

MAXWELL KARIKOGA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUZOFA J  
HARARE, 7 April 2021 & 22 April 2021

### **Review Judgment**

MUZOFA J. This matter was placed before me on 22 March 2021 for review with a cover note raising a procedural issue in the way the trial Magistrate canvassed the essential elements during the proceedings.

The accused was convicted and sentenced on a charge of contravening s 7 (1) of the Children's Act [*Chapter 7:10*]. He was sentenced to pay a fine of \$80.00 in default of payment 15 days imprisonment. In addition 5 months imprisonment was wholly suspended on condition the accused is not within that period commit an offence involving ill-treatment of minor children of which he is sentenced to imprisonment without the option of a fine.

The scrutinising magistrate expressed some reservations on the conviction. He was of the view that the accused was not properly convicted. Firstly, because the charge did not use the terms used in creating the offence to capture the essential elements and consequently the essential elements were not properly canvassed by the trial court.

A brief background is necessary. The accused a male adult, assaulted his 8 year old minor child with an electric cable. The charge was read and is as follows:

“Charged with ill-treating a child as defined in s 7 (1) of the Children's act [*Chapter 5:06*].

In that on 7 December 2015 and at 17:30 Hopley Zone 5 Maxwell Karikoga being the father of Faith Karikoga unlawfully assaulted the minor in a manner likely to cause injure (sic) to affect her body by severely assaulting her using an electric cable several times intending to cause injuries on her back.”

The accused pleaded guilty to the charge and I reproduce the relevant exchanges between the trial court and the accused below,

Q Admit on 17 July 2015 and at 17:30 Hopley 25 you assaulted Faith Karikoga who is a minor child

A Yes

Q What did you use

A A belt

Q Where

A On her back

Q How many times

A I don't know because I was angry

Q Admit you realised there was (sic) chance that she might suffer bodily harm

A Yes I was angry

Q Any right

A No

Q Any legal defence

A No'

Thereafter a verdict of guilty was entered.

Section 146 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] deals with the requisites of an adequate charge and provides,

“146 Essentials of indictment, summons or charge

(1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Subject to this Act and except as otherwise provided in any other enactment, the following provisions shall apply to criminal proceedings in any court, that is to say—

(a) the description of any offence in the words of any enactment creating the offence, or in similar words, shall be sufficient; and

(b) any exception, exemption, *proviso*, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negated in the indictment, summons or charge, and, if so specified or negated, no proof in relation to the matter so specified or negated shall be required on the part of the prosecution.”

In terms of subs (1) thereof a charge should be reasonably sufficient to inform the accused of the nature of the offence. Subsection 2 thereof provides an easier way to capture the essential elements of a charge by using the words creating the offence or similar words. The benchmark therefore is whether the accused understands what he or she is facing provided the charge creates an offence. It is commendable to use the language of the section creating the offence. However it cannot be an irregularity that vitiates the proceedings where the language is not slavishly adhered to where the charge is reasonably sufficient to inform the accused of

the nature of the charge. Where the charge is couched in terms that encapsulate the essence of the offence, I do not see any impediment to such a charge.

In *casu*, admittedly the charge was inelegantly set out. However, in its inelegance it is apparent that the accused is charged for assaulting a minor child. The intention part is captured in the words in ‘a manner likely to cause (sic) injure to affect her body by severely...’ In my view this captures the spirit of the charge in s 7 (1) which provides,

- “7 Ill treatment or neglect of children and young persons  
(i) Subject to subs 4, if any parent or guardian of a child or young person assaults, ill-treats, neglects, abandons or expose him or allows; causes or procures him to be assaulted, ill-treated neglected abandoned or exposed in a manner likely to cause him unnecessary suffering or to injure or detrimentally to affect his health or morals or any part or function of his mind or body he shall be guilty of an offence”.

The charge substantially complies with the wording of the section. I have no doubt the accused understood the nature of the charge. This is evident from his responses. He explained why he assaulted the child and appreciated that there was a possibility that the child might suffer bodily injury.

The second issue is that the trial Magistrate did not canvass the essential elements that the ill treatment was done in a manner likely to cause the minor unnecessary suffering or to injure or to detrimentally affect the minor’s health, or morals or any part or function of her mind or body.

As already stated, the exchange between the trial Magistrate and the accused shows that the court asked if the accused realised he could cause bodily harm. The accused admitted. The admission shows that the accused appreciated that the assault was potentially injurious to the minor child’s body.

The scrutinising Magistrate took a dogmatic approach in this case and focused on the form rather than the substance. I find no misdirection to make a finding that the accused was not properly charged and convicted.

Accordingly, both the conviction and sentence are confirmed to be in accordance with real and substantial justice.