

STATE
versus
FARAI MUTUDA
and
ERNEST MBOKOMA
and
BRIGHTON JABULANI MUNJANJA

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 6 April, 2005

Criminal Review

MAVANGIRA J: The accused persons in this matter were charged with attempted robbery of a motor vehicle. They pleaded not guilty but were all convicted after a trial. The first and second accuseds were each sentenced to 4 years imprisonment. The third accused was sentenced to 4 years imprisonment of which 2 years is suspended for 5 years on the usual and appropriate conditions of future good conduct.

The convictions of the accused persons and the sentences imposed on them are in order and call for no further comment. It is what transpired during their submissions in mitigation of sentence that cannot be left uncorrected.

The following is what transpired in relation to the first accused:

"BY ACCUSED 1 (To court)

I am 32 years old. I am not married. I am a father of two.

BY THE COURT: (To Accused)

How can those children be yours if you are not married? You are only the father of those children if you are married to the mother. Then you do not say I am not married. You say I am widowed. --- I am a widower and have two children.

Had you married her? --- Yes

How? --- I paid lobola but I did not have a marriage certificate.

You were not married to her at all. She just died single. You are only married to a person when you have a marriage certificate with him or her. Having a friendly relationship with her father and giving her father money is not marriage in Zimbabwe. Marriage is when you come before a Pastor, Priest or Magistrate, and you are given a Marriage Certificate to that effect.

Do fathers-in-law give certificates? --- We were not given a Marriage Certificate but we were given permission to live in.

To be given permission and not got married is not marriage. To be given permission to write 'O' level is not passing 'O' level. Are we together? --- Yes.

We have to speak about these things because many people are lost about it. We who solemnize marriages have to speak about it because even some Pastors do not understand what it is all about. You understand? --- Yes.

So because this one died, if you want another one you get her and you come before me or before any of the Magistrates or before a Pastor or Priest. That is when you are married. Are you employed? --- No.

Were you ever employed? --- Yes.

When? --- From 1987 up to 1993.

Where was that? --- I was employed in Msasa. I was employed as company guard specializing in repairing refrigerators.

That repairs what? --- Refrigerators.

Any money saved? --- I have \$800 000 at home.

Any assets? --- I have no assets of value.

Level of education? ---ZJC.

Where was that? --- Marlborough High.

Why stop at JC at Marlborough High. People there do not do that? --- When I sat for my ZJC exams the person who was paying fees for me had already died. Six months had already passed after his death.

And then? --- Noone was able to pay for me so that I could proceed with school.

Who was that? --- My father. So I wonned the custody of my step father.

Where did you live? --- Marlborough.

Which road? ---Sherwood.

In whose house? --- It was my father's house.

Your father had a house in Sherwood and go into Marlborough and you could not find the fees? --- My stepmother indicated that she no longer had any money.

How much was paid at that time? --- It was \$98.

And she could not find that? She could pay for water and electricity and rates but she could not find that for you to go to school? --- She later on sold the house.

You see this story coming together and then what happened to you? --- I then went to stay with an uncle in Mufakose who is a brother to my father.

Where did your father work? --- He was employed by the Airforce of Zimbabwe.

And the Airforce of Zimbabwe had no money to put an Airforce child into school? --- When he died he was now pensioner. He retired in 1986.

And then there was no money even in the pension? --- There is nothing I knew at the time.

This is why it is not coming together because when employed people die, their children are catered for. --- Nothing I knew at that time. My stepmother just told me that she did not have any money for me to proceed with school.

You were in form 2. You could not have been ignorant of these things. Anything else you want to say? --- I request the court to be lenient with me in passing sentence."

The following is an excerpt of what transpired in relation to the second accused:

"So what do you say you have done in life and as an achievement? --- I used to trim people's hair.

Who would want to be trimmed by you? People say dishonesty people do not cut each other's hair. If people know if you dishonesty, will they agree to have their hair cut by you? --- People would agree to have their hair trimmed by me because they do not know the kind of behaviour.

So those who know would not agree? --- Yes.

I would not want to ... anything else? --- I have nothing to say in mitigation.

There is still so much life in you. You could do quite a lot. That is if you do not abuse yourself like taking dark here, but since you taking dagga and all these things. There is nothing for you in life. If you were an employer in

Banket, would you employ somebody who was dark in his head? --- I would not look for somebody who smoke dagga, and one who do not know whether or not somebody smokes dagga.

When you smoke dagga, you think people do not see, do not know that this one takes dagga. You think it cannot be seen. --- Some can see that and some cannot.

Only those who are also in high with dagga cannot see but other people who are alright in the head, we see. Even old women can look at a boy who is taking dagga and say ah, that one smokes dagga. Maybe when you have taken it, do you think people cannot see but they see. Sit down."

The following transpired in relation to the third accused:

"I am 21 years old. I am single. I am self employed. I dig pit sand

BY THE COURT: (To Accused)

Where do you do that? --- In Epworth.

Epworth is worrying us by people waking up at 3 am to steal other people's sand. Maybe that now you are in prison, they are very happy that you are not digging their sand. What I am saying is people who dig sand in Epworth are not digging sand. They are stealing sand. Is it your stand where you pick up this sand? --- ...

Is it yours? So you will be stealing? You wake up at 12 midnight to dig by the moonlight. Do you know where I come from? --- No.

When you come out you will see me in Epworth and you will say ah, that is why he was talking about pit sand."

The magistrate's sentiments as expressed above show a lack of sensitivity to the accused persons' personal circumstances. He literally ridiculed the first accused's status as father of his children; he made fun of his marriage to his late wife. He made uncalled for and unnecessary comments about the institution of marriage, some of which comments are, in any event, not accurate. The magistrate generally harassed the accused person.

With regard to the second accused, the magistrate's comments regarding the trimming of people's hair by the accused were irrelevant to the issue before him. The accused was not about to be sentenced for an offence involving the smoking of dagga.

With regard to the third accused, the outburst by the magistrate on the theft of sand in Epworth was also uncalled for, unjustified and irrelevant in the details of its content.

It is important for judicial officers to maintain the dignity and propriety that goes with their office. It is important that judicial officers are not seen to trivialise the seriousness of legal proceedings or be seen to be teasing and mocking accused persons.

Accused persons do not cease to be human because they stand charged or convicted of a criminal offence. They have rights including rights that are due to them merely by the fact of their being human beings. They also have a right to a fair trial before an impartial tribunal in terms of section 18 of our Constitution and the magistrate in this case, by the way in which he conducted himself as shown in the cited passages, could easily create the impression of lacking in impartiality in his handling of the accused persons' cases.

However, as already indicated above the sentences imposed are nevertheless proper and justified on the facts and evidence before the magistrate and the convictions and sentences have been confirmed as being in accordance with real and substantial justice.

A copy of this judgment shall be forwarded to the office of the Chief Magistrate for the office to take any appropriate action it deems fit.