

**THE STATE**

**VERSUS**

**FABION MHONDIWA**

IN THE HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 8 DECEMBER 2011

Review Judgment

**MATHONSI J:** This matter epitomises all that is wrong and should not be done in criminal proceedings. It makes amockery of all the checks and balances presented by the review mechanism provided for in our criminal justice system.

On 24 February 2011, the regional magistrate's court in Gweru convicted the accused person of one count of theft of a motor vehicle in breach of section 113 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He was sentenced to 5 years imprisonment of which 3 years imprisonment was suspended on condition he made restitution to the complainant in the sum of US\$1400-00 representing the cost of repairing the vehicle which had been damaged when the accused was involved in an accident.

The remaining 2 years was suspended for 5 years on condition of future good behaviour. This left the accused person with no effective term of imprisonment.

The matter came before me for automatic review in terms of section 57(1) of the Magistrate's Court Act [Chapter 7:10] which provides:

"When any court sentences any person-

- (a) to be imprisoned for any period exceeding 12 months; or
- (b) to pay a fine exceeding level 6;

the clerk of court shall forward to the registrar, not later than one week after the determination of the case, the record of the proceedings in the case, together with such remarks; if any, as the magistrate may desire to append:

Provided that –

- (i) where any of the evidence in the case has been taken down in shorthand writing or recorded by mechanical means, it shall, unless the magistrate otherwise

directs, be a sufficient compliance with this subsection if the clerk of the court forwards to the registrar the manuscript notes of such evidence made by the magistrate in accordance with rules;

- (ii) this subsection shall not apply in relation to any person –
  - (a) who is represented by a legal practitioner
  - (b) which is a company as defined in the Companies Act [Chapter 24:03]

unless within 3 days after the determination of the case the legal practitioner of the accused or the person representing the company in terms of subsection (2) of section 385 of the Criminal Procedure and Evidence Act [Chapter 9:07], as the case may be, in terms of subsection (2) requests the clerk of the court to forward the case on review.

(2) ---

(3) ---

(4) The registrar shall with all convenient speed lay papers forwarded to him in terms of this section before a judge of the High Court in chambers for review in accordance with the High Court Act [Chapter 7:06]" (the underlining is mine).

Those provisions are peremptory and admit of no discretion whatsoever on the part of the magistrate or the registrar. Once the matter has been determined by the magistrate it must be forwarded for review within "one week."

Despite such clear and peremptory provision; this matter was only received by the Registrar of the High Court on fools' day, 1 April 2011. This was 1 month 7 days after it was determined by the magistrate in Gweru and in unmitigated violation of section 57(1) of the Act. No explanation, whatsoever was given for the delay.

After considering the proceedings I sought an explanation from the trial magistrate by letter dated 7 April 2011 which reads in part as follows:

"The Regional Magistrate

**GWERU**

Dear Sir/Madam

**RE: STATE VERSUS FABION MHONDIWA CRB NO. REG 29/10**

The accused was convicted of theft of a motor vehicle and sentenced to 5 years imprisonment of which 3 years was suspended on condition of restitution with the remaining two (2) years suspended on condition of good behaviour. This left the accused with no effective term of imprisonment.

Theft of a motor vehicle is a serious offence which generally calls for imprisonment. May the learned Regional Magistrate comment on why he settled for the sentence he imposed which, on the face of it, appears wholly inadequate."

He trial magistrate did not respond or send the papers back until 16 November 2011, more than seven (7) months after the matter was referred back to him. He wrote a letter dated 16 November 2011 which was received on 22 November 2011. It is worded as follows:

"The Registrar  
High Court of Zimbabwe  
**BULAWAYO**

**RE: STATE VS FABION MHONDIWA CRB NO. REG 29/10**

Place this before the review judge my apologies for a late response to the judges' minute.

Note was taken of the judge's concern. On reflection the sentence becomes inadequate bearing in mind that on (sic) prison term remained to be served. The main consideration was the circumstances in which the car was stolen which left the court in the belief that the matter was more of driving a motor vehicle without owner's consent rather than theft.

This was mainly due to the evidence led in court, complainant and accused's relations which come out in court.

If the Honourable judge decides that the sentence was wholly inadequate corrective measures should be taken in terms of the court's review powers.

I stand guided."

With due respect to the learned trial magistrate, he convicted the accused person of theft of motor vehicle and not driving a motor vehicle without the owners' consent. He was obligated to sentence him for that offence and not one stored in his mind. In any event in terms of section 275, as read with the 4<sup>th</sup> Schedule to the Criminal Law (Codification and Reform) Act, unauthorised borrowing or use of property is a permissible verdict to a charge of theft. If the trial magistrate was of the view that the evidence proved unauthorised borrowing of the motor vehicle it was within his power to convict the accused accordingly.

More importantly, what is contained in the magistrate's letter cited above does not feature anywhere in his reasons for sentence. In arriving at the sentence the magistrate navigated the following route:

**"Reasons for sentence**

The court took into account all you advanced in mitigation of sentence. Accused is a first offender with family responsibilities. You were employed as a rank marshal then. The stolen motor vehicle was recovered with extensive damages estimated at US\$1400-00.

Aggravating is the fact that you stole a motor vehicle. Complainant had overhauled his motor vehicle to engage in business of hiring out his motor vehicle. This had become his source of livelihood. When the car was involved in an accident he had to abandon his business because of cash flow crisis to repair the damaged motor vehicle he had just overhauled.

The court will not lose sight of the fact that you have been in custody since 24 May 2010. That makes it almost 9 months before finalisation of the matter.

Balancing the interests of justice and your personal circumstances, the need to restore complainant to his former position with the car, the following sentence will be just ---."

Apart from the fact that it is not borne by the facts, the issue of the offence being unauthorised use of the motor vehicle, certainly did not exercise the mind of the court at all. It may well be an afterthought to justify what is otherwise an unsupportable sentence. I shall return to that later in this judgment.

Our review system is designed to provide some much needed checks and balances in our criminal justice system. Most of the accused persons who appear before magistrates belong to that unfortunate group in society who are unable to afford legal representation. These unrepresented accused persons who are convicted and sentenced in those courts are entitled to an independent investigation into those convictions and sentences by another judicial officer whose duty it is to ensure that the proceedings are compliance with real and substantial justice.

The reviewing judge and the trial magistrate are a tag team serving the same purpose namely to ensure that justice is done and accused persons receive fair treatment. In review proceedings time is always of the essence and for that reason there must be strict compliance with the time limits provided for in the Act for submitting records of proceedings for review.

The reason for those requirements is self-evident. The reviewing judge may decide that the sentence imposed by the magistrate is excessive and should either be quashed or substantially reduced. It is therefore undesirable for an accused person to serve the whole or a substantial part of the sentence which he does not deserve while the record remains somewhere between the courtroom and the judge's chambers.

It is a mockery of the entire review system for a magistrate to sit on a record for more than seven (7) months. It defeats the whole purpose of the review process. Happily in the present case the sentence complained of was too lenient as opposed to being excessive. The consequences would have been dire had it been the latter situation.

Coming back to the merits of the sentence, the facts of the matter are that on 17 May 2010 at about 2200 hours the complainant parked his Mazda B2500 double cab motor vehicle outside Puza Dollar Nite Club in Gokwe and went inside the night club to drink beer. Later that night the accused person opened the vehicle, started the engine and drove away the same night to Kwekwe.

The accused person later drove from Kwekwe to the farms in that area where he was involved in an accident hitting a rock outcrop resulting in the motor vehicle being extensively damaged. Unable to drive the vehicle further the accused abandoned it at a farm but not before stripping it of 2 wheel spanners, a pump and a jack which he later sold to the owner of a Junk yard in Kwekwe.

The owner of the farm where the vehicle was dumped discovered it the following day and made a report to the police leading to the arrest of the accused a few days later. The value of the motor vehicle was US\$4500-00.

In his defence the accused claimed that he had been given the vehicle to drive to Kwekwe by the complainant but was unfortunately involved in an accident. He was disbelieved by the trial court resulting in his conviction aforesaid.

By any standards this is a very serious offence. It was only fortuitous that the accused was involved in an accident which disabled the vehicle leading to its recovery. The accused went on to sell some of the property belonging to the complainant which was in the vehicle

showing his ill intention. While assessing sentence is the discretion of the trial court, theft of a motor vehicle is usually visited with a term of imprisonment. I am of the view that to suspend the whole 5 year term does not meet the standard of compliance with substantial justice.

That is not the only problem with the sentence imposed. I have gone through the entire record of proceedings and there is nowhere either the complainant or the public prosecutor requested an order for restitution in term of section 368(1) of the Criminal Procedure and Evidence Act [Chapter 9:07].

Section 362 of the Act permits a court convicting a person to award compensation to any person whose right or interest in property of any description has been lost or diminished as a direct result of the offence. However section 368(1) limits the power to order compensation to only those situations where an application for it has been made. It provides:

“A court shall not make an award or order in terms of this Part unless the injured party, or the prosecutor acting on the instructions of the injured party, applies for such an award or order.”

I have stated that no such application was made in *casu*. The court therefore acted *mero motu* when it ordered restitution. This was a misdirection. Regrettably section 29(2) of the High Court Act [Chapter 7:06] precludes the substitution of a sentence more severe than that imposed by the magistrate. This is a case in which a more severe sentence was called for. In that regard the accused person is lucky indeed. Considering that he may have made restitution during the unacceptable delay which occurred, there is nothing that can be done to redress the situation.

For these reasons, while confirming the conviction of the accused person, I am unable to certify the proceedings has being in compliance with substantial justice and accordingly withhold the certificate.