STATE
versus
TORA TOKURA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 22 June 2021

Criminal Review Judgment

MUREMBA J: This record of proceedings was placed before me by the Registrar for review at the instance of the Chief Magistrate.

The circumstances giving rise to the request for review are as follows. The accused was charged with and convicted of theft of trust property as defined in s 113 (2)(d) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] on 27 February 2019. He was sentenced as follows:

> "$200/3 months imprisonment. In addition, 2 months' imprisonment wholly suspended on condition accused restitutes the complainant in the sum of $600 through the Clerk of Court Harare on or before 31 March 2019."

On 7 March 2019, the regional magistrate scrutinized the proceedings and certified them to be in accordance with real and substantial justice.

On 12 July 2019, more than 4 months after completion of the proceedings, the matter was again placed before the trial magistrate by the Public Prosecutor. The Public Prosecutor applied that the order for restitution that was granted on 27 February 2019 be made in US Dollars. The application was granted.

The transcribed record of those proceedings was furnished. It reads as follows:

> "*12/7/19*
> *Before: Muzondo T.B*
> *Prosecutor: Murozvi*
> *State: When the matter came before the trial magistrate Matare the complainant who had made an application that the complainant was supposed to have been restitution in US$ but the trial magistrate indicated that it would only be done by the trial magistrate who handled the matter, that is yourself your Worship(sic). We pray that he be restituted in US dollars.*

By the court: The order for restitution of $600.00 to the complainant shall be in US dollars since the prejudice was in US dollars and not RTGS$."

However, despite the amendment for restitution to be made in United States dollars, the Clerk of Court on 28 October 2019 accepted payment of RTGS$600 from the accused. Pursuant to this, a complaint is said to have been raised against the receipting of the restitution in RTGS instead of United States dollars. It is not indicated who raised the complaint. Be that as it may, the office of the Chief Magistrate wrote as follows.

> "This office wishes to have the proceedings placed before the High Court and be reviewed as regards the propriety of the second sitting which took place three months after the proceedings had terminated culminating in the ordering of the US$ restitution. The review we seek will assist this office to resolve the complaint raised in that it will determine the following issues:
> 1. Whether it was proper to vary the currency in which the restitution was to be paid three months after the case had been finalized.
> 2. Whether the restitution paid by the accused is in fulfilment of his obligations under the sentence as imposed on the date of sentence"

In S v *Muchamba* 1992 (1) ZLR 102 (S) the matter involved an appeal against conviction. The appellant's counsel argued that the appellant's guilty plea in the trial court had not been voluntarily made. He submitted that the sentence imposed should be set aside and the case be remitted to the trial court so that an application for a change of plea to one of not guilty could be made. The Supreme Court held that as the trial court had already convicted and sentenced the appellant it was *functus officio* and as such it could not therefore entertain an application for change of plea on any ground.

In *S* v *Mudambi* 1995 (2) ZLR 274 (SC) it was held that where a person pleads guilty but wishes to change his plea before conviction, he can do so. He simply has to give a reasonable explanation as to why he wishes to change his plea. After sentence, however, the court is *functus officio*. It must then be shown by the accused that there was a miscarriage of justice of the kind which would enable an appeal court to quash the conviction.

See also *S* v *Kwainona & Ors* 1993 (2) ZLR 354 (S) 93*;* and *S* v *Matare* 1993 (2) ZLR 88 (S) where it was held that after sentence has been imposed the trial court becomes *functus officio* and cannot re-open the matter.

What comes out of the above case authorities is the doctrine of *functus officio* which provides that a judicial officer has jurisdiction over a criminal matter up to the point where he or

she sentences the accused. Once the matter has reached its ultimate conclusion, the court no longer has jurisdiction to reopen the case or change its decision. It can no longer interfere with the conviction or the sentence. Its mandate would have expired for it would have performed its duties. Its authority would have come to an end. The only exception is when the judicial officer is making a correction in terms of s 201 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides that:

> "When by mistake a wrong judgment or sentence is delivered, the court may, before or immediately after it is recorded, amend the judgment or sentence, and it shall stand as ultimately amended."

From this provision it is clear that for the court or judicial officer to make a correction, two conditions must obtain. Firstly, there must be a genuine mistake in the delivery of the judgment or sentence. Secondly, the mistake must be corrected immediately. See Reid Rowland *Criminal Procedure in Zimbabwe* (LRF 1997) at p 24-8. Examples of sentencing mistakes that can be corrected are as follows.

- The judicial officer said something different from what he or she had intended to say. For instance, he or she intended to sentence the accused to six weeks' imprisonment, but he or she imposes 6 months' imprisonment.
- Where the court passes an incompetent sentence such as a sentence in excess of its sentencing jurisdiction. A correction can be made because an incompetent sentence can be corrected.
- Where the court passes an illegal sentence. The court is entitled to re-sentence the accused to a punishment authorised by law. For instance, in terms of s 357 of the Criminal Procedure and Evidence Act an accused cannot be sentenced to imprisonment of less than 4 days. Under such circumstances the court can correct itself and legally sentence the accused, even if it results in a greater sentence.

However, where the court has passed a competent sentence, but has changed its mind about it and wishes to reconsider the circumstances, the sentence may not be corrected in this way. Such a scenario is not a mistake but is a recalling of a sentence. We have no provision in our Criminal Procedure and Evidence Act which provides for a recalling of sentences.

Reid Rowland at p 24-8 explains that the requirement that the correction be made "immediately" does not mean instantaneously, but within a reasonable time, depending on the circumstances of the case.

In *casu* the prosecutor did not even state in terms of what law he was making the application to the court for the amendment of the restitution order. Even the court proceeded to grant the application without considering whether or not the law empowered her to do so. Be that as it may, looking at the circumstances of the case, it cannot be said that the initial order for restitution was granted by mistake. The record of proceedings of 12 July 2019 does not say that. In amending the restitution order the trial magistrate simply said that "the order for restitution of $600 to the complainant shall be in US dollars and not RTGS$". Clearly the trial magistrate upon application by the State, reconsidered the circumstances of the case and decided that prejudice had been in US dollars and decided that restitution should thus be in US dollars. There had been no mistake when the accused was sentenced on 27 February 2019. If there had been a mistake, the trial magistrate would have mentioned that as the reason for amending the sentence. It does not look like the trial magistrate was even aware of the existence of s 201 (2) of Criminal Procedure and Evidence Act. I say this because she made no reference to it whatsoever. If she was aware of it, she would have considered the two conditions or requirements which must obtain for a sentence to be corrected. However, even assuming that there had been a mistake when the accused was sentenced on 27 February 2019, a correction of the sentence could not be made on 12 July 2019 in view of the time that had lapsed. It was now more than 4 months and clearly the period was unreasonable. The only option the trial magistrate had was to submit the record for review to this court with a request for correction of the sentence[1].

I also make the observation that the second proceedings of 12 July 2019 were conducted irregularly. They were conducted in the absence of the accused, yet he was the person who was going to be affected by the correction of the sentence. This was his sentence, yet he was sentenced in his absence. This was a violation of the principles of natural justice and it was wrong. It is an accused person's right to be present when being tried[2] and it is his right to be heard during the proceedings. A trial includes the sentencing stage. In terms of s 334 (1) of Criminal Procedure and

[1] Reid Rowland Criminal Procedure in Zimbabwe (LRF 1997) p24-9.
[2] S 70 (1) (g) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013.

Evidence Act, "all judgments and sentences in criminal proceedings before any court against persons who are of or above the age of eighteen years shall be pronounced in open court." Therefore, no pronouncement of sentence can be done in the absence of the accused. It stands to reason that even a correction of the sentence has to be made in open court in the presence of the accused.

The foregoing brings me to the conclusion that the trial magistrate having been *functus officio,* it was wrong for her to amend the sentence. The sentence did not qualify for correction in terms of s 201 (2) of Criminal Procedure and Evidence Act. And even if it qualified for correction, the correction would have been invalid for the reason that it was done in the absence of the accused, which was a fatal procedural irregularity. Therefore, the restitution of RTGS $600 that was paid by the accused fulfilled his obligations in terms of the restitution order that was granted by the court on 27 February 2019.

Consequently, the amended restitution order of 12 July 2019 which reads, "*The order for restitution of $600.00 to the complainant shall be in US dollars since the prejudice was in US dollars and not RTGS$."* is hereby set aside. The following initial sentence remains extant.

> "$200/3 months imprisonment. In addition, 2 months' imprisonment wholly suspended on condition accused restitutes the complainant in the sum of $600 through the Clerk of Court Harare on or before 31 March 2019."

KWENDA J agrees:……