

THE STATE
versus
ANESU AGNES CHIKEREMA

HIGH COURT OF ZIMBABWE
TAGU & MUNANGATI-MANONGWA JJ
HARARE, 19 May 2017

Review Judgment

MUNANGATI-MANONGWA J: This matter came before me for review in terms of s 57 of the Magistrates Court Act [*Chapter 7:10*].

The accused a 21 year old woman was charged with attempted murder as defined in s 189 as read with s 89 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. She was duly convicted after a full trial and was sentenced to 3 years imprisonment of which 18 months imprisonment was suspended for 5 years on condition of good behaviour and the remaining 18 months on condition that she performs 525 hours of community service.

The background facts of the matter are as follows: The accused is the erstwhile wife of one Talent Masiya who is now married to the complainant. Talent invited the accused to his mother's place where the complainant and the accused met. The two women allegedly fought. At some point the accused pretended to go out but turned around and removed boiling water from the stove and threw it on the complainant who was seated. The complainant was seriously burnt and suffered severe injuries as per the medical report. The medical report was compiled the very day of the incident before recovery of the complainant. It is not clear why a current medical affidavit detailing the full extent of the injuries was not tabled before the court.

In court, pictures of the complainant revealing the injuries were produced as exh 1 (a) (b) and (c). They show a badly scarred body, with terrible scars on one breast, the whole stomach area, both thighs and the private parts area. The same observation was duly made and noted by the court a quo.

In convicting the accused the court made a finding that the accused deliberately threw hot water on complainant causing her to sustain burns which were a threat to her life. It went on to make a finding that the accused realised the possibility that her actions would seriously interfere with the complainant's health, "cause fatal injuries which would be a threat to her life and reconciled herself to that possibility."

I find no misdirection on the conviction. Before convicting an accused on a charge of attempted murder, the court has to be satisfied that both elements of the *mens rea* and *actus reus* are present. The *mens rea* or intention consists in the constructive intent. The accused has to subjectively foresee the real possibility of death occurring as a result of his actions and despite such an appreciation, the accused recklessly continues with his actions irrespective of the risk.

By pouring boiling water on the body of a pregnant complainant resulting in serious injuries, the complainant must have foreseen the real possibility of killing the complainant and, despite realising the risk attended therein, she proceeded with her actions. The conviction was thus proper.

It is the sentence imposed which raises concern. Accused is 21 years old and complainant is 22 years old. Both parties are thus young adults. The extent of the injuries on complainant is serious and the attack left her with permanent scars on most parts of her body. Definitely her life will never be the same being permanently scarred as she is. Exhibit 1 clearly shows that complainant was heavily pregnant when the attack was perpetrated. The effects on the child remain unknown. The record of proceedings shows that the accused did not show remorse nor did she regret her conduct. In essence, the facts in aggravation far outweigh the mitigatory factors.

Whilst it is desirable to keep first offenders out of prison one must not lose sight of the gravity of the offence and also societal interests. In *Isaac Bhero & Another v The State*, GUBBAY CJ (as he then was) stated as follows:

"Attempted murder is a crime which, save in the most exceptional circumstances is always treated as extremely serious. This is because it has the effect of holding human life cheap. It differs from murder only in that the intended result did not materialise. But the moral reprehensibility is there in equal degree. See *Nyoni AD 38/71 (unreported) S v Human 1979 (3) SA 331 (ECD) at 337 C – D.*"

The above correctly expresses how the offence should be depicted and treated. That complainant did not succumb to the injurious is only but fortunate. Despite being a youthful first

offender with one child, this offence called for an effective term of imprisonment. Apart from the deterring factor which I am aware needs not be over emphasised, sentences should be meaningful, proportionate to the offence and not so as to put to ridicule the whole judicial process. Society must feel confident and repose trust in the justice delivery system that offenders will receive appropriate punishment. Such punishment should make would be offenders realise that there is a line which if crossed will result in punishment consisting of paying for their wrong actions at the same time rehabilitating them to be better members of society, whilst instilling respect for the law.

A sentence of 24 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition that during that period the accused will not commit any offence involving assault or violence on the person of another for which she will be convicted and sentenced to a term of imprisonment without the option of a fine will have been appropriate.

I therefore cannot certify the proceedings as being in accordance with real and substantial justice. Accordingly I withhold my certificate.

Tagu J: agrees: