

THE STATE
versus
SONICA MABURUSE

IN THE HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 18 MARCH 2014

Review Judgement

TAGU J: The accused who was unrepresented was charged with contempt of court as defined in s 182 (c) of the Criminal Law (Codification And Reform) Act [*Cap 9.23*]. She pleaded guilty, and after agreeing with the facts and the essential elements the magistrate returned a verdict of guilty to the charge. She was sentenced on 22 November 2013 to 30 days imprisonment wholly suspended on condition that she pays restitution to the complainant in the sum of \$130 through the clerk of court Masvingo on or before 5 December 2013.

The facts were that the accused was the applicant in a maintenance case number M218 /12 in which she claimed maintenance from one Energy Ngundu sometime in 2012. She was granted US\$70.00 per month which was to be deposited into her POSB account number 208310017502 through Salary Services Bureau. On 10 July 2013 the maintenance order was discharged by the court in the presence of the accused and she was ordered by the court to stop receiving the money. Despite the discharge of the maintenance order, the accused on 26 August 2013 went and withdrew a sum of \$130.00 from her account. This withdrawal is the subject of the charge she is now facing.

The sentence *in casu* is not one which is subject to scrutiny by a Regional Magistrate nor review by a Judge of the High Court. However, after the conviction and sentence of the accused a Legal Practitioner took over the matter. The lawyer has now made an application for review of the proceedings. Attached to the request for review of the case are detailed submissions by the lawyer which I found to be very useful and I will quote them in *extenso*. These are they-

- “ 1. On 21st November 2013 the applicant was convicted by this Honourable Court on a charge of contempt of court and sentenced to a fine of \$130.00 or in default, 30 days imprisonment.
2. The applicant was unrepresented at the trial, pleaded guilty. It has now turned out that the conviction was based on an inaccurate and misleading set of facts. The plea of guilty was not offered from an informed point of view.
3. The outline of the state case on which applicant was convicted is misleading in the following respects:-
 - 3.1 It is not true that the maintenance's order was in the quantum of \$ 70.00. The order was in the sum of \$50.00 per month (See Annexure 'A').
 - 3.2 Annexure 'A' also clearly shows that before a Direction Against Employer was applied for by the Applicant, the maintenance was not payable through the bank account mentioned.
4. What the outline of the state case does not disclose is that a Direction Against Employer was issued by the maintenance court on 10th May 2013 following a complaint on oath by the applicant. In terms of the Direction (Annexure 'B'), deductions were to be made against Energy Ngundu's pay at the rate of \$70.00 per month, comprising current maintenance of \$50.00 and \$20.00 in respect of arrears. The arrears amounted in all \$ 300.00. These deductions were effective from 1st June 2013. The deductions were to be remitted Applicant's POSB Account 208310017502.
5. A perusal of applicant's POSB statement of account (Annexure 'C') shows that the monthly deductions of \$70.00 (made of \$20.00 for arrears and \$50.00 for current) were deposited into her account on 28th June 2013, on 29th July 2013 and on 30th August 2013. It is not clear why the deposit was suddenly stopped after 30th August 2013 and before the arrears were cleared.
6. It is also not in dispute that Applicant made a withdrawal of \$130.00 from the account on 26th August 2013. It is also not in dispute that this withdrawal occurred after the maintenance order in question had been discharged on 10th July 2013 (See Annexure 'D').
7. What seems to have been overlooked by the trial court is that when the \$130.00 was withdrawn by the applicant, she in fact was owed much more by way of arrears by Mr E. Ngundu. In terms of the Direction Against Employer, the arrears owing in favour of applicant as of May 2013 were in the sum of \$300. Only a small fraction of these arrears had been deducted and deposited by the employer into the POSB account as at the date of the withdrawal.

8. Applicant was perfectly entitled to the \$130.00 that she withdrew on 26th August 2013 because the termination of the maintenance order on 10th July 2013 did not affect what had already accrued to her by way of arrears. Therefore, applicant could only be said to have acted wrongfully if she had withdrawn money in excess of the arrears that had accrued to her.

It is therefore too simplistic hence technically and factually incorrect to say that Applicant unlawfully benefited from the maintenance proceeds after the order had been discharged.

9. It is submitted that had a more ample set of facts been presented to the court, conviction would obviously not have ensued.

WHEREFORE Applicant moves the court to refer the record of proceedings in this matter, with the appropriate comments, for review by a judge of the High Court. In the meantime, it is prayed that the time in which the fine is to be paid be extended pending finalization of the review. “

Faced with this situation the Provincial Magistrate forwarded this record to me for review without the trial Magistrate’s comments since she is currently on maternity leave.

Having perused the lawyer’s submissions as well as the annexures attached hereto, I am also satisfied that had the correct set of facts been placed before the trial magistrate, the conviction would have obviously not have ensued. If the correct facts had also been placed before the public prosecutors I am sure the accused would not have been prosecuted in the first place.

However, the sentence imposed is not what was captured by the lawyer. She was not fined \$130.00 in default of payment 30 days imprisonment. She was sentenced to 30 days imprisonment which was wholly suspended on condition that she pays restitution of \$130.00 on or before 5 December 2013.

Having said this I am of the view that the verdict of guilty to contravening s 182 (2) (e) of the Criminal Law (Codification and Reform Act [*Cap* 9.23] should be set aside. The accused was entitled to the money that she withdrew although she withdrew it after an order discharging the maintenance order was given. This is money she was owed by the respondent in the maintenance case who was in arrears. As properly observed by her defence counsel she could only have been prosecuted if she had taken more than she was entitled to.

For the foregoing reasons the verdict is set aside. Accused is found not guilty and is acquitted. If she had paid the money by 5 December 2013, the money has to be paid back to her. The trial magistrate is hereby directed to recall the accused and advise her of this order.

TAGU J:.....

MAWADZE J agrees.....