

1. THE STATE  
versus  
TUTSIRAI TOBAIWA MAKONI AND 2 OTHERS

2. THE STATE  
versus  
TITSIRAI TOBAIWA MAKONI  
and  
REVAI SAGOMBETO

HIGH COURT OF ZIMBABWE  
DUBE & TAGU JJ  
HARARE, 10 October 2015

### **Review judgment**

DUBE J: These two matters were placed before me for review. Both were dealt with by the same magistrate on 25 April 2016 and raise the same issue for review. The accused persons pleaded guilty and were accordingly convicted and sentenced.

In MTK 293-5/16, Tutsirai T .Makoni appeared jointly charged with two co-accused of two counts of contravening s131 (1) (a) as read with subsection 2(e) of the Criminal Law Codification and Reform Act Chap 9: 23, thus unlawful entry into premises. The accused pleaded guilty to the charges and were accordingly convicted. Tutsirai Makoni had two previous convictions of unlawful entry dating back to 2010. The third accused had two previous convictions of unlawful entry dating back to 2013. In the first previous convictions the third accused was sentenced to 12 months imprisonment of which 4 months imprisonment was suspended for 5 years on condition accused does not commit any offence involving unlawful entry into premises for which he will be sentence to imprisonment without the option of a fine. In the second previous conviction he were sentenced to 48 months imprisonment of which 12 months was suspended for 5years on conditions. A further 6 months was suspending on condition of restitution. The first and third accused was sentenced to 6 years imprisonment each. The second accused was sentenced to 5 years imprisonment. The convictions are in my view proper. My concern lies with the trial magistrates ‘approach to sentence and the severity of the sentences imposed. In my query to the magistrate, I raised

the concern that Tutsirai Makoni's previous convictions were not put to him before sentence. The trial magistrate in his response conceded that the record does not show that the previous convictions were put to the accused. He maintains that this was due to an omission in recording that part of the trial. The court explained that it noted that the suspended sentences in the previous convictions were brought into effect in a different case.

In MTK271-72/16 the second matter, the Tutsirai Makoni was jointly tried and convicted of another count of unlawful entry together with Reva Sagombeto. The court noted the same previous convictions for Tutsirai Makoni produced under MTK 293-5/16. Tutsirai Makoni was sentenced to 6 years imprisonment whilst his co-accused was sentenced to 5 years imprisonment. The same previous convictions for Tutsirai Makoni produced under MTK 293-5/16 was produced in this matter. The trial court conceded that the record does not indicate that the previous convictions were put to the accused and that this was due to an omission on the court's part.

The purposes, for which previous convictions are admitted, where present, are to inform the court of an offender's standing. The procedure adopted in producing previous convictions is that the prosecutor stands up and advises the court of the previous convictions. The previous convictions are put to the accused. The court should enquire if the previous convictions are admitted to. If the accused admits the previous convictions, the previous convictions are handed over to the magistrate, if there is a relevant previous conviction in respect of which there is a suspended sentence, the prosecutor is required to apply for the suspended sentence to be brought in to effect. In a case where the previous convictions are relevant but are stale, the court may still use the previous convictions to enhance the sentence being imposed. A separate enquiry is required to be made where an accused has previous convictions. The trial magistrate is required at all times to record this exchange fully. This procedure does not emerge from the record.

Previous convictions should not be admitted into the record for mere decoration. In every case where it has been shown that an offender has previous convictions, these are required to be put to the accused. It must be apparent from the court's reasons for sentence what the court's approach to the previous convictions was. Where the previous convictions are brought into effect, this should be clear from the magistrate's reasons for sentence. It is not in every case where previous convictions are acknowledged that a court has to bring the suspended sentence into effect. The court has discretion over what weight it places on the

previous convictions and how to treat the previous convictions. The court's approach to the previous conviction must be made clear from the court's reasons for sentence. Even where a previous conviction is stale or expired; the previous conviction has a bearing on the sentence to be imposed and ought to be produced... The previous conviction has to be relevant to the offence under consideration. It has to be of the same or similar type of crime as the one under consideration. Also to be considered is the seriousness of the crime committed, its prevalence and the number of previous convictions involved. It has also to be considered how long ago the offence was committed and the intervals at which the offences were committed.

A glimpse at Mtk 393-95 /16 reveals that the trial magistrate's approach to the previous convictions was cursory. The procedure followed in admitting the previous convictions is not recorded in the record. It does not appear from the magistrates' reasons for sentence that he was alive to the first accused's previous convictions. He makes no reference to the first accused's previous convictions. The previous convictions though committed more than five years ago were still relevant for purposes of assessing the correct sentence.

With respect to the third accused the court remarked that the accused had "a system of breaking into people's houses." The accused had relevant previous convictions dating back from the year 2013. No explanation is given why the suspended sentences were not brought into effect. The trial court did not explain why the 12 months imprisonment under MTK 325/13 and the 12 months suspended under MTK 329/13 were not brought into effect. The suspended sentences are still hanging over the accused's head. If the suspended sentences were discounted, what is the reason for that approach? It is not good enough for a magistrate sentencing an offender with previous convictions that are still alive to merely remark that an accused has "a system of breaking into people's houses" without closely analysing the previous convictions. If the magistrate decided to disregard the previous convictions, he ought to have given the reasons for doing so in his reasons for sentence.

At the time of sentencing, the second accused had no previous convictions. Sentences for unlawful entry range between 3 to 4 years imprisonment for first offenders in circumstances akin to these. I see no justification for the 5 year custodial sentence. There is no explanation why the second accused who was a first offender did not have the benefit of a portion of his sentence suspended. The property stolen is worth \$350 -00 and was all recovered. Whilst unlawful entry is a prevalent and serious offence, no justification has been shown for the stiff sentence imposed on the second accused. Whilst a review court is

discouraged from interfering with the sentencing discretion of a trial court, the inescapable conclusion is that the sentences imposed are excessive in the circumstances of the offences committed as well as the circumstances of the accused. No basis was laid for the stringent sentences imposed on all accused.

In MTK 271-72/16, the accused entered a house and stole property valued at \$300-00 and property worth \$290-00 was recovered. The accused both pleaded guilty and were sentenced to 6 and 5 years imprisonment respectively. The first accused's previous convictions were once again produced. The record does not indicate that the previous convictions were produced or that they were ever put to the accused. The records just find themselves in the record. Every document produced and placed in the record during proceedings is required to have a trail and its production recorded in the record. The trial court makes no reference at all to the previous convictions in his reasons for sentence. If the same previous convictions were admitted and taken account of in a different matter and the court was not placing any reliance on them, that fact should have been highlighted in the record and reference of that case given.

Sentences of five and six years induce a sense of shock. The court accepts that the offence the accused stood convicted of is serious and prevalent. What is in the accused's favour is that most of the property was recovered. Whilst accused one had relevant previous convictions, these related to a conviction from the year 2010. The sentences imposed are not in line with sentences imposed in similar cases. Sentences in the range of four to five years would have met the justice of the cases. In the result the sentences imposed are set aside and substituted with the following,

The sentence under MTK 293-95/16 is altered to read as follows,

Accused 1 and 3 -5years imprisonment

Accused 2 -4 years' imprisonment.

The sentence under MTK 271-72\16 is altered to read as follows,

Accused 1- 5 years' Imprisonment

Accused 2- 4 years' Imprisonment

DUBE J .....

TAGU J agrees .....