STATE
versus
PHILLIP GUVHU

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO: 22 November 2018

Criminal review

MAFUSIRE J:

[1] In this matter there were two major irregularities by the trial court. I only picked the second one much later. The first irregularity that drew my attention concerned the sentence meted out on the accused for a conviction of stock theft as defined in s 114(2)(a) of the Criminal Law (Codification and Law Reform) Act, [*Cap 9:23*] ("***the Code***"). He stole two cows and a calf in a single act.

[2] In the absence of special circumstances, theft of a bovine attracts a mandatory minimum sentence of nine years imprisonment. But in *S v Chitate* HH 568-16 we[1] said:

> "Where the essential elements of the crime have been proved and there are no special circumstances, the courts have no choice but to impose the prescribed minimum. Undoubtedly, the court may go above the prescribed minimum. But by all accounts 9 years is already a very long stretch. The court's discretion to impose a sentence other than the prescribed minimum has to be exercised judiciously, not whimsically. The sentence should not be a thumb-suck."

[3] The cattle the accused stole were valued at $1 150. All were recovered. He pleaded guilty. He was sentenced to fourteen years imprisonment of which four years imprisonment was suspended for five years on the usual condition of good conduct. Thus the effective sentence was ten years.

[5] The aggravating circumstances noted by the court were:

[1] Mawadze J and I

- stock theft is a very serious offence;
- stock theft has become prevalent;
- there was premeditation;
- the accused's intention was to deprive the complainant permanently of his property given that it was over a month before he was discovered and the cattle recovered;
- it was necessary to deter the accused from committing further similar offences;
- removing the accused from society for a long time will enable him to mend his ways;

[6] The personal and mitigating circumstances were:

- the accused was forty-two years old; was a farmer and was married with ten children;
- the accused had two cattle and two calves of his own, and he earned about $300 per season;
- the accused pleaded guilty and thereby saved time;
- the accused did not benefit from the theft as all the cattle were recovered;
- the accused was a first offender;

[7] Frankly, in cases of mandatory jail terms where there are no special circumstances, aggravating and mitigating circumstances have diminished relevancy. However, this is not to suggest that the assessment should not be made. It should always be made. But judicial officers should be careful not to be distracted from the duty to investigate special circumstances, as appears to have happened in this matter.

[8] In this case the accused was properly convicted. Therefore the conviction is hereby confirmed.

[9] I queried the sentence. It was above the mandatory minimum. In the light of *Chitate's* judgment above the trial court readily conceded that there was no justification for the higher sentence. The concession was well made.

[10] If the irregular sentence was the only misdirection, we would probably have simply reduced it and returned the record, with appropriate directions. Sadly, there was another irregularity in relation to the manner the court *a quo* treated the more crucial aspect of special circumstances.

[11] Section 114(3) of the Code requires the court to record the special circumstances peculiar to the case that an accused may mention. Although nothing is said about the recording of the court's own explanation to the accused, it is now trite that this too ought to be done: see *S v Manase* HH 110-15; *S v Chembe* HH 357-15 and *Ziyadhuma v S* HH 303-15.

[12] In the present case, the record of proceedings shows that neither the court's explanation of special circumstances nor the accused's response thereto was taken down. All that the record bears is:

> "Special circumstances explained and understood.
>
> Q Do you have any special circumstances?
> A No"

[13] That was most perfunctory and somewhat a dereliction of duty by the trial magistrate.

[14] In *S v Ziyadhuma* above, the magistrate had merely recorded that "*Special circumstances peculiar to the case explained and understood*". Bere J, as he then was, (Hungwe J concurring) set aside the sentence imposed, and said[2]:

> "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."

[2] At p 3 – 4 of the cyclostyled judgment

[15] In *S v Chaerera* 1988 (2) ZLR 226 (S); and *S v Manase* above, it was said 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.

[16] Accurate recording and proper record keeping are key. A magistrate court is a court of record[3]. A court record that fairly and accurately represents the proceedings and the findings facilitates the review of, or appeal from, such proceedings or findings. Admittedly, current resource limitations mean that judicial officers are condemned to the tedious and mechanical process of recording proceedings in long hand. There are no video or audio facilities. The judicial officer's notes remain the only evidence of the proceedings. The court record is a reflection of what the adjudicating officer believes to have heard. There is of course, the obvious danger of mistake or mishearing. Sometimes there are omissions on the actual questions put to a witness, the answers thereto or the full submissions by the parties.

[17] Generally the record should contain all the questions and answers. As Bere J noted in *Ziyadhuma* above, it is difficult on review or appeal to appreciate the meaning of responses if the questions asked are not recorded. In cases where only answers to questions are recorded, the context in which a response is given and the intended meaning of the response are not clear on review or appeal.

[18] Whilst from personal experience the problem of incomplete or inadequate records from the lower courts is not prevalent, thanks to the dedication and industry of the majority of the presiding officers therein, in spite of notable punishing work schedules combined with demoralising conditions of service, continuous efforts should be made to achieve god results with what is available. It is hoped judicial officers in those lower courts will embrace the above explanation in order to improve record keeping.

[19] Sadly, because of the deficiencies documented above, the sentence of the court *a quo* has to be set aside and the record remitted. It is ordered as follows:

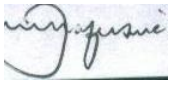
[3] Section 5(1) of the Magistrates Court Act, *Cap 7:10*

i/ The conviction is hereby confirmed.

i/ The sentence is hereby set aside.

iii/ The record is hereby remitted to the court *a quo* for a proper investigation into special circumstances after which the court may pass an appropriate sentence.

22 November 2018



Hon Mawadze J: I agree _____Signed on original_____