HB 01-16
HCAR2279/15

THE STATE

Versus

RICHARD MARUVA

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 14 JANUARY 2016

Criminal Review

BERE J: The accused was charged and convicted of the offence of assault as defined in section 89 (1) of the Criminal Law (Codification and Reform) Act. From the record of proceedings it is clear that the accused was mentally challenged not only at the time he allegedly committed the offence but right until the time he was tried and convicted in the lower court.

For purposes of clarity it is imperative that I reproduce the relevant parts of the court record in the lower court. The following captures the proceedings in the lower court as captured by the presiding magistrate:

"Charge put to the accused, explained

Plea –

The complainant has her own case … She destroyed my target (*sic*)

She was doing prostitution at the shops with the police.

I kicked her

Plea of NG entered

State outline read

By PP

> The accused was examined by a psychiatric who concluded that accused committed the offence when he was mentally challenged. The state applies to tender in the medical affidavit.
>
> Court accepts the affidavit as exhibit l.
>
> The accused seems not to be appreciating the proceedings. His mental capacity seems to be challenged. The State applies that accused be committed for treatment.
>
> Accused was asked to plead to the charge by the court. Instead of pleading he was just explaining incoherent things before the court. It is clear that his statements are not clear and he does not appreciate the court proceedings. It will be impossible to conduct a trial with the accused that state.
>
> The medical affidavit clearly states that accused is mentally disturbed to such an extent that he should not be held responsible for his actions.
>
> Accordingly a special verdict is returned, accused is found not guilty and acquitted due to insanity…"

It is the whole approach adopted by both the prosecutor and the learned magistrate that has caught my attention. The record of proceedings as captured shows that there was a genuine but grievous error in the handling of the case that involved the accused who was mentally and intellectually challenged at the time he appeared in court.

The first elementary mistake that both the magistrate and the prosecutor made was to put mentally challenged person in the dock for purposes of conducting a trial.

It is incompetent to purport to put on trial a mentally disordered or intellectually handicapped person. If that person has to be tried he or she must first be certified to have recovered and fit to stand trial. Recourse in this regard must be had to the psychiatrist's report which should be an integral part of the State papers.

The approach which the learned magistrate ought to have adopted in this case was to invoke the provisions as outlined in section 28 (9) of the Mental Health Act[1].

1. The Mental Health Act Chapter 15:12

The relevant section is couched to precisely deal with the situation which the learned magistrate found herself in. The record suggests that the accused was not in a position to understand or conduct his defence because of his mental disorder. For clarity's sake section 28 (9) of the Act reads as follows:

> "9. If the judge or magistrate is unable to conclude whether or not the person concerned is mentally disordered or intellectually handicapped or whether he would be able to understand the nature of any criminal proceedings or properly conduct his defence, the judge or magistrate may issue and order –
> (a) directing that the person be removed to an institution and detained there for examination;
> (b) directing the release of the patient, for examination for such period and subject to such conditions as may be specified in the order, for the purpose of examination of his mental state."

I need to point out though that generally and in view of the unpredictability of mentally challenged persons preference should be given to an order made in terms of (a) *supra* because it reassures the court of the safety of members of the public from the conduct of the mentally sick accused person. These are the options which were open to the learned magistrate as opposed to proceeding to give a verdict against him before even hearing evidence from the State.

This brings me to another error which was committed by the lower court in this case. Where a mentally challenged person is certified to be fit to stand trial, the trial assumes its natural course, the hearing is conducted in the same manner as if the accused were not mentally challenged. Evidence must be led in the normal manner to assist the presiding officer to arrive at an informed verdict. It is only when all the evidence has been led that the magistrate can then pronounce a verdict which verdict will be informed by the evidence gathered. A special verdict in terms of section 29 of the Act is only pronounced once the magistrate has been satisfied that indeed the accused committed the offence and that when he did so he was mentally disordered or intellectually handicapped to the extent that he could not possibly be held to be responsible for his conduct.

It is clear that the proceedings in the lower court did not comply with the provisions of the Mental Health Act and the only recourse to this court is to set aside the proceedings and order that the lower court complies with the Act in question.

Consequently, it is ordered as follows:

a) That the proceedings be and are hereby quashed.
b) That the magistrate be and is hereby directed to recall the accused and refer him for treatment to a special institution.
c) That the accused be tried only upon being certified to be fit to stand trial.

Mathonsi J …….I agree