

STATE  
versus  
ADVANCE ADVOCATE MHUNGU

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
MASVINGO, 14 November 2016

### **Criminal review**

MAFUSIRE J: The accused was unrepresented. He was convicted on his own plea of guilty to stock theft as defined in s 114[2][a] of the Criminal Law [Codification and Reform] Act, [Cap 9:23] [*“the Criminal Law Code”*]. He stole one heifer and exchanged it for a bicycle. The heifer was subsequently recovered. The court found no special circumstances. It imposed the mandatory minimum sentence of nine years imprisonment. The matter has now come up on automatic review in terms of s 57 of the Magistrate’s Court Act, [Cap 7:10].

The accused is now represented. Through his legal practitioner he has submitted a statement on review in terms of s 59 of the Magistrate’s Court Act. That section says in any criminal case which is subject to review in terms of s 57 aforesaid, the accused person may, if he thinks the sentence passed upon him is excessive, deliver any written statement setting out the grounds or reasons upon which he considers the sentence excessive. The judge is then obliged to take the grounds or reasons into account in the review of the proceedings.

The accused’s statement alleges a fundamental misdirection by the trial court on the treatment of “**special circumstances**” allegedly warranting interference by this court.

The record of proceedings shows that after the pronouncement of the verdict of guilty, the court went on to record:

*“Investigation into special circumstances explained to accused and understood.”*

Next, is recorded the accused’s explanation of the purported special circumstances. He said the heifer had been discovered [probably meant “**recovered**”]; that he had not killed it and that he thought that community service at a school was proper. The accused also said that he had wanted to further exchange the bicycle to go and pay *lobola* for his wife.

After that there was mitigation and the passing of sentence. As said already, the trial court found no special circumstances and imposed the mandatory sentence.

In the accused's statement on review, the point is made that it was not enough for the trial court to simply record that the investigation into special circumstances had been explained to the accused and understood. It is argued that there is nothing to show that the court gave a correct and proper definition or meaning of special circumstances. Reference is made to the cases of *S v Manase*<sup>1</sup> and *S v Chembe*<sup>2</sup> both of which stressed the point that a trial court should record its own explanation of the special circumstances.

In *S v Chaerera*<sup>3</sup> and *Manase, supra*, it was held that it should be further explained to the accused that in addressing the court on special circumstances, it is his right, should he so wish, to lead evidence from witnesses.

It is argued in the statement on review that if the issue of special circumstances had properly been explained, the accused would have led evidence from the complainant. Attached to the review statement is an affidavit allegedly by the complainant. It says that the accused was his "... *in-law* ..." to whom he had entrusted his cattle to keep at his homestead. The affidavit goes on to say that he [the complainant] later learnt that the accused had sold the heifer to someone else to solve a hunger issue. The complainant had confronted the accused. However, the matter had been resolved within the family and before the village court. The resolution had been that the accused should pay back the heifer.

The affidavit says the accused had honoured the resolution and had paid back the heifer. However, someone else had tipped the police. They came to record a statement from the complainant. He says he was not aware of the court proceedings thereafter. He later learnt that the accused had been convicted. He thinks that the accused has received double punishment. He had wanted to withdraw the case but says he had not been given the chance to do so.

The complainant's affidavit ends by making a plea that the charges against the accused be withdrawn since he had been given back his heifer, and further, since he is closely related to the accused. He says he no longer feels prejudiced.

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<sup>1</sup> HH 110-15

<sup>2</sup> HH 357-15

<sup>3</sup> 1988 [2] ZLR 226 [SC], at p 229G

In the accused's statement on review, it is argued that his prosecution was unwarranted and that it only came about because some unknown public busybodies had alerted the police. Reference is made to the cases of *S v Hamadziripi*<sup>4</sup>; *S v Mlala*<sup>5</sup> and *S v Kelly*<sup>6</sup>.

*Hamadziripi* was a case where the point was made that it is a legitimate tool in a prosecutor's kit to decline to prosecute if it is considered that the prosecution would serve no useful purpose. In that case, a double conviction and sentence of driving without a licence and of careless driving was, with the concurrence of the Attorney-General, set aside on review where the accused, a hospital administrator had, in an emergency, driven an ambulance to go and fetch the ambulance driver who was away so that he could come and ferry to hospital, on the doctor's orders, a patient who had needed to undergo an operation.

*Mlala* was where the court said that if an accused's offence is against the personal property of the complainant and not against the person or the public interest generally, and the complainant does not wish to press charges, then it will be impossible to say that the person wronged will derive any satisfaction from any punishment imposed on the wrong-doer. The court further said that an unwillingness to press charges may be a strong mitigating factor because if the person directly prejudiced can show mercy, then a court of law cannot ignore such magnanimity. The court made those remarks in the context of the complainant, an uncle to the accused, herself a single mother who, together with her child, lived with the complainant, who had wished to withdraw charges after the accused had defrauded him of various sums of money by making fraudulent withdrawals from his bank account using the passbook which the complainant had entrusted into her custody. It was accepted that it was the State's prerogative to determine whether to proceed with the prosecution of any person, the lack of desire on the part of the complainant only being a very weighty mitigatory factor on sentence.

*Kelly* is where the court reiterated that in as much as one appreciates that crimes are generally committed against the State, where the complainant indicates that it is not his desire to have the accused incarcerated, a sentencing authority ought to attach weight to such expressions as they have an impact on the form of sentence to be imposed.

*In casu*, the accused's statement on review concludes by declaring that the complainant's affidavit showed that special circumstances existed. Reference is made to the case of *S v*

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<sup>4</sup> 1989 [2] ZLR 38 [HC]

<sup>5</sup> 1985 [2] ZLR 287 [HC]

<sup>6</sup> 2004 [1] ZLR 176

*Kambuzuma*<sup>7</sup>. In that case MUREMBA J, in a review judgment [with which MAWADZE J concurred], found that special circumstances existed where the accused who had stolen four cattle belonging to the complainant and had sold them, showed, among other things, that he had been the complainant's herd-boy, and that despite the complainant having entrusted his entire head of cattle and the accused to a neighbour whom he lived with thereafter during the next eight years when the complainant had relocated to South Africa, the accused had continued with his duties as herd-boy but without receiving a salary or any form of financial assistance. The trial court had accepted the existence of special circumstances and had imposed a sentence of twelve years imprisonment but wholly suspended on condition the accused paid restitution in the form of four bovines by a certain date. On review, the trial court's findings on special circumstances were generally accepted. However, the magistrate was criticised for misdirections in other respects. The sentence was set aside and substituted with five years imprisonment but wholly suspended on condition that the accused paid restitution in the sum of \$2 000.

*In casu*, it is submitted in the accused's statement on review that the court *a quo*, allegedly having committed such a serious and fatal irregularity, the matter should be remitted for a proper recording and enquiry into special circumstances.

Do I agree?

For stock theft, the term "special circumstances" is found in s 114[3] of the Criminal Law Code. In my paraphrase, the provision says that stock theft involving a bovine or equine animal attracts a penalty of nine years imprisonment where there are no special circumstances [subsection (2)(e)]. However, where there are special circumstances peculiar to the case, the mandatory minimum penalty may not be imposed. The court has two options: either [1] to impose a fine either not exceeding \$5 000 [i.e. level fourteen], or twice the value of the stolen property, whichever is the greater, or [2] to impose a term of imprisonment for a period not exceeding twenty-five years.

Section 114[3] does not exactly define what should constitute special circumstances. It has generally been accepted that the expression is incapable of any hard and fast definition and that, in fact, it is undesirable to do so as every case will have to be determined in accordance with its own special set of circumstances: see *R v Finnis*<sup>8</sup> and *R v da Costa Silva*<sup>9</sup>.

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<sup>7</sup> HH 175-15

<sup>8</sup> 1948 [1] SA 788 [SR], at p 791

<sup>9</sup> 1956 [2] SA 173 [SR], at p 185

All that the section requires is that the special circumstances be those **peculiar to the case**. It does not say peculiar to the accused. But in *da Costa Silva* above, it was held that there is, or should be, no distinction.

Discussing the expression “special circumstances of the case” in the context of a motoring offence in terms of the then Roads and Road Traffic Act, in terms of which driving a motor vehicle on a road without third party insurance cover attracted a jail term unless there were special circumstances of the case enabling a court to impose a fine, the court said that no distinction should be drawn between circumstances special to the offence and circumstances special to the offender.

To help explain the point, BEADLE J, as he then was, at p 181 of the judgment, gave the example of a very elderly man suffering from some chronic disease requiring some special diet and specialised medical treatment who, if convicted of the motoring offence in question, would be liable for the mandatory prison term. The learned judge said that if it were shown that the sentence of imprisonment would be likely to cause the sick old man’s death, then it would be a proper factor for the court to take into account and impose a sentence of a fine instead of imprisonment, even though this would be a circumstance “special” to the offender, and not “special” to the offence.

“Special circumstances peculiar to the case” must be those factors associated with the crime which serve to diminish morally the degree of the accused’s guilt. In other words, they are mitigating or extenuating circumstances, not amounting in law to a defence to the charge, but are directly connected with the commission of the offence, and which the court ought to properly take into consideration when imposing punishment: *da Costa Silva, supra*, at p 179.

Section 114[3] aforesaid requires the court to record the special circumstances peculiar to the case that an accused may mention. Nothing is said about the recording of the court’s own explanation to the accused. But it is now trite that the court’s own explanation should also be recorded: see *Chaerera; Manase; Chembe*, all above, and *Ziyadhuma v S*<sup>10</sup>. On this score, I support the summing up in *Ziyadhuma* where, in setting aside the sentence of the court *a quo* where the magistrate had, exactly as in this case, merely recorded that “*Special circumstances peculiar to the case explained and understood*”, BERE J [HUNGWE J concurring] said<sup>11</sup>:

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<sup>10</sup> HH 303-15

<sup>11</sup> At p 3 – 4 of the cyclostyled judgment

“It is imperative in my view that where there is need to deal with the issue of special circumstances, the actual explanation given by the magistrate be recorded to avoid the appeal court having to speculate on what was explained to the appellant before sentencing. ... The proper approach should be for the magistrate to explain what special circumstances are and also the consequences of a failure by the convicted person to give such special circumstances. Both the explanation given by the magistrate and the responses given by the convicted person must be recorded.”

The importance of adequately and properly explaining the expression “special circumstances peculiar to the case” is perhaps underscored by the fact that if not done, the convicted persons invariably and routinely end up talking about the plight of their wives and children should the mandatory jail term be imposed. In *S v Dube & Anor*<sup>12</sup> DUMBUTSHENA CJ, criticising the magistrate’s approach in mentioning special circumstances only at the end when imposing the sentence, said<sup>13</sup>:

“This approach is grievously inadequate. It normally leads, as it led in this case, to a recitation of the number of wives, children and dependants who will be discommoded if the accused is sent to prison. The accused should have been told at this stage [indeed ... at a much earlier stage] that the offence involved a minimum sentence and that the court was obliged to ... send each of them to prison for at least five years unless they could establish the existence of special circumstances. Some explanation of special circumstances should then have been proffered, including that they may be circumstances peculiar to the offender himself or to the commission of the offence.”

In the present case, the accused’s statement on review refers to *Hamadziripi* above where a prosecution should not have been mounted in the first place. He then says he too should not have been prosecuted. He blames some nameless overzealous public busybodies.

But it is not the function of a statement on review submitted in terms of s 59 of the Magistrate’s Court Act for an accused to seek the setting aside of a conviction. The purpose of such a statement is to show the grounds or reasons why a sentence of the court should be considered excessive.

The accused was properly prosecuted. He was properly convicted. Cases such as *Mlala* and *Kelly* are irrelevant to his cause. They clearly explain that a complainant’s unwillingness to press charges, or his willingness to withdraw them where the State has already instituted a prosecution, are factors relevant only to the mitigation of sentence.

In the premises, the conviction of the accused is hereby confirmed.

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<sup>12</sup> 1988 [2] ZLR 385 [SC]

<sup>13</sup> At p 391E – G

Regarding the failure by the magistrate to record his own explanation to the accused of the expression “special circumstances peculiar to the case”, I agree that this was a misdirection. As the review court or judge, I am unable to tell what exactly the court’s explanation was and whether or not it was adequate. In such circumstances, the general approach would be to remit the matter to the trial court for the proper recording of the explanations on special circumstances. However, this is not a rule of thumb. Every case depends on its own special facts.

In terms of s 57[4] of the Magistrate’s Court Act, the review of a criminal matter from the magistrate’s court is done in accordance with the High Court Act, [*Cap 7:06*]. Section 29 of the High Court Act says that, among other things, if on review the judge considers that the proceedings of the inferior court are in accordance with real and substantial justice, he shall confirm them. Sub-section [3] says that no conviction or sentence [of the inferior court] shall be quashed or set aside by reason of any irregularity or defect in the record or proceedings unless the review judge is satisfied that a substantial miscarriage of justice has actually occurred.

Thus, it is not every irregularity or defect in the record or proceedings that leads to the setting aside of the sentence, or the quashing of the proceedings of the court *a quo*. It is only those from which the court is unable to conclude that real and substantial justice has been done. The situation has to be considered holistically and objectively, not in an over fastidious manner.

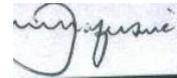
In this case, it is not that the magistrate did not explain the term “special circumstances” to the accused. He did. It was because of something explained to him that the accused proffered an explanation about having stolen the heifer so as to exchange it for a bicycle which he would in turn exchange to pay *lobola* for his wife. The mistake by the magistrate was to omit recording his own explanation to the accused. Thus, one is unable to gauge the adequacy or otherwise of that explanation. If that was the end of the matter I would probably have remitted it. But it was not the end of the matter.

I now know from the accused’s statement on review, now with the aid of legal representation, what other explanation of special circumstances he would give. I now know which witness he would call to back him up. The accused’s explanation, the other one, would be that the complainant was his in-law who would have withdrawn charges given that he himself had recovered his stolen property. I now know that the complainant would explain that but for some unknown public busybodies the offence would not have been reported to the police.

However, none of all that amounts to special circumstances peculiar to the case or the accused. There is nothing special in them. These are the ordinary and general mitigating features. They are not the kind contemplated by the law. The accused's circumstances are quite far removed from those in *Kambuzuma* where, for the reason that the complainant therein had literally abandoned both the accused and the head of cattle for eight years, the court held that there were special circumstances peculiar to the case. As a result, it was able to depart from the mandatory sentence and impose a much lesser term of imprisonment, wholly suspended on condition of restitution. In the present case, the accused's circumstances, as explained in the statement on review, whilst probably mitigating, do not amount to such special circumstances as would dissuade the imposition of the mandatory sentence.

In the result, the sentence passed by the court *a quo* is hereby confirmed. The accused's request to have the matter remitted for a recording and enquiry into special circumstances is hereby dismissed.

14 November 2016

A handwritten signature in black ink, appearing to be 'N. J. J. J.', written over a horizontal line.

*Ndlovu & Hwacha*, legal practitioners for the accused