POLITE WEZA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & DUBE-BANDA JJ
BULAWAYO 24 JANUARY 2021

Criminal Appeal

Mr Muvhami for the appellant
B. Gundani for the respondent

MAKONESE J: The appellant appeared before a magistrate at Bulawayo on the 24th January 2019 facing a charge of public violence as defined in section 36 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). Appellant pleaded guilty. Appellant was convicted and sentenced to 5 years imprisonment of which 1 year was suspended for 5 years on condition of future good behavior.

Dissatisfied with the sentence the appellant noted an appeal against sentence only.

Factual background

From the 14th of January 2019 Zimbabwe was rocked by widespread demonstrations across the country and in all major cities. The state alleged that appellant was part of a group of demonstrators that gathered as Woza Woza Bottle store in the western suburbs of Bulawayo. It was alleged that the appellant took part in violent destruction and theft of property. In particular it was that appellant stole an ox-drawn plough, 20kg bag of seed maize from OK Supermarket. Appellant proceeded to Woza Woza Bottle store where he stole a 20 inch Logic monitor, a speaker and a 32 inch Samsung television. It was alleged that at Athens Supermarket appellant stole a diesel generator belonging to the complainant.

Submissions by the appellant

The appellant contends that the court *a quo* erred and misdirected itself by formulating an alternative charge of theft for the purposes of sentence. The offence of theft was neither an alternative charge to the main count of public violence nor was it pleaded to by the appellant. It was argued on behalf of the appellant that the learned magistrate in the court *a quo* misdirected himself by sentencing the accused for a crime for which he was not charged. The appellant argued that in the event this court upheld the conviction and sentence, the custodial sentence was inappropriate in that the court *a quo* failed to consider other forms of punishment such as community service. The appellant contends that the effective custodial sentence of 4 years is unduly harsh and excessive and induces a sense of shock.

Submissions by the respondent

The state concedes that the charge sheet does not reflect that the state preferred any alternative charge to the charge of public violence. The state avers that page 41 of the record of proceedings shows that the learned magistrate endorsed that the appellant pleaded guilty to an alternative charge of theft and found him guilty as charged. The respondent noted, correctly in our view that, no alternative charge is reflected in the record. The appellant was therefore found guilty of a charge which was never preferred and the appellant was sentenced for the offence of theft as indicated by the reasons for sentence. This fact is confirmed by the sentence which indicates that a portion of the prison term was suspended on condition the appellant did not commit an offence involving dishonesty.

Whether the conviction and sentence is competent

It is clear that the learned magistrate in the court *a quo* misdirected himself by formulating an alternative charge of theft for the purposes of sentence. The court *a quo*

sentenced the appellant in respect of a charge that was never preferred against him, either as a main charge or an alternative charge. There can be no doubt that the essential elements for theft which the court *a quo* put to the appellant were not part of the charge sheet neither were they in respect an alternative charge. The appellant did not plead to the charge of theft because such charge was not referred against him. The state did not amend its charge sheet at any stage before the pronouncement of sentence.

In his response to the notice of appeal the learned magistrate stated as follows:

> "1. The charge of theft is what was put to the appellant and the pleaded to it as show by the endorsement by the court at the back of the charge sheet.
> 2. Even if the charge of pubic violence was the main charge and theft not being an alternative charge the court would not have erred as theft is a permissible verdict on a charge of public violence.
> See: Fourth Schedule (section 275) on permissible verdicts of the Criminal Law Codification Reform Act (Chapter 9:23).
> 3. The court explained fully the reasons for sentence and how it arrived at the sentence imposed …"

It seems to us that the learned magistrate did not apply his mind to the facts and the charge sheet. There was no alternative charge to the charge of public violence. The appellant did not plead to the charge of theft. At no stage did the learned magistrate indicate during the proceedings that the appellant was being convicted and sentenced on the basis of a permissible verdict as provided in the Fourth Schedule to the Criminal Code under section 275. The issue of a permissible verdict only arose as an afterthought when the trial magistrate had read the notice of appeal. Instead of conceding the error the learned magistrate found himself in an unfortunate situation where he was scrambling to re-write the record of proceedings. An appeal is noted and determined on the record of proceedings. The court *a quo* is a court of record. A trial magistrate must refrain attempting to reconstruct record to justify an obvious and patent error. I note that in canvassing the essential elements

the magistrate in the court *a quo* appears to have been mixing up the essential elements of public violence and theft. This is not desirable and results in an improper conviction and sentence.

In the circumstances, the conviction and sentence is vitiated by a misdirection ad cannot be allowed to stand.

In *Nyamande* v *Minister of Home Affairs & Ors* 2011 (1) ZLR 141 (H), it was held that where it is intended to sentence the accused to an alternative charge, the alternative charge ought to be charged together with the main charge so that the accused can prepare his defence in respect of both charges. It was held that failure to do this violates the *audi alteram partem* rule.

It is clear therefore that, unless the alternative charge had been brought it would not be competent for the court *a quo* to sentence the appellant on a charge which the court had not put to the appellant. Put differently, the court cannot sentence an accused for a charge to which he has not pleaded. In terms of s145 of the Criminal Procedure and Evidence Act (Chapter 9:07) it is provided as follows:

> "If, by reason of the nature of an act or series of acts, or any uncertainty as to the facts which can be proved, or if for any other reason whatever it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with having committed all or any of those offences, and any number of such charges may be tried at one time, or the accused may be charged in the alternative with having committed some or one of those offences."

It was therefore a gross misdirection for the court a quo to sentence the appellant on a charge which was never preferred against him.

In the result, in the exercise of its review powers, and in terms of s29 of the High Court Rules (Chapter 9:07) the court makes the following order:

1. The appeal is allowed.

2. The conviction is set aside.

Dube-Banda J ……. I concur

Mugiya, & Muvhami Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners