JOHANNES MUYOGO
and
65 OTHERS
and
NIMROD GUVAMOMBE
and
THE ATTORNEY GENERAL
and
THE COMMISSIONER OF PRISONS

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 8th and 17th November, 2004

Criminal Review

Mr *Samkange*, for the applicants
Mr *Phiri*, for the respondents

BHUNU J: The 66 applicants were convicted on their own pleas of guilty to a charge of contravening section 36(1)(e) of the Immigration Act [*Chapter 4:02*]. The section provides that:-

> "36(1) Any person who-
> (a) .....
> (b) .....
> (c) .....
> (d) .....
> (e) Commits any fraudulent act or makes any false representation, by conduct, statement or otherwise for the purpose of facilitating or assisting the entry into or departure from Zimbabwe of himself or any other person, whether or not such person is *doli capax*, in contravention of this Act.
>
> Shall be guilty of an offence and liable to a fine not exceeding $1.5 million dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

The statement of agreed facts presented to the court reads as follows:-

> "Statement of Agreed Facts

1. Accused persons will plead guilty to contravening section 35(1) (e) of the Immigration Act [*Chapter 4:02*] to enter or assist any person to enter, remain in or depart from Zimbabwe.
2. On the 7th March 2004, at about 19:20 hours the crew of a boeing 727-100 Aircraft registration number N4610 namely Jaap Neil Steyl, Hendrik Jacobus Hamman and Kenneth Fred Pain contacted the Control Tower at the Harare International Airport seeking permission to land.
3. The Control Tower Controller, Faith Chinyanga Gutsire asked the crew to declare the number of passengers on board. The crew stated that there were three crew members on board.
4. Faith Chinyanga Gutsire then passed the information to Passmore Magudu who was responsible for landing and departing of aircraft on that day.
5. Passmore Magudu then received instructions from Manyame Airbase to let the plane taxi to Manyame Airbase refueling and he complied.
6. when the plane reached Manyame intending to collect arms and ammunition which had been purchased by one Simon Mann, base Commander Group Captain Nhamoinesu ordered the plane to be searched as per standing regulations.
7. During the search it was discovered that apart from the three-crew members declared by the crew to the Control Tower, there were sixty four other passengers aboard the aircraft."

On these facts the learned trial magistrate sentenced the captain and co-captain to 16 months imprisonment each, whereas each of the remaining 64 co-accused's were sentenced to 12 months imprisonment.

Counsel for the applicants has now brought the proceedings on review complaining of gross irregularity in the proceedings.

His complaint is that the learned trial magistrate did not give reasons for imposing custodial sentences without the option of fines despite the fact that the offence is punishable by a fine.

It was his contention that the general principle is that where the legislature has prescribed a fine and in the alternative imprisonment the court must first consider imposing a fine before resorting to imprisonment see *S v Sizala* HC-H-57-24, *William Rutsvara v S* SC-2-2004 and *Smart Kasaru v The State* HC-H-59-04. His further complaint is that the accused being first offenders, the trial court ought to have suspended a portion of the terms of imprisonment in respect of the captain and his co-captain.

He attacked the severity of the sentences on the basis that the learned trial magistrate pointed to no aggravating circumstances. The above submissions were not disputed by the State prosecutor. It is trite that in sentencing convicted offenders, trial magistrates and judges have a wide discretion. The net result is that both the reviewing and appeal courts will not lightly interfere with the exercise of such discretion in the absence of gross irregularity or misdirection.

Where reliance is placed on gross irregularity the standard of proof is very high indeed. Our courts have adopted the English position that a decision can only be said to be irrational if it is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a decision. See *Mutambara and Others v Minister of Home Affairs* 1989(3) ZLR 96(HC).

An examination of the applicants' complaints on review reveals that their only complaint against the trial magistrate is that he departed from the usual general sentencing principles and norms. General principles and norms do not however translate into binding principles and rules of law though they remain valuable guidelines.

For instance it was held in the case of *S v Gorogodo* 1988(2) ZLR 378(HC) that:

> "There is no rule that every first offender who is to be imprisoned is entitled to have a portion of the sentence suspended."

There is equally no rule of law which entitles a convict to a fine as of right where an offence is punishable by a fine and or imprisonment. The decision whether or not to impose a custodial sentence is entirely in the discretion of the trial court.

The discretion must however be exercised judiciously and rationally having regard to judicial precedent and plain common sense. Aggravating circumstances ought to be weighed against mitigating features to strike a balance between the interests of the offender, the State and society at large.

A perusal of the record of proceedings shows that in assessing sentence the learned trial magistrate weighed aggravating features against mitigating features. He expressly said so in his opening remarks. In his own words this is what he had to say:-

> "In assessing sentence, I will take into account what was submitted in mitigation by the defence on behalf of the accused and I will also take into account what the State submitted in aggravation."

After having weighed the aggravating features against the mitigating features the learned trial magistrate concluded:-

> "In my view this is not just a technical contravention of the Act. A whole group of 67 foreigners illegally entered Zimbabwe. This court is enjoined to give effect to the spirit of the legislator on such offences. Given the circumstances of this case, it would be in my view inappropriate to impose a fine."

It is clear that the learned trial magistrate first considered the imposition of a fine as is required by judicial precedent and practice but ruled in favour of a custodial sentence giving good and sufficient reasons for his decision.

One cannot agree more with the trial court that this was no ordinary contravention of the Act. This was a unique case with security implications for the State and the Nation at large.

It is my considered view that whenever the security of the State and the Nation is at stake all organs of the State and the Nation at large must pull in the same direction regardless of one's beliefs and station in life. One shudders to think what could have happened had the applicants been confronted after they had gained possession of the arsenal of arms and ammunition. Thus the courts have a fundamental duty to deal severely with convicted offenders whose crime tends to place the security of the State at risk by passing stiff and deterrent sentences.

Even if one were to disagree with the learned trial magistrate it cannot be said by any stretch of the imagination that in the circumstances of this case, the sentences he meted out were so outrageous in their defiance of

logic and acceptable moral standards that no reasonable court applying its mind properly could have meted out such sentences.

Viewed from that angle I am satisfied that the concessions made by the State counsel to the effect that the learned trial magistrate misdirected himself in that he failed to address aggravating features and to suspend a portion of the prison terms are ill conceived, in appropriate and insupportable by the facts on the record of proceedings.

Having said that I am also constrained to point out that this was more of an appeal disguised as a review simply to facilitate a quick hearing of the case. This amounts to an abuse of process and in future the court might express its displeasure by an award of costs against the lawyer concerned.

In the final analysis it is ordered that the application for review be and is hereby dismissed.

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ByronVenturas & Partners, the applicant's legal practitioners
The Attorney General's Office, the respondent's legal practitioners