THE STATE
versus
ADVICE BWANA
and
TANAKA CHAKUNA

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU JJ
HARARE, 31 September, 2021

Review judgment

CHITAPI J: In this matter the accused persons appeared before the Provincial Magistrate A.J. Maburo Esquire at Mt Darwin Magistrates' Court on 3 March, 2021. They were charged with the offence of assault as defined in s 89 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It was alleged against them that they jointly unlawfully assaulted the complainant, a female juvenile aged 6 years with booted feet and open hands intending to cause harm or realizing that there was a real risk or possibility that their conduct would result in bodily harm to the complainant.

The two accused pleaded guilty to the offence. The trial was purportedly disposed of in terms of the provisions of s 271 (2) (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. The accused persons were sentenced to 12 months imprisonment with 6 months suspended on conditions of future good behavior and the remaining 6 months on condition that the two accused perform community service. The record of proceedings was referred to the Regional Magistrate for scrutiny in terms of the provisions of s 58 (1) of the Magistrates Court Act, [*Chapter 7:10*]

Upon scrutinizing the record of proceedings, the regional magistrate picked up an irregularity. He noted that essential elements of the offence had not been put to the accused and that the trial magistrate did not therefore ascertain whether the guilty plea was genuine. When asked to comment on the omission, the trial magistrate responded that he was shocked to see the regional magistrate's query because he believed that he had endorsed the canvassing of the essential elements on the record. He professed to have been "very much mindful of the provisions

of s 271 (2) (b) CPEA" and attributed his failure to endorse the enquiry on essential elements to what he called "an error of omission".

The regional magistrate after considering the response of the trial magistrate was not satisfied that the proceedings accorded with real and substantial justice. The regional magistrate then referred the record of proceedings to the registrar for placement of the record on review by a judge of this court. In terms of the provisions of s 58 (3) (b) where the regional magistrate refers the record to a judge as was done in this case, the record becomes subject to the process of review as if the proceedings were reviewable in terms of s 57 of the Magistrates Court.

I have considered the record of proceedings. It is not only the trial magistrate's failure to record essential elements which was an irregularity. The trial magistrate contrary to his declaration that he was "very much mindful of the provisions of s 271 (2) (b) CPEA" did not demonstrate his declared knowledge of the procedure in the conduct of the proceedings on review. The following is what appears on record which is material to the conduct of the guilty plea trial-

"No complaints against police s 163A….CPEA explained and understood
Q. Do you want to be legally represented?
A. Axd 1 – No
Axd 2 – No
Charge read and understood
Q. How do you plead
A. Axd 1 – Guilty s 271 (2) (b) CPEA
Axd 2 – Guilty s 271 (b) CPEA

PP: I beg leave to tender the medical report in terms of s 278 CPEA –
Axd (1) and (2) – No objections from both axd
Facts read and understood
Q. Are facts true and correct
A. Yes
Q. Any variations
A. No

E/Elements – Axd 1:….
…."

The above constitutes the complete record of the guilty plea process which was followed by the trial magistrate. As is common cause, the essential elements were not put to the accused. In fact there is no verdict of guilty which was recorded as evident from the above quote. There is however endorsed at the back of the summary jurisdiction (charge sheet) the words, "V. Guilty as

pleaded." Again even if one is generous and holds that the verdict was recorded, that verdict does not indicate whether it relates to one or both of the accused persons.

In regard to the correct procedure for disposal of trials in the magistrates court by way of guilty plea in terms of s 271 (2) (B) of the Criminal Procedure and Evidence Act, there have been written several judgments of the High Court wherein appropriate directions have been given. In some of the judgments, the review judge(s) has directed that judgments should be circulated to the magistracy through the office of the Chief Magistrate. It is unacceptable that the same errors which have been committed and corrected on review are repeated. It is unacceptable for the magistrate to turn a blind eye and close his or her ear to authoritative texts and pronouncements of a superior court whose judgments at law bind the magistrate.

The plea proceeding in this case fell far short of the directives given by this court on guilty plea disposals in the magistrates court. In particular the magistrate was totally oblivious to the provisions of s 271 (3) of the Criminal Procedure Act which must be complied with when a trial is being disposed of in terms of s 271 (2) (b). The two ss (2) and (3) of s 271 aforesaid impose duties on the magistrate on what the magistrate must do, for example to *inter-alia* explain the charge and record the explanation given (not simply the essential elements). In the review case *S* v *Walter Zvakuomba* HMA 34/21, MAWADZE J stated on page 5 of the cyclostyled judgment when speaking to the need for the magistrate to explain the charge:

> "To begin with, the accused was an unrepresented litigant. He in all probability has no knowledge of the law. It was therefore incumbent upon the trial Magistrate to fully explain to the accused the essential elements of the offence of contravening s 70 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]
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> While the accused may appreciate and understand what sexual intercourse entails [and that he was not married to the complainant] he may not understand the reasons or circumstances that constitute criminal conduct arising from such a sexual act. The trial court therefore has a duty to clearly explain to such unrepresented persons the prohibited conduct which constitutes the criminal offence. This was aptly captured by GILLESPIE J in *S* v *Tau* 1997 (1) ZLR 93 (H) at 99(H) when he said:
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> > 'The vast majority of criminal prosecutions are against unrepresented persons. The Magistrate is the primary balwark defending the ignorant or impoverished against potential injustices brought through an excess of zeal, pressure of work, administrative inefficiency or plain ineptitude in investigation and prosecution of the offence. Thankfully most Magistrates appear to be equal to this task, were they not, a judge's responsibilities on review would be unbearably burdensome."

This court therefore speaks with one voice on the need to have the charge and essential elements of the offence clearly explained to an unrepresented accused. The magistrate in this case was not equal to the task and has made the judge's responsibilities on review burdensome. I say this against the magistrate for the reason that I have already recorded that the High Court has through its many judgments played its part in directing magistrates on the procedure for disposing of a trial by guilty plea. If those who are directed refuse to take the directives made or to follow them, then the cause becomes one for the Chief Magistrate to deal with.

MAWADZE J continued in the *Zvokuomba* case at page 6 and said:

> "In my respectful view s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is not only very simple to understand but is used daily by Magistrates in plea cases. Be that as it may, quite a number of Magistrates pay perfunctory adherence to these mandatory provisions thus invalidating the whole proceedings.
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> I shall repeat this exhortation. The essential elements of the offence should be clearly explained to the accused. In putting essential elements of the offence the court should in simple, lucid, clear and detailed manner explain the acts or omissions which constitute the prescribed conduct or the offence. In some cases, this may not be apparent from the charge itself.
>
> This burden falls squarely on the shoulders of the trial magistrate to formulate such relevant and meaningful questions which enables an unrepresented accused to fully understand the essential elements of the charge in compliance with s 271 (2) (b) of the Criminal Procedure Evidence Act [*Chapter 9:07*].
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> The Magistrates Court is a court of record. This means that all what transpires in compliance with the provisions of s 271 (2) (b) of Criminal Procedure and Evidence Act [*Chapter 9:07*] should be properly and fully recorded. If not, how then would the reviewing judge or the appellate court decide whether there has been compliance with the mandatory provisions of s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]?"

I may add that it is ss (3) of s 271 which provides that all that transpired should be recorded. The magistrate in *casu* as admitted by him failed to comply. I should also note that although the *Zvakuomba* judgment dealt with a case of sexual assault, the principles on how a guilty plea is to be disposed of applies to all cases. The case of *Zvakuomba* albeit not quoting previously decided case, reiterates what has been stated in several judgments decided before it. See *S* v *Test Phiri* HH 121/18; *S* v *Febbie Mutokodzi and* others HH 299/21, *S* v *Mangwende* HH 695/20; *S* v *Moyo* HH 697/20, *S* v *Madhananga* HH 386/21; *S* v *Sammuel Agere* HH 123/2018.

Having discussed for the umpteenth time the procedure for disposal of guilty plea, it is apparent that the failures of the magistrate to comply with set procedures in disposing of the

proceedings on review was so grossly irregular that the proceedings cannot stand. They must be set aside.

Disposition

The following order is made

i) The proceedings in case No CRB CTN 22-23/21 are hereby quashed for procedural irregularity.

ii) The Prosecutor General in his discretion may prosecute the accused afresh provided that if they are properly convicted they should not be sentenced to any greater sentences than previously imposed and any sentence already served by them shall count for purposes of serving any fresh sentence which may be imposed on re-trial.

MUSITHU J AGREES ……