

THE STATE (CASE 1)

versus

GODKNOWS MUKWENA

THE STATE (CASE 2)

versus

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HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 30 June, 2017

Criminal Review

MAWADZE J: This review judgment has been occasioned by my routine visit to Mutimurefu Prison in Masvingo on 13 May 2017. During the normal interface with the prisoners the accused/prisoner in both cases herein raised a complaint to the effect that prison authorities were improperly interpreting the sentences imposed upon the accused in both cases, being CRB CH 707/15 and CRB CHR 38/16. After I engaged the Officer in Charge of the Prison it dawned upon me that indeed there was a dispute as to the total sentence accused was to serve. The prison authorities and the accused had different interpretations to the sentences imposed upon the accused in both matters.

While at the prison I only had sight of the accused's two warrants of committal to prison in relation to both cases. In the circumstances I was not able not to only fully appreciate the nature of the dispute but to also prescribe a solution. I decided therefore to invoke the powers vested in me in terms of s 29(4) of the High Court Act [*Cap 7:06*] which provides as follows;

“29. *Powers of review of criminal proceedings*

(1) Not relevant

(2) Not relevant

(3) Not relevant

(4) Subject to Rules of court the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal court are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or judge for review.”

I proceeded to direct the Registrar of the High Court to call for the records of proceedings in both matters from Chiredzi Magistrates Court and have them placed before me.

The following facts are apparent from the two matters;

CRB CH 707/15

In this matter the accused was arraigned before the Magistrate sitting at Chiredzi facing four counts of stock theft as defined in the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

The accused pleaded guilty to two of the counts but was convicted of all the four counts after a trial was held in respect of the other two counts which he denied.

The facts relevant to all the four counts are that the accused would proceed to the complainants' pens to steal goats or sheep at night. The accused would slaughter the goats or sheep. This happened from the period extending December 2014 in count 1 to February 2015 in count 4.

After being convicted in respect of all the four counts, the accused was sentenced on 8 October 2015. All the four counts were treated as one for purposes of sentence. The accused was sentenced to 24 months imprisonment of which 2 months imprisonment were suspended on the usual condition of good behaviour. A further 8 months imprisonment were suspended on condition accused paid restitution to the four complainants. The accused was to serve 14 month imprisonment.

These proceedings were confirmed on review by this court on 17 November, 2015.

I however mention in passing that the part of the sentence relating to payment of restitution is not properly couched as no time limit was given as to when restitution should have been paid. Further it should have been stated that restitution be made through the Clerk of Court, Chiredzi.

CRB CHR 38/16

The accused in this case appeared before the Senior Regional Magistrate sitting at Chiredzi facing 3 counts of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act, [*Cap 9.23*].

The brief facts are that on 23 July 2015 the accused raped his step daughter three times the same night at their residence being Plot 142 B, 25 Hectares in Chiredzi. The accused had chased away his wife who is the complainant's mother.

After a protracted trial the accused was convicted of all 3 counts of rape. On 11 May 2016 all the 3 counts were treated as one for purposes of sentence and accused was sentenced to 18 years imprisonment of which 3 years imprisonment were suspended for 5 years on the usual conditions of good behaviour leaving an effective sentence of 15 years imprisonment. In addition to that the Senior Regional Magistrate ordered the sentence on CRB CH 707/15 to run concurrently with the sentence in this matter. For clarity purposes the Senior Regional Magistrate's sentence is couched as follows;

"All counts as one for sentence.

18 years imprisonment for which 3 years imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving sexual conduct for which accused will be sentenced to imprisonment without option of a fine. The sentence on CH 707/15 will run concurrently with this sentence."

The proceedings in CRB CHR 38/16 were also confirmed on review by this court on a date which is not clear from the record.

It is the order by the Senior Regional Magistrate to the effect that the sentence on CRB CH 707/15 should run concurrently with the sentence on CRB CHR 38/16 which has caused the dispute between the accused and prison officials.

The first issue which exercised my mind is whether I can competently review both these matters as it were when the same matters were reviewed by this court. Would that not amount to reviewing the orders made by a fellow judge of similar jurisdiction? After careful consideration I believe my conduct does not amount to reviewing the orders made by my fellow judges that the proceedings are in accordance with real and substantial justice. I am not at all interfering with the proceedings or the sentences confirmed on review. All I am doing, in my respectful view, is to further clarify what the orders entail in view of an administrative dispute which has arisen between the accused and the prison officials as to the exact length of accused's prison term. I find no other possible route to resolve such a dispute. In that vein I am of the firm view that my conduct is lawful and competent.

The dispute

The accused's perception is that the Senior Regional's sentence on CRB CHR 38/16 entails that the 14 months imprisonment on CRB CH 707/15 should now run concurrently with the 15 years imprisonment on CRB CHR 38/16. Further the accused submitted in his query that he should now only serve 15 years imprisonment in both matters and most importantly that the period he had spent in prison from 8 October 2015 when he was sentenced on CRB CH 707/15 to 11 May 2016 when he was sentenced on CRB CHR 38/16 should be considered by subtracting it from the 15 years imprisonment. In mathematical terms accused is saying he should now only serve a total of 14 years 5 months in respect of both matters.

The prison officials on the other hand disputed accused's perception or interpretation but were unclear as to what they perceived to be the total sentence the accused should serve in both matters.

Disposition

The order by the Senior Regional Magistrate on CRB CHR 38/16 is in terms of s 343(2) of the Criminal Procedure and Evidence Act [*Cap 9:07*]. It simply provides as follows;

“343. Cumulative or concurrent sentences.

(1) Irrelevant

(2) When sentencing any person to punishments in terms of subsection (1), the court may direct the order in which the sentences shall be served or that such sentences shall run concurrently.” (my emphasis)

It is the manner in which the Senior Regional Magistrate couched the sentence which in my view is confusing.

At the time the accused appeared before the Senior Regional Magistrate on 11 May 2016 on CRB CHR 38/16 he had already served 7 months imprisonment for the charges on CRB CH 707/15. The Senior Regional Magistrate seemed to have overlooked this fact. At that stage on 11 May 2016 the sentence remaining on CRB CH 707/15 was only 7 months imprisonment out of the 14 months imprisonment. This means that what the Senior Regional Magistrate could only competently deal with were the remaining 7 months on CRB CH 707/15. It is these remaining 7 months imprisonment which the Senior Regional Magistrate should have ordered to run concurrently with the 15 years imprisonment on CRB CHR 38/16.

In my view there is no prejudice to the accused or the State if that clarity is made.

Accordingly, the sentence Senior Regional Magistrate is amended to read as follows;

“All counts as one for sentence.

18 years imprisonment for which 3 years imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving sexual conduct for which accused will be sentenced to imprisonment without the option of a fine. The remainder of 7 months imprisonment on CRB CH 707/15 shall run concurrently with the effective sentence of 15 years imprisonment.”

In order to further clarify the ambiguity I earlier on referred to in respect of CRB CH 707/15 as regards the time limits within which the accused should pay restitution and how such restitution should be paid I have made the following order which again is neither prejudicial to the State or the accused;

“The restitution to be paid to the 4 complainants on CRB CH 707/15 should be made through the Clerk of Court, Chiredzi on or before 31 July 2017.”

If the accused has already paid the restitution this latter order would be of no consequence.

Lastly, in light of the above, the accused should be called and be properly advised of the orders I made. I have advised the Registrar accordingly and a copy of this judgment should be availed to the Officer in Charge of Mutimurefu Prison.

Mafusire J. agrees