

THE STATE
versus
DAVIDCHIUDZU

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 16 February 2015

Criminal review

MAFUSIRE J: On scrutiny, the regional magistrate, in terms of s 58(3) (b) of the Magistrates Court Act, [*Cap 7:10*], referred the record in this matter to this court for review. He had detected what he considered to be an anomaly. But on perusing the record I detected a far more serious anomaly. It had previously been raised by the trial magistrate, albeit in passing. But nothing came of it. It seems the scrutinizing magistrate missed it. It was this. From the facts, the charge preferred against the accused and which he was convicted of, was relatively inconsequential. He should have been charged with a far more serious offence. Here are the details.

The accused pleaded not guilty to unlawful entry as defined in s 131 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] (“**the criminal code**”). After a full trial he was convicted of the offence and sentenced to twelve months imprisonment which was wholly suspended for five years on condition that he did not, during that period, commit an offence involving **dishonesty** for which, upon conviction, he would be sentenced to imprisonment without the option of a fine. In the course of her judgment the trial magistrate said this:

“The state managed to prove that the [accused] did unlawfully enter into the [complainant’s] residence and further went on to assault him with a dangerous weapon i.e. [a] machete. [Accused] could have easily killed [complainant] and the court is actually surprised why [accused] was not even charged with [the] more serious offence of attempted murder.”

Indeed the accused, from the facts, should have been charged with attempted murder. At the very least, he should have been charged with assault in terms of s 89 of the criminal code.

In her reasons for sentence the trial magistrate said:

“The court considered that this is a very serious offence which was exacerbated by [an] assault with the use of a dangerous weapon.”

But in my view, it was rather the other way round. The unlawful entry, under the circumstances, was inconsequential. The assault with a dangerous weapon did not merely exacerbate a serious offence. It was itself *the* serious offence.

Here are the full facts. The complainant was 30 years old. The accused was his uncle. They lived in the same village. One night, around 23:00 hours, the accused, armed with a machete, budged into the complainant’s bedroom. The door had been unlocked. The complainant said he had retired to bed. The accused then started assaulting the complainant all over the body with a machete. Colour photographs produced in court showed that the complainant sustained several lacerations on various parts of his body. He had shouted for help. Two of his relatives came to the rescue. Together with the complainant they overpowered the accused. They started walking towards the police station. Meanwhile the accused’s daughter, who had arrived at the scene, but after the accused had already been overpowered, had rushed to call the police. Apparently she had reported the matter as an assault on her father. The police met up with the accused being escorted by the complainant and his assistants. Blood from the complainant had spilled onto the accused. The police assumed it had been accused’s blood. So they arrested the complainant and his assistants. However, the complainant managed to explain things out. It was then that the accused was arrested. Incredibly, he was charged only with unlawful entry!

There was evidence that the accused had previously assaulted the complainant with a shovel. The reason for these assaults appeared to be the belief by the accused that the complainant was stealing his maize.

The medical affidavit by the attending doctor rated the complainant’s injuries as serious. However, the affidavit had not been signed before a commissioner of oaths. That was the one anomaly noted and raised by the scrutinising magistrate. He said in terms of s 278(11) of the Criminal Procedure and Evidence Act [*Cap 9:07*] the affidavit should not have been accepted as an exhibit.

The other anomaly raised by the scrutinising magistrate was that the sentence of imprisonment imposed by the trial magistrate had wholly been suspended on condition that, during that period, the accused did not commit a crime involving **dishonesty**. The scrutinising magistrate felt that it was improper to have referred to dishonesty in relation to a crime of

unlawful entry. He suggested that unlawful entry itself should have been the more appropriate element in the condition of suspension.

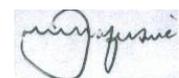
Furthermore, the regional magistrate had initially expressed concern on the appropriateness of a wholly suspended sentence. However, he said he had eventually convinced himself that given that the accused was 80 years old the sentence had been proper.

From the record, there is no doubt that even during the trial itself, the weight of the evidence, comprising the witnesses' testimonies and the exhibits, spoke of nothing but the assault. Very scanty attention was devoted to the elements of unlawful entry as set out in s 130 and s 131 of the criminal code. Attention was wholly focused on the assault. The medical affidavit which the regional magistrate scrutinised, was in relation to the assault, not the unlawful entry. The pictures of the complainant, showing lacerations on his body, were in relation to the assault, not the unlawful entry. The picture of the machete had also been produced in court. It was a wicked looking weapon. It was in relation to the assault, not the unlawful entry. In the witnesses' testimonies there was repeated reference to the amount of blood that had spilt from the complainant from the cuts to his body. That had nothing to do with the unlawful entry. Under such circumstances, it defies logic why the state preferred such an inconsequential charge, leaving out the more obvious, more glaring and more serious one.

Other than merely making reference to the anomaly in her judgment, as pointed out already, the trial magistrate did not check with the state as to why the more serious crime had been ignored. On his part, the scrutinising magistrate concerned himself with trivia. One would have thought that his initial concern about a wholly suspended sentence had been informed by the heinousness of the assault, not the unlawful entry. But it seems that it was not the case.

I find that the charge preferred against the accused was manifestly inappropriate. It offends against one's notion of justice. In the premises, whilst nothing else needs be done, I nonetheless withhold my certificate and decline to confirm that the proceedings in the court *a quo* were in accordance with real and substantial justice.

16 February 2015



HONOURABLE MUSAKWAJ: I agree