THE STATE
versus
LOVEMORE JOCHOMA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 21 October 2014

Criminal Review

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

A perusal of the record shows that the accused was convicted on his own plea of guilty to the charge of engaging in a practice commonly associated with witchcraft in contravention of s 98 (1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The section reads:

"**98. Engaging in practices commonly associated with witchcraft**

(1) Any person who engages in any practice knowing that it is commonly associated with witchcraft shall be guilty of engaging in a practice commonly associated with witchcraft if, having intended thereby to cause harm to any person, such practice inspires in the person against whom it was directed a real fear or belief that harm will occur to that person or any member of his or her family, and be liable to a fine not exceeding level ten or imprisonment for a period not exceeding five years or both.

(2) Spoken or written words shall not in themselves constitute a practice commonly associated with witchcraft for the purpose of this section, unless accompanied by or used in connection with other conduct commonly associated with witchcraft.

(3) For the avoidance of doubt it is declared that any person who assists another person to commit the crime of engaging in a practice commonly associated with witchcraft

by giving advice or providing any substance or article to enable that person to commit the crime shall be liable to be charged as an accomplice to the crime.

(4) A court shall not take judicial notice of any practice that is said to be commonly associated with witchcraft, but any person who, in the opinion of the court, is suitably qualified to do so on account of his or her knowledge, shall be competent to give expert evidence as to whether the practice that forms the subject of charge under this section is a practice that is commonly associated with witchcraft, whether generally or in the particular area where the practice is alleged to have taken place"

The facts admitted by the accused were that on 25 March 2014 at around 6 am he was observed by a security guard at Chitungwiza Magistrates Court breaking an egg at the court gate. When confronted he ran away. The following morning at around the same time he was again observed attempting to break another egg at the same gate. When confronted he again fled but was pursued and apprehended upon being searched he was found in possession of some red and white cloths.

When he appeared before the trial magistrate he pleaded guilty to the charge and unequivocally admitted all the facts and essential elements of the offence. The trial magistrate properly canvassed the essential elements of the offence with the accused as follows:

"Q. Have you understood facts read?
A. Yes.
Q. Anything to add or subtract?
A. Nothing.
Q. You admit that on 26/8/14 you unlawfully and intentionally engaged in a practice that is commonly associated with witchcraft?
A. Yes.
Q. You admit that you intended to cause harm to persons at the said premise?
A. Yes.
Q. Any right or excuse?
A. None.
Q. Any excuse to offer?
A. None.

J. -- Guilty as charged."

Despite the fact that it is clear that the accused admitted all the facts and essential elements constituting the offence the Chief Magistrate was of the view that the accused was not properly convicted. He took the view that having regard to the wording of the section it was not competent for the magistrate to convict without expert evidence. In his written submission the Chief Magistrate had this to say:

"1. Much as the Accused purportedly pleaded guilty to the charge it would appear that section 98 (4) precludes a Court from taking judicial notice of any practice commonly associated with witchcraft. It provides that:

> 'A court shall not take judicial notice of any practice that is said to be commonly associated with witchcraft but any person who, in the opinion of the court, is qualified to do so on account of his or her knowledge of, shall be competent to give expert evidence as to whether the practice that forms the subject of a charge under this section is a practice commonly associated with witchcraft, whether generally or in the particular area where the practice is alleged to have taken place.'

The above provision clearly shows that a court cannot simply convict an accused of this offence without calling expert evidence to determine whether indeed the practice which forms the subject of the charge is a practice commonly associated with witchcraft. It follows therefore that it may not be possible for an accused to be convicted on his/her own plea of guilty on this charge. Some form of expert evidence is required. Unfortunately no such evidence was called in this case. Further the essential elements of the offence were canvassed in one swooping question which read:

> 'You admit that on 26th March 2014, you unlawfully and intentionally engaged in a practice that is commonly associated with witchcraft?'

It is doubtful that the accused ever understood what that meant. It is our considered view that the conviction may be untenable on this basis."

With respect, I am unable to agree with the Chief Magistrate's opinion. It is trite and a matter of elementary law both at common law and statute that what is admitted need not be proved because the admission constitutes evidence of the admitted fact. The adage *volenti non fit injuria* that is to say no harm is done where one has consented to it is apt. This is a logical common sense approach consistent with the provisions of s 31of the Criminal Procedure and Evidence Act [*Cap 9:07*] which provides that:

"**314 Admissions of fact**

(1) In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and <u>any such admission shall be sufficient evidence of that fact.</u>"

Where an accused person pleads guilty and the plea is accepted by the State as happened in this case, the court is authorised to convict the accused without hearing any further

evidence. Section 271 (1) of the Criminal Procedure and Evidence Act provides for the procedure to be followed on a plea of guilty. It reads:

> **"271 Procedure on plea of guilty**
> (1) Where a person arraigned before the High Court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea, the court may, if the accused has pleaded guilty to any offence other than murder, convict and sentence him for that offence without hearing any evidence"
> .

Thus following his unequivocal plea of guilty to the charge, admission of the facts and all the essential elements of the offence the accused was convicted on the basis of proven facts in terms of s 314 of the Act.

Judicial notice is a rule of evidence that allows a fact to be introduced into evidence where the truth or veracity of that fact is so notorious or well-known such that it needs no proof. For instance if a certain event occurred on Christmas day, the court needs no evidence to establish that the event took place on 25 December. This is because everyone knows that Christmas invariably comes once in a year on 25 December.

Cross On Evidence 6 ed at p 63 gives two scenarios where the court or judicial officer will take judicial notice when he says that:

> "There are two classes of case in which the court will act in this way, for, to quote Lord Sumner:
>
> Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."

The rational for taking judicial notice is that the fact in question is too notorious to be the subject of any serious dispute or doubt in the mind of any reasonable person.

In this case the trial magistrate did not take judicial notice of the fact that breaking an egg at the gate with the intention of causing harm to the occupants of the premises is a practice commonly associated with witchcraft. He correctly convicted the accused person on the basis of proven facts placed before him by virtue of the accused's admission. That being the case, the question of taking judicial notice of any facts in convicting the accused does not arise.

With respect it appears the Chief Magistrate misconstrued the relevant section. The section merely provides for the mode of proving disputed facts that are in issue. It certainly

does not require that undisputed facts that are not in issue be proven through expert evidence as suggested by the Chief Magistrate.

While s 98 (4) of the Criminal Law (Codification and Reform) Act precludes the court from taking judicial notice of, "any practice commonly associated with witchcraft" without expert evidence, nowhere does it preclude an accused person from admitting that a particular conduct he engaged in amounts to "any practice commonly associated with witchcraft." Had the law maker intended that no conviction should be made without expert evidence it would certainly have said so. Section 271 (1) of the Criminal Procedure and Evidence Act makes it clear that it is only in the case of murder that the law expressly prohibits the conviction of an accused person on a plea of guilty without hearing evidence.

The nature of the offence has to do with the accused's mental state at the time he engaged in the proscribed conduct. The accused admitted that his conduct in breaking an egg at the court house gate with the intention of causing harm to the occupants is conduct commonly associated with witchcraft. He further admitted that his motive was to defeat the course of justice. Undoubtedly his admission constitutes the best evidence of his state of mind and commission of the prohibited conduct. It would then be preposterous to speculate and suggest that the accused might not have understood the nature of the proscribed conduct when his own mouth militates against him.

The trial magistrate can therefore, not be faulted for convicting the accused on his own plea of guilty.

Turning to the question of sentence, the accused was sentenced to 12 months imprisonment of which 3 months imprisonment was suspended for a period of 5 years on appropriate conditions of good behaviour. The offence is punishable by a fine not exceeding level ten or five years imprisonment depending on the accused's moral blameworthiness, mitigating and aggravating circumstances.

In assessing sentence the trial magistrate took into account that the accused is a first offender who pleaded guilty and was contrite. He also took into account the accused's personal circumstances. He is a responsible married man with 3 children. He was gainfully employed earning $2-00 per day. In aggravation he found that the offence was serious calling for a deterrent sentence. He then weighed the mitigating features against the aggravating features and found that the aggravating circumstances outweighed the mitigating circumstances. He then decided to impose an effective period of imprisonment of 9 months.

I cannot agree more with the trial magistrate that the accused's moral blameworthiness was of a very high degree indeed. The offence was committed with brazen courage and determination driven by an evil and wicked frame of mind, not once but twice.His conduct was akin to a person who sets a time bomb or booby trap in a crowded public place with the wicked intention of defeating the course of justice. In that case it does not matter whether or not the bomb explodes with fatal consequences, the accused's moral blameworthiness remains high, against that background the trial magistrate took into account that the accused's immoral criminal conduct had induced real fear in court officials thereby undermining the due administration of justice.

At this juncture it is appropriate to restate that assessment of sentence is to a large extent governed by a wide judicial discretion. Unless that discretion is vitiated by irregularity, incompetence, misdirection or where the sentence imposed by the trial court is so severe as to induce a sense of shock, the reviewing or appeal court will not interfere. See *S* v *Nhunwa* SC 40/88 and *S* v *Dejager*1965 (2) SA 612.

In this case I am unable to find any irregularity or misdirection on the party of the trial magistrate warranting interference by this court on review. The conviction is proper and the sentence eminently appropriate.It suits both the crime and the offender.

The proceedings are accordingly confirmed as being in accordance with real and substantial justice.

BHUNU J: ……..

UCHENA J agrees ……