

THE PEOPLE v GRACE SIMUTOWE (1993) S.J. 75 (H.C.)

HIGH COURT
CHILESHE V. H., J.
HKR/07/1993

Flynote

Criminal Law - Conditional or absolute discharge - Where the Law provides a punishment.

Headnote

The accused was charged with Assault Occasioning Actual Bodily Harm contrary to section 248 of the Penal Code to which she pleaded guilty before a Kitwe magistrate court. She was convicted and discharged for one year on condition that she was not convicted of any offence during the period. She was also ordered to pay a fine of K7,000 which was latter converted into compensation in addition to K10,000 to be paid out of court. The matter came up for review before the High Court.

Held:

- (i) It would be improper for a magistrate to discharge a person conditionally or absolutely where the law provides a punishment. An exception seems to lie only where the law provides punishment but has ceased to function.

Legislation referred to:

- (i) Criminal Procedure Code, Cap160, S. 337
- (ii) Penal Code, Cap 146, S. 41
- (iii) Criminal Courts Act of 1973, S. 7 (Refer to page 268 of the Stones Justices Manual, volume 1 of 1978)

Review

CHILESHE V. H., J.: delivered the judgment of the court.

The case came before me for review in terms of section 337 of the Criminal Procedure Code Cap. 160.

The accused person, Grace Simutowe, a housewife, appeared before a Subordinate Court of the First Class sitting at Kitwe charged with one offence, namely, Assault Occasioning Actual Bodily Harm Contrary to section 248 of the Penal Code Cap. 146.

The particulars of the offence were that Grace Simutowe on the 26th day of December, 1992, at Kitwe in the Kitwe Distict of the Copperbelt Province of the Republic of Zambia assaulted one Lizzy Moyo thereby occasioning here bodily harm. She pleaded guilty and was convicted and discharged for one year on condition that she was not convicted of any offence during the period and was ordered to pay K7000 fine or 14 days simple imprisonment in default. The fine was converted into compensation in addition to K10,000 which was paid out of court.

Section 41 of the Penal Code Cap. 146 provides various types of punishments which include absolute and conditional discharge. It says that:

“Where a Court by or before which a person is convicted of an offence, not being an offence the sentence for which is fixed by law, is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the probation of Offenders Act is not appropriate the court may make an order discharging him absolutely or subject to the condition that he commits no offence during such period not exceeding twelve months from the date of the order as may be specified therein.”

The above law was copied verbatim from the British Act as provided for by Section 7 of the Criminal Courts Act of 1973 (Refer to page 268 of the Stones Justices Manual, volume 1 of 1978). It says:

“Where a Court or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is expedient to inflict punishment and that a probation order is not appropriate the Court may make an order discharging him absolutely, or, if the Court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding three years from the date of the order as may be specified therein.”

It would be improper for a magistrate to discharge a person conditionally or absolutely where the law provides a punishment. An exception seems to lie only where the law provides punishment but has ceased to function. This was the holding by Lord Goddard C. J. in the case of *Wilcock v Mucl* (1951) 2 ALL E.R. 367.

The facts of the case were briefly that the appellant was convicted by Justices of failing to produce his national registration identity card to the respondent, a police officer in uniform when required to do so contrary to section 6(14) of the National Registration Act, 1939, and was discharged absolutely under Section 7(1) of the Criminal Justices Act, 1948. On appeal, the appellant contended, *inter alia*, that the Act was no longer in force because of several declarations the first of which was made on 19th February, 1956, effectively terminated the emergence Act. But Sir Raymond Evershed M.R. and Delin J. said in their Judgment that the Act was still in force because even though there were several declarations, there was no order in Council to deal particularly with the National Registration Act. The appellant was properly convicted. When he further appealed to the Court of Appeal Lord Goddard said the following in his judgment:

“To use Acts of Parliament, passed for particulars purposes during war, in times when the war in past, except that technically a state of war exists tends to turn law abiding subjects into lawbreakers, which is a most undesirable state of affairs. Further, in this country we have always, prided ourselves on the good feeling that exist between the police and the public and such action tends to make the people resentful of the acts of the police and inclines them to obstruct the police instead of assisting them. For those reasons I hope that if a similar case comes before any other bench of Justice they will deal with the case as did the Hornsey bench and grant an absolute discharge.”

The law can be distinguished in the present case before me. Firstly it has not ceased to function. Secondly it provides a sentence. The trial magistrate himself said so before he passed the sentence. He said that the offence was punishable for 5 years imprisonment. Conditional discharge was, therefore, improper.

There are few provisions under the Criminal Procedure Code which empower a magistrate to discharge an accused person. For example under section 59 a magistrate of the 1st or 2nd Class can cancel a bond or surety in favour of the applicant on ground of good conduct and discharge him. Under section 88(a) an accused person can be discharged if a public prosecutor, with the consent of the Court or on the instructions of the Director of Public Prosecution withdraws the prosecution before judgment. The president may by order under section 164 discharge a person detained during the President's pleasure. Such a discharge could be conditional or absolute. Finally if at the close of the prosecution case the court finds that there is no sufficient evidence to put the accused person on his trial, he could be discharged under section 230.

As can be evidenced here there is no provision under the Criminal Procedure Code empowering a magistrate to impose a discharge against an accused person as a form of punishment after conviction, with regard to compensation Chomba J. said in the case of *The People v Kamocha* (1972) Z.R. 41 that:

- “(i) The powers to order an accused to pay compensation is created by section 162 A of the Criminal Produce Code.
- (ii) The amount of compensation which the Court orders to be paid may not exceed K50 as provided by section 162 A of the Criminal Procedure Code.”

The law at that time gave discretionary powers to magistrates to award compensation of K50 or more. The law is not different. 175 (1) which says under its proviso that in no case shall all the amount or value of the compensation awarded exceeded Fifty Kwacha.

Since magistrates have lost their discretionary powers to award compensation of K50 or more under the repealed law the trial magistrate misdirected himself to award compensation of K7000. It was equally improper to change the fine into compensation because it was not backed by law and did not in hence the jurisdiction of the High Court as provided for by section 9(2) of the Criminal Procedure Code Cap. 160.

For the foregoing reasons I set the sentence aside and replace it by the following:

- (a) K7000 fine. In default 3 months simple imprisonment.
- (b) K50 compensation to be paid out of the fine

Sentence set aside
