DAVID KAROMBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 29 January 2015

Criminal Appeal

T Muchineripi, for the appellant
E Makoto, for the respondent

HUNGWE J The appellant was convicted, on his own plea, with the crime of offering assistance to a woman who had escaped from police custody. He was sentenced to 24 months imprisonment of which six months were suspended for 5 years on the usual conditions of good behaviour. He appeals against both conviction and sentence. His grounds of appeal against conviction is premised on the sole ground that the section relied on in framing the charge was inappropriate, therefore, he ought to be acquitted. There is a concession regarding the sentence imposed which concession, in our view, is well taken in light of the penalty provisions set out in the relevant statute for this type of offence.

This matter raises the common and frequently asked question which is whether an accused person can rely on an obvious technicality to escape conviction. The Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that where there is a defect in the indictment, summons or charge sheet, such defect may be cured by evidence. Section 203 is opposite. In the present case however the complaint is that a wrong section altogether has been preferred instead of a more appropriate one. Assuming the appellant is correct, it seems that this does not, on its own, give succour to him. I say this because, as correctly pointed out in the respondent's heads of argument, s 205 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] ("the Criminal Code") defines an accessory as;

> "A person who renders assistance to the actual perpetrator of the crime, or to any accomplice of the actual perpetrator after it has been committed."

Section 206, the section under which the appellant was convicted, makes it an offence for one to offer assistance after an offence has been committed. This is the offence to which the appellant pleaded guilty. The essential elements of the offence were properly put and admitted by the appellant. The appellant clearly committed an offence when he gave assistance to Patience Bikausaru by removing handcuffs from her hands after she had escaped from police custody. It seems to me that the charge preferred correctly describes the offence committed by the appellant. However, what it may lack is the actual detail of the degree of assistance and the point when such assistance was given. In *S* v *Carlson* 1973 (4) SA 615 the court held that failure to refer to the section at all or reference to the wrong section of a statute or even the wrong statute does not affect the validity of a charge provided that it is clear that the accused, because of the factual description of the alleged offence, was aware of the nature of the charge and was not prejudiced. It appears to me that the appellant could have been charged either as an accessory to the crime of escaping from lawful custody or of the offence of giving assistance after the commission of the crime as defined in the Criminal Law Code. The more appropriate offence, in my view, is the one with which he was charged. However the charge ought to have been framed as follows;

> "Assistance after commission of an offence as defined in section 206 as read with section 185 (1) of the Criminal Law (Codification and Reform) Act, [Cap 9:23] in that on the 28th December 2010 and along Nyamhunga-Chawara Road, Kariba, David Karombe knowingly or realising that there was a real risk or possibility that Patience Bikausaru had escaped from lawful custody, rendered assistance to Patience Bikausaru with a view to enable her to evade justice by taking and harbouring her at his house and removing handcuffs from her person."

There is no suggestion that the appellant was prejudiced by the charge as preferred. She will not be prejudiced should the charge be amended as suggested. In any event, the appellant conceded that there was and will not be any prejudice suffered by the appellant. As I said, the appellant understood, from the factual description of the alleged offence, the charge preferred against him. He admitted the facts constituting the offence. His plea was a genuine admission of the facts as well as the essential elements of the offence. He genuinely pleaded guilty to that charge. He will not be prejudiced if the charge is to be amended as suggested above. It is so ordered. The appellant's conviction is therefore confirmed.

Regarding sentence, a casual reference to s 185 of the Criminal Code reveals that the court *a quo* exceeded the maximum penalty permissible under the law. The sentence is therefore incompetent. It is set aside. The suggested sentence of 8 months suspended on

condition that the appellant carries out community service commends itself as appropriate. The reasons for this is that the said beneficiary of the assistance had already escaped from lawful custody when the appellant assisted her. As such the larger part of the blame ought to be borne by the escapee.

In the result therefore the charge will be amended as suggested above. The appeal against conviction therefore is dismissed. The appeal against sentence succeeds to the extent that the sentence imposed in the court a quo is set aside and in its place the following is imposed;

> "8 months imprisonment of which 6 months is suspended for 5 years on condition the accused is not, during that period, convicted of any offence involving rendering assistance before or after commission of an offence for which he is sentenced to imprisonment without the option of a fine. The remaining 6 months is suspended on condition the accused performs 210 hours of community service at Nyamhunga Clinic, Kariba, on the usual conditions to be explained to the accused by the Magistrate."

BERE J agrees _____

Muchineripi & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners