THE STATE

Versus

MUNYARADZI SHAVA

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 29 DECEMBER 2011

Review Judgment

MATHONSI J: The accused person appeared before the Provincial Magistrate in Zvishavane and was on 4 May 2011 convicted of aggravated indecent assault in breach of section 66 (1) (a) of the Criminal Law Code [Chapter 9:23]. He was sentenced to 12 months imprisonment of which 6 months was suspended for 5 years on condition of good behavior.

The matter came before me after the accused had already served his sentence.

The facts are that the 17 year old accused was a herd boy employed at the 13 year old complainant's homestead. On 7 December 2010 he forcibly got into the complainant's blankets while she was sleeping and forcibly removed her skin tight before inserting his erect penis in between the complainant's legs. The complainant screamed forcing him to flee.

Section 66 (1) (a) provides:

> "Any person who, being a male person, commits upon a female person any act, other than sexual intercourse or anal sexual intercourse, involving the penetration of any part of the female person's body or of his own body with indecent intent and knowing that the other person has not consented to it or realizing that there is a real risk or possibility that the other person may not have consented to it, shall be guilty of aggravated indecent assault and liable to the same penalty as is provided for rape."

In terms of section 65 of the Criminal Law Code, the penalty for rape is imprisonment for life or any shorter period. The provincial magistrate therefore did not have jurisdiction to deal with the matter and the facts which I have set out above prove attempted rape.

When the scrutinizing magistrate queried these issues the trial magistrate was quick to apologise saying it was just an oversight on her part. Not impressed by that response the scrutinizing magistrate insisted on a full response to the queries. 6 months after the conviction

and sentence of the accused, and after he had already served the sentence imposed, the trial magistrate responded as follows:

> "The above matter refers. Your worship my apologies. The court had no jurisdiction to hear the matter. There was no penetration effected to any party (sic) of the body. I do agree that the conviction was not proper.
>
> His erect penis was only inserted between the legs of the victim hence no penetration was effected. The charge was wrong.
>
> My sincere apologies your worship."

Clearly, both the conviction and sentence were improper. In terms of section 275 as read with the 4th Schedule to the Criminal Law Code on a charge of aggravated indecent assault, indecent assault is a permissible verdict. If the trial magistrate was convinced that the facts did not prove aggravated indecent assault, he should have convicted him of indecent assault. In which event the accused person should have been sentenced as provided for in section 67 of the Criminal Law Code. That section provides for a fine not exceeding level 7 or to imprisonment for a period not exceeding 2 years or both.

The proceedings were therefore not in compliance with real and substantial justice. There is nothing to suggest that the magistrate applied her mind to the charge and indeed the facts of the matter. As a result an injustice was done. This court has in the past bemourned the lack of diligence in transmitting records for review – *S* v *Mhondiwa* HB-193-11. In that case I stated at pages 4 – 5 as follows:

> "The reviewing judge and the trial magistrate are a tag team serving the same purpose namely to ensure that justice is done and accused persons receive fair treatment. In review proceedings time is always of the essence and for that reason there must be strict compliance with the time limits provided for in the Act for submitting records of proceedings for review. The reason for those requirements is self evidence. The reviewing judge may decide that the sentence imposed by the magistrate is excessive and should either be quashed or substantially reduced. It is therefore undesirable for an accused person to serve the whole or a substantial part of the sentence which he does not deserve while the record remains somewhere between the court room and the judge's chambers."

It is regrettable that I have to repeat the foregoing remarks in the present case. The record in this matter was placed before the scrutinising magistrate in June 2011 more than a month after conviction and sentence. He raised queries on 20 June 2011 and although the trial magistrate wrote her

letter on 12 July 2011, she only sent it out in August 2011. The scrutinizing magistrate respondent by letter dated 30 August 2011 and it was not until 6 November 2011 that the trial magistrate wrote back admitting her mistakes. Meanwhile during all these delays the accused person had completed his sentence.

Considering that the accused person is a youthful first offender, had the proceedings been properly conducted it is very likely that he would have benefitted from the provisions of section 67 aforesaid and got a sentence other than imprisonment.

Whichever way the proceedings cannot stand. There is a pressing need to quash them and remit the matter for corrections to be made. In the result, it is ordered as follows:

1. That the conviction of the accused person is quashed and the sentence is set aside.
2. That the matter is remitted to the magistrate's court for the prosecution to prefer proper charges against the accused person before a competent court.
3. That the said court shall have regard to and credit the accused with the sentence that he has already served in assessing an appropriate sentence.

Mathonsi J ……

Makonese J agrees ……