

THE STATE
versus
MEMORY MUSHANGWE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 25 October 2007

Criminal Review

BHUNU J: The accused was convicted on her own plea of guilty to a charge of assault as defined in s 89 of the Criminal code in consequence whereof she was sentenced to ten months imprisonment of which six months imprisonment was suspended on appropriate conditions of good behaviour. The remaining four months imprisonment was suspended on condition she paid a fine of \$4 000-00. The State outline had alleged that the accused assaulted the complainant on the head with an axe.

The learned scrutinizing regional magistrate has now referred the record of proceedings for review with the following comments:

“The accused was convicted on her own plea of guilty to assault GBH as defined in s 89 of the Criminal Law Act [*Chapter 9:23*]. This conviction is proper.

However I have problems with the sentence which I consider to be manifestly lenient. I am saying so because of the following reasons:

According to the facts the accused directed his thrust of an axe on the head of the complainant. It is fortunate that no very serious injuries resulted from the assault but the complainant’s life was in grave danger. The court was supposed to register society’s indignation to such flagrant violation of the personality rights of others by the accused by passing a deterrent sentence (*sic*). The magistrate merely fined the accused \$4 000-00 and this will sent a wrong signal to the community.”

In his response to the learned regional magistrate’s query the trial magistrate had this to say:

“I would like to say that I stand guided if I was lenient when I imposed a fine as a sentence. I had considered that the accused being a widow with six children would find life difficult while doing community service. Imprisonment in my view would have contaminated the accused. However I stand guided if I was unduly lenient”.

It appears that the learned regional magistrate referred this matter for review without first having properly scrutinized the record of proceedings. Had the learned scrutinizing regional magistrate properly read the trial magistrate’s long hand notes he would undoubtedly have appreciated that the accused was convicted of a lesser charge on the basis that she used a log to assault the complainant and not an axe as alleged in the State outline.

The relevant portion of the trial magistrate’s longhand notes reads:

“Q. Do you understand and agree with the facts?

A. Yes.

Q. Do you wish to add or subtract anything?

A. I only used a log which was in the fire to assault the complainant. I did this twice.

PP We accept a limited plea. We tender the affidavit as an exhibit

Q. Do you admit that on the 23December 2006 you assaulted the complainant twice with a log on the head?

A. Yes.

Q. As a result of the assault the complainant got injured?

A. Yes.

Q. When you assaulted the complainant you realized that there was real risk or possibility that she would get injured?

A. Yes.

Q. Did you have any right to act in the way you did?

A. No.

Q. Do you have any defence to offer?

A. No.

Court: I find you guilty as pleaded.

Judgment ----- Guilty (of) assault”.

It is pertinent to note that the trial magistrate was careful to pronounce and record that he had found the accused guilty of assault as pleaded as opposed to being found guilty of assault as charged.

The learned scrutinizing regional magistrate also appears to have misconstrued or misunderstood the sentence imposed on the accused by the trial magistrate. The sentence reads:

“Ten months imprisonment of which six months is wholly suspended for five years on condition accused does not within that period commit any offence involving violence for which she would be sentenced to imprisonment without the option of a fine. A further four months imprisonment is wholly suspended on condition accused pays a fine of \$4 000-00.”

It is clear that apart from the fine the trial magistrate also imposed a wholly suspended term of imprisonment on appropriate conditions of good behaviour, yet the learned scrutinizing regional magistrate in his referral letter alleges that the trial magistrate, “merely sentenced the accused to a fine”. It is inexplicable how this clearly recorded phenomenon could have escaped the learned scrutinizing regional magistrate’s notice.

Regional magistrates perform an invaluable function of supervising the work of their subordinates as a safety measure against injustice. I cannot therefore overemphasize the need for regional magistrates to scrutinize the work of their subordinates with assiduous care and due diligence. In this case it boggles the mind how it could have escaped the scrutinizing regional magistrate’s notice that the accused was in fact convicted of the lesser charge of assault on the basis that she did not use an axe to assault the complainant.

It however appears that he was to some extent misled by the review cover which reflects in error that the accused was convicted of “Assault GBH”. The trial magistrate was at fault in this respect in that he ought to have checked the correctness or otherwise of the record of proceedings in general and the review cover in particular before signing and submitting it for scrutiny.

This minor error should not in the circumstances have misled the scrutinizing regional magistrate because a casual perusal of the record of proceedings makes it abundantly clear that the accused was convicted of the lesser charge.

The facts clearly establish that the learned scrutinizing magistrate's criticism of the sentence was based on an erroneous perception of the facts, arising from his failure to properly peruse the record of proceedings.

Had he properly scrutinized the record of proceedings as he was duty bound to do, he would undoubtedly have confirmed the proceedings because the sentence is eminently appropriate. It fits both the offender and the offence as correctly pointed out by the trial magistrate.

This is particularly so considering that the offence was committed in circumstances of an unpremeditated village brawl with no serious injuries being occasioned. The medical report states that moderate force was applied and there is no likelihood of permanent injury. In the result I can only confirm the proceedings.

It is accordingly ordered that the proceedings be and are hereby confirmed on review.

BHUNU J:

MAKARAU J P: agrees,