

THE STATE
versus
SHEPHARD NYAMUKONDIWA

HIGH COURT OF ZIMBABWE
BERE J,
HARARE, 3 April 2004

Criminal Review

BERE J: This matter was placed before me for review with the following comments from the trial magistrate:

“May you place the attached record before the Honourable Judge with this minute.

I convicted the offender on his pleas of guilty in respect of three counts. In passing sentence I considered that he is a repeat offender. In retrospect, I have realised that the accused appealed against the convictions. I considered as previous convictions. Secondly, I also brought into effect a suspended sentence the accused had appealed against.

I am referring the record to you for guidance”.

One can easily discern two issues of concern from the trial magistrate.

The learned magistrate seemed to be of the view that once one appeals against a conviction such an offender ceases to be regarded as a repeat offender for purposes of assessing sentence in the event of future transgression against the law.

Secondly, the learned magistrate also seems to hold the view that once an accused person has appealed against a conviction the suspended sentence if any cannot be brought into operation pending the prosecution of such an appeal.

It is trite that the lodging of an appeal *per se* does not suspend the execution of sentence unless the requirements of s 63 of the Magistrates’ Court Act¹ have been fully complied with.

For clarity’s sake s 63 is worded as follows:-

“63 Execution of sentence of imprisonment, fine or community service not suspended pending review or appeal unless bail granted.

The execution of any sentence of imprisonment, fine or community service shall not be suspended by –

(a)

¹ [Chapter 7:10]

(b) The noting of an appeal referred to in section sixty.

Unless –

- (i) in the case of imprisonment or fine, bail is granted by a judge or magistrate in terms of s 123 of the Criminal Procedure and Evidence Act [*Cap 9:07*] or
- (ii)

It is quite clear that once bail is granted pursuant to the noting of an appeal, the execution of sentence is suspended pending the outcome of the appeal.

But there may also be occasions (though very rare) when a judge or magistrate may refuse bail to an appellant but still direct that the appellant be treated as an un-convicted prisoner pending the determination of his appeal, applications or review. In such a situation, the execution of sentence is again suspended until such time the appeal is heard and a determination made. This is the situation provided for in s 123(7)(a) of the Criminal Procedure and Evidence Act².

A perusal of the record of proceedings and in particular the reasons given for sentence clearly show that at the time the accused was convicted of the instant offences he was on bail pending appeal and as such it was not competent for the trial magistrate to treat him as either a repeat offender or to consider the bringing into operation a suspended sentence which is the subject of an appeal.

I have considered the record of proceeding in this matter and in the light of the above referred observations, I am satisfied that save for the error made by the trial magistrate of prematurely bringing into operation the 12 months previously suspended, the sentence itself cannot be faulted.

Accordingly the 12 months brought into operation by the trial magistrate is hereby set aside and the rest of the sentence is confirmed.

BERE J:

HUNGWE J: agrees

² [Chapter 9:07]