

THE STATE
versus
TINASHE LEFITALA
and
ROBERT MURINDI
and
TAFADZWA MAGUTA

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 23 February and 17 April 2023

Criminal Review

MUNANGATI-MANONGWA J: This matter came before me for automatic review in terms of section 57(1) of the Magistrates Court Act [*Chapter 7:01*]. The three accused persons who were unrepresented faced assault charges as defined in section 89(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It being alleged that on 31 January 2023 at a business Centre in Mrewa one, each or all of them unlawfully committed an act of assault upon Evidence Chiponda by grabbing him once on the neck, hitting him once on the face and stabbing him twice on the stomach with a broken beer bottle intending to cause bodily harm or realizing that there is a risk or possibility that bodily harm may result. All the three accused persons pleaded guilty to the charge and were all convicted.

The facts of this matter and the ultimate convictions bring to the fore the duties of Magistrate at plea recording stage. The facts of this case are that: On 31 January 2023 at midnight the complainant was standing at a shop at Murehwa Business Centre when first accused person grabbed him on the neck. The second accused person approached complainant and hit him with a fist once on the face. The third accused person approached the complainant and held him. The first accused person broke a beer bottle and stabbed the complainant twice on the stomach. The medical report shows that the complainant suffered two wounds on the side of the abdomen one being approximately 8cm x 1cm and the other 9cm x 1cm.

The facts of the matter more particularly that the first accused person broke a beer bottle and stabbed the complainant twice on the stomach are such that a charge of assault was misplaced. Stabbing a person twice on the stomach a vulnerable part of the body cannot by any stretch of imagination be classified as an ordinary assault. An act can be indicative of intention. The question becomes what is it that the perpetrator of an offence intended to achieve. The mere act of breaking a beer bottle and using the sharp edges to strike blows on a person's stomach can only point to a sinister motive much more than causing injury. Whilst it is the state which brings charges against an accused person, the court has a duty to see whether the charges accord with the facts at hand. Justice delivery is not a one way process. It is a process where the police, the state, the defence counsel and the court are partners in the justice delivery system. Where the facts point to a more serious offence the court can *mero motu* raise issue with the state as regards whether the charges facing the accused are appropriate.

The facts before the Magistrate pointed at best to a charge of attempted murder. Upon the reading of the charge, before the accused is called upon to plead, the court should be satisfied that the charge is appropriate. The obligation to scrutinize the charge becomes more pressing where there is no legal counsel or an accused is not represented. It is not for the court to simply proceed with plea recording where it is apparent that the charge and the allegations are at variance. It is the duty of the court is to see that justice is done and the process starts from the onset of the proceedings. This duty is premised on the fact that it is the court which is conducting a hearing and it cannot turn a blind eye to an irregularity, it has to raise it with the state which in criminal proceedings is the *dominus litis*. The police prepare the charge sheet from their understanding of the law. Where the officer dealing with case prefers a charge not consistent with the facts, the prosecution must pick the error and request for regularization. Where that does not happen the court still has a duty to raise issue on the appropriateness of the charge. If it were not so a court can simply proceed with a rape case as if it is indecent assault. Justice can never be served where a court believes that its duty is to give judgment in the end without taking control of the proceedings and seeing to it that procedurally and substantively the proceedings are in accordance with real and substantial justice. In the end what the complainant suffered during the commission of the offence must be what informs the charge because it is a complaint of a criminal conduct that triggers a charge.

It is also noted that whilst the state outline identifies the role played by each party the court imputed upon each of the accused persons the actions of the other. The facts are clear that it is the first accused person who broke the beer bottle and struck the complainant twice with it. Yet in putting the facts to each accused the court alleged that the accused grabbed the complainant on the neck, hit him once on the face and stabbed him twice on the stomach. This was a misdirection as the role of each accused person was clearly outlined. Each accused person was supposed to answer to their alleged role and conduct. It is clear that the court imputed common purpose as the driving force behind the commission of the offence. This certainly would create problems if the parties were to be convicted of attempted murder given that the second and third accused had not contemplated the use of a broken bottle by the first accused to stab the complainant the two's roles having been limited to a punch and holding the complainant by the neck.

Under the circumstances the proceedings do not accord with real and substantial justice and I accordingly withhold my certificate.

MUNANGATI-MANONGWA J:.....

WAMAMBO J:.....agrees