

THE STATE
versus
ELISHA MUTASA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 23 October 2014

Review Judgement

TAGU J: The record was referred to me by the Regional Magistrate in terms of section 58 (3) (b) of the Magistrates Court Act [*Cap 7.10*] for review and guidance.

The accused was convicted of theft as defined in s 113 (1) (a) and (b) of the Criminal Law (Codification And Reform) Act [*Cap 9.23*]. He was sentenced as follows-

“\$ 300 in default of payment, 6 months imprisonment. In addition 3 months imprisonment is wholly suspended on condition the accused restitutes complainant in the sum of \$ 150-00 through the Clerk of Court, Marondera on or before 4-7-14”.

The facts are that on 29 May 2014 at around 0250 hours and at Tutani Night Club Dombotombo Business Centre in Marondera the complainant was drinking beer with his friends. The accused with his unknown accomplice approached the complainant and searched complainant’s pocket and took his money. Accused started to assault complainant and accused’s accomplice ran away. The stolen money is \$ 150.00 and nothing was recovered.

The Regional magistrate referred this case with the following comments-

- “3. It is my view that the accused person was wrongfully convicted for the trial court appears to have taken appearance for demeanor. There was too much emphasis on the appearance of complainant and accused and trial court disbelieved accused because of his appearance.
4. The trial magistrate wrote in her judgment, ‘looking at the demeanor of the accused one can see that he is a fierce person. He had knife marks in his face with two front teeth missing. He showed the court he is an unrespectful person since he would be seen exchanging harsh words with the public prosecutor or state witnesses’

5. About the complainant the trial magistrate said, ‘The complainant is a man of character and he is a very humble man. He is a person who has the potential to have money and the court cannot believe that he wanted to steal from the accused who seemed to be very poor’
6. On the second from last page of the judgment, the trial magistrate had this to say, ‘The accused person and his young brothers are cunning thieves who can play with the minds of on looker’
7. From the above cited paragraphs it appears to me the accused was not afforded a fair trial for he was convicted on the basis of appearance than evidence presented in court.
8. In so far as sentence is concerned, it is my view that 6 months imprisonment as an alternative to a fine of \$300.00 is rather disproportionate. I believe 3 or 4 months would have been a realistic option.....”

The Regional magistrate further suggested that at least community service and or longer time to pay the restitution should have been considered.

On the issue of conviction generally there was nothing wrong for the court to comment on appearance and demeanor of a person appearing before it. It would be wrong to overemphasise on appearance at the expense of the evidence led. Appearance and demeneanor alone are not the determining factors. What determines whether a person is guilty or not is also the evidence led. The cited paragraphs created the impression that the trial court convicted accused on the basis of appearance which had a bearing on his demeneanor as well. If she indeed saw the knife cuts and missing teeth, and saw or heard him exchanging harsh words with witnesses and the public prosecutor it shows that the trial court was very observant. Be that as it may, I carefully perused the whole record of proceedings with the view of checking whether there was any evidence linking accused to the offence.

The following exchanges left me with no doubt that there was enough evidence to convict the accused. In his evidence in chief the complainant was asked among other things the following questions to which he replied satisfactorily-

“Q – Did you see him stealing?

A – He inserted his person (sic) in my pocket and I grabbed it

Q – Did you recover it since you grabbed his hand?

A – I did not manage to recover it because when I faced him to give me my money the accused and 3 others started to fight me.....

Q –When you grabbed his hand did you see the money?

A –He was holding it and I tried to recover it from him and he assaulted me with his friends. I wanted the accused to return my money”.

During cross-examination by the accused the complainant was asked this question-

“Q. If I had stolen from you and a body search was done where did I put the money?

A. Your colleague ran away and that is the person you gave the money.”

From the above evidence and much more in the record I am convinced that there was enough evidence led to prove the guilty of the accused despite what was said in the judgment by the court *a quo*. In any case it is not disputed that the complainant was assaulted by accused and his colleagues and was later rescued by other patrons.

As regards the sentence I agree that an alternative of 6 months to a fine of \$300.00 is disproportionate. A period of 3 -4 would have been a realistic option. In the circumstances there is need to reduce the period of the alternative period.

On community service and time to pay the trial court gave its reasons which in my view were properly in its discretion and there is no need to interfere.

Wherefore I make the following orders-

1. The conviction is confirmed.
2. The sentence by the court *a quo* is amended to reflect a realistic alternative to the fine as follows- “\$ 300.00 in default of payment, 3 months imprisonment. In addition 3 months imprisonment is wholly suspended on condition the accused restitutes complainant in the sum of \$150.00 through the Clerk of Court, Marondera on or before 4-7-14.
3. The accused is to be recalled and advised of the new sentence.

MAWADZE J agrees.....