THE STATE
versus
ISAAC KAMANGA

HIGH COURT OF ZIMBABWE
MUZENDA AND MUNGWARI JJ
MUTARE, 26 February 2023

Criminal Review

MUNGWARI J: The correctness of a charge is central to any criminal trial. Much as the prosecution is *dominus litis* the exercise of its powers under that principle is not absolute. In the case of *S* v *Thebe* 2006(1) ZLR 208 (H) this court emphasised the issue that the court's purpose is to do justice between man and man. Its function is to determine the real issues between the parties. As such in instances where the facts alleged reveal that the prosecutor has preferred a completely wrong charge the court has inherent power to cause him/her to prefer suitable charges. A court has authority to prohibit a prosecutor from proceeding with a lesser charge where the facts reveal a more serious one. I wish to add that in equal measure the court has power to prevent the state from preferring a charge under one section of a statute in cases where the facts show that the more suitable charge is under another section or under a different statute. Refer to the case of *S* v *Chidodo and Anor* 1988(1) ZLR 140 (H) for similar propositions.

This case was placed before me on automatic review in terms of s 57(1) of the Magistrates' Court Act [*Chapter 9:10*]. Its background is that the accused person was employed as a herd boy at a farm in Munyati North in Chivhu District. He resided at the farm with his young family, which was made up of himself, his wife named Brenda Chiraramire (Brenda) and their 3 month old baby girl Christened Talent ("herein after the deceased"). Their marriage appeared to have been on the rocks. It got worse and sometime in October 2022 they had a complete fall out after which the accused directed Brenda to leave the homestead. He caused her to also leave the infant whom he then took sole custody of for three months. On 5 January 2023 the baby fell sick. Realizing the seriousness of the infant's condition, he took her to hospital for a medical checkup. At the hospital she was diagnosed with malnutrition

and dehydration and was admitted for treatment. Two days later the accused on his own engineering and without authority from the hospital staff removed the deceased from the hospital ward and took her to an apostolic shrine for prayers. The deceased died five days later at home and in the accused's custody. He informed the village head who in turn informed the police. Investigations into the cause of death of the deceased led to the arrest of the accused. A postmortem was carried out on the body of the deceased at Chivhu General Hospital. The cause of death was found to have been as a result of "severe acute malnutrition."

The accused was subsequently arraigned before the Regional Court on a charge of contravening s 7 (1) as read with s 7(5) of the Children's Act [*Chapter 5: 07]* (The Act) that is ill-treatment of a child. After a contested trial he was convicted and sentenced to:

> "2 years imprisonment of which 6 months is suspended for 5 years on condition accused does not within that period commit any offence involving exposing, neglecting or ill-treating of a child upon which on conviction will be sentenced to imprisonment without the option of a fine"

What exercised my mind was the propriety of the charge preferred against the accused in light of the agreed facts. The undisputed fact of the child's death brings to the fore the question of whether the accused could still be charged with ill treatment of that child in terms of the Children's Act in circumstances where it was clear that he directly contributed to the deceased's death.

From the record of proceedings I note that the charge which was purportedly premised on s 7(1) of the Act is couched as follows:

> "….Isaac Kamanga being the biological father of Talent Natalie Kamanga unlawfully ill-treated, neglected, or exposed Talent Natalie Kamanga when he took her away from her mother, Brenda Chiraramire and the hospital in a manner that caused her unnecessary suffering and affecting her health resulting in her death."

Section 7 (1) reads as follows:

7. Prevention of neglect, ill-treatment and exploitation of children and young person

S 7 (1) of the Act in particular states that

> "any parent or guardian of a child or young person who assaults, ill-treats, neglects, abandons or exposes him or allows, causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause him suffering or to injure or to detrimentally affect his health or morals or any part or function of his mind or body, shall be guilty of an offence."

What sticks out from the above section is that the element of death is not mentioned. It must follow that the legislature did not intend to cover under this provision, ill-treatment or some other form of neglect of a child which directly leads to that child's death. A proper

reading of the Act would reveal that its main objective is to make provision for the protection, welfare and supervision of children. It provides remedies for children in instances where it has been established that there is ill treatment and or neglect of a child. These include the removal of children and young people into care homes and other designated institutions. The offences which are created under the Act are all intended to ensure that children are not abused. They act as a deterrent against child abuse by those parents and guardians inclined to do so. Against that understanding the supposition is that the child intended to be protected is a living child as opposed to a dead one. Section 2 of the Act defines a child as "… a person under the age of eighteen years and includes an infant. The definition does not extend to a person under the age of eighteen years or an infant who is dead like in this instance. I note that confusion may have arisen as a result of the wording of s 7 (3) (c) which provides that:

> "(3) A person may be convicted of an offence specified in subsection (1) notwithstanding that—
> (*a*) actual suffering or injury or detriment to health, morals, mind or body has been obviated by the action of another person; or
> (*b*) actual suffering or injury or detriment to health, morals, mind or body has not occurred; or
> (c) the child or young person, who is the subject of the charge, has died."

Clearly the provision is not intended to deal with a parent or guardian who deliberately or negligently causes the death of a child or a young person. The instances where a conviction under s 7 may ensue when the child has died are situations where a parent or guardian previously ill-treated or neglected a child but there is no nexus between the child's death and that ill-treatment and or neglect. It means that despite the fact that the child is dead and cannot testify in court the parent or guardian can be convicted as long as there is evidence that he/she committed the offence. The absurdity which would result from a literal interpretation of the provision is that any parent or guardian who killed or negligently caused the death of his/her child could resist prosecution for murder or culpable homicide by virtue of s 7(3) (c). Instead, the mischief which the legislature intended to deal with in the Children's Act is the ill-treatment or neglect of living children.

Section 47 (1) of the Criminal Law Code prescribes that:

> "**47 Murder**
> (1) Any person who causes the death of another person–
> (a) intending to kill the other person; or
> (b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder."
> (Underlining is mine for emphasis)

As is clear from the construction of the crime, the intention for murder is not restricted to situations where a person deliberately sets out to kill his victim. It extends to instances where he/she foresees the possibility of death but is reckless as to whether the consequence ensues. Culpable homicide in turn requires the accused, as a reasonable person to have foreseen the possibility of death.

In this case, it is admitted that the accused took the infant from its mother when it was barely three months old and was still being breast-fed. It is also admitted that he took the same child out of hospital when it was admitted suffering from severe malnutrition without authority of health professionals at the hospital. The child died the same night. These facts also appear in the state outline in that raw manner. In fact the trial court itself concluded that the accused was reckless and arrogant. That recklessness was apparent from the state's allegations even without more. It must have been clear to the accused that death was likely to occur if such an infant was starved of its mother's milk. The accused must have also foreseen the possibility of death resulting from taking a severely ill child from a hospital ward and purport to go with her to an apostolic shrine for purposes which he only knows. At the very least the accused, as a reasonable person must have foreseen the possibility of the death of child under the described circumstances. A reading of the charge as it is discloses the offence of negligently causing the death of the deceased complete with its particulars of negligence. Put simply, the more serious charge of culpable homicide is apparent from both the charge and the facts. That should have provoked the trial court to probe the issue with the prosecutor instead of simply accepting what had been brought before it because the state was at liberty to charge what it preferred. If the accused had a defence to any of the crimes of murder or culpable homicide, he was entitled to it but the starting point was for the trial magistrate to at least query from the prosecutor if the accused had not been charged with a lesser crime than the one revealed by the facts or whether he had not been charged under a wrong statute altogether.

It may also be important to remind magistrates that when an accused appears before a court on a charge of contravening the Children's Act, the court does not sit as Magistrates' Court but as sits as a Children' Court in terms of s 3 (2) of the Act which states that:

> **"3 Establishment of children's courts**
> (1)…
> (2) Every magistrates' court shall be a children's court for any part of the area of its jurisdiction for which no children's court has been established in terms of subsection (1)."

The reason why the Act established Children's Courts is to allow courts flexibility in dealing with children's issues. My view is supported by the provisions of s 5 of the Act. It provides that:

> **"5 Procedure of children's courts**
> (1) A children's court shall not be bound by any rules relating to civil or criminal proceedings and, in any case not provided for in this Act or in rules, the proceedings of a children's court shall be conducted in such manner as to the officer presiding over the children's court seems best fitted to do substantial justice.
> (2) The officer presiding over a children's court may in his discretion permit evidence to be given to the court by way of affidavit or report and may permit the child or young person to express his views or opinion on the matter before the children's court:
> Provided that the officer presiding over the children's court shall, upon the request by or on behalf of any person who in his opinion is a properly interested person, require the appearance before the court of the maker of any such affidavit or report and shall afford that person an opportunity to cross-examine the maker of the affidavit or report upon oath."

The provision gives the trial officer an open cheque in relation to procedure as long as the method he/she follows results in substantial justice. What is not apparent is whether the court has jurisdiction to try criminal cases. I elect to leave that issue open for discussion in an appropriate case. It does not affect my determination of this case.

Disposition

The courts have been cautioned against blindly accepting the charge as preferred by the state even in circumstances were the state outline does not fit the charge. The correct approach is for a trial magistrate to study a charge and juxtapose it against the state outline. The two documents must speak to each other. It is the duty of a judicial officer to ensure that before it is read to an accused the charge is correctly formulated and is in harmony with the facts alleged by the state. The court has power to prevent the state from proceeding on an improper charge such as in this case. Needless to say, it was inappropriate for the trial court to allow an improper charge, not supported by the facts to stand. The impropriety of that charge and the prejudice which allowing it to stand occasioned is demonstrable if the penalty provision to a charge under s 7(1) of the Act is compared to that provided for a charge under s 49 of the Criminal Law Code. The maximum penalty permissible under the former is two years imprisonment whilst under the latter a convicted person may be sentenced up to life imprisonment. For the reasons stated above the accused's conviction on that wrong and lesser charge than what is revealed by the facts cannot be allowed to stand.

DISPOSITION

In the premises, IT IS ORDERED THAT:

1. The conviction and sentence be and are hereby set aside
2. The accused is entitled to his immediate release from custody
3. The Prosecutor retains the prerogative to cause the accused to be tried afresh. If a new prosecution is instituted a different magistrate to preside over the trial. The period of imprisonment served by the accused should be factored into the sentence in the event of a conviction.

MUNGWARI J:……

MUZENDA J …….AGREES