STATE
versus
ERNEST CHEZITA

HIGH COURT OF ZIMBABWE
MUSAKWA & MWAYERA JJ
HARARE,7 July 2017

Criminal Review

MUSAKWA J: A grave injustice occurred in this case. This is because as at the time of reviewing this matter the accused had already been punished. This is despite the fact that legally he did not commit the offence that was preferred against him on account of muddled charge and facts. Being a juvenile, the accused person was sentenced to receive two strokes with a rattan cane.

The accused person pleaded guilty to contravening s 176 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The charge reads that-

> `"In that on the 11th day of June 2017 and at Rutope Business Centre, Shamva Ernest Chezita unlawfully assaulted or by violent means resisted a police officer namely Police Constable Chamumbima acting in the course of his duty, knowing that he is a Police Officer or realizing that there was a real risk or possibility that he is a Police Officer that is to say, Ernest Chezita assaulted Police Constable Chamumbima of Rutope Police Base by holding him by his riot trousers and lifted him up and down three times holding his genital parts tightly whilst on duty."

The outline of state case is to the effect that the accused person resides at Joking 8, Shamva. The complainant resides at Brickan Farm, Shamva and is a member of the neighborhood watch.

On 11th June 2017 the complainant asked the accused if he had received a letter summoning him to Rutope Police Base. The accused confirmed receiving the letter but indicated he would not go. The accused added that he wanted to demonstrate his powers to the complainant and other members of the neighborhood watch as they could not arrest him. The accused person took off his jacket and advanced towards the complainant whom he grabbed by the trousers before lifting him up and down thrice. The accused person also grabbed the complainant by the throat and genitals.

When essential facts were put to the accused person, the trial court asked him if the facts were correct. It went on to ask the accused person whether he assaulted a Police Officer who was performing his duties. The accused person answered in the affirmative and also referred to the complainant as a Police Officer.

The facts never described the complainant as a Police Officer. They are at variance with the charge.

Section 176 provides that-

> "Any person who assaults or by violent means resists a peace officer acting in the course of his or her duty, knowing that he or she is a peace officer or realising that there is a risk or possibility that he or she is a peace officer, shall be guilty of assaulting or resisting a peace officer and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both."

In light of the discordance between the charge and the facts, the trial court should have sought clarification of the facts by the prosecutor. This is because peace officer is defined in s 175 as-

> "peace officer" includes—
> (*a*) any magistrate or justice of the peace;
> (*b*) the Sheriff or any deputy sheriff;
> (*c*) any police officer;
> (*d*) any prison officer;
> (*e*) any immigration officer;
> (*f*) any inspector of mines;
> (*g*) any—
> (i) chief, within his or her community; or
> (ii) headman, chief's messenger or headman's messenger, within the community of his or her chief, as defined in the Traditional Leaders Act [*Chapter 29:17*];
> (*h*) any other person designated by the Minister by notice in a statutory instrument;"

It is apparent from the above definition that a member of the neighbourhood watch is not a peace officer. It is immaterial that the accused person also referred to the complainant as a Police Officer. He must have used that term in a loose sense considering the role played by members of the neighbourhood watch. In the present case this was even heightened by the wearing of Police uniform by the complainant, which is described in the charge and state outline as "riot" trousers.

Section 271 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that where an accused pleads guilty and the prosecutor accepts the plea-

> "the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph
> (i) or (ii) of paragraph (*a*) or if requested thereto by the prosecutor—

> (i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and
> (ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor;
> and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law:
> Provided that, if the accused is legally represented, the court may, in lieu of the procedure provided in subparagraphs (i) and (ii), satisfy itself that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor by relying upon a statement to that effect by the legal representative of the accused."

In *S* v *Svondo* 1984 (1) ZLR 140 (H) it was held that it is not adequate where an accused pleads guilty for the court to merely record that "elements explained". In the present case the trial court recorded that "facts read and understood". But we now know that the facts are vague as to whether the complainant is a peace officer. In *S* v *Matimbe and Others* 1984 (1) ZLR 283 (H) it was held that the accused person must fully understand the elements of the offence. It was further held that the elements of the offence must be fully explained and recorded. Then, in *S* v *Dube and Another* 1988 (2) ZLR 385 (H) it was held that a judicial officer must exercise care when faced with a plea of guilty. This is because it is not every fact that should be regarded as proved merely because it has been admitted.

As is always the case, the genesis of the problem was poor presentation by the prosecutor. The prosecutor's role should not end with placing the facts before the court and putting the charge to the accused. He must ensure that the charge is properly framed and that the facts make sense. On the other hand, the presiding officer has an equal duty to ensure that the charge is valid and that the facts are correctly stated to elucidate the charge. At the end of the day, the bungling by the prosecutor becomes the bungling of the court.

In the result, the conviction is hereby set aside.

MUSAKWA J _____

MWAYERA J, agrees _____