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**THE STATE**

**Versus**

**CHIEDZA DUBE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 19 & 28 FEBRUARY 2019

**Criminal Review**

**MAKONESE J:** The accused is a female aged 18 years. She is now into full time prostitution. She has no fixed abode but appears to sell her services at or around Gokwe Centre. On 29<sup>th</sup> August 2018 she appeared before a Provincial Magistrate at Gokwe facing a charge of unlawful entry as defined in section 131 of the Criminal Law Codification and Reform Act (Chapter 9:23). She pleaded guilty and was sentenced to 4 months imprisonment, wholly suspended for 5 years on condition of future good conduct. The brief facts surrounding the commission of this offence are that on the 28<sup>th</sup> August 2018 at around 0900 hours accused was spotted emerging from the complainant's house through a window. Accused was asked to explain why she had unlawfully entered the premises and she gave no meaningful response. When she appeared before the magistrate she then said the reason for entering the premises was that she wanted to bath. In mitigation she gave her age as 14 years. The court seemed to have accepted that her age was between 14 and 15 years.

The accused is not a first offender. On the 9<sup>th</sup> of August 2018 accused appeared before the same court and pleaded guilty to the same offence of unlawful entry into premises. She again pleaded guilty and was sentenced during the same month to 6 months wholly suspended for 5 years on condition she was not convicted of an offence involving dishonesty and unlawful entry into premises for which upon conviction she would be sentenced to imprisonment without the option of a fine.

On 7<sup>th</sup> September 2018, the scrutinizing Regional Magistrate addressed a letter to the trial magistrate in the following terms:

“The accused person was duly convicted and sentenced on a charge of unlawful entry into premises. The conviction raises no issue but the sentence does.

My queries regarding sentence are as follows:

- (i) In his reasons for sentence the trial magistrate stated that, “The suspended sentence is further suspended” but the sentence does not reflect that. Was the suspended sentence of 6 months imprisonment further suspended or was not brought into effect?
- (ii) Since the trial magistrate settled for imprisonment without the option of a fine was it competent for the magistrate to further suspend the suspended sentence or not to bring it into effect in the light of *S v Sibanda* 2016 (2) ZLR 486 (H)?
- (iii) Since the accused person is a juvenile in terms of section 351 of the Criminal Procedure and Evidence Act (Chapter 9:07) which deals specifically and in detail with how convicted juveniles should be handled.

May the learned trial magistrate comment on the queries raised.”

On the 15<sup>th</sup> of September 2018 the trial magistrate responded to issues raised in the following manner:

“The trial magistrate did not intend to further suspend the previously suspended term of imprisonment but he intended not to bring it into effect. That explains why the sentence he imposed in case number CRB GRP 1039/18 does not reflect that. It was a slip of diction as the trial magistrate intended to convey the message that the 6 months imprisonment in CRB 953/18 was not brought into effect. He intended to leave the suspended as it is and take no action upon it. (my own emphasis)

(ii) The trial magistrate considered the circumstances of the first offence and decided that it was not justified to send the accused to jail. See; *S v Jussab* 1970 (1) ZLR, 1970 (3) SD 727 and *S v Wilson* 1984 (2) ZLR 129 (SC).

The very low moral culpability of the offender convicted of a trivial one (1) count of unlawful entry into premises with the intention to bath was a “good cause” for not bringing into effect the suspended sentence imposed for 2 counts of unlawful entry into premises and theft.

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As highlighted above, the invoked words “suspended” sentence is hereby further suspended” was a slip of diction as the trial magistrate did not intend to further suspend the suspended sentence but he intended not to bring into effect the suspended sentence as shown by the question he posed to the offender on page 4 of the record of proceedings in mitigation.

The circumstances of the record of proceedings conducted by the trial magistrate are quite distinguishable from the case of *S v Sibanda* 2016 (2) ZLR (H), in that the trial magistrate did not reflect that the suspended sentence was further suspended on the eventual sentence he imposed. The discretion not to impose or put into effect the suspended sentence was guided by the principle enunciated in the Supreme Court case of *S v Wilson* 1989 (2) ZLR 129 (SC).

(iv)The trial court did not deal with the accused in terms of section 351 of the Criminal Procedure and Evidence Act (Chapter 9:07) because he thought that by not imposing the suspended term of imprisonment in respect of both sets of crimes, the sentences were adequate, this would reform accused, as the statute gives the magistrate a discretion to proceed or not in terms of section 351 of the Criminal Procedure and Evidence Act. I was of the opinion that the sentence I imposed was appropriate. In the event that my explanations are not convincing I stand guided.”

The Regional Magistrate then forwarded the record for review with the following comments:-

“The accused person who is a juvenile offender aged between 14 and 15 years was convicted on her own plea of guilty to a charge of unlawful entry into premises and was sentenced to 4 months imprisonment which was wholly suspended on the usual condition of good behaviour. The trial magistrate did not bring into effect 6 months imprisonment suspended on the 9<sup>th</sup> of August 2018.

I am of the view that the proceedings are not in accordance with real and substantial justice because of the following:-

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- (i) The trial magistrate sentenced a juvenile offender in the absence of the requisite support (Probation Officer's Report) to inform him on how to manage the offender. The trial magistrate did not also involve the family of the juvenile before coming up with the sentence. In the case of *S v Moffat Mavasa* HH-13-10, MAKARAU J (as she then was) held that:-  
*"To simply proceed without both the probation officer's report and involvement of the juvenile's family is, in my view, akin to proceeding in complete darkness."*

The probation officer's report was vital *in casu* because the juvenile was a child in need of care since she is a person of no fixed abode and is practicing prostitution at a tender age.

- (i) The sentence imposed is not proper in that:-
- (a) It encourages the juvenile to continue with prostitution.
- (b) Since the trial magistrate settled for imprisonment without the option of a fine it was incompetent for the trial magistrate not to bring the suspended sentence into effect. This is supported by MATHONSI J's remarks in *S v Sibanda* 2016 (2) ZLR 486 when he held that:  
*"Therefore, the moment the trial magistrate settled for imprisonment without the option of a fine, he fettered his discretion. He could no longer influence the implementation of the previously suspended sentence. It had to be brought into effect."*

It is my considered view from the foregoing that the juvenile, who is a child in need of care was supposed to be dealt with in terms of section 351 of the Criminal Procedure and Evidence Act, which deals specifically and in detail with how convicted juveniles should be handled ..."

I carefully considered the queries raised by the Regional Magistrate in this matter and the responses thereto, and addressed a letter to the trial magistrate seeking an explanation why a probation officer's report was not requested. On the 11<sup>th</sup> December 2018 I received the trial magistrate's response indicating that efforts to locate the accused person for the purposes of

compiling a probation officer's report were made to no avail. The probation officer had failed to locate the whereabouts of the accused.

As stated in this judgment, the accused person who was still a juvenile had already had brushes with the law at an early age. She was aged between 14 years and 15 years. She was engaged in prostitution. The unfortunate situation had been caused by a broken family background. The accused was clearly a person covered by section 351 of the Criminal Procedure and Evidence Act. The trial magistrate's reasoning was that he did not intend to send the accused to prison, hence his decision not to bring the suspended sentence into effect. That is where the learned trial magistrate fell into error. Since accused was sentenced to a term of imprisonment without the option of a fine, he had no discretion not to bring into effect the suspended term of imprisonment. The trial magistrate was required firstly, to obtain a probation officer to enquire into circumstances of the accused in terms of section 351 of the Criminal Procedure and Evidence Act. The trial magistrate referred to the cases of *S v Jussab* 1970 (1) RLR 181 and *S v Wilson* 1984 (2) ZLR 129 (SC). In both cases, the court held that in certain instances where the degree of moral culpability is low it made it wholly inappropriate for the magistrate to bring into effect the suspended sentence. That is not the essence of the query relating to the magistrate's sentence in this particular matter. The accused person was a juvenile who had been convicted of unlawful entry into premises twice in the same month. The juvenile was given to prostitution. The provisions of section 351 of the Criminal Procedure and Evidence Act are clear. It is provided that:

- “(3) Any court before which a person who is nineteen years of age or more but who is under twenty-one years of age has been convicted of any offence other than murder, treason or rape, may instead of imposing a [punishment of a fine or imprisonment on him for that offence –
- (a) Order that he shall be placed under the supervision of a probation officer or any other suitable person designated in the order for the period specified in subsection (1) of section three hundred and fifty two ...”

In this matter the least trial magistrate could have done was to obtain a probation officer's report. The juvenile offender clearly needed care and assistance. The effect of suspending the

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sentence, in effect, was simply allow the juvenile to continue with her activities of prostitution. It was the duty of the court to protect the juvenile offender by having expert opinion from the probation officer. There was a chance for the juvenile offender to be placed in a special institution where children in need of care are taken care of. That chance was unfortunately denied this particular juvenile. With juvenile offenders, the court must always strive to find a sentence that carries prospects for rehabilitation of the offender.

For the foregoing reasons, I am unable to certify the proceedings as being in compliance with real and substantial justice. I accordingly withhold my certificate.

Moyo J ..... I agree