THE STATE
versus
MUNYARADZI NGORIMA

HIGH COURT OF ZIMBABWE
DEME & MUNGWARI JJ
HARARE, 22 February 2024

Criminal Review

MUNGWARI J: This record of proceedings came before me on automatic review in terms of s 57 of the Magistrates Court Act [*Chapter 7:10*].

At his trial, the accused who was charged with the offence of assault as defined in s 89(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (the Code) pleaded guilty to that crime. However, at the time that the trial magistrate was explaining the essential elements of the offence to him, it turned out that the accused's explanation for the commission of the crime was that he was intoxicated at the time that he committed the offence. At the instigation of the prosecutor, the magistrate abandoned the assault and convicted the accused of the crime of voluntary intoxication leading to unlawful conduct as defined in s 222 of the Code. The correctness of such a course is doubtful.

The brief background facts of the charge are that on the fateful night Munyaradzi Ngorima (the accused), a young man of twenty six (26) years met Moses Jazi (the complainant) at Chibhanguza shops in Nyatsime, Beatrice. The two consumed alcoholic beverages together. At around 2300 hours a misunderstanding arose between them. The accused threatened to beat the complainant and that threat of violence prompted the latter to leave the establishment and head home. The accused followed him, seized a beer bottle and proceeded to stab the complainant multiple times on the nose and on the ear with it. The complainant managed to escape further harm by fleeing to his house. He however had sustained serious injuries and sought medical treatment. I presume he made a police report in the course of seeking treatment as the accused was subsequently arrested and charged with assault. As already alluded to, on 11 October 2023 the accused pleaded guilty to the charge after his right to legal representation

was properly explained to him. The following was the exchange that took place between the accused and the trial magistrate during the canvassing of the essential elements.

> "Q Correct you were at Chibhanguza shops in Nyatsime on 08 October 2023 and you were drinking beer in the company of Moses Jezi
>
> A. That is correct
>
> Q. Is it also correct that as you were imbibing the two of you had a misunderstanding
>
> A. That is correct
>
> Q. Is it correct that Moses Jezi when he left you were drinking beer and you followed him to his place of residence
>
> A. No I did not follow him to his place of residence rather we left together from Chibhanguza in the company of one Dube who was owing me some money.
>
> Q. Do you admit that whilst at this place you broke a beer bottle on the ground and went on to stab Moses Jezi on the nose and once on the left ear
>
> A. That is true
>
> Q. Did you appreciate what you were doing at the time you stabbed the complainant on his nose and on his left ear
>
> A. I was drunk your worship"

PROSECUTOR

> "Your worship we accept the accused was drunk. However, since accused is admitting to have stabbed the complainant in the manner alleged, we apply that the court proceed to canvass the essential elements of the offence of voluntary intoxication leading to unlawful conduct in terms of s 222 of the Criminal Law Codification and Reform."

In compliance with the prosecutor's application, the trial magistrate directed his attention once more to the accused and began to inquire into the aspect of voluntary intoxication. He said the following:

> "Q. Mr Ngorima do you therefore admit that at the time you stabbed Moses Jezi on the nose and on the ear, you had voluntarily intoxicated yourself
>
> A. That is true
>
> Q. Do you have any defence to offer
>
> A. I have no defence to offer
>
> Q Is your plea a genuine admission of the charge, facts, and essential elements as has been put to you
>
> A. Yes
>
> VERDICT: Not guilty of assault but guilty of voluntary intoxication leading to unlawful conduct in violation of s 222 of the criminal law (Codification and reform) Act"

As already indicated, I have serious reservations regarding the propriety of the conviction. The exchange cited above betrays a lack of appreciation of not only the procedure of recording a plea of guilty under s 271(2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP & E Act) but also the import of the defence of intoxication running from ss 219 – 225 under Part IV of the Code. The simple rule of statutory interpretation is that a statute must be read in whole in order for its context to be better understood. The rule applies with better force where the statute is compartmentalized into parts such as Part IV of the Code, each dealing with a specific issue. The defence of voluntary intoxication in s 222 which the trial court latched on to cannot be understood properly without reading the preceding sections into it. It is intricately linked to ss 220 and 221. Section 220 provides as follows:

> **"220 When involuntary intoxication a complete defence to crimes**
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> (1) The fact that a person charged with a crime was intoxicated when he or she did or omitted to do anything that is an essential element of the crime shall be a complete defence to the charge if—
>
> (a) the person was involuntarily intoxicated when he or she did or omitted to do anything that is an essential element of the crime; and
>
> (b) in relation to a crime of which intention, knowledge or the realisation of a real risk or possibility is an element, the person was intoxicated to such an extent that he or she lacked the requisite intention, knowledge or realisation.
>
> (2) For the avoidance of doubt it is declared that involuntary intoxication shall be a complete defence to any crime of which negligence is an element."

For purposes of clarity, what the above provision spells out in subparagraph (a) is simply that for the defence to hold, an accused must show that he was intoxicated; that he/she had become intoxicated involuntarily. In other words that he/she did not choose to consume the intoxicating substance when he/she committed or omitted to do anything which is an essential element of the offence charged. Subparagraph (a) is joined to subparagraph (b) by the conjunctive "and". Needless to state, it must follow that both requirements in (a) and (b) must be fulfilled for the defence to succeed. Subparagraph (b) requires an accused to show, if he/she is charged with a crime such as assault which requires the proof of intention, knowledge or the realisation of a real risk or possibility that he/she was so intoxicated that he/she did not formulate the intention or did not have the knowledge or the realisation of a real risk or possibility. Put differently it is not enough for an accused to simply say he/she was involuntarily intoxicated because even if he/she were but managed to formulate the requisite intention in one or the other of the forms described above, the fact of involuntary intoxication

will count for nothing as that accused will remain liable for his/her actions. My conclusion is supported by s 221 as shown below.

> **"221 Intoxication no defence to crimes committed with requisite state of mind**
>
> (1) If a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility—
>
> (a) was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but
>
> (b) the effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realisation;
>
> such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed.
>
> (2) Where a person is charged with a crime requiring proof of negligence, the fact the person was voluntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime shall not be a defence to any such crime, nor shall the court regard it as mitigatory when assessing the sentence to be imposed."

Clearly therefore it is not enough to just say that because a person was voluntarily intoxicated, he/she is therefore not guilty of the crime charged but is guilty of voluntary intoxication leading to unlawful conduct. Where the charged person pleads voluntary intoxication, he/she is required in addition to illustrate that he/she lacked the intention to commit the offence charged. It is only if he/she succeeds in doing so that the court can then find him/her guilty of voluntary intoxication leading to unlawful conduct. Such a verdict cannot be arrived at in the summary manner adopted by the trial court in this case. Once the accused had raised the defence of intoxication, the court was obliged to alter his plea from guilty to not guilty and order the prosecution to proceed to trial. I say so because intoxication is relative in individuals. Where there is no scientific test carried out, it can be proven by things such as uncharacteristic behaviour exhibited by an accused as described by those who are familiar with him/her; the volume or any other measurement of intoxicating substances taken by the accused. It is not enough to discount intention merely because the accused has said he was intoxicated. Worse still, a complication arises in instances as those provided under s 223 where a person becomes intoxicated for purposes of facilitating a crime. The section describes the so-called Dutch courage where one consumes intoxicating substances for purposes of gaining courage or strength to commit a crime. It means the person would have formulated the intention to commit the crime before becoming voluntarily intoxicated. Put differently, the law recognises that a person could become voluntarily intoxicated but still manage to formulate the intention to commit an offence. On the other hand, the law is also clear that a person can formulate an

intention to commit a crime first, then consume intoxicants to facilitate the fulfilment of his/her intention to commit the offence.

Given the above, in this case, there was no investigation by the trial court on whether or not the accused had the necessary intention, knowledge or realisation of real risk or possibility to commit the assault. There was equally no investigation whether he had not formulated the intention to assault the complainant before he (accused) became intoxicated. It is for that reason that I found the court's decision to acquit the accused of assault and summarily convict him of contravening s 222 rushed and premature. As shown in s 222 reproduced below, it is only in circumstances where a full investigation into the various issues explained above has been done where a verdict under it can be returned.

> **"222 Voluntary intoxication leading to unlawful conduct**
> If a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility (hereafter in this section called "the crime originally charged") and it is proved that–
> (*a*) the accused was voluntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime originally charged; and
> (*b*) the effect of the intoxication was such that the accused lacked the requisite intention, knowledge or realisation;
> he or she shall be guilty of voluntary intoxication leading to unlawful conduct instead of the crime originally charged and liable to the same punishment as if–
> (i) he or she had been found guilty of the crime originally charged; and
> (ii) intoxication had been assessed as a mitigatory circumstance in his or her case."

The above provision is not meant to be an escape avenue for those accused of crime. I read it to be a provision that shows the legislature's displeasure with people who take intoxicants and then commit offence. It closes the door to any such person from escaping without punishment but not before a court is fully convinced of the person's lack of intention.

Before I conclude, I also wish to point out that the manner in which the trial court made a volte face at the instance of prosecution suggests a trial magistrate who was not in control of his/her court proceedings. My view is supported by the fact that because of the instigation of prosecution, the magistrate failed to realize that voluntary intoxication is not a competent verdict of assault or of any offence that would have been preferred by the state. It is a standalone offence. It is not a lesser offence than assault as shown by the requirement that the punishment should be the same as that imposable if the accused had been convicted of assault.

The competent verdicts flowing from assault are shown in the fourth schedule to the CP & E Act as negligently causing serious bodily harm; disorderly conduct in public place;

possessing a dangerous weapon; dealing in or possession of prohibited knives or any crime of which a person might be convicted if he or she were charged with any of the mentioned crimes. Voluntary intoxication leading to the commission of unlawful conduct is not mentioned amongst the permissible verdicts. Where the offence is not a permissible verdict it is unlawful for a court to convict an accused of a charge which he has not been formally advised of and to which he has not tendered a plea. The only circumstances under which that could happen are those provided for under s 274 of the Code which states as follows:

> **"274 Conviction for crime other than that charged**
> Where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he or she committed the crime charged."

This was also posited by MAKONI J as she then was in *S* v *Chazivepi* HB 5-15 wherein she said:

> "I agree with the state's reasoning that the two sections were put in place by the legislature to provide for situations whereby the accused committed an offence which is not a competent verdict or charged in the alternative but whose essential elements are encompassed in the offence charged. The accused may be found guilty of the proven offence whose essential elements are found in the offence for which the accused had been charged."

I agree with this position and hasten to emphasise that it must be shown that the essential elements of the crime originally charged include the essential elements of that offence which the court intends to convict the accused on. It must be proven through facts which ordinarily are obtainable through a trial.

In casu, the conviction of the accused on the basis of s 222 was in my considered view, arbitrary and cannot be allowed to stand. It was not counsel for prosecution's call to determine whether the accused was drunk. It was the court's responsibility to verify the authenticity of the plea. The prosecutor's attempt to take control of the proceedings by interjecting during the exchange between the accused and the magistrate in order to request the court to canvass the essential elements of an offence that the accused had not been charged with and had not pleaded guilty to could not have been proper particularly where the trial court then obliged the request in circumstances where it should have refused.

Even assuming that voluntary intoxication was a competent verdict of assault, the procedure adopted by the trial magistrate could still not be proper for the following reasons:

Firstly, where there is a competent verdict, the accused must properly plead to the offence. The state must then accept a limited plea whereupon the essential elements of the competent verdict

must be properly explained to the accused. Only then can a competent verdict be entered against the accused. In this case it was a unilateral decision made by the court at the instigation of the prosecutor and the trial magistrate simply convicted the accused without properly explaining the essential elements to the accused. It is important to note that the requirements for convicting the accused of a competent charge are the same as those that apply to his/her conviction on a main charge.

Once confronted with the circumstances as discussed and the application from the prosecutor, the magistrate was obligated to alter the plea to one of not guilty and thereafter refer the matter to trial. This was particularly important in that the evidence of his intoxication would then have been laid bare for the court to conclude that he was indeed voluntarily intoxicated and could not have formulated the intention to commit the offence. The evidence of the complainant and Dube would have assisted in the resolution of this aspect. The failure by the magistrate to alter the plea and refer the matter to trial constitutes a gross irregularity. Consequently, the conviction of the accused and the imposition of 18 months imprisonment with portions of the sentence suspended on condition of good behaviour and community service cannot stand. They must be vacated. Part of the community service may have been served by now and simple mathematics on the duration of community service performed will amount to four months of the sentence which unfortunately cannot be reversed.

In the premises, IT IS ORDERED THAT:

1. The conviction of the accused under Harare CRB BTR310/23 and the imposition of 18 months imprisonments suspended on conditions be and are hereby set aside.
2. The matter is remitted back to the Magistrate's court for trial *de novo* before a different magistrate.
3. In the event of a conviction, the sentence must not exceed the sentence originally imposed and the 4 months of community service that may already have been performed shall be taken into account during the assessment of sentence.

DEME J…….. Agrees