STATE
versus
WESTON JOWO MUPFUPI
and
CLIVE MUNETSI

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 2 January 2015

Criminal Review

MAWADZE J: Both matters were dealt with by the same trial magistrate who referred the matters for scrutiny. The learned scrutinizing Regional Magistrate was unable to confirm the proceedings in both matters as in accordance with real and substantial justice as she believes there was a patent failure of justice. Both matters were referred to this court for review.

The facts of each of the case are as follows;

1. STATE v WESTON JOWO MUPFUPI

The accused was arraigned before the trial magistrate facing three counts which are as follows;

In count 1 the accused was charged with fraud in contravention of s 136 of the Criminal Code [*Cap 9:23*].

In count 2 the accused was charged with driving a motor vehicle without a driver's licence in contravention of s 6(1) as read with s 6(5) of Road Traffic Act [*Cap 13:11*].

In count 3 the accused was charged with bribery in contravention of s 170 (1) of the Criminal Code [*Cap 9:23*].

The facts giving rise to all the three counts are as follows;

The accused who is 24 years old and resides at Mount Bokota Farm Macheke left Murehwa Business Centre on 2 September 2014 at about 1700 hours driving a Nissan Caravan Registration Number ACQ 7982. The accused had 15 passengers on board plying

the Macheke route. While at Zinwa Offices in Chinake village the accused stopped his motor vehicle in the middle of the road and switched off the engine. Accused disembarked as he checked another truck parked by the road side which had a breakdown. Two police officers driving a Land Rover Defender Registration Number 4750 arrived at the scene but could not proceed as accused's motor vehicle blocked the road. The accused was asked to why he was parked in the middle of the road and to produce his driver's licence.

In relation to count 1 the accused produced a certificate of competency issued in the name of Tatenda Jowo Mupfupi National I.D No 63-2046435 T47 serial no 957143B purporting to be his when in fact it belongs to accused's brother. The Police Officer asked the accused to produce his national identification card and he failed to do so claiming it was at his house. The police then drove to the accused's house with the accused to collect his identity card but on the way the accused confessed that the certificate of competency he had produced was not his. This is the basis for the charge of fraud.

This confession leads to count 2 which relates to driving a commuter omnibus without a driver's licence.

In relation to count 3 it is alleged that as the police officers took the accused to his house for him to produce his identity card the accused produced a US$10-00 note serial number MF 5159812A and handed it over to Detective Inspector Mapepeta as a consideration to induce him not to arrest the accused hence the offence of bribery.

The accused pleaded guilty to count 2 of driving without a licence and pleaded not guilty to count 1 – fraud and count 3 – bribery.

In count 2 the accused was duly convicted on his own plea and sentenced to 6 months imprisonment. In addition the accused was prohibited from driving motor vehicles in respect of the class to which commuter omnibuses relate for life. The sentence is proper in view of the penalty provisions of the Road Traffic Act [*Cap 13:11*] as no special circumstances were found.

Nothing turns in respect of count 1, fraud and count 3, bribery as accused was discharged at the close of state case in both count 1 and count 3 and acquitted.

The query raised by the regional magistrate in respect of count 2 is that the trial magistrate did not properly canvass the essential elements of the offence hence the conviction is improper.

The learned regional magistrate seems to have taken issue with the answer the accused gave to this question;

> "Q: Do you admit that you drove the vehicle at the material time when you were not a holder of a valid driver's licence and statutory requirements concerned.
> A: Yes."

While the bit relating to "statutory requirements concerned" is unclear and irrelevant, the answer the accused was expected to give as he had no driver's licence was "No" instead of "Yes".

The trial magistrate in response to this query or anomaly explained that he or she made a genuine error by recording "Yes" instead of "No".

I am inclined to accept the trial magistrate's explanation. This is so in light of the other questions put to this accused in relation to driving without a licence and the answers accused gave. The following is recorded;

> "Q: Do you admit that on 2 September 2014 and along Murehwa-Chamapango Road, Murehwa you drove a Nissan Caravan, Public Service vehicle with registration number ACQ 7982.
> A: Yes.
> Q: Are you a holder of the requisite driver's licence for the class concerned.
> A: No. (emphasis is mine)
> Q: Did you have a right to drive the Public Service vehicle with a driver's licence.
> A: No.
>
> (The trial magistrate explained that it was meant to be "without" rather than "with" in light of the question underlined above)
>
> Q: Do you have any defence to offer.
>
> A: The licence which was on the dash board in the vehicle belongs to my brother, it is not mine. I don't have any defence or driver's licence." (sic)
>
> V: Guilty as pleaded."

While it is clear that the trial magistrate was not alert in recording the accused's answers the fact remains that the accused was properly convicted of driving a commuter omnibus without a licence. The charge was put to the accused and he admitted that indeed he did not have the driver's licence. The facts in relation to count 2 were read to him and he agreed with the facts. It is clear from the totality of his answers to the questions put to him by the trial magistrate that the accused admitted that he had no driver's licence and that the one he had belonged to his brother. The errors by the trial magistrate in recording "YES" instead of "NO" and "with" instead of "without" would not distract from this fact. There is therefore no miscarriage of justice in convicting the accused in count 2. In fact it would be a serious miscarriage of justice to set aside the conviction in count 2.

I am unable to appreciate the query raised as to why mitigation was recorded after the accused pleaded guilty to count 2 before the trial proceedings in count 1 and 3 for which accused was subsequently acquitted. The learned regional magistrate does not refer to any relevant provisions of the law which were violated or how this caused prejudice to the accused. I find no merit in respect of this query.

2. STATE v CLIVE MUNETSI

The accused was convicted after a protracted trial of the offence of assault in contravention of s 89 (1) (a) of the Criminal Code [*Cap 9:23*].

The proved facts are as follows.

The 36 year old accused resides in Munetsi homestead in Deera Village Chief Chikwaka and the 36 year old complainant resides at Devonia Farm where he is a farmer. There was a dispute between the accused and complainant as the accused was allegedly carrying out mining activities on complainant's farm. On 2 July 2014 complainant was driving his motor vehicle at the farm when he saw the accused. Complainant stopped the motor vehicle and enquired from accused as to why he was mining in complainant's farm when the court was seized with the dispute between them. The accused was not amused and proceeded to assault the complainant in the following manner;

i) by poking the complainant with his fingers on complainant's head.

ii) by holding and dragging the complainant out of the vehicle

iii) by hitting the complainant with clenched fists on the mouth and twice on the back

iv) by throttling complainant and suffocating him.

The accused was restrained by one Chamunorwa Mavhunga. The complainant was medically examined on 4 July 2014 and the Doctor observed that the complainant had the following injuries;

(a) abrasions on the right hand

(b) loose incisor tooth

(c) that severe force was used to inflict the injuries described as serious as complainant would lose the tooth.

The accused was sentenced to pay a fine of US$120-00 or in default of payment 3 months imprisonment. In addition 3 months imprisonment were wholly suspended on the usual conditions of good behaviour.

I am again unable to appreciate the query or issues raised by the learned Regional Magistrate in this case.

It would appear that the learned Regional Magistrate is satisfied that on the evidence led accused was properly convicted of assault. Further, no issue is taken as regards the appropriateness of the sentence imposed.

The learned regional Magistrate raises some procedural issues without explaining whether such alleged procedural irregularities are fatal to the proceedings. Let me comment on each of the issues raised.

(a) The failure to cite the provisions of the Criminal Procedure and Evidence Act [*Cap 9:07*] after asking the accused to explain or give his defence outline:-

I am unable to appreciate this query. After the trial Magistrate asked the accused to give his defence outline the accused gave a detailed defence covering about 3 pages of handwritten notes recorded by the trial magistrate. What then is the issue raised by the learned Regional Magistrate? It is clear the accused understood what a defence outline is and proceeded to give one. The citation of the relevant sections would be unhelpful to a lay person like the accused. This query clearly lacks merit and the learned Regional Magistrate is advised not to raise such frivolous issues with no bearing to real and substantial justice.

(b) That the exhibits were improperly produced:-

This presumably relates to the medical report.

Again the query lacks merit. The record of proceedings on p 8 of handwritten notes reflect the following;

> "State applies to produce the medical report affidavit in evidence.
> No objection from the accused. He had been served with the affidavit.
> Medical report accepted as Exh I."

The Trial Magistrate should be praised for keeping such a detailed record of proceedings. The learned Regional Magistrate does not explain which provisions of the criminal procedure and Evidence Act [*Cap 9:07*] were violated, how they were violated, how that would prejudice either the State or the accused's case and how it affects the propriety of the conviction of the accused on the charge of assault in view of both the oral evidence led and the medical evidence. No possible remedy is suggested by the learned Regional Magistrate.

I find no merit in relation to this query.

(c) That after the close of the defence case both the State and the accused were not invited to address the court or make submissions:-

The learned regional Magistrate does not cite the relevant provision in the Criminal Procedure and Evidence Act [*Cap 9:07*] which makes it mandatory for the state and the defence to addresses the court at this stage and that failure to do so is fatal to the proceedings. I do not believe that this query deserve further comment.

In the result;

IT IS ORDERED THAT:

1. The proceedings in CRB MW 613/14 be and are hereby confirmed as in accordance with real and substantial justice.

2. The proceedings in CRB J 162/14 be and are hereby confirmed as in accordance with real and substantial justice.