THE STATE
versus
DAVID CHIGANGO

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 13 January 2010

Criminal Review

BERE J: The accused in this matter pleaded to and was convicted of the offence of contravening s 113(1)(a)(b) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

Upon his conviction the accused was sentenced to a straight term of 2 years imprisonment.

Two issues have exercised my mind in this matter

The manner in which the conviction itself was secured as well as the sentencing approach adopted in this matter are the two issues of major concern.

Ad Conviction

At the conclusion of the canvassing of the elements of the offence the learned magistrate recorded the following notes:-

> "Q. Is this a free admission of the charge and the allegations as read to you? – Free admission".

It will be further noted that when the accused was asked in mitigation why he stole, the accused retorted as follows:-

> "I wanted to sell the property to raise money to buy food. I had not been paid for 6 months. I sold the pipes and raised $7000". (my emphasis).

When the Learned Magistrate wrote his reasons for sentence he took it upon himself to enter the boxing ring by commenting *inter alia* as followed;

> "I do not believe you when you say you had not been paid for 6 months. You would not have stayed on that job for so long if you were not being paid".

The above comments by the learned magistrate were not as a result of any inquiry carried out by the magistrate. No evidence was sought through the public prosecutor to try and put to test the issues raised by the accused person but the presiding magistrate took it upon

himself to counter the utterances made by the accused from a very uniformed position (that is, on the party of the magistrate).

With all due respect, it is clear to me that when the accused proffered to the presiding magistrate the reason why he had committed the alleged theft, the accused was not merely raising a very strong mitigatory factor but a possible defence to the charge of theft.

It occurs to me that the accused was at that stage raising either the defence of a claim of right or that of a mistake of fact which defences could not simply have been wished away at that stage but screamed for the court to record the plea of not guilty in order to pave way for a fully fledged trial as provided for by s 272 of the code[1].

For the avoidance of doubt the section in question is couched in the following:-

> "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 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 to trial;
> ……."

There are separate requirements which must be satisfied before either a claim of right or a mistake of fact can succeed as a defence. See the case of *Stainer v Regina*[2]and *S v Davy*[3].

These defences are best dealt with in a proper trial and not to be intuitively dismissed by the trial court because of the nature of the inquiry that must be carried out.

In the instant case it was improper for the presiding magistrate to merely dismiss the explanation tendered by the accused without carrying out a proper inquiry, for in doing so he was offering himself as a witness without affording the accused person an opportunity to cross-examine him or to test the verasity or otherwise of his assertion or conclusion. Such an approach is wrong.

Ad Sentence

---

[1] Criminal Procedure and Evidence Act [*Cap 9:07*] "272 Procedure where there is doubt in relation to plea of guilty

[2] 1956 R and N 199

[3] 1988 (1) ZLR 238 See also a Guide to the Criminal Law of Zimbabwe, G Feltoe, 2nd edition Published in 1984 p 26-29

In the unlikely event that I am wrong in making a finding that the explanation tendered by the accused raised a potential defence, there is one other monumental mistake which the presiding magistrate appear to have committed.

Assuming that the accused person had gone for six months without being paid his salary (as he stated to the presiding magistrate), surely this would have been a very strong factor in mitigation which could not have by any stretch of imagination justified the sentence imposed by the magistrate.

For the above reasons I am unable to confirm these proceedings and with the concurrence of my brother BHUNU J I make the following order-

1. The conviction and sentence are set aside.
2. The charge against the accused is remitted for trial *de novo* before a different magistrate
3. In the event of the accused being convicted, any period served in prison already must be taken into account in the assessment of sentence
4. Pending the hearing of the matter the accused is to be released from prison.

BHUNU J: agrees, ……