THE STATE
versus
SHEENA CHIKUNDA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 10 October 2014

**Criminal Review**

BHUNU J: This matter was referred to the High Court for review by the Chief Magistrate in terms of s 29 (4) of the High Court Act [*Cap 7:06*]. That section entitles a Judge of the High court to review any criminal proceedings of an inferior court whenever it comes to his attention that the proceedings were not conducted in accordance with real and substantial justice.

The reference for review of the proceedings was prompted by a letter of complaint dated 9 October 2014 addressed to the Chief Justice and copied to his deputy by the accused's mother. Her complaint was that her daughter had been convicted of a criminal offence despite being mentally disordered and incapable of appreciating the nature of her conduct. She blamed the trial magistrate for not conducting the trial in terms of the Mental Health Act despite that her daughter was a known mental patient previously detained at Ingutsheni Mental Hospital. Although she claimed to have the relevant medical records they were never placed before the trial magistrate and consequently they are not part of the record before me. Despite her claims to the contrary there is nothing in the record of proceedings to suggest that the police and the trial magistrate were appraised and made aware of the accused's alleged mental disability.

The facts giving rise to the proceedings according to the record before me are as follows:

The accused is a young lady of 34 years of age residing at house number F27 Mzilikazi Bulawayo. On 4 October 2014 at around 23:30 hours she was at Kudu bar in

Hatfield Harare. Whilst outside the bar she struck and damaged the windscreen of the bar owner's motor vehicle with an empty beer bottle causing damages assessed at US$299.00.

On those facts she was arrested and charged with malicious damage to property as defined in s 140 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. She pleaded guilty to the charge. The trial magistrate properly canvassed and the accused unequivocally admitted all the essential elements of the offence. She was accordingly convicted by the magistrate sitting at Harare on 8 October 2014 upon her unequivocal admission of her guilt. The record of proceedings reads:

"Q. Admit that on dates unknown to the prosecutor but on 4 October 2014 and at Kudu Bar you unlawfully and intentionally caused damage to the property of Richard Mufunani?

A. Yes

Q. Admit caused damage to property namely a Toyota Land Cruiser Reg. number AAY 0463

A. Yes.

Q. How did you cause damage to the property?

A. I struck his vehicle windscreen with 2 bottles of pilsner.

Q. Admit realised that there was a real risk or possibility that damage could result due to your actions?

A. Yes.

Q. Any right?

A No.

Q. Any defence to offer?

A. No.

**Mitigation**

34 years
Single

One child.
Into buying and selling $150/fortnight
$2 on person
No money at home
No savings
No assets of value

Q. Why did you commit this offence?

A. I was angry at the complainant as he had assaulted me and thus I decided to strike his car so he would also feel my pain. My relatives have money and we are willing to restitute same".

It is apparent from a reading of the record of proceedings that the accused's response to the magistrate's questions was entirely rational and reasonable. When asked why she damaged the complainant's motor vehicle she explained that she was venting her anger on the complainant because he had assaulted her. She therefore had a sound rational motive for committing the crime. Hers was not a mindless irrational criminal behaviour often displayed by mental patients. At no time did she give the trial magistrate any reason to believe or suspect that she was suffering from a disease of the mind at the time she committed the offence. According to the record of proceedings before me no one including her mother ever brought it to the trial magistrate's attention that she may have been of unsound mind at the time she committed the offence.

The accused's mother did not herself interact with the police or the trial magistrate. All her unfounded allegations against them are entirely based on hearsay. In my considered view it is highly unlikely and not in the least probable that both the police and the trial magistrate would have failed to record the accused's alleged mental illness had the issue been raised with them.

While our law in the ordinary run of things places the onus of poof on the State, it creates an exception in respect of the defence of insanity by shifting the burden of proof onto the accused to prove his mental status at the material time on a balance of probabilities. This is for the simple reason that our law presumes everyone to be normal until proven otherwise. That is the position both at common law and statute. The proviso to s 18 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] places the burden of proof squarely on the accused it reads:

"**18 Degree and burden of proof in criminal cases**

> (1) …
>
> (2) …
>
> (3) …
>
> (4) Except where this Code or any other enactment expressly imposes the burden of proof of any particular fact or circumstance upon a person charged with a crime, once there is some evidence before the court which raises a defence to the charge, whether or not the evidence has been introduced by the accused, the burden shall rest upon the prosecution to prove beyond a reasonable doubt that the defence does not apply:
>
> *Provided that where an accused pleads that, at the time of the commission of a crime, he or she was suffering from a mental disorder or defect as defined in section two hundred and twenty-six, or a partial mental disorder or defect as defined in section two hundred and seventeen, or acute mental or emotional stress, the burden shall rest upon the accused to prove, on a balance of probabilities, that he or she was suffering from such mental disorder or defect or acute mental or emotional stress*".

Thus the onus was on the accused and her mother to establish on a balance of probabilities that at the time she committed the acts constituting the offence she was suffering from a disease of the mind rendering her incapable of appreciating that what she was doing was wrong. This they did not do. On the contrary she knew that what she had done was wrong and was liable and willing to compensate the complainant for the damage she had caused. She knew the exact amount of money she had on her person and that it was insufficient to compensate the complainant. She also knew that she could ask for help from her relatives to help her pay reparations.

Case law establishes quite clearly that what matters is the accused's mental state as at the time of commission and not at any other time. In the case of *Obert Nyamini Mapfumo* v *The State AD – 48 – 79* McDONALD CJ quoted the trial court with approval and had this to say at p 1 of the cyclostyled judgment:

> "The appellant's mental state was exhaustively investigated at the trial and the trial court made the following finding on this aspect of the case, '…the court considers that the most that it can say consistently with the medical evidence is that, there is a possibility that the accused was suffering from hysterical dissociative condition at the time of the shooting but I cannot put it higher than that. *There is no evidence that the accused was unaware of the nature and quality of his acts and that what he was doing was wrong*. Mr. Chidyausiku who appeared at the trial and who now appears in this

> appeal, has informed the court he feels unable to challenge this finding in the light of the evidence led"

Like what I have already indicated above, the accused's answers to the magistrate's questions while canvassing the essential elements of the offence established beyond question that the accused knew the nature and quality of her conduct and that what she was doing was wrong. She knew that she had been assaulted and she deliberately took a conscious unlawful decision to retaliate by damaging the complainant's car. When asked she had an independent recollection of the details of her criminal conduct at the material time. That cannot be the attributes of a person suffering from a mental disease at the time of commission of the crime or trial. There is nothing patently unusual about her conduct in this respect. By far the majority of persons who commit offences of this nature will be reacting to anger after provocation which does not amount to a defence but strong mitigatory features.

This brings me to the question whether the trial magistrate properly handled the question of mitigation and consequently the quantum of sentence. As we have already seen the accused was a defenceless woman in a bar in the middle of the night. She indicated that she damaged the complainant's motor vehicle using two empty beer bottles because he had assaulted her. The accused who was unrepresented at her trial was raising two very important mitigating features which needed to be ventilated before arriving at an appropriate sentence. Her submission in this respect was not challenged, so it ought to have been accepted as the truth and yet the trial magistrate disregarded this important mitigating feature which tended to reduce her moral blameworthiness considerably. Once the trial court had established that the complainant had assaulted her, it was incumbent on the magistrate to investigate and establish the extent and severity of the assault. The court should not be seen to be giving over protection to male chauvinists who attack and abuse women in public places.

The circumstance's and scene of the crime suggest quite strongly that this might have been a drunken brawl. The magistrate was therefore duty bound to investigate whether the accused's natural moral inhibition had been affected by alcohol. This the magistrate did not do preferring to gloss over the question of mitigation in a rather perfunctory manner. This was again an important mitigating feature that tended to reduce the accused's moral blameworthiness considerably if proved.

While the accused's conviction as charged is beyond reproach the same cannot be said of the sentenced. The magistrate's failure to take into account important mitigating factors in

assessing sentence was a monumental misdirection warranting interference by this court on the question of sentence. It is accordingly ordered:

1. That the conviction of the accused as charged be and is hereby confirmed.
2. That the sentence imposed by the trial court be and is hereby quashed and set aside.
3. That the matter be and is hereby remitted to the trial court for resentencing after properly taking into account all mitigating features.
4. That in resentencing the accused the trial court shall take into account the period already served by the accused in prison if any.

BHUNU J ……………………………….

CHIWESHE JP: agrees ……………………