THE STATE
versus
BRIGHTON MUSHAPAIDZE

HIGH COURT OF ZIMBABWE
MUNGWARI & MUSHURE JJ
HARARE; 16 August 2024

Criminal Review

MUNGWARI J: The matter which came before me for automatic review in terms of section 57 of the Magistrates Court Act [*Chapter 7:10*] is a quintessential example of how not to conduct a trial. Everything that could have gone wrong with the trial, did go wrong. The magistrate, oblivious to the numerous procedural and substantive law prerequisites, rushed to secure convictions, committing fundamental errors in the process. That regrettably, resulted in a grave injustice for the accused who is currently serving a seven-month prison term.

The brief facts which are largely undisputed are that on 21 June 2024, the accused, a 38- year old unemployed man, visited the police station in Mahusekwa. Unprovoked, he began hurling obscenities at the police officers and everyone present at the station. He then removed a nearby washing line and issued threats to assault children who were playing outside, causing them to scurry away to safety. In response to the chaos the accused was creating at the station, a courageous officer, Frank Mutasa tried to restrain him and with great difficulty, managed to confine the violent accused in the police holding cells for disorderly conduct. The accused was however not subdued because some thirty minutes later, Tinashe Mhandu who was sharing a cell with him, called out for help because the cell they were in was engulfed in smoke. Upon investigation, the accused was found in possession of a box of matches. A blanket valued at USD40 was destroyed as a result of the accused's actions.

From those facts, the accused was charged and arraigned before the Magistrates' Court on two charges. One was for disorderly conduct as defined in section 41(a) & (b), of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ('the Code') and the second was for malicious damage to property as defined in s140 (a)&(b) of the Code. Curiously, the charge of disorderly conduct was crafted as follows:

COUNT 1

> "In that on the 21st day of June and at ZRP Mahusekwa Brighton Mushapaidze unlawfully and intentionally engaged in a disorderly or riotous conduct intending to provoke the breach of peace or realizing that there was a real risk or possibility that a breach of peace may be provoked by insulting police officers at a police station and burning a blanket in the police cells" (sic) (the underlining is my emphasis)

Count 2 was a separate charge of destruction of the same blanket. It read as follows:

> COUNT 2
>
> "In that on the 21st of June 2024 and at ZRP Mahusekwa police cell Brighton Mushapaidze unlawfully and intentionally burned one blanket the property of state causing such damage or destruction knowing that the state is entitled to own or, possess or control the property or realizing that there was a real risk or possibility that such damage or destruction may result from his act or omission"

The above must have been red flags for the trial magistrate at Wedza who was seized with ascertaining the correctness of the charge before proceeding with the trial. On the face of it, it appears the accused was charged with the destruction of the same blanket twice. Once in the disorderly conduct charge and secondly as a standalone malicious damage charge. This is tantamount to an improper splitting of charges. The same evidence in the first count would inevitably be applicable to the second count. This however did not strike the magistrate as odd because he proceeded with the trial without addressing the discrepancy.

It is the magistrate's duty above everyone else's to ensure that the charges are properly and clearly formulated before trial can be proceeded with. As can be expected, the unrepresented accused pleaded guilty to both counts. At the end of the truncated trial, the accused was sentenced to:

> "**Count 1:**4 months imprisonment wholly suspended for 3 years on condition that the offender shall not commit similar offences" (*sic)*
>
> **Count 2:**10 months imprisonment, 2 months suspended for 3 years on condition that the offender shall not commit similar offences. A further 1 month suspended on condition the offender restitutes USD 40-00 on or before 26/7/24. The remaining 7 months are effective"

Before the incomprehensible sentences were imposed, the exchange that had taken place between the court and the accused went as follows:

> "Charge read and understood-Count 1
>
> On 21/6/24 and at ZRP Mahusekwa you engaged in disorderly conduct
>
> Charge read and understood-Count 2
>
> On 21/06/24 and at ZRP Mahusekwa you damaged the blanket of the complainant intentionally
>
> Q: How do you plead –count 1

A: I admit

Q How do you plead –count 2

A: admit"

No need to read facts I am aware of them. I dispense"

I am not sure whether the statements which appear below the 'charge read and understood 'in both counts 1 and 2 were meant to be an explanation of the charge by the court. If it was, I doubt that it meant anything to the accused. An explanation of the charge is intended to simplify for the accused any legal terms which may appear therein. To repeat words, like 'disorderly conduct' or 'intentionally' is complicating issues for an unsophisticated and unrepresented accused. The exchange further indicates that when the accused was asked if he needed the facts to be read to him, he responded that it was unnecessary because he was already aware of them. The magistrate subsequently recorded "I dispense." The trial magistrate must have known better. He/she was dealing with an unrepresented accused person. It is dangerous to assume that he knew the facts of the matter.

The procedure of dispensing with the reading to an accused of the outline of the state's case is better suited for accused persons who are represented by legal practitioners who would have explained such facts to them before commencement of trial. In every other case, it remains critical for the court to insist that the facts be read to the accused and to ensure that he understands them. He must be aware of the specific facts which ground his admission of guilt. That stage is vital. It provides the accused with the opportunity to add or modify the facts on record and to confirm whether he agrees with them or not. Moreso, it is at that stage where he can even tender a limited plea and if the State wishes, it may accept such plea. He could even begin to raise a defence at that juncture. Denying the accused that opportunity therefore undermines the integrity of the trial through the guilty plea.

In this case, while the accused might have been familiar with the events of 21 June 2024, there remained the question of whether his understanding aligned with the version presented in the unread state's summary of events. In the case of *S* v *Machokoto* 1996 (2) ZLR 190 (H) this court emphasized the necessity for the trial court to explain the charge and its essential elements to ensure the accused understands the case he has to meet. The magistrate, in this case, erred by assuming that the charge sheet alone constitutes the entirety of the charge. For the avoidance of doubt, a charge in the magistrate's court is anchored on a state outline which describes in some detail the essential elements of the offence as well as the acts or

omissions on which the charge is based. The two go hand in glove and cannot be separated. Where the facts described in the state outline do not support the charge the court can enquire into the said and suggest the crafting of a charge that is the correct fit to the state outline.

It is therefore irregular and inappropriate for a court to inquire from an unrepresented accused whether he/she wishes to have the facts read to him/her. Instead the facts must be read to him accompanied by an assurance that he/she fully understands them. In cases where the accused is represented, the legal representative is expected to affirm to the court-acting as an officer of the court-that they have taken the time to explain the charge to the accused and he understands it and so the court may dispense with the reading of facts. However, even in such circumstances, the proviso to Section 271(2) (b) (ii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ('the CPEA') obligates the court to ensure that the accused comprehends the charge along with its essential elements as well as the acts or omissions on which the charge is based as stated in the charge or by the prosecutor. This duty remains imperative to safeguard the rights of an accused to a fair trial.

To show that not only was the need to read the contents of the State outline to the accused lost to the trial court, the magistrate immediately proceeded with addressing the essential elements of the offence. I can only speculate whether the State counsel was afforded an opportunity to advise the court on the appropriate procedure to adopt because the record of proceedings is silent on that. Needless to state, it appears that it was section 271(2) (b) of the CPEA that was engaged as the trial magistrate proceeded to canvass the essential elements based on the unconfirmed facts. That raises concerns about the validity of the accused's guilty plea. It invites questions on what exactly the accused was pleading to, underscoring the importance of ensuring clarity in the proceedings.

The following was the follow up exchange in the canvassing of the essential elements:

> **"Count 1**
>
> Q On the 21/5/24 you were at ZRP Mahusekwa
>
> A Yes
>
> Q You engaged in disorderly conduct by insulting police officers and burning blankets in police cells
>
> A Yes
>
> Q Why
>
> A I was drunk
>
> Q He was voluntarily intoxicated

A Yes

Q Any defence

A. No

V-Guilty as charged

Count 2

Q On the 21/6/24 you were at ZRP Mahusekwa

A Yes

Q You burnt blankets at ZRP Mahusekwa

A yes

Q Why

AI was drunk

Q voluntarily

Ayes

Q Any defence

Ayes

V-Guilty as charged (*sic*)"

The initial emphasis that the accused was drunk is telling. Put simply, the accused asserted that he had no intention to commit the offence because he was intoxicated at the material time. As a layman, he was raising a defence of intoxication in terms of the Code. A diligent magistrate attentive to the proceedings would have picked that up and pursued the accused's explanation. He was proffering a valid defence to the charge. In legal parlance he was denying that he had the requisite *mens rea* that is to say, the necessary intention to commit the crime. It was important to find out whether or not the accused was so intoxicated that he could not formulate the intention to commit the crimes alleged against him.

The manner in which the magistrate proceeded raises fundamental issues of criminal procedure. A failure to observe mandatory procedural requirements constitutes a gross irregularity which may lead to the conviction and sentence being set aside on review. The questions which arise from the above facts relate to how to properly canvass essential elements of the offence charged and a magistrate's duty to enter a Not Guilty plea as soon as it becomes apparent that an accused may have a valid defence to the charge.

The plea procedure

This is usually a convenient truncated form of trial adopted where the accused is admitting the charge. Fair trial requires that the magistrate satisfies himself/herself that the plea

is indeed understandingly and genuinely being made and that the accused has no defence to the offence. Where the court entertains the possibility that the accused may have a defence or that the plea is not genuine, it must change the accused's plea to that of Not Guilty and ask the prosecution to proceed and prove the accused's guilt beyond reasonable doubt.

Section 272 of the CP&E Act is couched as follows:

> **"272 Procedure where there is doubt in relation to plea of guilty**
>
> If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed—
>
> (a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or
>
> (b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or
>
> (c) is not satisfied that the accused has no valid defence to the charge;
>
> the court shall record a plea of not guilty and require the prosecution to proceed with the trial:
>
> …"

The provision uses the word 'shall 'meaning that as soon as any of the instances of doubt listed in paragraphs (a) to (c) manifests, the court must record a plea of not guilty and require the prosecution to proceed to trial. The court has no discretion to proceed otherwise. Anything apart from stopping and altering the plea to Not Guilty is an irregularity as well as a clear violation of the accused's inalienable right to a fair trial. Sections 271 (2)(b) and 272 of CPEA are some of the legislative provisions that give effect to accused's right to fair trial guaranteed by the Constitution. As can be seen, section 271 (2)(b) prescribes a detailed procedure which is designed to ensure a fair trial to the accused and which must be adhered to without deviation. The proper method of recording the plea has been extensively discussed in numerous authorities. It is a well-trodden path. There is no need for me to overemphasize it, save to state that the purpose of explaining the facts and canvassing of essential elements is not to test the accused person's credibility, but to simply determine precisely what it is that he is admitting to. That is accomplished by posing simplified questions that can easily be understood by a layperson. It is essential to avoid the use of terminology laden with complex legal concepts.

In the instant case, the magistrate, in the above-quoted exchanges with the accused, asked whether the accused confirmed he was voluntarily intoxicated at the time he committed the offence. That question was asked notwithstanding the fact that voluntary intoxication is

broadly defined in the Code and encompasses a number of requirements that may be beyond the comprehension of a layperson. See the cases of *S* v *Bizwick* 1987 (2) ZLR 83 (SC) and *S v Tachiona* 1994 (2) ZLR 402 (H).

Lastly, I feel compelled to address the sentences imposed by the trial magistrate particularly the clauses stating that portions were suspended "on condition the accused does not commit similar offences" This wording of sentences has long been condemned. That which constitutes similar offences is not specified in the sentence. It will be difficult to bring into effect any of those suspended sentences in a case where the accused commits other offences in the future. It is a well-established principle that the conditions for suspension must be clear and specific. They should be appropriate to the nature of the crime and articulated with sufficient precision so that the accused fully understands the scope of the conditions. Appropriate wording is essential to ensure that the accused knows exactly what actions must be taken to avoid the activation of the suspended sentence -see Criminal Procedure in Zimbabwe by John Reid Rowland, at pp 25-46.

The ambiguity surrounding the conditions on which the magistrate suspended the sentences raises significant concerns. Undoubtedly, the accused in this case does not know what crime he must avoid as well as what will happen to him in the event that he does commit it. Further, it is important to note that the accused was sentenced twice for the destruction of a blanket owned by the Zimbabwe Republic Police. He suffered double jeopardy. That practice undermines the fundamental legal principle that prohibits an individual from being tried or punished more than once for the same offense.

Disposition

Once confronted with the circumstances as discussed, the magistrate was obligated to ensure that there wasn't an improper splitting of charges and that the accused would be charged with the appropriate charge of prosecution's choice. That was not done. By proceeding with the two charges, the court fell into grave error. It further misdirected itself when it did not ascertain whether the facts read to the accused were true and correct and whether the accused wanted to add or subtract any facts to it. Seemingly, the unrepresented accused pleaded guilty to facts not known to him, making it a fallacy that he pleaded guilty to anything.

As if that was not all, the magistrate, oblivious to all this, hit a brick wall when the accused indicated that he had a defence to offer to both counts. The court ignored his defences. At that point, the trial magistrate was obligated to alter the pleas of guilty to not guilty and thereafter refer the matter to trial. That was not done. The magistrate then topped up all those

procedural irregularities by imposing impermissible sentences for the improperly split charges. For the above reasons, I conclude that it was grossly irregular for the trial magistrate to convict an accused on pleas of guilty in such circumstances and subsequently sentence him. That being the case the convictions and sentences cannot stand. In the premises, IT IS ORDERED THAT:

1. The convictions of the accused under MARONDERA CRB MHSK 101/24 and the imposition of the sentences be and are hereby set aside.
2. The matter is remitted back to the Magistrate's Court for trial *de novo* before a different magistrate.
3. The registrar of this court is directed to issue a warrant for the liberation of the accused from prison forthwith.
4. In the event of a conviction, the sentence must not exceed the sentence originally imposed and the two (2) months already served shall be considered as part of that sentence.

MUNGWARI J: ……..

MUSHURE J: ……... **Agrees**