HH 48-2002
CRB C195/2002

THE STATE
vs
SIMON NGULUBE

HIGH COURT OF ZIMBABWE
NDOU J
HARARE 10 April 2002

Criminal Review

NDOU J: This matter is before me by way of automatic review as provided for in section 57 of the Magistrates Court Act [*Chapter 7:10*]. The accused was charged and convicted of contravening section 13(c) of the Public Order and Security [*Chapter 11:17*]. Nothing turns on the conviction. The essential elements were fully canvassed with the accused and as such the propriety of conviction cannot be doubted.

The accused was sentenced to pay a fine of $100 000 or in default of payment to 5 years imprisonment. The offensive weapon was declared forfeited to State without the learned trial magistrate carrying out any investigations whatsoever in respect of its ownership.

The maximum penalty provided for in this legislation for this type of contravention is a fine not exceeding $200 000 or in default of payment to imprisonment not exceeding 10 years. The sentence imposed, *in casu*, is 50% of the maximum penalty i.e. both the fine and the alternative term of imprisonment.

The salient facts of this case are that the accused is aged 44. He is a member of the Zimbabwe National Army stationed at Mechanised Brigade, Inkomo Barracks Harare. On 28 February 2002 at about 0100 hours he was at Nharira Business Centre in Chivu where he was arrested by some ZANU-PF youths on suspicion of causing violence in the area. He was handed over to a Constable Mutodzi. The latter searched the accused and recovered one CS tear smoke canister from his trousers pocket. In brief mitigation the accused indicated that he was earning $26 000 per month in the Army. *Ex facie,* the record does not show whether this is a gross or nett

salary. He indicated that he had $20 000 in savings. He also indicated that he is widowed and has six children to look after. He lastly indicated that he owns a motor vehicle. This is a cursory way of canvassing the personal circumstances of an accused and the circumstances under which the offence was committed. The accused was not legally represented during the trial. The learned trial magistrate should have full enquired the circumstances under which the accused, a member of the Army, came into possession of the tear smoke canister. Since the accused is based in Harare it was necessary to investigate how he ended up in Chivu with the canister. It is clear that the learned trial magistrate imposed an unusually heavy fine of $100 000 based on very scant information about the accused and the circumstances and nature of the offence. The decision on sentence must be made on a rational and informed basis. This is an example of intuitive approach to sentencing. This approach has drawn criticism from academics in the legal fraternity e.g. R. Graser in an article entitled "Sentencing as a Rational Process" (in *Crime, Punishment and Correction)* journal of June 1975 26 at 30 cited and criticized the approach as crafted by United States of America Appeal Judge IRVING KAUFMAN in the following terms:

> "The experienced judge, like any good craftsman, does the right thing without constant awareness of his motivations. He may call it a "feel of sentencing"."

There is certainly no room for such instinctive sentencing in our jurisdiction. It is trite that our courts have over the years followed the rational approach to sentencing. In this approach the sentencing judicial officer determines the limits set by the legislature as far as type and quantum of punishment is concerned and then, within this, the limits set by the culpability of the offender. He then carefully considers the differing purposes of punishment and, if they conflict, rationally balances them against each other, according to each its due in the final sentence he imposes – see "*Sentencing*" by DP van der Merwe at paragraphs 1 – 14.

Judgments in our jurisdiction have always emphasised that the sentencing court, in deciding upon the appropriate punishment, must strive to find a punishment which will fit both the crime and the offender. The sentence must be

fair and just instead of excessive, savage and draconian – see '*A Guide to Sentencing in Zimbabwe'* by G. Feltoe at page 1. The punishment must fit the criminal as well as the crime, be fair to the State and to the accused and be blended with a measure of mercy – see *Sparks and Another* 1972 (3) SA 396 A.

In light of the above sentencing principles, it is essential that magistrates should equip themselves with sufficient information in any particular case to enable them to assess sentence humanely and meaningfully, and to reach a decision based on fairness and proportion. The needs of the individual and the interests of society should be balanced with care and understanding' - see *S v Moyo* HH 63-84. Pre-sentencing information is very important. Whilst the age, marital and family status, employment, savings and assets are important aspects in the assessment of sentence, magistrates should always bear in mind that the reason why the accused committed the offence and the circumstances of the offence is of equal importance. In some cases the reason is evident from the facts of the case. In other cases it is not. In such cases the magistrates must canvass these aspects with an unrepresented accused. Generally all the mitigatory and aggravating factors must be canvassed and the court must be aware of the full facts of the case, including the offender's reasons for committing the crime. It seems to me that in some instances sentences imposed by magistrates are getting harsher whilst the quantum of pre-sentencing information is diminishing. Such a situation is not conducive to rational and fair sentencing of unrepresented accused persons.

In similar circumstances in the case of *Amon Maponga v State* HH 276-84 REYNOLDS J (as he then was) on page 6 of his cyclostyled judgment stated as follows:

> "Turning to his second contention, however, which is to the effect the magistrate's failure to consider factors relevant to sentence amounted to a gross irregularity, there is far more room for criticism of the magistrate's court proceedings. Here, as in every criminal, it was virtually necessary to the Magistrate to be fully informed of all factors relevant to sentence before attempting to assess an appropriate penalty. It is simply not possible for any

> judicial officer to determine a fitting punishment unless he is appraised of all the facts of the case, including the personal circumstances of the accused."
>
> In the present case the magistrate appears to have made no inquiry as to what factors led up to the commission of the offence, and it seems doubtful that he afforded the accused the opportunity of explaining either. … To pass sentence in the dark, as it were, to my mind constitutes a gross irregularity within the meaning of section 27 of the High Court of Zimbabwe Act, 29 of 1981.
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> Certainly to rely only on perfunctory inquiry that was made here could result in grave prejudice to the accused. In my view it is important that magistrates must not regard the procedure provided in section 255 (now section 271) of the Criminal Procedure and Evidence Act [*Chapter 59*] as a warrant to hasten pell-mell through cases. Indeed this form of trial is so truncated, and the possibility of error, as a result, is so great, magistrates should be at particular pains, and should excuse every caution to avoid injustices occurring (see *Mavis Zindonda v S* AD 15-79)"

The accused, *in casu,* was not legally represented and as such the trial magistrate had a duty to ensure that factors of mitigation are fully canvassed because the accused himself will often be unaware of the sort of things which are relevant when it comes to sentence (see page 81 of "*A Guide to Sentencing in Zimbabwe (supra)*). The reason why the court must do this is because the accused himself will often be ignorant about what sort of things are salient and may influence the court to impose a less severe sentence. The court must thus offer some guidance to the accused in this regard. Without such assistance by the court the unrepresented accused may be hindered in his/her endeavour to adduce sufficient and meaningful information to enable the court to assess the sentence humanely and meaningfully, and to reach a decision based on fairness and proportion. As pointed out earlier on, the needs of the individual and the interests of society should be balanced with care and understanding. (See *S v Mavis Moyo* HH 63-84 at page 3); *S v Manwere* 1972 (2) RLR 139; *S v Zinn* 1969 (2) SA 537 and *S v Rabie* 1975 (4) SA 855).

All available information that would be of assistance in assessing an appropriate penalty should be before the court. If necessary, and if the presiding

magistrate cannot elicit this information by questions, the case should be postponed for the necessary enquiries to be made – (see *State v A. Ngombe and 3 Others* HH 504-87 at pages 2 – 3).

The sentencing process is as distinct and vital a factual enquiry as the determination of the guilt of an accused. Punishment should as far as possible be individualised by conducting meaningful pre-sentence investigations. As indicated above, the record demonstrated clearly that the trial magistrate decided this matter upon the minimum of evidence, which presented a picture which was so incomplete that it cried out for further investigation and elucidation. The trial court should not leave the assessment of punishment to a haphazard guess based on no or inadequate information – see *S v Jabavu* 1969 (2) SA 466 (AD); *R v Taurayi* 1963 (3) SA 109 (R) (at page 429); *S v Maxaku and S v Williams* 1973 (4) SA 248 (C); *Mbuyase and Others v R* 1939 (2) P.H. H 159 (N) (at page 167) and *S v Joseph* 1969 (4) SA 27 (N).

In the circumstances I find that the manner in which the trial magistrate conducted the proceedings (as far as sentencing is concerned) constitute a gross irregularity. The finding that there was a gross irregularity in these proceedings does not necessarily require remittal of this case. It is only in exceptional cases that a remittal will be ordered. Remittal will be ordered only in those matters where it appears that if the conviction or sentence were left undisturbed there would be a possibility, amounting almost to a probability, that a miscarriage of justice would take place – see *Amon Maponga v State (supra); R v Haya* 1957 R and N 645; *R v Mokwena* 1948 (2) PH H203; *Belchem v Jarvis N.O. & Garnett N.O.* 1952 SR 140.

Generally, the interests of justice are not served by lightly requiring the re-opening of a case that has already been adjudicated upon – see *R v Boshoff* 1956 R & N 61 (SR). In light of these strictures, basic requirements must normally be met before a remittal is ordered. These are:

a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial (see *S v Ngombe* 1964 RLR 231 (1964 (3) SA 816 RA));

b) There should be a *prima facie* likelihood of the truth of the evidence;

c) the evidence should be materially relevant to the outcome of the trial – see *S v de Jager* 1965 (2) SA 612 at 613.

Specifically, no conviction or sentence may be quashed or set aside by reason of irregularity or defect in the record of proceedings unless the reviewing judge considers that a substantial miscarriage of justice has actually occurred – see section 29(3) of the High Court Act [*Chapter 7:06*]. I agree with the observation of author John Reid Rowland in *Criminal Procedure in Zimbabwe* paragraph 26-10(h) that the object of this section is to prevent proceedings being set aside on technical grounds. The test is whether there has been substantial prejudice to the accused.

As far as sentence is concerned, I am of the view that a remittal is justified and necessary. The trial magistrate must carry out investigations on why the accused committed the offence. The Act under which the accused was charged has just been promulgated. Two characteristics worth noting is that, firstly, the Act provides for very harsh and severe penalties. Secondly, the Act gives all levels of magistrates special jurisdiction to impose sentences well above their ordinary jurisdiction as provided for in section 50 of the Magistrates Court Act [*Chapter 7:10*]. In such circumstances the magistrates are enjoined to equip themselves with sufficient pre-sentencing information before exercising their newly found jurisdiction. The moral blameworthiness of the accused and the circumstances under which the offence was committed must be carefully examined before such harsh sentences are imposed. The magistrates should not be overzealous to reach the maximum sentence or to get as close to the maximum as possible. In deserving cases such severe punishment may be imposed. From the scant information I am unable to say whether this is such a deserving case. It is, unfortunately, not just for this court to substitute what I consider to be an appropriate sentence in view of the inadequacy of the pre-sentencing information.

The reviewing court has wide powers to remit the case to trial court with instructions about the further proceedings to be had in the case. These wide powers would entitle the reviewing court or judge, in appropriate circumstances, to confirm the conviction entered by the trial magistrate but send the case back for sentence to be passed afresh in light of further information or evidence which the trial magistrate is instructed to hear – see *Criminal Procedure in Zimbabwe (supra)* – paragraphs 26 – 9(f)(iii). I hold that this is an appropriate case where I should take this exceptional route.

In the circumstances the conviction is confirmed and sentence set aside, and the matter is remitted to the magistrates Court for sentence *de novo* before the same magistrate. At the subsequent trial the trial magistrate shall not pass sentence in excess of that already imposed upon the accused, and he shall take into account, in assessing sentence, the purport of this judgment, and the length of the time the accused has served in prison.

Mungwira J: I agree.