

STATE

Versus

BONGANI HADEBE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 22 NOVEMBER 2024

Criminal Review

The offender appeared to have initially been jointly charged with 2 others. It is not clear what became of the other 2 but I do not intend to dwell on this. The record reflects just this offender although the CRB number is indicative of the fact that there were 2 others whose fate, as already alluded to, is not clear.

The offender was facing 3 counts, robbery, attempted murder and theft. The allegations are that, he, in the company of 3 others went to Nikas 6 Mine Zimbili in Fort Rixon and through the use of violence took the first complainant, Jabulani Sibanda's wallet which had USD175, ZAR 20, a P7 cell phone, a stylo cellphone, 12 volt battery, 24 x 21 and 2 x 750l cooking oil and a yellow hammer. When Jabulani screamed the second complainant reacted and came out of his tent. He was then assaulted with the back of an axe twice on his head and once on the left hand. The gang also took the third complainant's cell-phone.

It is not clear whether the offender pleaded guilty to the counts of attempted murder and theft but not guilty to the robbery charge. I must say the Regional Magistrate's approach left a lot to be desired, especially given that he is a Regional Magistrate.

Evidence was led from witnesses, which evidence canvassed all the counts. Curiously in his judgment the Regional Magistrate returned the following verdict.

“Accused is also found guilty of robbery as charged.”

Why the word “also” was used is anyone’s guess. My query did not get a sensible response. The Regional Magistrate appeared to be of the view that he had to advise me on what to do to correct the error instead of explaining why the record was not as clear as it ought to have been.

That said however there is no doubt that the offender must have pleaded not guilty to all 3 counts given that his defence was that of an alibi. Since the offences were committed at the same place and around the same time although to 3 different complainants, his *alibi* therefore leads to the inescapable conclusion that his pleas were Not Guilty to all 3 counts. The curiously worded verdict does not change the fact that the evidence proved that all 3 counts were committed and the verdict ought to have been one of guilty on all 3 counts. The court’s sentence also made reference to the 3 counts.

I have highlighted this only for the purposes of encouraging the Regional Magistrate to pay attention to detail. The offender will not be prejudiced by a correction of the verdict so it covers all 3 counts. More so as the sentence makes reference to all 3 counts.

This is not the end of the matter. The Regional Magistrate proceeded to take all 3 counts as one and imposed a sentence of 20 years imprisonment.

Section 51(2) of the Magistrates Court Act [Chapter 7:10] provides for special jurisdiction for Regional Magistrates and states:-

- “(2) Notwithstanding section fifty, the jurisdiction of a court of a Regional Magistrate in respect of punishment for –
 - (a) ...
 - (b) Robbery or attempted robbery if the court finds in terms of section 126(3) of the Criminal Law Code that aggravating circumstances were present, whether on summary trial or remittal by the Prosecutor-General, shall be –
 - (i) Imprisonment for a period not exceeding twelve years;
 - (ii) a fine not exceeding level thirteen.”

The maximum penalty a Regional Magistrate can impose for robbery is therefore 12 years. The learned Regional Magistrate appears to have laboured under the misapprehension

that SI 146-23 bestows special jurisdiction to Magistrates. That could not be further from the correct position. The presumptive penalties provided in SI 146/23 are imposed where such is also within the jurisdiction of the Magistrate concerned. Put differently the fact that the presumptive penalty for robbery is 20 years does not mean a Regional Magistrate whose jurisdiction is 12 years is endowed with increased jurisdiction to impose a sentence greater than his jurisdiction.

By taking all 3 counts as one the learned Magistrate fell into error. Firstly because the offences cannot be said to be of a similar nature. Granted robbery and theft can be described as offences of a similar nature as robbery is theft accompanied by violence to induce the taking. However attempted murder is an offence of a different nature.

Where offences are different in nature they ought not to be taken as one for purposes of sentence (*S v Chawasarira* HB 18-91, *S v Mahlangu* 1968 (4) SA 576 T).

Secondly by taking all 3 counts as one for sentence the learned Magistrate exceeded his jurisdiction as the robbery charge attracts a maximum of 12 years in terms of his jurisdiction.

The theft of a cell phone would surely not attract 20 years nor the attempted murder charge. Granted the complainant was assaulted with an axe on the head and hand but unfortunately there was no medical report detailing the extent of his injuries. The medical report which was produced related to Jabulani Sibanda, the robbery victim. A sentence of 20 years would therefore not be appropriate for the attempted murder charge.

A sentence must always be rational and speak to the offence the offender stands convicted of. It must fit the offence, the offender and be fair to society. Sentence must never be approached with a vengeful attitude (*S v Ndlovu* HB 46-96, *S v Harington* 1988 (2) ZLR 344, *S v Rabie* 1975 (4) SA 855 (A)).

That said, the learned Regional Magistrate correctly described robbery and attempted murder as serious offences. The complainant in the robbery count sustained serious injuries “a deep cut on the head about 7 cm long, bruises both knees, deep cut on the back of the left

forearm about 5 cm long with exposed bone”. This made the robbery heinous deserving of the maximum penalty a Regional Magistrate can competently impose.

Whilst the convictions are in order and the record will be corrected to reflect the following:-

“Guilty of all 3 counts,” the sentence has to be interfered with.

Accordingly the sentence is set aside and substituted with the following:-

“1st count - 12 years imprisonment

2nd count - 5 years imprisonment

of which 2 years is suspended for 5 years on condition the offender does not within that period commit any offence of which an assault or violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

3rd count - 12 months imprisonment.”

Kabasa J.....

Ndlovu J..... I agree