

THE STATE
vs
ELIAS TIRIVANHU

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 6 March, 2002

Criminal Review

PARADZA J: The accused was convicted on his own plea of guilty on a charge of contravening section 46(1)(2) of the Criminal Procedure and Evidence Act, [Chapter 9:01] (the Act). Before I proceed I must say that the way the charge has been cited is obviously incorrect. It cites subsection (1) and subsection (2) of section 46 of the Act. I will deal with that aspect later in my judgment.

The accused admitted that after he had been arrested by one Constable Zhakata, a member of the Zimbabwe Republic Police, who had been looking for him for some time, he subsequently managed to wrest himself free from the grip of the police officer and ran away. It is mentioned in the State Outline that the police officer was trying to arrest the accused so that he could question the accused about certain moneys allegedly stolen by way of an armed robbery by a brother of the accused. The police officer suspected that the money could be in the possession of the accused.

After the essential elements had been put to the accused, the trial magistrate was satisfied that the plea was genuine and accordingly found the accused guilty as charged. He sentenced the accused to a term of 18 months imprisonment, of which 3 months imprisonment were suspended for 5 years on the usual condition that the accused does not commit any offence involving escaping from lawful custody. I comment, in passing,

that since the accused was being convicted of resisting arrest, the proper condition of suspension of part of the sentence should include the element of resisting arrest.

When the matter came before me on review I was satisfied that the magistrate had erred in a number of respects and therefore I directed that the accused be released forthwith, as he had been in custody since 24 December, 2001, a period of approximately 2 months. The following are my reasons for arriving at that decision.

Section 46 of the Act reads as follows -

"46. Saving of Civil Rights

Nothing in this Part shall be construed as taking away or diminishing any civil right or liability of any person in respect of a wrongful or malicious arrest".

A reading of that provision clearly shows that it does not deal in any way with either the aspect of resisting arrest or escaping from police custody. Clearly, the accused was charged and convicted under a wrong, or non-existent provision. It is regrettable that the police officer who investigated the case and who co

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correct one. He may have placed reliance on the duty of the prosecutor to correct the charge before it came to Court, but my view is that he allowed himself to be embarrassed by failing to satisfy and acquaint himself with the provisions of the Act under which the accused was being charged.

I must emphasise that judicial officers have an obligation to acquaint themselves with the relevant provisions of the law under which accused persons are being charged. Not only must they do that, they should also endeavour, having understood and appreciated the effect of a specific provision, to know what penalties, if any, are provided for by that statute in which the provision is found. If they do not do that, they will clearly not be able to understand the essential elements of the charge in order that they can put the relevant questions to the accused person to satisfy themselves of the genuineness of the guilty plea tendered by an accused person. As mentioned above, they will also not be able to acquaint themselves with the relevant penalty provisions that are provided in that particular statute or elsewhere in another act. Needless to say, this matter before me is a typical example of the irregularities that can result where law enforcement agents and judicial officers adopt a rather casual and careless approach towards what they are expected to do in processing matters which come before them. The result is that the accused was convicted and was serving a jail sentence which was not justified and which amounted to a gross infringement of his liberty.

Under the Criminal Procedure and Evidence Act, incidents that deal with resisting arrest are covered in section 42. I will deal with this provision in a moment.

Sections 43 and 44 deal with similar situations but not with the actual situation in this case. They deal with a person who is already in lawful custody and who escapes, a situation which is not the same as in this case. Section 44 provides for the penalties that can be imposed upon a person who has escaped from the lawful custody of a police officer. I have been unable to find any provision in the Criminal Procedure and Evidence Act that deals with penalties relating to a person who has resisted arrest or has run away in an effort to evade arrest.

I will deal with Section 42 of the Act which reads as follows -

"42. Resisting Arrest

(1) If any person authorised or required under this Act or any other enactment to arrest or assist in arresting another person attempts to make the arrest and the person whose arrest is attempted -

- (a) resists the attempt and cannot be arrested without the use of force; or
- (b) flees when it is clear that an attempt to arrest him is being made or resists attempt and flees;

the person attempting the arrest may, in order to effect the arrest, use such force as is reasonably justifiable in the circumstances of the case to overcome the resistance or to prevent the person concerned from escaping.

(2) Where a person whose arrest is attempted is killed as a result of the use of reasonably justifiable force in terms of subsection (1). the killing shall be lawful if the person was to have been arrested on the ground that he was committing or had committed or was suspected on reasonable grounds of committing or having committed an offence referred to in the First Schedule."

The effect of section 42, therefore, as is clear from the wording of the section, is to authorise a police officer to use such force, including the killing of the suspect in attempting to arrest someone as long as such force is reasonably justifiable and is sanctioned by the provisions of section 42. Section 42 clearly does not create an offence of resisting arrest. It is merely an enabling provision that gives an arresting officer

certain added powers to act in a manner that would enable him to effect an arrest or prevent a suspect from evading the law.

I have not been able to find any other provision in the Criminal Procedure and Evidence Act where resisting arrest has been made a statutory offence. Such a provision would be along the lines of section 27 of the First Schedule to the Defence Act [Chapter 11:02] that clearly creates an offence for resisting arrest and escaping from the custody of the person authorised to arrest and detain offenders.

Paragraph 27 of the First Schedule to the Defence Act [Chapter 11:02] reads as follows -

"Any member who -
(a) being ordered into arrest -
 (i) refuses to obey such order; or
 (ii) assaults the person ordering him into arrest; or
 (iii) resists the person whose duty it is to apprehend him; or
(b) assaults or resists any person in whose custody he has been placed; or
(c) escapes from custody; or
(d) hinders or obstructs any person lawfully carrying out a search of his person, equipment, belongings or living quarters;
shall be guilty of an offence and liable to imprisonment for a period not exceeding 2 years or any lesser punishment."

I have not been able to find a similar provision in the Criminal Procedure and Evidence Act under which this accused could have been charged.

In view of the above I am satisfied that under the Criminal Procedure and Evidence Act there is no offence which is committed where a person conducts himself in the manner the accused did. His conviction therefore is not supportable.

The Miscellaneous Offences Act [Chapter 9:15], according to its long title, is an Act to provide for the suppression and punishment of certain offences. There is a very wide variety of offences created in that Act and it is not possible, from reading the

headings to some of the sections, to ascertain the offences created. One has to read each section, subsection and paragraph to discover the offences. Thus the heading to section 3 is "Certain conduct punishable" whilst the headings to sections 5 and 6 are "Penalty for certain offences" and "Penalty for certain other offences". Then in the last section of the Act one finds a provision setting out when a police officer or constabulary member (whoever that may be) is deemed to be acting in the execution of his duty. Tucked away in para (f) of subs (1) of s 6 one finds that any person who resists, or incites, aids or encourages any person to resist, or hinders or disturbs any police officer, constabulary member of the Police Force or officer of a local authority in the execution of his duty is guilty of an offence and liable to a fine not exceeding \$500 or imprisonment for a period not exceeding 3 years or both. Therefore the accused should have been charged with contravening s 6(1)(f) of the Miscellaneous Offences Act [[Chapter 9:15](#)]. As I have endeavoured to point out, this provision, whilst it is very appropriate, is hidden in a very obscure place. I would strongly recommend that it be removed from the Miscellaneous Offences Act and inserted in the Criminal Procedure and Evidence Act, possibly immediately after s 42. At the same time s 13 of the Miscellaneous Provisions Act should also be removed and inserted in either the Police Act or the Criminal Procedure and Evidence Act.

I will now deal with the aspect of the sentence that was imposed by the trial magistrate. As indicated above the accused was sentenced to serve a term of 18 months imprisonment, of which 3 months imprisonment was suspended. A note which appears to be the reasons given by the trial magistrate for imposing such a sentence in the record of the proceedings reads as follows -

"Accused pleaded guilty and showed contrition. He is a first offender. The offence is serious. He took the law into his hands. A custodial sentence is justified."

With due respect to the trial magistrate, it is quite clear that what he stated as the reasons for the sentence imposed do not go any further towards justifying the sentence he imposed. He simply stated mostly what was obvious. He does not, for example say why he was of the view that the offence was so serious as to justify such a lengthy term of imprisonment. He does not say why he was of the view that the accused took the law into his own hands. It baffles a judicial mind what law he says was taken into the hands of the accused. It is quite clear that the magistrate did not fully apply his mind in arriving at the sentence he imposed.

As stated above, section 42 does not create an offence. It also does not make provision for the relevant penalty in the event of the person being convicted of conduct that would amount to or be construed to amount to resisting arrest. However, section 44 of the Act as mentioned above provides for penalties in respect of a person who escapes or assists another person to escape from lawful custody. This section deals with a person who is in lawful custody of a police officer or a prison who then decides to escape from such custody. This section limits the maximum penalty of a fine not exceeding \$200,00 or imprisonment for a period not exceeding 2 years. The penalty prescribed in s 6 of the Miscellaneous Offences Act for a person who resists arrest is a maximum fine of \$500 or imprisonment for a period not exceeding 3 years or both. I am perfectly aware that these sections are being amended by the Criminal Penalties Amendment Act (No 22 of 2001), so as to substantially increase the fines that may be imposed for our purposes, and for the purpose of this judgment, that Act has not yet come into operation.

It is quite clear therefore from the above that an option to pay a fine, which at the moment is substantially insignificant, has been prescribed for conduct which is substantially similar to the one I am dealing with. I am satisfied that the sentence imposed by the trial magistrate induces a sense of shock and warrants being interfered with.

The trial magistrate also clearly paid no regard to the age of the offender. The indictment shows that accused is aged 20 years which makes him a very youthful offender. The trial magistrate did not pay any attention whatsoever to the fact that the accused was also a first offender. The law has been repeatedly stated and should be known to almost every legal practitioner and judicial officer in our jurisdiction. Such persons must be kept out of prison as much as possible.

Assuming the accused had pleaded guilty on a properly preferred charge other options including community service should have been considered. The trial magistrate did not do that and in my view he did not take heed of the various judgments which have been made by the superior courts to magistrates to look at all other options available when it comes to matters of sentence.

I am therefore unable to certify the proceedings before me as being in accordance with real and substantial justice. I therefore make the following order -

The conviction is quashed and the sentence is hereby set aside. The accused should be released from custody immediately. As I have already issued a warrant of liberation, I have no doubt that he would have, by now, been released. A copy of this judgment will be distributed to all magistrates through the Chief Magistrate's Office.

SMITH J: I agree.

