

THE STATE
versus
JACOB MADYAMOTO

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 23 JUNE 2016

Criminal Review

MATHONSI J: The accused person appeared before the regional magistrate in Gweru on 25 April 2016 charged with attempted murder in contravention of s47 of the Criminal Law Code [Chapter 9:23] the allegations being that he had beaten up his 22 year old drunken and abusive uncle with a hoe handle on the night of 18 July 2015.

He pleaded not guilty to the charge and his plea was an unequivocal denial of the offence. He said:

“I never intended to kill the complainant. After all complainant is my nephew. I deny trying to kill him. No way. No I didn’t.”

One is left wondering what the relationship is between them because according to the state outline the complainant is the uncle of the accused person. Whatever the case what struck me when I reviewed the proceedings is what transpired after the accused person had pleaded not guilty and given his position which was an unequivocal denial of the charge. Thereafter his defence outline was not recorded.

Instead of getting on with the trial by opening the state case, the public prosecutor addressed the court and the procedure that was then adopted is unprecedented. I reproduce hereunder the record of proceedings:

“Summary of state case accepted (marked) Annexure A.

I must submit that the prosecution does not have evidence to prove intention to kill on the accused’s part. Looks like accused and complainant had some misunderstanding between them, may be caused by the complainant’s drunkenness on that night. The problem is that accused overreacted and used a hoe handle to negligently strike the complainant on the head. Accused did not have to strike the complainant using a hoe handle, as he did in

the circumstances accused negligently inflicted a serious injury on the complainant in contravention of s90 of the Criminal Law Code.

So accused can be cleared of the charge of contravening s47 as read with s189 of the Code (i.e. attempting to kill) but should be found guilty of negligently inflicting the injury on the complainant in contravention of s90 of the Criminal Law Code here.

By Court to Accused: So, you were negligent when you struck the complainant by a hoe handle on the head as you did on 18 July 2015 causing the serious injury.

Accused: I admit that I should not have used a hoe handle to strike the complainant on the head as I did. I was negligent to behave the way I did. May be I should have simply gotten out of the house and went away instead of hitting complainant as I did. The complainant was drunk also. I am sorry.

By Court: I find you not guilty of attempted murder but guilty of contravening s90 of the Code.”

It should be understood that in this country the Prosecutor General and, by extension the public prosecutors he assigns to prosecute offenders on his behalf, is *dominus litis* in criminal prosecutions. It is therefore the prosecutor’s right to determine which charge to prefer against an accused person and to ensure that the accused person is charged with the correct offence. See *S v Sabawu and Another* 1999 (2) ZLR 314 (H).

While s202 (1) of the Criminal Procedure and Evidence Act [Chapter 9:07] permits a court in certain circumstances to amend a charge, it only allows corrections to be made by the court to an existing charge. It certainly is not an omnibus provision permitting the court to substitute a totally different charge. See *S v Shand* 1994 (2) ZLR 99 (S).

In the present case, the prosecutor advised the court that he had no evidence to sustain the charge that he had preferred against the accused person who had gone on to plead to the charge and pleaded not guilty. One wonders therefore why the prosecutor preferred the charge in the first place when he had no evidence. If he had any evidence against the accused, the prosecutor should have decided on the correct charge that could be sustained by that evidence and not to hop, step and jump over the rights of the accused person, as happened in this matter.

Ordinarily, the moment the prosecutor conceded that he had no evidence to sustain the charge to which the accused person had pleaded, the accused person was entitled to his acquitted

and not to an adulteration of criminal procedure. If the evidence could sustain an alternative charge or a permissible verdict then by all means the state should have proceeded to prefer an alternative charge and led such evidence in quest of a conviction on the alternative offence.

The state did not lead such evidence or any evidence at all even after the accused person had pleaded not guilty to the charge that was preferred against him. Instead the trial magistrate took over the show and started interrogating the accused person who was not even under oath. As it is now there is no evidence whatsoever in the record to prove any averment in the charge but the accused person has been convicted, not by virtue of any guilty plea of his he having pleaded not guilty, but of contravening s90 of the Criminal Law Code for which he was not charged and did not plead. It is a section which creates an offence which is not even a permissible verdict in terms of the Code.

It is salutary in our criminal procedure that an accused person must plead to the charge. Absolutely noone, not even his legal representative, can enter a plea on behalf of an accused person. The plea is his own preserve. As long as the accused person has pleaded not guilty to the charge the case has to go for trial unless the state elects to withdraw the charge that has been pleaded to after plea. Where that happens the accused person is entitled to his acquittal.

In my view the procedure adopted by the trial magistrate was very wrong. At no point during the proceedings and in answer to the charge had the accused person stated that he had been negligent or that he had struck the complainant. The magistrate however went on to put it to him that he had been negligent when he struck the complainant. Clearly that line of questioning which was of a leading nature and coming from the court itself, had the effect of influencing the accused person to alter his plea from not guilty to that of guilty to some other offence for which he was not even charged. See *S v Manyami* HB 36/90.

This was an unrepresented accused person to which the court owed a duty of assistance. There is nothing to suggest that the court was sensitive to that duty. The facts themselves were simple and straight forward. The accused person had been sleeping in his bedroom on the night of 18 July 2015 when the complainant arrived at about 2130 hours.

The complainant was drunk and he started harassing the accused person. The state alleges that a misunderstanding then ensued as a result of which the accused struck the

complainant with a hoe handle all over the body. He allegedly sustained a deep cut on the head. A medical report supporting the allegations of assault was produced. When it was produced the accused person was never consulted. His right to be given notice of it were not explained to him.

After inviting the accused person to address the court in mitigation of sentence, the court then allowed the state to lead evidence from the complainant on the injuries he sustained. It is then that he told the court the accused had struck him with a hoe causing injury to the head. He however said he had fully recovered. Evidence was also led from a relative of the accused concerning payment of medical bills.

After all this, the accused was sentenced to 5 years imprisonment of which 3 years imprisonment was suspended for 5 years on condition of future good behavior. The remaining 2 years was suspended on condition he restitutes the complainant the sum of \$956-00 in medical expenses on or before 30 November 2016.

When the record was placed before me I queried the procedure followed. I desired to know from the magistrate why after the accused had pleaded not guilty to attempted murder, he had returned a verdict of not guilty of attempted murder but guilty of contravening s90 of the Criminal Law Code when the charge was not contravening s90.

The magistrate's response is contained in a letter dated 13 June 2016 which reads:

“RE: REVIEW MINUTE: S V JACOB MADYAMOTO: CRB GWR 119/16

Place this record before Mr Justice Mathonsi , with the following comments:

There appears to be no legal basis to have convicted the accused of c/s 90 of the Criminal Law Code (i.e. negligent assault), who had pleaded not guilty to attempted murder, in the proceedings under considerations. Certainly the charge should have been amended accordingly to conform with what appeared to be some agreed facts, resulting in conviction for c/s 90 of the Code. His Lordship did not miss something at all. The trial magistrate can only implore the honourable reviewing Judge to employ the powers of review in s29 of the High Court Act (preferably s29(3)).

I stand guided.”

The last part of the trial magistrate's letter is remarkable not by reason that it sheds any light to the manner in which the proceedings were conducted by him but by the fact that he appears to direct how the matter should be reviewed. He had an opportunity to conduct the

proceedings procedurally and in accordance with real and substantial justice. Having come short in both fronts now he sees it fit to render advice to the reviewing judge. Interesting indeed, considering that s29 (3) which he commends to me provides:

“No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record or proceedings unless the High Court or a judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred.”

With due respect to the learned regional magistrate considerations of whether a substantial miscarriage of justice has occurred are the function of the reviewing judge and not the court whose proceedings are being reviewed. It is not the province of that court to seek to have the impugned proceedings upheld when the record is in shambles and a trial was circumvented when the accused person had pleaded guilty through the inappropriate bidding of the court.

In my view prevailing upon an accused person who has pleaded not guilty to the charge to accept a charge which was not put to him even without the state leading any evidence to prove the charge is a substantial miscarriage of justice. Where the prosecutor comes to court expecting a guilty plea but the accused surprises him by pleading not guilty, as happened in this case, he cannot elicit the assistance of the court to help him persuade the accused person to see the light. The prosecutor must get on with the business of presenting the state case. If he has not brought his witnesses, the right thing to do is to seek a postponement to secure the attendance of witnesses.

This is because where the accused pleads not guilty the onus is on the state to prove every averment in the charge in order to secure a conviction unless the accused person relieves him of part of the burden by admitting to certain facts. While it is true that in terms of s272 of the Criminal Procedure and Evidence Act, any element, act or omission correctly admitted by the accused up to the stage that a not guilty plea is entered and which has been recorded in terms of s271 (3) is sufficient proof of the element, act or omission, I am of the view that such admission must be lawfully made and not forced out of the accused by the court inappropriately.

I would otherwise substitute the verdict of guilty to assault as it is a permissible verdict to a charge of attempted murder in terms of s275 as read with the 4th Schedule to the Criminal Law Code, but in my view that can only be done where the evidence led by the state in an effort to

prove the charge is insufficient to sustain the charge but the lesser charge permissible by law. The unique situation we have in this matter is that the state did not lead evidence to prove the charge. The only evidence that was led was in respect of sentence long after the accused person had pleaded not guilty to the charge, and had already been convicted.

It occurs to me that where the state abdicates its responsibility of proving the averments in the charge, the end result is that envisaged by s9 of the Criminal Procedure and Evidence Act which states:

“The Prosecutor General may, at any time before conviction, stop any prosecution commenced by him or by any other person charged with the prosecution of criminal cases but, if the accused has already pleaded to any charge, he shall be entitled to a verdict of acquittal in respect of the charge.”

As I have already said, after putting the charge to the accused person the prosecutor stood up to say he had no evidence to prove the charge. Strange though it was, that is what happened and he did not bother to lead any evidence, leaving the magistrate to take over. The intervention of the magistrate in a duel where he was supposed to be the arbiter and not to descend onto the arena was a misdirection and whatever flowed from it was a nullity.

To the extent that the prosecutor stopped the prosecution without leading evidence on the guilt of the accused meant that the accused was entitled to a verdict of not guilty. The matter should therefore end there. Whatever followed thereafter was an exercise in futility, undertaken to the very serious prejudice of the accused person.

In the result, it is ordered that:

1. The conviction of the accused person is hereby quashed.
2. In its place is substituted the verdict that the accused person is found not guilty and acquitted.

Mathonsi J.....

Takuva J agrees.....