

THE STATE

Versus

METHUSELI NYONI

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO5 & 12 JUNE 2014

Criminal Review

MAKONESE J: The accused person is a male adult aged 27 years. He was charged and convicted on a charge of robbery as defined in section 126 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). He denied the charge but was convicted after a full trial.

The brief allegations against the accused are that on the 14th of December 2013 and at around 20:00 hours, the complainant had disembarked from a bus at Makepesi Business Centre, Lower Gweru area and was walking home carrying some groceries. He observed that two men were standing by the road side. As he was passing these men he was struck with a knobkerrie and fell to the ground. The men then searched his wallet and robbed him of the sum of R800, an identification card, three pairs of tennis shoes and 10kg of maize seed. The man disappeared into the bush with the stolen goods. Investigations were launched resulting in the arrest of the accused person. Accused person's accomplice was not located and the state proceeded with the prosecution of the accused. The total value of the stolen goods was US\$100 and R800 in cash.

The trial court rejected the accused's defence which was patently false and properly convicted him. Nothing therefore, turns on the conviction.

The record has been placed before me by way of automatic review and I have queried the propriety of the sentence which I consider to be wholly lenient and inappropriate. The trial magistrate's response to my query is in the following terms:-

"I refer to the above matter and wish to highlight that I considered that the accused was a first offender.

Further the state did not clearly bring out what was used to assault the complainant whether it was a brick (according to state papers) or a knobkerrie (according to the first witness).

Even the degree of injuries was not highlighted to the court and there was just the complainant's uncorroborated evidence of the alleged assault. There is therefore a possibility that the accused committed the offence of theft.

As such I felt that community service would give the accused a chance of reforming

without being subjected to hard-core criminals in prison. Further, a portion of the sentence on condition of good behaviour and restitution of the property that was not recovered was justifiable ...”

It is difficult to follow the reasoning of the trial magistrate. If indeed there was no evidence to support a conviction on a charge of robbery why then convict the accused person? In her reasons for sentence the learned trial magistrate outlines her reasons for sentence as follows:-

“In assessing sentence the court considered that accused was a first offender who was still single and had no children to take care of.

Further, some of the property that he stole was recovered.

What was considered as aggravating was the violent manner in which the accused behaved. There was no medical report but that behaviour alone was considered detestable.

Further, not all the property was recovered and so accused benefitted from the commission of the offence.

The court was of the view that performance of community service coupled with conditions of good behaviour and restitution would suffice.” (emphasis is mine)

The evidence of the complainant appears at page two of the handwritten record and it is in the following terms:-

“... I then fell down and his colleagues came and lifted me and took a wallet from my pocket. Some of his colleagues took away my groceries ...”

What is clear from the oral testimony of the complainant is that he was struck by some object which he described as a knobkerrie. The state outline refers to the use of a half brick by the accused person. In my view, it matters not that the complainant was attacked with a knobkerrie, a half brick or some other unknown object. The critical issue is that the state established that the accused person and his associate used violence to rob the complainant. All the essential elements of the offence were proved beyond reasonable doubt.

On the question of sentence the learned trial magistrate misdirected herself and imposed a sentence that was manifestly lenient and wholly inappropriate. Robbery is a serious crime which involves the use of violence against another person. The courts should not be seen to be treating such offenders with kid gloves. Invariably, robbery should attract a custodial sentence. Section 126 (3) of the Criminal Law (Codification and Reform) Act provides that:-

“For the purposes of subsection (2), robbery is committed in aggravating circumstances if the convicted person or an accomplice of the convicted person

(a) Possessed a firearm or a dangerous weapon; or

(b) Inflicted or threatened to inflict serious bodily injury upon any person ...”

The circumstances of the case provide no doubt that the accused and his accomplice used physical violence to rob the complainant of his cash and groceries. The reasons proffered

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by the learned trial magistrate in imposing a non-custodial sentence lack any merit.

I am unable, accordingly to confirm that the proceedings are in accordance with real and substantial justice, and therefore withhold my certificate.