

1. STATE **GNDP 369/20**

Versus

NKOSIYABO NGWENYA

2. STATE **GNDP 406/20**

Versus

KELVIN NKAUWU

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 2 FEBRUARY 2021

Criminal Review

TAKUVA J: The two records were placed before me by the Registrar. They had been referred to this Court by the Learned Scrutinising Regional Magistrate at Gwanda with the following comment:

“Both matters came to me by way of scrutiny and were dealt with by the same Magistrate. I queried the correctness of the convictions seeing it was quite clear from the record of proceedings that the accused persons were raising defences. In response to the queries raised the trial Court conceded.

If the learned Judge is with me may corrective measures be taken.”

THE FACTS

(1) **NKOSIYABO NGWENYA**

Accused appeared before a Magistrate at Gwanda on a charge of assault in contravention of section 89 of the Criminal Law (Codification and Reform) Act Chapter 9:23 (The Code). He was alleged to have struck Victor Justice Moyo with an axe in the head intending to cause him bodily harm or realising that there was a real risk or possibility that bodily harm might result.

The accused pleaded guilty and was convicted and sentenced. In canvassing the essential elements of the offence, the accused gave the following responses;

“Q - What was your intention when you hit the complainant on the head with the handle?

A - I was acting in self defence.”

In mitigation the following exchange occurred;

“Q - Tell this court what led you to assault the complainant?

A - My aunt requested to use the complainant’s donkeys. I then advised the complainant to accompany me to show him the person who authorized me to take and use the donkeys. They refused to go, they teamed up, they even blocked me, that’s when the complainant picked up a stone intending to strike me. I avoided the missile (stone) by ducking. I then picked the handle of the axe and struck the complainant in self-defence. That is all.” (my emphasis)

Notwithstanding this clear denial of the unlawfulness of the offence, the court *a quo* proceeded to return a verdict of guilty on his “own plea.”

(2) **STATE V NQOBANI KELVIN NKAWU**

The accused appeared before the same Magistrate on a charge of assault in contravention of section 89, of the Code. The specific allegation being that the accused unlawfully and intentionally hit complainant on the face and head using stones and an axe intending to cause bodily harm or realising that there is real risk or possibility that bodily harm may result.

While canvassing essential elements, the following exchange took place;

“Q - Did you have an altercation with any body at the stores during the period 2200 hours and 2300 hours?

A - Yes

Q - Tell this court what happened?

A - We were drinking beer together, the complainant suggested that we put money to buy more beer. I gave him my money and he then left. I saw him and when I asked for my money he advanced in a manner to assault me. I was not able to physically match him in a fight, so I picked stones to hit him and

and an axe handle ...

Q - What was your intention when you hit him with stones? And with the axe?

A - Nothing, he was the one who was aggressive.”(my emphasis)

Again despite this clearest manifestation of a plea of not guilty, the court *a quo* pronounced itself thus; “I find you guilty by your own plea of guilty.”

A plea of guilty must be genuine and unequivocal. *In casu* both accused persons informed the court without any equivocation that the assault was not unlawful. A clear and known defence to our law was tabled before the court, warranting a plea of not guilty. The court *a quo* conceded its error which it ascribed to an oversight on its part. Magistrates should keep in mind that a crime consists of two elements i.e. *theratus reus* and the *mens rea*. Both must be present before a plea of guilty can be properly returned.

Invariably in assault cases, an accused would admit the *actus reins* while denying the *mens rea*. For this reason, Magistrates should be alert of the possibility of defences mushrooming from an accused’s responses during a plea inquiry.

This is exactly what happened *in casu* and unfortunately the Magistrate failed to swiftly identify the defences and enter a plea of Not Guilty. This is an irregularity that vitiates the entire proceedings.

In the circumstances it is ordered that;

1. The verdict in both cases is altered to Not Guilty.
2. The sentences be and are hereby quashed.
3. The matters are remitted to the court *a quo* for trial *de-novo* before a different Magistrate.
4. In the event of a conviction the trial court must take into account the portion of the sentence served by the accused persons before it was set aside.

Mabhikwa J I agree