

STATE

Versus

BONIFACE JACK

HIGH COURT OF ZIMBABWE
MANZUNZU J

HARARE, 14 July 2023.

CRIMINAL REVIEW

MANZUNZU J: The accused appeared before the Provincial Magistrate sitting at Marondera facing a charge for contravening section 27 (d) of the Firearms Act, Chapter 10:09 (the Act), that is, unlawfully discharging a firearm in or upon a public place. He was convicted on his own plea of guilty and sentenced to pay a fine of US\$100 failure of which to undergo imprisonment for a period of 6 months.

The facts of the case as stated by the prosecution is that on 12 November 2022 the complainant assaulted someone at Don Second farm in Macheke. Following the alleged assault, the complainant went into hiding. On 14 November 2022 word reached the accused that the complainant was seen at his residence. The accused is a member of the Police neighbourhood watch committee. With the aim to go and arrest the complainant over the offence of assault, he armed himself with a shotgun and teamed up with three other members of the neighbourhood watch committee and two farm security guards and proceeded to the complainant's residence.

When the accused and his team arrived at complainant's residence, the complainant armed himself with an axe and threatened to strike them with the axe. This was shortly before the complainant, still armed with the axe, went into his house and locked himself in the bedroom. The accused and his team wrestled to open the door which they finally had to break to access the complainant. Despite all those hustles, the complainant still wanted to axe one of the team members with an axe at which point the accused ordered the complainant to surrender the axe but the complainant refused. This was the moment the accused opened fire and shot the complainant on his knee and as a result they managed to arrest him. The complainant

sustained some gunshot injuries, which were described in the medical report as a wound with a depth of 13 x 8 cm.

These are the facts upon which the accused was charged and convicted.

The record of proceedings was placed before the Regional magistrate for scrutiny who in a minute of 17 April 2023 asked the trial Magistrate to comment on the following expressed views which read in part; *“Is section 27 (d) the appropriate charge in the circumstances where accused knew he was going to confront someone with a firearm? Complainant was in their private residence. The facts are also incomplete to show how accused discharged the firearm.*

A medical report shows complainant got injured seriously. The state outline is incomplete to show how complainant got injured or circumstances under which he then got injured.”

In response the trial Magistrate also said she doubted the appropriateness of the charge at the time of hearing the case. She said she raised this concern with the Prosecutor who in turn insisted to proceed with the charge as it was. The court then did not persist with the issue given the State is *dominus litus* in the public prosecution of criminal matters.

The Regional Magistrate has now placed the proceedings before this court in terms of section 58 (3) (b) of the Magistrates Court Act, Chapter 7:10. In his covering minute the learned Regional Magistrate has expressed the view that the facts point out to a more serious offence of attempted murder and the court ought to have sought guidance from the case of *S v Thebe 2006 (1) ZLR 208 (H)* where the court expressed the following remarks;

“While it is part of our criminal procedure that the State is dominus litis, this rule is not absolute. The trial court is a trier of facts whose main object is to do justice between man and man. It therefore has inherent powers to ensure that suitable charges are preferred against those who appear before it. It is, therefore, within its power to prevent the State from proceeding with the prosecution on a lesser charge where justice clearly requires a more serious one.”

I will not dwell much on this view expressed by the learned Regional Magistrate because not only is the present case distinguishable from the Thebe case (*supra*), but I do not think the facts support a charge of attempted murder. The facts by the State shows that the sole purpose

of the accused arming himself with a gun was to go and effect an arrest on the complainant. The complainant was hostile and armed with an axe threatening to cause harm. The accused did not just, upon sight of the complainant, shoot him, he only did it as a last resort in order to overcome complainant and arrest him. He aimed at the complainant's leg and not any other life threatening part of the body. Accused is a member of the neighbourhood committee entrusted with the duty to arrest criminal suspects. Whether or not he used excessive force under the circumstances is a different story.

My real concern in this matter is whether the facts can sustain a conviction for contravening section 27 (d) of the Act. It is clear the State had a quandary of what charge to prefer against the accused. The charge sheet shows that there was an attempt to charge the accused for contravening section 27 (c) for negligently or recklessly discharging a firearm before the same was abandoned and substituted with the current charge for contravening section 27 (d).

Section 27 (d) of the Act reads;

"Any person who—

(a) ...

(b) ...

(c) ...

(d) knowingly and without lawful cause, discharges a firearm in or upon a public place;

shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

The essential elements of this offence are therefore that the accused must:

(a) knowingly

(b) discharge a firearm in or upon a public place

(c) have no lawful cause

The accused pleaded guilty to the charge and the court proceeded in terms of section 271 (2)(b) of the Criminal Procedure and Evidence Act, Chapter 9:07 (the CP&E Act) the relevant part of which reads,

"Where a person arraigned before a magistrate's court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea—

(a) ...

(b) the court shall, ...

(i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and

(ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor;

and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the

offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law: ...”(emphasis is mine).

The Magistrate’s court is a court of record per section 5 (1) of the Magistrates Court Act, Chapter 7:10. Section 271 (3) of the CP& E Act mandates the court which proceeds under section 271(2) (b) to record the exchange between the court and the accused.

The question and answer exchange between the court and the accused is recorded hereunder:

“Q. Confirm on the 14/11/22 you were at 26B Castledine Macheke.
A. Yes
Q. Is it correct you discharged a firearm on the day.
A. Yes
Q. Was it a public place that you discharged the firearm.
A. yes
Q. Confirm you realised the potential to endanger other persons by your conduct.
A. Yes
Q. What did you want to do with the firearm.
A. I was keeping it so that I can apprehend him.
Q. Did you harm someone out of your conduct.
A. Yes I harmed him.
Q. Any lawful right
A. No.”

It is clear from this exchange that the elements of the offence were not fully canvassed by the court. Accused pleaded guilty because his actions were a direct result of the complainant’s injuries not that he understood the elements of the offence. The accused was a self-actor who has no clue of the legal definition of a public place. The court did not explain to him the meaning of “public place” and whether the place he discharged the firearm falls within that definition. In fact, the State outline says it was at the complainant’s private residence.

On the unlawful or otherwise of his conduct, the accused said he kept the gun as a means to apprehend the complainant. That on its own nullifies the element of “without lawful cause”. The accused’s explanation suggests he had a lawful cause. No further inquiry was done by the court.

I find no basis upon which the court convicted the accused. The court ought to have retained a plea of not guilty and proceed with a trial. This also turns on the correct observation by the learned Regional Magistrate that *“Complainant was in their private residence. The facts are also incomplete to show how accused discharged the firearm.”*

For the reasons already stated, the conviction cannot stand and with no conviction the sentence likewise falls away. In this regard, I am therefore unable to certify these proceedings

as being in accordance with real and substantial justice. This is a matter in which the trial court proceeded to convict the accused without being satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts on which the charge is based as stated in the charge.

I withhold my certificate with the result that:

1. The conviction is quashed and the sentence is set aside.
2. If the accused has already paid a fine, he shall be refunded the money so paid.
3. In the unfortunate event the accused is serving the alternative imprisonment term, he shall be released with immediate effect.
4. The trial court shall call the accused and explain to him this position and avail a copy of this judgment to him.

Chilimbe J agrees