

THE STATE

Versus

RICHARD MOYANA

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 2 NOVEMBER 2017

Criminal Review

BERE J: The accused in this case appeared at Gweru Magistrate Court facing a charge of attempted rape as defined in section 65 a read with section 189 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. At the conclusion of the trial the accused was convicted of the crime charged and sentenced to 3 years imprisonment 6 months of which were suspended on condition of future good conduct leaving him with an effective 2 ½ years imprisonment.

I got seized with this record by way of review. I am extremely concerned with the apparently lackadaisical approach adopted by the trial magistrate in this case. My concern stems from the following developments in this case.

After running through the review record, I wrote to the trial magistrate as follows:

“There is evidence on record that this accused was committed to Mlondolozhi Institute on 1 June 2016 owing to his mental disorder.

On 23rd of January 2017 a qualified psychiatrist, Dr Elena Poskotchinova after examining the accused on a number of occasions concluded in her filed affidavit that in her opinion “the accused was mentally disordered to such an extent that he should not be held responsible for his actions.”

There is no indication at all from the tendered record of proceedings that the learned magistrate took into account the mental condition of the accused person at the time of the alleged offence.

Let me hear from the trial magistrate.”

The learned magistrate promptly responded and stated *inter alia* as follows:

“... the trial magistrate concedes that he did not take into account the mental condition of the accused person at the time of the alleged offence.

The omission was gross oversight on the part of the trial magistrate

I did not properly apply my mind relative the opinion stated in paragraph 5 of the affidavit of Dr Elena Poskotchinova. The oversight is regretted.”

My concern in this matter stems from the fact that the concerned magistrate conducted a full trial in this matter where the state called the complainant and closed its case. The accused was the only witness in his case after which the trial magistrate wrote quite an elaborate judgment which resulted in the conviction and sentence of the accused person.

The fact that the review record consists of, apart from the trial magistrate’s notes all state papers including the detailed mental history of the accused person suggests that there is no way the trial magistrate would have overlooked the detailed mental history of the accused person which was obviously relevant to the outcome of the criminal trial.

In a detailed medical report attached to the trial magistrate’s notes and record Dr Ellen Poskotchinova, a psychiatrist stationed at Ingutsheni Central Hospital, Bulawayo, after examining the accused on numerous occasions concluded her report as follows:

- “5. In my opinion there is a reasonable possibility that at the time of the alleged crime the accused was suffering from mental problem (probably schizophrenia). He was mentally disordered to such an extent that he should not be held responsible for his actions.
6. He is fit to stand trial.
7. I make this statement conscientiously believing it to be true.”

The point must be made and emphasized that once there is documentary evidence suggesting a possible serious mental defect of the accused person at the time of the alleged offence, in the absence of any other evidence to the contrary, the accused person must be given the benefit of doubt. Even where the accused shows flashes of normalcy at the time of trial, it

seems to me that the court may not have an option but to extend that benefit of doubt to the accused person because what matters is the accused’s mental condition not at the time of trial but at the time of the alleged offence.

This is a proper case where the court should have invoked the provisions of section 29(2) of the Mental Health Act Chapter 15:12, and returned a special verdict to the effect that the accused person was not guilty because of insanity and proceeded to deal with the accused person with either section 29(2) (a) or (b) of the same Act.

Consequently, the conviction of the court *a quo* is quashed and the sentence is set aside. In its place the following verdict is substituted:

“The accused person is found not guilty because of insanity.

The accused is returned to prison for transfer to Mlondolozhi Mental Institution for further treatment until such time the Institution certifies him to have fully recovered.”

Mathonsi J I agree