

THE STATE

Versus

COSTA PETROS JANI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 DECEMBER 2006

Criminal Review

NDOU J: The accused was convicted by a Gweru Provincial Magistrate of two counts of theft by false pretences. He was sentenced to 36 months imprisonment. The facts of this case are sad. The accused, who claims to be a traditional healer, was approached by the two female complainants separately. It is common cause that each complainant sought assistance from the accused's traditional practice as they held some suspicion regarding the cause of their illness. It appears that each complainant sought confirmation of the suspicion and treatment. The accused carried out divinatory procedures and purported to diagnose and cure the complainants' natural misfortunes. When the complainant in count one approached the accused, he initially had some measure of success in the diagnosis much to the satisfaction of the complainant. This is evinced by the allegations in paragraph 3 of the state outline which states:

“3. The accused met the complainant on the 12th day of October 2004 and he introduced himself as a traditional healer. The accused went on to tell the complainant many issues concerning her life which she agreed with.”

The complainant was impressed and invited the accused to her residence. There, the accused performed a series of rituals. Some of the rituals were frightening to say the least. But, the most disturbing one was one of “sexual healing”. I would have preferred not to go into details of this particular healing but because I strongly

believe that it should be guarded against I will nevertheless give minimal details.

After carrying out several rituals the accused advised the complainant that a so-called goblin had been having sexual relations with her. He suggested to her that part of the treatment involved her sharing the same blankets with him. She agreed to the suggestion. At night he performed further rituals on her body which boiled down to having sexual intercourse with her. The following day, the accused was paid \$1 705 000 (old value) and he also took a blanket for destruction after alleging that it was messed up by a goblin. There was no significant or obvious improvement in her condition resulting in her lodging a complaint of theft of the aforesaid consultation fee and blanket.

In count two the *modus operandi* was the same. Here too, the accused's performance was initially successful as evinced by the allegations in paragraph 3 of the state outline which states:

- “3. The accused ... introduced himself as a traditional healer. He said a lot of issues pertaining to the life of the complainant. The complainant was convinced and she invited the accused to her house on the same day.”

The accused performed several rituals culminating in a sexual act as described in count 1 above. For his divinatory services he was paid \$1 150 000 (old value) and 100 Botswana Pulas. He also took the blanket used in the performance of the rituals for destruction. When her condition did not improve, the complainant laid a criminal charge of theft of the aforesaid amounts and the blankets.

From the accused's *ex-curial* statement produced during the trial, it is clear the accused is also facing separate charges of raping the two complainants. Ideally, the accused should have been charged for all the charges before a Regional Magistrate –

Paweni & Anor v A-G (2) 1984(2) ZLR 39 (S) at 45-6; 1985(3) SA 720 (ZS) and section 144(1) and (2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. That way, the complainant would have been spared the trauma of reliving the incidents by repeating what is essentially the same testimony before two different magistrates – *Criminal Procedure in Zimbabwe* by J R Rowland at 10-24 to 10-25. This would also be advantageous to the accused person in his defence. Be that as it may, I will confine this judgment to the two theft charges. The learned trial magistrate, in response to my query, concedes that the state did not adduce evidence to show that the treatment was fake or that the accused was a fake traditional healer. In the absence of such evidence, real or circumstantial, the convictions cannot stand. Not all traditional or scientific medicines are successful in curing patients for whom they are prescribed. That does not necessarily make the traditional healer or doctor fake. This failure to cure is common in medical practice. In *Traditional Healers the Shona Patient* by G Chavunduka at page 74 the learned author has this to say:

“To sum up ... suggest five different kinds of reasons why those who consulted traditional practitioners sometime gave them up and sought scientific medicine. This change of therapy was more likely to occur in the following circumstances: when traditional medicine failed to cure the disease, when the suspicions held by the patient and his social group regarding the cause of abnormal illness were not confirmed by traditional practitioners, when the patient and his social group were unable to accept the traditional practitioner’s diagnosis, when the patient and social group were uncertain about the diagnosis or prognosis of the illness and were willing to try both approaches to healing ... Thus some traditional healers fail to cure illnesses presented to them. These instances of failure do not, however, usually lead people to condemn the whole system of traditional medicine ... Failure may be interpreted as due to a wrong diagnosis and a second opinion is sought.”

The state had to lead some evidence to show, directly or by inference, that the accused is not a genuine traditional medical practitioner. In his statement, the accused

alleged that he is genuine and registered as traditional practitioner with ZINATHA (Zimbabwe National Traditional Healers Association).

Evidence from the said Association would have shed light on whether the accused is a fake traditional healer. If the accused is indeed not a fake traditional healer he could still be convicted if the state has proved beyond a reasonable doubt that there is evidence of deliberate negligence and abuse of position on his part in dealing with patients. That is, of course, if all other essential elements of the charge are proven. There is no evidence *in casu*, that the accused was misrepresenting himself to be a traditional healer, when in fact, he was not one. In the absence of proof of such misrepresentation, the charges of theft by false pretences cannot stand.

Accordingly, I quash the convictions in both counts and set aside the sentences imposed.

Cheda J I agree