

THE STATE
versus
OLIPER NDLOVU

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO 9 APRIL 2015

Criminal Review

MUTEMA J: The accused person *in casu* was arraigned before a provincial magistrate sitting at the Western Commonage Magistrate's Court, being charged with contravening section 100 of the Prisons Act, [Chapter 7:11], the allegations being that on 27 February, 2015 at house number 682 Old Magwegwe, Bulawayo, she unlawfully and intentionally harboured Lungisani Maphala, a prisoner whom she knew had unlawfully escaped from Mbizo Satellite Prison.

The accused pleaded guilty to the charge as framed and following the canvassing of the facts and the essential elements of the gravamen of the charge she was duly convicted.

The escapee is the accused's husband whom she concealed in a wardrobe when a Prison and Correctional Services Officer one Pianos Marega went to the house in an endeavour to arrest the escaped prisoner.

Following the conviction alluded to *supra* the trial magistrate proceeded to take the accused person's mitigation. When it came to assessment of sentence the trial magistrate says he then consulted the Prisons Act to look for the penal provision and, to his horror and dismay, discovered that section 100 of that Act in terms of which accused had been charged and convicted was repealed. He then forwarded the record of proceedings to this court to have them "quashed or for further direction."

I am not persuaded that these proceedings should be quashed solely on the basis that the section of the charge that was preferred against the accused was a repealed section. That defect

is not fatal to the proceedings and no prejudice will be occasioned to the accused if this defect is amended at this stage. She agreed *in toto* with the facts and essential elements which fully support the conviction arrived at. It is permissible to amend the charge on review in an appropriate case in terms of section 29 (b) (iii) of the High Court Act [Chapter 7:06]. Again in terms of subsection (3) of the same section no conviction can be quashed by reason of any irregularity or defect in the proceedings unless a substantial miscarriage of justice has occurred. *In casu* there is no such miscarriage of justice.

There is a plethora of case law authorities to the effect that provided there is no prejudice, it is proper on review to amend a misdescription of the heading of the charge. In the leading South African case of *R v Harmer* 1906 T.S. 50 INNES CJ said at page 54:

“If we were to quash review proceedings for informalities to which the accused took no objection and in respect of which he raised no appeal, it is difficult to say where we could stop. The result would be that many proceedings would be quashed on mere technical informalities, and the Crown put to the expense, and the prisoner the worry, of fresh proceedings, with possibly the same ultimate result as to his guilt. I think, therefore, that in cases like the present we should have regard to the evidence recorded. If that evidence, either as originally led, or as supplemented by the order of the court, proves clearly that the crime intended to be charged was committed, and if the court is satisfied that the misdescription of the crime in the charge sheet did not in any way prejudice the prisoner, then I think we should not set the proceedings aside but confirm them. If the charge sheet is defective the court has power under Ordinance 12 of 1904, sec. 5, itself to correct the proceedings. I think the court should exercise that power where it does not intend to quash the proceedings, so that, as confirmed, the record may be formally in order, and the charge sheet may show a due indictment for the crime in respect of which the conviction is obtained.” See also *R v Milos* 1965 RLR 462

The crime the accused committed on the facts postulated *in casu* used to be provided for in section 100 of the Prisons Act but since its repeal such conduct is now criminalised by section 185 (3) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] which provides as follows:

“185 Escaping from lawful custody
(1) ...
(2) ...

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- (3) Any person charged as an accessory to the crime of escaping from lawful custody, in that he or she employed or harboured or concealed or assisted in harbouring or concealing an escaped person knowing him or her to have escaped, shall be liable if convicted to a fine not exceeding level six or imprisonment for a period not exceeding one year or both.”

In the result the charge that was framed against the accused is hereby amended to read:

“Harbouring an escaped prisoner as defined in section 185 (3) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] in that on the 27th day of February, 2015 and at house number 682 Old Magwegwe, Bulawayo Oliper Ndlovu unlawfully and intentionally harboured Lungisani Maphala, a prisoner whom she knew had unlawfully escaped from Mbizo Satellite Prison.”

With that amendment the proceedings are remitted back to the trial magistrate to proceed to assess the appropriate sentence.

Takuva JI agree