

STATE
versus
DANIEL JIM

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO: 22 February 2018

Criminal review

MAFUSIRE J:

- [1] Both the conviction and sentence in this case offend against norms of justice. It is imperative that this court should intervene.
- [2] The accused was convicted in the Regional Magistrate's Court with attempted murder. The charge itself was demonstrably an overkill. The circumstances disclosed nothing more than an assault.
- [3] The accused was sentenced to two years imprisonment, with a paltry six months imprisonment being suspended on the usual condition of good behaviour. Such a sentence was way over the top. Given the circumstances, it served only to break the accused. He was a mere eighteen year old rural village man. By all accounts, it was his filial instinct, and a sense of duty to stop any further harm to those close to him and, possibly to preserve family honour, that he struck the wildly violent brother-in-law, the complainant, who had been abusive towards his wife, the accused's sister; and was now thumbing his father-in-law, the accused's father, in the presence of some villagers, including the village headman.
- [4] The facts, from the State Outline, were these. The complainant and his wife, Regina Jim [**“Regina”**] were coming from consulting a prophet. The complainant was drunk. Regina did not want to go home with him. She ran away to seek help from the village head, one Emmanuel Mugwira [**“Mugwira”**]. The complainant followed her. At Mugwira's place, the complainant raised a storm. Mugwira's efforts to calm him down were fruitless. The accused; his younger brother; and their father, Some Jim

[“**Jim**”], arrived at the scene, shouting. They carried a knobkerrie. The Outline does not say who in particular, carried the knobkerrie.

[5] There was a slight variation in the facts. The State Outline said when Jim and his sons arrived, Mugwira asked them to leave. But when canvassing the essential elements, and in mitigation, this was not quite the version that came out. The accused said following an exchange of words, the complainant assaulted Jim.

[6] There was another slight variation on what happened next. The State Outline said after Mugwira had asked him and his sons to leave, Jim approached the complainant and tried to strike him with a knobkerrie. It said Jim fell down together with the complainant. Jim asked his sons to help him. It was then that the accused allegedly took the knobkerrie and struck the complainant twice on the head. The complainant fell unconscious. Jim and his sons are said to have left together. But in court, this is not what was said to have happened. The exchange between the court and the accused, in canvassing the essential elements, was this:

“Q *Correct whilst thereat [i.e. at Mugwira’s place] your father and complainant had an exchange of words?*

A *Yes*

Q *Correct complainant assaulted your father with clenched fists and booted feet?*

A *Yes*”

[7] There was yet another variation in the facts. The State Outline said after the accused had struck the complainant unconscious, Regina poured water on him. They took him to his father. But in court the version was as follows:

“Q *Correct the father demanded his daughter Regina?*

A *Yes*

Q *Correct Regina joined your father and she cried for her child back?*

A *Yes*

Q *Correct complainant ran towards your father and further assaulted him?*

A *Yes*

Q *Correct you then assaulted the complainant with a knobkerrie on the head?*

A *Yes*”

[8] In mitigation the court asked the accused why he had assaulted the complainant in the manner alleged. His answer –

“He was assaulting my father who was not armed” [all emphasis by myself].

[9] The accused pleaded guilty. But by such answers, the court should have seen the red lights flashing. This was a case crying out for a plea of not guilty to be entered in terms of s 272 of the Criminal Procedure and Evidence Act, *Cap 9:07*. It says:

“272 Procedure where there is doubt in relation to plea of guilty

If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed—

[a] is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or

[b] is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or

[c] is not satisfied that the accused has no valid defence to the charge; the court shall record a plea of not guilty and require the prosecution to proceed with the trial:

Provided that ...”

[10] The trial court did not explore the variations in the facts. This shortcoming is further illustrated by yet another exchange with the accused. In this further exchange, the court was evidently trying to establish ‘intention’ [*mens rea*], an essential ingredient for a charge of attempted murder. The exchange went like this:

“Q *Correct by assaulting the complainant twice in the head with a knobkerrie you intended to kill him?*

A **No** [my emphasis]

“Q *Correct by assaulting complainant twice in the head with a knobkerrie you realised that there was a real risk or possibility that he might die?*

A *Yes*”

- [11] Evidently, by its first question above, the court intended to establish ‘actual intention’ [*dolus directus*]. Having hit a brick wall, the court swiftly changed course and sought to get the accused to admit ‘legal’ or ‘constructive intention’ [*dolus eventualis*]. It did.
- [12] The accused was not represented. The court did nothing to assist him. At best, it was most perfunctory in its exploration of the essential elements. At worst, it sought to trap him. How could the unrepresented accused, an unsophisticated young peasant farmer, have been expected to decrypt that the court’s second question above sought to establish *dolus eventualis*? Did he really know what he was saying “Yes” to?
- [13] The law behoved the learned magistrate to have taken the version of facts most favourable to the accused. His answers depicted some possible defences. It was incumbent upon the court to have made an effort to decipher those defences.
- [14] In a nutshell, the accused’s defence was that he assaulted the complainant because he was assaulting his father. He was not saying his assault of the complainant was out of revenge. Rather, it was to stop the complainant. The court should have deduced the defence of person, as defined in s 253 of the Criminal Law [Codification and Reform] Act, *Cap 9:23* [“***the Code***”], or the defence of necessity, as contemplated by s 263 of the Code.
- [15] In the defence of person in terms of s 253 of the Code, a person is excused if he commits a crime whilst, among other things, defending another person from an unlawful attack. An ‘unlawful attack’ is defined to mean unlawful conduct which endangers a person’s life, bodily integrity or freedom [*my emphasis*]. The complainant’s assault on Jim had been on-going. It was an unlawful attack. At the very least, it endangered Jim’s bodily integrity.
- [16] According to s 253, the requirements for the defence of person, as it relates to the defence of another, are as follows:
- That the unlawful attack had commenced, or was imminent. In this case the attack had commenced and was on-going.

- That the accused's conduct was necessary to avert the unlawful attack, and that he could not otherwise escape from, or avert the attack. The accused's striking the complainant in the manner he did was to stop the complainant from continuing to assault his father, Jim. Obviously the second rung of this requirement does not apply to his situation.
- That the means used to avert the unlawful attack were reasonable in the circumstances. A knobkerrie is not an inherently dangerous weapon. Admittedly, the accused's blows landed on the complainant's forehead, a rather delicate part of the body. Although the medical report suggested that severe force was used, and that a permanent disability was likely to occur, it also ruled out the likelihood of any danger to life. Furthermore, the accused delivered only two blows. These inflicted no more than a cut and severe contusion [or bump] on the forehead.
- That any harm or injury caused by the accused's conduct was to the attacker and not any third party; and that the harm was not grossly disproportionate to that liable to be caused by the unlawful attack. Weighing proportions in matters of this nature calls for value judgment. Nobody can say how far the complainant might have gone in assaulting Jim if the accused not intervened. Therefore, without a proper investigation, it cannot be said the cut and the contusion on the complainant's forehead were disproportionate to the harm the complainant was likely to inflict on Jim.

[17] According to s 263 of the Code, for necessity to be a complete defence, the requirements are broadly similar to those for the defence of person. They are these:

- That the harm which the accused sought to avoid would have resulted in, among others, the death or serious bodily injury to himself or another person;
- That the accused believed on reasonable grounds that the harm had started or was imminent;
- That the harm did not arise through his own fault;
- That he believed on reasonable grounds that his conduct was necessary to avoid the harm and that there was no other feasible way of avoiding it;
- That by his conduct he did no more harm than was reasonably necessary to avoid the harm and that the harm he himself inflicted, was not disproportionate.

[18] Undoubtedly, the accused's conduct seemed to eminently fit all those requirements. The bottom line is that the court did not investigate at all.

- [19] Even if in spite of all the foregoing, the court still felt the accused was guilty of attempted murder, and beyond any reasonable doubt for that matter – which would be incredible – it should have noted that there were weighty mitigating circumstances. Among other things, the accused was provoked. Here was a brother-in-law who not only had been abusive to his wife, Regina, the accused’s own sister, but was also now pounding his father-in-law, Jim, the accused’s father.
- [20] According to s 238 of the Code, whilst provocation is not a defence to a crime other than murder [to which it is a partial defence if certain conditions are met], nevertheless the court may regard it as mitigatory when assessing the sentence.
- [21] Furthermore, in terms of s 218 of the Code, diminished responsibility operates in mitigation of sentence. It is diminished responsibility if, among other things, at the time when the accused commits a crime, his capacity to appreciate that the nature of his conduct is unlawful, is diminished on account of, among other things, acute mental or emotional stress. The court takes into account diminished responsibility when imposing sentence. In the present case, it must have been emotionally stressful for the accused to witness the complainant assaulting those close to him.
- [22] The accused should have simply been charged with assault as defined in s 89[1] of the Code. If the State had insisted on proceeding with the charge of attempted murder, then after canvassing the essential elements, and if in spite of what is said above, it was still bent on convicting, the court could have passed a verdict of guilty of assault. In terms of the Fourth Schedule to the Code, as read with s 275, assault is a permissible verdict to attempted murder.
- [23] The prescribed penalty for assault in terms of s 89[1] aforesaid is a fine up to, or exceeding level fourteen [\$5 000], or imprisonment for a period not exceeding ten years, or both. The range is quite wide. The top end is quite steep. But unquestionably, this is designed to cater for all manner of assaults, from the very minor ones, to those very serious assaults as would cause grievous bodily harm. In no

way should the court *a quo*, if it felt it safe to convict, have considered a custodial sentence.

[24] In light of what is said above, the court *a quo* should not have convicted the accused on either attempted murder, or common assault. In addition, I certainly consider it quite unsafe to certify the proceedings as being in accordance with real and substantial justice, as required by s 29 of the High Court Act, *Cap 7:06*. This is so for yet another significant oversight by the court *a quo*. In terms of s 163A of the Criminal Procedure and Evidence, *Cap 9:07*, the magistrate is obliged to inform an accused person of his right to legal representation, and to endorse on the record the fact that he or she did so inform the accused. The record in this matter has no such endorsement. All that is there is:

“*Accused* : *Daniel Jim*
: *In person*
: *Not legally represented*”

[25] Yet s 163A is couched in peremptory terms. It says:

“ [1] At the commencement of any trial in a magistrates court, before the accused is called upon to plead to the summons or charge, the accused ***shall*** be informed by the magistrate of his or her right in terms of section 191 to legal or other representation in terms of that section.

[2] The magistrate ***shall*** record the fact that the accused has been given the information referred to in subsection [1], and the accused’s response to it.”[my emphasis]

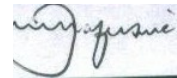
[26] In this judgment, without having researched the point, I will not go so far as to rule that such an omission is by itself fatal to the entire proceedings. However, coupled with all the other short-comings noted above, the proceedings of the court *a quo* cannot stand.

[27] The accused was sentenced on 12 January 2018. At the time of this judgment he had already served more than a month in jail. There is no benefit to be served by remitting the record back to the court *a quo* for a trial *de novo* or for the correction of the

anomalies noted above because the possible worst outcome for the accused is a conviction on assault, for which, because of the overwhelming mitigating circumstances, including the fact that he was only eighteen years old at the time of the offence; was married; and was a first offender, no custodial sentence would be justified. The accused is entitled to his immediate release.

[27] In the circumstances, the conviction of the accused in the court *a quo* is hereby quashed. The sentence imposed is hereby set aside. The Registrar is directed to immediately execute the warrant of liberation to enable the accused to be released forthwith.

22 February 2018

A handwritten signature in black ink, appearing to read 'M. J. Mawadze', written over a horizontal line.

Hon Mawadze J: I agree _____