

1.THE STATE
versus
MIKE PILATE

CRB HREP 1725/21

2.THE STATE
versus
SIBANDA PILATE

CRB HREP 1700/21

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU JJ
HARARE, 24 January 2022

Review Judgment

CHITAPI J: The two records of proceedings in these two cases were dealt with by the same Magistrate at Harare Magistrate Court on 16 and 17 March, 2021.

In case number HREP1700/21 the accused pleaded guilty to the offense of theft as defined in s113 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (the code). The admitted facts were that on 10 March, 2021 the accused stole a Samsung phone handset from the complainant's phone repair shop. The phone was not recovered. The theft occurred at Chiremba Shops in Epworth. The accused was sentenced to 15 months imprisonment with part suspended on conditions of future good behaviour and the balance on conditions of community service.

In case number HREP 1725/21 the accused pleaded guilty to three counts of theft as defined in s 113 (1) (a) of the code. In count 1 the accused admitted to stealing the complainant's mountain bicycle which was parked at N Richards Wholesale, Msasa on 1 March, 2021. In count 2, the accused admitted to stealing the complainant's mountain bicycle on 15 March, 2021 at the same place as in the first count. On 16 March, 2021 the accused admitted by him stole yet another mountain bicycle at the same place as in counts 1 and 2. The accused clearly had a penchant for mountain bicycles.

The accused was convicted and sentenced to 18 months imprisonment with all three counts taken as one for sentence purposes. 8 months was suspended on conditions of future good behaviour. The magistrate recorded that 16 months would be the remaining period after deducting the 8 months which was a miscalculation since the balance would be 10 months. The magistrate also ordered that of the erroneously calculated remaining 16 months, 1 month be

suspended on condition of restitution of the value of the stolen mountain bicycle which was not recovered. The magistrate then again miscalculated that the remaining period would be 12 months which he suspended on condition of community service.

It is important that particular attention be paid to recording sentence which is an integral part of the trial process. An imposition of a punishment connotes a sanction upon a person's freedom. Mistakes must be avoided in calculations of sentences. *In casu*, it will not be necessary to recast the sentence because of the basis on which this review will be disposed of.

The trial magistrate upon a query which I directed at him/her on whether the magistrate had complied with the provisions of s 271 (3) (a) of the Criminal Procedure and Evidence Act, [Chapter 9:07] which requires that the charge be explained to the accused and that the explanation given be recorded. The trial magistrate in response stated that although he explained the charge, he did not record the explanation. He stated that the omission was due to an oversight on his/her part caused by pressure of work on 16 March, 2021 at the court.

It has been held in *S v Mangwende* HH 695/20 and subsequent decisions after that case that, it is imperative to comply strictly with the provisions of s 271 (2) (b) as read with s 271 (3) of the Criminal Procedure and Evidence Act. The provisions provide *inter – alia* that the charge is explained to the accused before the accused is called upon to plead. Such explanation as given must be recorded as well as the accused's acknowledgement that he/she has understood the explanation. It must be apparent from the record what the content of the explanation given was so that there is no uncertainty that the accused pleaded guilty whilst in the know of what the charge entails. It has been held in the case aforesaid that a failure to comply with the peremptory provisions of s 271 (2) (b) and 271 (3) in a trial upon a guilty plea vitiates the proceedings. The same approach will be adopted herein. The review is disposed of as follows:

- i) The proceedings in case Nos HREP 1700/21 are hereby quashed and the convictions and sentences imposed set aside.
- ii) The accused may at the discretion of the Prosecutor General be prosecuted afresh.
- iii) Should the accused persons be retried and are convicted, the portion of the sentences already served by them shall be taken into account as served portions of the new sentence which may be imposed.

MUSITHU J: AGREES