THE STATE

Versus

DANIEL CHAUKE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 16 AUGUST, 2017

CRIMINAL REVIEW

MAWADZE J: The issue which arises in this matter is a novel one to say the least.

This matter was referred to me by a Magistrate at Chiredzi for what is called "guidance". I assumed that I am being requested to exercise my review powers as provided for in s 29(1) of the High Court Act, [*Cap 7:06*]. The background facts of the matter would be useful in the circumstances.

On 1 August 2011 the then 33 year old accused was arraigned before the Provincial Magistrate sitting at Chiredzi. The accused was convicted on his own plea of guilty of contravening section 114(2) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] which relates to stock theft.

The agreed facts are as follows;

The accused and the complainant reside in Chief Sengwe's area, Chiredzi near the Mozambican border. On 21 July 2011 the complainant released his 19 herd of cattle to the pastures in the morning. The accused, acting in common purposes with an unnamed Mozambican national who was never arrested proceeded to the pastures where they stole 3 beasts belonging to the complainant valued at US$900. They drove the beast into Mozambique where they sold them. The complainant who started to look for his missing

beasts followed a spoor right into Mozambique where he gathered information that the accused had been seen in possession of the complainant's beasts. The accused was apprehended with the help of the Mozambican locals and handed over to the Zimbabwean police. The 3 beasts were however not recovered.

The accused who was arraigned before a Provincial Magistrate one G.T. Ndava on 1 August 2011 at Chiredzi was sentenced to 12 years imprisonment of which 3 years imprisonment were suspended on condition accused paid restitution to the complainant in the sum of US$900 through the Clerk of Court, Chiredzi by 31 December 2012.

The proceedings in this matter were confirmed on automatic review by HLATSWAYO J (as he then was) on 30 April 2013.

The accused did not pay restitution by 31 December 2012 which meant he had to serve the 3 years imprisonment which had been suspended on condition of payment of restitution by that date. In essence the accused was not to serve 12 years imprisonment instead of 9 years imprisonment if he had paid the said restitution on or before the given date.

It is not clear from the record of proceedings how the accused then found himself before another Magistrate one G.V. Mutsoto some 5 years later on 17 July 2017. The accused purportedly made an application before the said Magistrates and was apparently indulged.

In that "application" whose basis at law is unclear the accused conceded that after he failed to pay the said restitution by 31 December 2012 the trial court ordered him to serve the 3 years which had been conditionally suspended. This was in 2012. The accused however alleged that he had had since paid restitution to the complainant in the sum of US$900. As already noted it is not clear as to who had initiated these proceedings some 5 years after accused had been ordered to serve the alternative of 3 years.

Apparently the complainant was roped in as per the notes of the Magistrate and indicated that indeed he had been paid US$900 on 28 June 2017. The complainant then pleaded that accused whom he said is his nephew should be released from prison as accused's family was suffering in his absence especially the minor children.

The Magistrate one G.V. Mutsoto then proceeded to make the following order;

"*Matter is referred to High Court for determination*."

The mind boggles as to what this court is being asked to determine.

In a referral minute dated 10 July 2017 the Magistrate briefly regurgitated the history of this matter as already explained and then indicated that this matter was being forwarded to this court for what is described as "guidance."

On 21 July 2017 out of sheer curiosity I directed the Registrar to inquire from the Magistrate how the said restitution had been paid some 5 years later as there was no such proof attached in the record. In the response dated 25 July 2017 the Magistrate stated that accused had not paid restitution as per the order of the Provincial Magistrate G.T. Ndava, which would have been through the Clerk of Court, Chiredzi before 31 December 2012. Instead the Magistrate said restitution had been paid well after that due date through some private arrangements between accused and the complainant. This would have been well after accused had been ordered to serve the alternative of 3 years imprisonment. In fact the Magistrate said accused had paid restitution in the sum of US$900 directly to the complainant on 28 June 2017 and that the Magistrate was not privy to any further details in surrounding this payment.

As already stated I am at loss as to what guidance the Magistrate is seeking from this court. Further, what determination is this court supposed to make? Are they any legal issues which arose before the Magistrate?

In my view the first issue which arises in this matter is how the Magistrate became seized with this so called application or inquiry. Put differently, in terms of what provisions of the law did the Magistrate become seized with this matter, let alone to proceed to hold the inquiry or hear the so called application? To my mind what is clear is that when the Provincial Magistrate on 31 December 2012 ordered the accused to serve the conditionally suspended 3 years imprisonment, the Magistrates Court became *funtus officio* on that issue. It is not legally tenable for the same court some 5 years thereafter to have revisited the same issue.

The sentence imposed by the Provincial Magistrate on 1 August 2011 is clearly competent in terms of s 358(3)(b) of the Criminal Procedure and Evidence Act [*Cap 9:07*]. This is distinguishable from restitution ordered in terms of Part XIX of the Criminal Procedure and Evidence Act, [*Cap 9:07*].

The second point is simply that the accused failed to abide by the competent order of the Provincial Magistrate which conditionally suspended the 3 years imprisonment. After having failed to abide by that order the accused was properly ordered to serve the 3 years imprisonment by a competent court as at 31 December 2012. The accused should therefore simply carry his cross.

It would be absurd to give any legal effect to accused's conduct of deciding when and how to comply with a court order. The accused decided to pay restitution some 5 years later

after the due date. Further, accused decided to make such payment privately outside the ambit of the court order. Put in simply terms the accused simply failed to derive benefit from the conditionally suspended sentence. That benefit was not open ended. It had a due date upon which it would lapse. The accused can therefore not be seen to be crying foul more so after being advised by a competent court that the said benefit was no longer available to him, a decision he did not challenge in any manner. Accused could not, in my view, some 5 years later choose a date he wishes to pay restitution and the manner to do so. That would amount to doing violence to a clear competent and unambiguous court order.

The last point I wish to make is that if indeed accused paid restitution as alleged there is nothing wrong with that. All would be in order as the complainant would not be unjustly enriched. The accused can not claim to have suffered double jeopardy. All what accused has done is to simply make good the loss he occasioned to the complainant. If he had not paid the restitution the complainant could still have sued the accused in a civil court for the said US$900 prejudice caused even after accused had finished serving the 12 years imprisonment. By paying restitution in the manner accused has allegedly done accused has simply ensured that he would not be liable to a civil suit by the complaint for the prejudice he occasioned in 2011.

The accused should simply continue to serve his sentence as was pronounced by the Provincial Magistrate on 31 December 2012. This court cannot lessen his burden in any manner. Accused should be advised accordingly.