

STATE
versus
MAULINE RASHAMIRA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 10 December 2015

Review Judgment

MAFUSIRE J: The accused was complainant's step-mother. She pleaded guilty to contravention of s 90 of the Criminal Law (Codification & Reform) Act, [*Chapter 9: 23*], namely, "***negligently causing serious bodily harm***".

The circumstances were that the accused **negligently** poured boiling water on the step-child, a girl aged 6 years. The complainant sustained burns on her back and developed some blisters that were some 5cm to 7cm large.

The State outline said the accused intended to pour the boiling water on her husband whom she had gotten angry with over the paternity of the complainant. However, she ended up negligently pouring the boiling water onto the child.

The trial court convicted the accused on her plea of guilt. It sentenced her to a fine of \$300, or, in default, three months' imprisonment. An additional six months imprisonment was wholly suspended for five years on conditions of good behaviour.

On scrutiny, the regional magistrate raised some queries. He questioned the propriety of the charge and of the conviction. He felt that on the facts, the offence appeared to have been committed **intentionally** rather than merely **negligently**. He put it this way:

"The 6 year old complainant was the subject of the misunderstanding that ensued between her father and step mother resulting in her getting burnt. For that reason I have doubts that accused committed the offence negligently as opposed to intentionally."

The other query raised by the regional magistrate was that the interests of the complainant, a mere juvenile victim, seem not to have been taken into account. He said this was a bad case of domestic violence.

Paragraph 6 of the State Outline stated that the complainant sustained a “*small*” burnt on her back. The reference to “*small*” did not escape the eagle eye of the regional magistrate. He referred to the medical report:

- On the degree of force required or applied, i.e. between “*Slight*”, “*Moderate*” and “*Severe*”, the medical report said “*Severe*”.
- On the possibility of permanent injury, the medical report said “*High – physical and psychological*”.
- On the severity of the injuries, i.e. between “*Not Serious*”, “*Moderate*” and “*Severe*”, the medical report said “*Severe*”.

Because of that obvious discrepancy between the State Outline and the medical report, the regional magistrate concluded:

“Paragraph 6 of the state outline shockingly gives the impression that complainant sustained minor burns yet the medical report says the opposite. One gets the impression that the state wished to portray the accused as having less moral blameworthiness.”

The regional magistrate went on to suggest that the trial court should have called the father to explain the circumstances under which the complainant had found herself in. He also said that the trial court could have referred the matter to social welfare for a thorough investigation into the suitability of both the step-mother and the father retaining custody of the child. This was said to be necessary for the protection of the young complainant.

The regional magistrate’s final conclusion was that while the sentence was a deterrent on the accused committing a similar offence in the future, it did not cater for the psychological abuse of the young complainant who remained vulnerable to further abuse of that nature by the step mother. He said the fact that the accused had been arguing with her husband over the complainant was an indicator that the accused did not want her.

The regional magistrate’s parting shot was: was justice done?

The trial magistrate responded, in summary, as follows:

- The misunderstanding was between the step-mother and the father, albeit over the complainant;
- The complainant was injured through the negligence of the step-mother as she quarrelled with the father;
- There was no intention on the part of the accused to injure the complainant;

- The suspension of the prison term was premised on the essential elements of the offence. The court did not know how it could have factored in psychological abuse in the sentencing;
- The need to have referred the case for a social welfare investigation on the complainant's living conditions was appreciated given that the complainant stayed with the father [in Gutu], while the step-mother stayed and worked elsewhere [in Mutare];
- However, there was no miscarriage of justice just because the father had not been called to testify or just because the matter had not been referred to social welfare.

Dissatisfied with the trial magistrate's response, the regional magistrate referred the record to this court for review. He felt that the trial court had failed to take the interests of the child into account.

In my view, the facts of this case would set the alarm bells ringing for any reasonable court. The regional magistrate's hunch was not without basis. Why did the State purport to down play the severity of the injuries sustained by the complainant to the extent of openly contradicting the medical report? A reasonable court would want to know.

A reasonable court would also want to know more. Just how exactly did the child get so severely injured in a scuffle that apparently was between two adults, albeit over herself? What did the father have to say about this? Was this not a case of domestic violence as the regional magistrate suspected?

There is a subtle detail in the record that I find rather curious. The accused pleaded guilty to the charge as put to her. She accepted the outline of the facts as read out from the State Outline. But as the trial magistrate was canvassing the essential elements of the offence with her, and in reply to a direct question as to the whereabouts of the child as the scuffle ensued, the accused had this to say:

"She was nearby **but I did not intend to pour water on the father** but I wanted to threaten him to tell the truth. The father blocked the flask and the water splashed on the back of the child." [my emphasis]

The State readily accepted the variation in the facts. It was its right to do so. But if regard is had to the attempt to down play the medical evidence, this was curious. The point is, the accused, even though unrepresented, seemed quite alive to the possible dangers of **intention**, as opposed to mere **negligence**, being established as an element of the offence. It

was her right to be alive to that. But what did the father have to say about that? After all, for such an offence, i.e. one against, *inter alia*, a child of either of them, the father was a competent and compellable witness in terms of s 247 of the Criminal Procedure & Evidence Act,[*Chapter 9: 07*].

The accused did not stay with her husband and her young victim. She worked and stayed in Mutare. The child stayed with her father in Gutu. It does not appear from the record which of the two was the family's permanent home, or how frequently the accused visited the family. But it does not require permanent presence for the accused to cause further harm to the child. The regional magistrate's hunch was that the accused hated the complainant. Certainly the possibility of psychological damage, as noted on the medical report, continuing or recurring, should have been a cause for concern for any reasonable court.

Furthermore, the propriety of the young girl child staying alone with her father needs investigation. All sorts of morbid thoughts creep into the mind of any reasonable court given the prevalence of cases of abuse of girl children that the courts handle on a daily basis. No definite conclusion can be made on this. And it is not intended to cast aspersions on the father vis-à-vis his relationship with his daughter. But this was a matter crying out for further investigation by the department of social welfare.

In my view, the trial court ought to have realised the anomaly in the outline of the State case and the medical report. It ought to have indicated to the State counsel the appropriate charge. The State may be the *dominus litus* in criminal proceedings. But that does not mean that the court should blindly proceed with an inappropriate charge where the facts clearly show a much serious offence having been committed. *In casu*, the facts depicted a *prima facie* case of domestic violence of a serious nature perpetrated against a six year old by someone whom she would ordinarily look up to for protection.

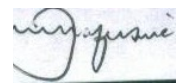
The regional magistrate's observations seemed pertinent. Justice does not seem to have been done. Given the gravity of the offence as detailed by the circumstances, the nature of the injuries sustained and the age of the victim, it would be, in my view, a travesty of justice to confirm the proceedings as being in accordance with real and substantial justice. The sentence was too lenient.

This review judgment is brought to the attention of the Prosecutor-General and the Chief Magistrate for their information.

This court being the upper guardian of all minor children in Zimbabwe, a directive is hereby issued that the record in this matter, together with this judgment, should be referred to

the Department of Social Welfare for a comprehensive investigation into the living conditions of the complainant, and thereafter to submit a report to the Children's Court, together with recommendations, if any, on the appropriate order to be made regarding the living conditions of the complainant.

10 December 2015

A handwritten signature in blue ink, appearing to read 'Mwayera J', written over a horizontal line.

Honourable Mwayera J agrees