

THE STATE

Versus

METRON CHONGANI MAKAMBA

And

KNOWLEDGE JONASI

IN THE HIGH COURT OF ZIMBABWE

BERE J

BULAWAYO 26 MAY 2016

Review Judgment

BERE J: It is important for me to provide an elaborate background to this case and there is no better way of doing so than to reproduce both the charge sheet and the state outline as well as the correspondence that I have exchanged with the magistrate concerned.

The two accused appeared at Gweru Regional Magistrates Court and were charged with the crime of “attempted robbery as defined in section 189 as read with section 126 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

In that on the 7th of July 2015 and at Safago Farm, Shurugwi. Metron Chongani Makamba and Knowledge Jonasi one or both of them unlawfully and intentionally attempted to steal property belonging to Edwin David Shaw by using violence or threats of future violence towards Innocent Mabuto, Simbarashe Jonathan Sithole and Shamiso Nyamala employees of Edwin David Shaw. That is to say Metron Chongani Makamba and Knowledge Jonasi all armed with pistols threatened to shoot Innocent Mabuto, Simbarashe Jonathan Sithole and Shamiso Nyamala who had lawful control of the property to relinquish control over it....”

The charge sheet was backed up by the State Outline which reads as follows:

- “1. The complainant in this case is Edwin David Shaw residing at Safago Dairy Farm, Shurugwi and is the farm owner.
2. Accused person number one Metron Chongani Makamba resides at village 6, Bangala Ranch Chiredzi and accused number two, Knowledge Jonasi resides at Taruvinga village Chief Bota, Zaka. Both are not employed.
3. On the 6th day of July 2015 the two accused persons together with Anold Makamba who is still at large hatched plan to rob the complainant at Safago Dairy Farm, Shurugwi.
4. At around midnight the two accused persons with Anold Makamba proceeded to Safago Dairy farm using a grey Toyota Gaia without number plates. Accused number one Metron Chongani Makamba was putting on a police riot uniform, accused number two was putting on civilian clothes while Anold Makamba was putting on police FD suit. The three introduced themselves as police details from Gweru Rural Police Station and requested to see the complainant.
5. While at Safago farm, the accused persons awakened farm workers and locked them into Jonathan Simbarashe Sithole’s house after confiscating their cellphones.
6. The accused persons then force marched Jonathan Simbarashe Sithole, Innocent Mabuto and Shamiso Nyamala to the complainant’s house where they ordered Jonathan Simbarashe Sithole to break open the main door whilst accused one and two were holding pistols.
7. Accused persons entered the house and whilst inside, they searched the whole house demanding cash and pistols.
8. The accused persons ordered Jonathan Simbarashe Sithole to grind open a chub safe which they found in the complainant’s bedroom but failed to open it. The accused persons then coerced the farm workers to lift the chub safe into their car but they all failed.

9. The accused person then took a black hunters torch from the bedroom and a bunch of keys before tying Innocent Mabuto's hands and shoved him into the vehicle. The accused persons drove away and later dumped Innocent Mabuto at Guinea Fowl Primary School along Gweru-Shurugwi road.
10. On the 18th of August 2015 the two accused persons were arrested in Masvingo. Detectives searched accused persons' residence and recovered police and army uniforms.
11. An identification parade was conducted at Mashing Police Station and accused number one Metron Chongani Makamba was positively identified by Jonathan Simbarashe Sithole and Shamiso Nyamala.
12. The value of the stolen and damaged property is USD1, 750,00 and nothing was recovered.
13. The accused persons acted unlawfully."

When this matter was placed before me on review I raised a query with the Magistrate and on 11 May 2016, my minute was framed as follows:

"The summary of the state case as confirmed by the first witness David Shaw (record page 3) suggests that a black hunter's torch and a bunch of keys were taken away by the accused in circumstances where clearly violence was used against the witnesses. How does the conviction of the accused person get restricted to attempted robbery under such circumstances?

If the evidence did not support the allegations as contained in the outline with specific reference to the violent taking away of the torch and workshop keys, why is that this issue was not addressed in the judgment itself?

Let me hear from the learned magistrate."

The Magistrate's response was as follows:-

"Place this record before the Honourable, Bere J, with the following comments.

1. The Charge preferred against the Accused, was that of Attempted Robbery.

See, the Charge Sheet.

The trial Court's mind, got largely exercised by the alleged 'attempt'. And, to be honest, the Court got impressed upon, as if, the Accused 'attempted to rob the chubb safe' from the complainant's premises.

See, the State Outline; especially

In the process of attempting to rob, the items grabbed away, were a torch and some keys. Quite honestly, it did not occur to the trial Court, that Accused should be convicted of robbing a torch and keys, as opposed to being convicted of attempting to rob the complainant of the chubb safe.

2. As stated earlier, the trial Court was looking out for the 'attempt to rob the complainant of the chubb safe'. That is why the issue of the violent taking away of the torch and keys from the complainant's workers, was not specifically address in the judgment; which judgment was focusing on 'an attempt to rob the cub safe'.
3. Well, it maybe that, the Accused may have been convicted of Robbery of the torch and keys which would have been justified, really. But, it seems to the trial Court, that the conviction for Attempted Robbery here, still meets the justice of the Accused's case.

The trial court does not readily see any substantial miscarriage of justice, in the totality of the circumstances of the case..."

It is this clearly belligerent and intransigent attitude exhibited by the trial Magistrate which has prompted me to write this review judgment in the desperate hope that at the end of it all the issues that are of concern to me in this matter will make sense to the trial Magistrate and possibly help others of a like mind.

I must mention in passing that when issues are raised by a review Judge, the motive is not to belittle the trial Magistrate or to try and find fault where none exists. Quite often some minor omissions are noted and ignored with the result that the proceedings are confirmed. This is not one such a case.

Having said this I now propose to focus on the substantive issues in this case.

Firstly, a simple perusal of the outline of the State clearly shows that some property belonging to the complainant was stolen and was never recovered. Paragraph 5 of the outline speaks to the armed robbers having confiscated the victims' cellphones. Paragraph 9 of the same outline makes specific reference to the armed accused persons having violently taken a black hunters torch and a bunch of keys from the victims. The State Outline concludes in its paragraph 12 by asserting that:

“12. The value of the stolen and damaged property is USD1, 750,00 and nothing was recovered.”

On reading of the evidence as recorded by the trial Magistrate the witnesses confirmed that indeed property in the form of a torch and workshop keys were stolen (record page 3, per Edwin David Shaw's evidence). The evidence of Shamiso Nyamala (record page 6) further confirms that the phones were violently taken by the accused persons.

Given the nature of the defence proffered by the convicted accused person, the convicted first accused could not possibly have offered any sustainable defence and the Magistrate correctly found against him.

The query that I raised with the Magistrate pertained to the propriety of the charge sheet and the conviction given the overwhelming evidence that was at his disposal which clearly supported a conviction of the accused of the offence of robbery.

Just by merely paying sufficient attention to the presentation of the outline of the State case, an alert Magistrate would have been able to appreciate that the preferred charge was not complementing the facts as outlined. But sometimes because Magistrates and all other judicial officers are fallible, the Magistrate probably overlooked this and needs not be condemned. However, one gets concerned when it becomes clear that the presentation of the charge sheet and the outline of the State case was not the only opportunity the Magistrate had in this case. The Magistrate followed and recorded the testimony of the witnesses in this case. If he was not

lackadaisically following the proceedings he could not have failed to appreciate that this case was much more than attempted robbery but robbery *per se*.

It completely took the review Judge by surprise for the Magistrate to attempt to give a *virilis defencio* to the undefendable. Such attitude retards the development of our jurisprudence and an otherwise healthy exchange of views between the High Court bench and the lower court. It should never be the case.

Having said this I must now consider the appropriate remedy in this case. I have already noted that from the inception the attempted robbery charge was incompetent given the facts and the accepted evidence which fully supported the substantive charge of a violation of section 126 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (the Code).

It must therefore follow that the verdict of the Court must be amended to reflect the fact that accused 1 be found guilty of having committed robbery as informed by section 126 (1) of the Code. The conviction is so amended.

The sentence of the court remains the same.

It is for the foregoing reasons that I am unable to confirm these proceedings as having been in accordance with real and substantial justice. I withhold my certificate.

Mathonsi J I agree