

THE STATE
versus
ISABELLA MUPFURIRWA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, September 2013

Criminal Review

MUREMBA J: The accused was charged with theft of trust property as defined in s 113 (2) (d) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. She pleaded guilty and was convicted on her own plea. She was sentenced to 6 months imprisonment of which 4 months were suspended on condition of good behaviour. The remaining 2 months were suspended on condition she paid restitution to the complainant in the sum of US\$48.00 by 24 August 2012.

The record of proceedings was referred for scrutiny by a regional magistrate who then forwarded it for review with the following comment:

“I was not satisfied that these proceedings were in accordance with real and substantial justice for the following reasons;

- (1) In my consideration, it is inappropriate to use such short forms of words like “b4” for “before” in a record of proceedings.
- (2) The state outline contains a lot of grammatical errors e.g. “a handbag which was contained with” and “did not found”. There is also an allegation in the state papers including the charge sheet suggesting that the value of the stolen property was 48 years.
- (3) In my view, since accused was found guilty of the offence as it was put to him he should have been found “guilty as charged” as opposed to “guilty as pleaded”.
- (4) Accused was recommended for community service by the community service officer and I believe he was a suitable candidate. However, the court did not sentence him to community service nor did it give him reasons for not doing so.
- (5) I believe the sentence meted out on accused person was too harsh considering the value involved and the circumstances under which the offence was committed.”

The learned Regional Magistrate had asked the trial magistrate to comment on all the issues he had raised.

In response the trial magistrate commented as follows:-

- “(1) I stand guided
- (2) I stand guided
- (3) I stand guided
- (4) The court found it more appropriate not to sentence accused to undergo community service because she is the sole breadwinner and she is also a widow whom I wanted to give another chance to reform, and continue with her livelihood.
- (5) Having regard to the mitigatory and aggravatory factors the court found the sentence to be suitable. I stand guided”

A reading of the record shows that indeed the trial magistrate used short hand and abbreviations like “B4”, PP, Intpr, E/E”. The state outline does indeed contain a lot of grammatical errors. Just as an example paragraph 3 thereof reads;

“The circumstances are that on the date and time known to the Prosecutor but in the month of July 2012 and at around 13.30 hours the complainant has approached the accused and gave her handbag which was contained with a green track suit, blue jean skirt all valued at USD\$48 years”

Paragraphs 4 to 6 contain many other errors as well.

After canvassing the essential elements of the offence which the accused all admitted to the trial magistrate went on to find the accused, “guilty as pleaded”.

The purpose of a scrutiny or a review is to ascertain whether or not the proceedings are in accordance with real and substantial justice. In *State v. Lea Kawareware* HH 268/11 UCHENA J at page 6 said;

“Real and substantial justice would thus be the considerable judicious exercise of judicial authority by the trial court, which satisfies in the main the essential requirements of the law and procedure. Failure to comply with minor requirements, minor mistakes and immaterial irregularities should, however not result in the scrutinizing or reviewing judicial officer’s refusal to certify proceedings as being in accordance with real and substantial justice.”

UCHENA J. further stated that “real and substantial justice” is proof that the conviction is safe despite the imperfections in the proceedings. What this means is that the imperfections or

irregularities should not vitiate the conviction. The critical consideration is whether or not the accused has been correctly convicted.

UCHENA J quoted with approval what Gillespie J. stated in *State v Gore* 1991 (1) ZLR 177 (HC). Gillespie had this to say,

“.....a judge should not quash a conviction on the grounds of irregularity unless he considers that a substantial miscarriage of justice has occurred”.

Section 27(c) of the High Court Act [*Cap* 7:06 limits the High Court’s powers of review and interference to gross irregularity.

In *casu* the learned Acting Regional Magistrate raised a valid point about the grammatical errors in the state outline. They leave a lot to be desired. A state outline should outline the nature of the state case concisely, meaning that it must be brief and comprehensive. It must contain all material facts. It is understandable that magistrates work under a lot of pressure considering the volume of work that they receive on a daily basis but there is need for them to be scrupulous and insist on clear and concisestate outlines from the public prosecutors.

This is one case in which the trial magistrate ought to have insisted on a better state outline from the prosecutor. However, despite the numerous grammatical errors, the state outline in question contains all the material facts and the magistrate was able to canvass all the essential elements of the offence using them.

I am mindful of the fact that with the pressure of work that magistrates have, it is common practice for magistrates to use short hand and abbreviations like “B4” for before, “PP” for Public Prosecutor, and “Interp” for Interpreter. However, the problem is that the scrutinizing regional magistrates and reviewing judges may not understand such short hand and abbreviations because they are not common to everyone. This may result in the need to have such records transcribed. The other option would be for the trial magistrate to provide a key for his abbreviations to facilitate easy understanding of the record.

However, in view of the cases cited above I would say that the use of short hand and abbreviations, grammatical errors and the accused being found guilty as pleaded instead of being found guilty as charged are immaterial irregularities which do not warrant the quashing of the conviction. Despite these imperfections, I am satisfied that there was no substantial miscarriage of justice. The accused was duly convicted. Accordingly the conviction is confirmed.

The last two issues that the learned Acting Regional Magistrate raised pertain to the issue of sentence. Firstly, that despite the recommendation of community service by the community service officer the trial magistrate did not sentence the accused to community service nor did she give her reasons for not doing so. Secondly, that the sentence imposed was too harsh in view of the value involved and the circumstances in which the offence was committed.

The accused was entrusted with the complainant's property valued at US\$48.00 which she converted to her own use. Nothing was recovered. The trial magistrate justified her sentence by saying she had decided not to sentence the accused to undergo community service because she is the sole bread winner of her family and she is a widow who deserved a chance to reform and continue with her livelihood. There is a community service assessment form in the record which means that the trial magistrate at some stage referred the accused for assessment by the community service officer. The sentence that the magistrate then imposed shows that she later abandoned the option of community service and opted for a wholly suspended prison term. In my view there is no prejudice to the accused because she was not sentenced to effective imprisonment. If the trial magistrate had imposed an effective custodial sentence it would have been imperative for her to give reasons why she had not sentenced the accused to community service. As such I would not say that the trial magistrate misdirected herself by not sentencing the accused to community service.

Considering the value involved and the circumstances in which the offence was committed, it can be said that the sentence imposed by the magistrate is indeed severe. However, it seems to me that the magistrate did not misdirect herself because she then went on to suspend a portion of the sentence on condition of good behavior and another portion on condition of payment of restitution. In other words, the whole prison sentence was suspended and the accused was spared an effective jail term. In the circumstances I do not feel compelled to interfere with the discretion of the trial magistrate.

Accordingly the sentence is confirmed.

BHUNU J Agrees.....