HH 58/18
CRB H 687/11

HIGH COURT OF ZIMBABWE
BERE J
HARARE 12 JUNE 2013 & 7 FEBRUARY 2018

Review Judgment

BERE J: When this matter was placed before me on review I immediately conferred with my brother Judge and with his concurrence I ordered the immediate release of the accused person. Here are the reasons that informed my decision.

The accused appeared at Norton Magistrates' Court charged with the offence of theft as defined in section 113 (1) (2) (d) of the Criminal Law (Codification and Reform) Act Chapter 9:23. The brief allegations were that the accused had been entrusted to keep custody of a housing cooperative money which he converted to his own use. The amount converted was put at US$42 000,00.

What exactly transpired in court when the accused person appeared on a plea is well captured by the Regional Magistrate, Mr Tsikwa who directed the record for review to the High Court. The learned magistrate commented as follows when he invited a response from the trial magistrate:

> "The record of proceedings indicates that the accused person was convicted after pleading guilty to the charge. However, an examination of the record shows that accused was subjected to thorough questioning by the court. It appears the court was investigating the case during the plea proceedings to an extent of descending on the arena. Most of the questions asked by the trial court had nothing to do with the essential elements of the offence but the court proceeded to convict the accused.
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> Furthermore, the accused person did not unequivocally plead guilty to the charge but proffered some explanations which amounted to defence(s), for instance, the accused person indicated that he did not admit taking $42 000,00 but was prepared to accept a figure around $20 000,00. Despite this, the court convicted him of stealing $42 000,00 without any proof of that amount.

The accused person indicated in this lengthy questioning that the council delayed in settling land for stands to the co-operative and he used the money to buy building material. Further, he argued that if an audit was conducted it could have revealed the actual short fall but the court went on to ask the accused to produce evidence.

In addition, the accused did not admit that he failed to allocate stands but he was still in the process and the people who caused his arrest were impatient and he indicated to the court that he had a right to do what he did.

Despite all his explanations which showed he was trying to raise a defence, the trial magistrate proceeded to convict him.

Did the trial magistrate not realize accused raised a number of issues which required a full trial making it necessary to alter a plea to one of not guilty?

Does the trial magistrate appreciate that in plea proceedings she must be satisfied of the genuineness of accused's guilty plea and that once in doubt she has to alter the plea to not guilty?

Does the trial magistrate know that the accused does not have the onus to prove anything but the state?

Why was the accused person subjected to lengthy questioning by the court instead of asking question relevant to the essential elements of the offence?

How did the trial court arrive at the figure of $42 000,00 without any evidence because the accused denied taking that amount?

May the trial magistrate comment on all these issues."

Faced with this elaborate constructive criticism, the learned trial magistrate conceded his mistake leading to the referral of the record of proceedings for review.

There can be no doubt that the procedure adopted by the trial magistrate went against the provisions of section 271 (2) (b) of the relevant Act[1] which regulates the handling of a plea like the one the magistrate was seized with.

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[1] Criminal Procedure & Evidence Act (Chapter 9:07)

The section in question envisages an unequivocal plea of guilty. The protestations which characterised the recording of the accused's plea in this case are not consistent with the provisions of the Act.

It is elementary procedure that once an accused person brought on a plea gives an explanation which tends to show that if properly interrogated the explanation might result in a defence, then the proper thing for the court to do is to alter the plea to one of not guilty in order to pave way for a fully fledged trial. This would accord well with the provisions of section 272 of the same Act.

What one sees in these proceedings is a determined effort by the trial magistrate to investigate the matter as if he were the investigating officer instead of having to merely set out the elements of the charge of theft to the accused. There can be no doubt that by doing what the trial magistrate did, she fell into a serious error warranting the conviction to be set aside.

In looking at this case, I could not agree more with WADDINGTON J's views captured in the head note to the case of *S* v *Matimba & Ors*[2] where the learned Judge is quoted as follows:

> "Particularly when an accused person is unrepresented or is lacking in legal knowledge, magistrates, before entering pleas of guilty to offences with which the accused is charged, should be satisfied that the accused understands the elements of the offence and admits those elements. The elements of the offence must be fully and properly explained to the accused."

There should never be a time when the magistrate has to be involved in a "fight" with the accused as it were in order to extract an admission of guilt. The questions asked by the magistrate and the responses given by the accused must leave an innocent by-stander in no doubt that the accused's plea of guilty is both genuine and unequivocal.

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[2] 1984 (1) ZLR 283

See also the case of *S* v *Dube and Another*[3].

It was for these reasons that I ordered the immediate release of the accused and with the concurrence of my brother MUSAKWA J I formulate the appropriate order as follows:

1. The conviction and sentence are set aside.
2. The matter is remitted for trial de novo before a different judicial officer.
3. In the event of the conviction any period spent in prison by the accused must be taken into account in the assessment of sentence.

Musakwa J agrees ……

[3] 1988 (2) ZLR 385 (SC)