THE STATE
versus
JUSTIN NGWENYA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 September 2021

**Review Judgment**

CHITAPI J: The above matter is before me on automatic review in terms of s 57 of the Magistrates Court Act, [*Chapter 7:10*]. When the record was first placed before me in April 2021, I considered five other records which were dealt with by the same learned magistrate T A Chamisa, Esquire. The other five records were as follows: *S* v *Jeseline Mare* KADP 40/21, *S* v *Nyasha Shava* + 1 KADP 104-5/21, *S* v *Watson Kuruneta Banda* + 1 KADP 22-23/21, *S* v *Tavengwa & Anor* CHK 4-5/21 and *S* v *Simbarashe Tembo* BF 5/21. The proceedings suffered from the same procedural defect of a failure by the learned magistrate to comply with the provisions of s 271(3) of the Criminal Procedure & Evidence Act when conducting the trial of the accused on a guilty plea in terms of the provisions of s 271(2)(b) which must be read together with s 271(3).

In a minute to the learned magistrate dated 13 April 2021, I raised a query in respect of the proceedings in all the six records as follows in part:

> "The magistrate does not appear to have complied with the peremptory provisions of Section 271(3) of the Criminal Procedure and Evidence Act which requires that the magistrate shall explain the charge and essential elements of that charge which shall be recorded. The magistrate recorded the following on record:
> Charge explained to accused person and understood.
>
> In the case of *S* v *Banda* KADP 22-23/21 the magistrate recorded:
>
> "Charge explained to accused persons and understood."
>
> May the magistrate comment on the query. Further may the magistrate indicate whether he/she is acquainted with the decision of this court in *S* v *Enock Mangwende* HH 595-20 whereas s 271(3) of the Criminal Procedure & Evidence Act is discussed…."

The learned magistrate responded as follows in a minute dated 4 June 2021. The minute was only placed before me in September 2021 owing to limited court operations because of Covid-19, Lockdown Restrictions: The learned magistrate however forwarded this record of proceedings only and not the other five records. There was no explanation for that omission.

> "…. I have noted the concerns raised by the Honourable Judge and I am indebted and stand guided.
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> After having gone through the case of *S* v *Enock Mangwende* HH 695-20 I am now aware that I am in terms of s 271(3) of the Criminal Procedure & Evidence Act, [*Chapter 9:23*] required to explain the charge to the accused and record the explanation so given in context. This is so because the said provision is intended to ensure fairness to the accused by ensuring that the guilty plea is tendered deliberately and knowingly.
>
> I will not repeat the same mistake in future as I am now fully aware of the fact that section 271(3) provision must be complied with."

It is noted that the omission to strictly comply with the provisions of s 271(3) of the Criminal Procedure and Evidence Act, has been widespread. However, it is also noted that the procedure set out in *S* v *Mangwende* (*supra*) has now become selected practice as appears from recent cases being brought on review. A deliberate approach to writing as many judgments as possible on the same point of the need to comply with s 271(2)(b) as read with s 271(3) has been adopted in the several impugned proceedings which I have dealt with, as a way of providing as much reading material on the point as possible given the many learned magistrates who are dotted around the many magistrates' courts that are in the country. If the magistrate cannot find the *Mangwende case*, there will be several other cases to refer to.

In *casu*, the accused was charged with the offence of robbery as defined is s 126(1)(a) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. It was alleged that on 24 January 2021 at Tepe turn off, Kadoma, the accused used force and violence to disposes the complainant of his Honda Fit motor vehicle. The accused also stole the complainant's identity and bank cards. The *modus operandi* of the robbery was that, the accused and his accomplice forcibly entered the complainant's vehicle. They ordered the accused off the driving seat and drove to a bushy area where they ordered the complainant off the vehicle and further ordered him to sit on the ground. They demanded for money and other valuables. The complainant surrendered his wallet which contained US$31.00; ZWL1 000.00, driver's licence and bank cards. The accused and his accomplice then stabbed the complainant with a knife once on the chest before handcuffing the complainant whom they ordered to lie down. They again stabbed the complainant for a second time with the knife on the chest.

The accused and his accomplice left the complainant where they had stabbed him and drove away in the vehicle. In the vehicle there was ZWL$28 000.00 in the glove compartment, a Nokia cellphone handset and 18 x 6 pack bottles of super chibuku. The accused was arrested in possession of the vehicle. He was searched and found in possession of two double edged

hand-made knives hidden in his boots. He was also found in possession of the complainant's cellphone and part of the money stolen from the complainant.

The accused pleaded guilty to the charge and accepted the summarized facts as correct. The accused, a 24 year old male adult was sentenced to 24 months imprisonment which the learned magistrate expressed as follows:

> "24 months imprisonment of which 4 months imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving dishonesty for which upon conviction accused is sentenced to imprisonment without the option of a fine.
>
> A further 4 months imprisonment is suspended on condition accused restitutes complainant in the sum of US$31.00 and ZWL$27 340.00 on/or before 26 February 2021 through the Clerk of Court, Kadoma Magistrates Court.
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> Effective: 20 months imprisonment."

Even though the learned magistrate committed an irregularity which vitiates the proceedings, I nonetheless consider that I should comment on the sentence which was imposed by the magistrate. It is not only mathematically wrongly calculated as an effective term of imprisonment of 20 months as was recorded but the sentence is grossly inadequate and a clear travesty of justice. It sends a wrong message in the minds of the public that offenders convicted for committing serious offences can expect lenient sentences to be imposed by the courts. In regard to calculation of sentence, the total suspended sentence on conditions of good behaviour and restitution was 8 months which if subtracted from 24 months leaves an effective sentence of 16 months imprisonment. In this respect, it is emphasized that the trial court should pay attention to all details including calculation of sentences to avoid making embarrassing errors of a failure to make a simple subtraction of simple figures.

As regards the leniency and inadequacy of the sentence, it was quite difficult to appreciate why, given the serious admitted facts, the learned magistrate even considered that he had jurisdiction to pass an adequate sentence. In the first instance, the learned magistrate was required to consider whether or not the robbery was committed in aggravating circumstances set out in subs (3) of s 126 of the said Act. The robbery was clearly committed in aggravating circumstances because the accused possessed and used a dangerous weapon, a knife and stabbed the complainant. The accused also inflicted serious injury on the complainant by stabbing the complainant on the chest. In such a situation s 126(2)(a) of the Criminal Law Codification & Reform Act provides that the appropriate sentences range from a definite prison term to imprisonment for life. It should have dawned on the learned magistrate

that his ordinary maximum jurisdiction of 2 years imprisonment was not sufficient. The magistrate should at best and after conviction have referred the record to the Prosecutor-General for remittal to the magistrate with extended jurisdiction or a direction to refer the accused to the High Court for sentence. The facts of the matter were in my view so serious that the appropriate level of magistrate to preside over the matter was a Regional magistrate. The lesson to be learnt by the learned trial magistrate is that it is important to also pay attention to detail in relation to whether jurisdiction in a particular case should be exercised.

Having commented on the disturbingly inadequate sentence as an aside, this review is disposed as follows:

(i) The proceedings in case no. KADP 103/21 are quashed and the sentence imposed set aside for procedural irregularity.

(ii) The Prosecutor-General may in his discretion prosecute the accused afresh.

(iii) A copy of this judgment is to be forwarded to the Prosecutor-General for his urgent attention.

MUSITHU J agrees:…….