

THE STATE

Versus

TRUST MANOKORE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4 May 2023

Review judgment

DUBE-BANDA J:

[1] This is a review at the instance of the scrutinising Regional Magistrate. The accused was charged with two counts: *viz* count 1, physical abuse as defined in s 3(1)(a) as read with s 4(1) of the Domestic Violence Act [Chapter 5:16]. It being alleged that he kicked and slapped the complainant his wife several times all over the body. In count 2 he was charged with the crime of malicious damage to property as defined in s 3(1) (h) as read with s 4(1) of the Domestic Violence Act [Chapter 5:16]. It being alleged that the accused smashed a Tecno core pad cell phone belonging to the complainant his wife.

[2] He pleaded guilty in count 1 and he was convicted and sentenced to ten (10) months imprisonment of which two (2) months were suspended for five (5) years on condition of good behaviour, and a further eight (8) months suspended on condition of community service. In count 2 he pleaded not guilty and after a contested trial he was convicted and sentenced to a fine of \$30 000.00 in default of payment one (1) month imprisonment. In addition, he was sentenced to a further one (1) year imprisonment suspended on condition of restitution.

[3] Nothing turns on count 1, it is count 2 that is subject to this review judgment.

[4] The case was referred for review by Regional Magistrate under a covering minute dated 13 December 2022. It appears from the said minute that he came across the matter during scrutiny. He is of the view that the accused did not receive a fair trial because of the following reasons:

- i. The trial magistrate did not explain the trial processes and stages to an unrepresented accused, e.g., the provisions of s 188 and 189 of the Criminal Procedure and Evidence Act [Chapter 7:09] (CP & E Act). And the provisions

of s 198 and 199 of the CP & E Act, i.e., the defence outline and the defence case respectively.

- ii. In reply to a query generated by the Regional Magistrate, the trial magistrate indicated that he explained but omitted to record the explanation. The Regional Magistrate is of the view that the explanation ought to have been recorded and since it was not recorded, it can reasonably be inferred that no explanation was given.

[4] It is a fundamental principle of our law that an accused person is entitled to a fair trial. The trial should be fair in substance as well as form. Where the accused is unrepresented, a trial magistrate has a duty to assist the accused to the extent that is necessary to ensure that justice is done. See: *Garande* HH-46-02. This is not to say that the magistrate must assume the role of being defence lawyer. He or she does not have to conduct the defence. He or she does, however, have to try as far as possible to ensure that relevant stages of the trial are explained to an unrepresented accused.

[5] At the close of State case, even where there is no application for a discharge, the magistrate must examine whether State made out *prima facie* case such as to require accused to be put to his defence. And must inform the accused of his right to apply for a discharge. (s 198(3) CP & E Act). Where the accused is put to his defence, the magistrate shall request the accused to make a statement, if he or she wishes, inform him of his or her of his right to remain silent, and the consequences of exercising that right, i.e., carefully explain that failure to mention salient features of a defence at the outset may lead to adverse inferences being drawn. (s 188(b) of the CP & E Act). And explain to him that he has a right to call witnesses and to testify himself. (s 199 CP & E Act). See: *Musindo* 1997 (1) ZLR 395 (H).

[6] In terms of s 51(1) The Magistrates' Court Act [Chapter 7:10] the magistrates' court is a court of record. The record must be complete and tell a full and accurate story of what transpired in court. See: *S v Chidavaenzi* HH 133-08; Prof. G Feltoe *Magistrates' Handbook* 446. The magistrate cannot start to add and explain what is not in the record. The record must speak for itself. I take the view that the explanation by the trial magistrate that "due to pressure of work the magistrate omitted to record the explanation although the court explained to the accused" is inconsequential. It serves no useful purpose. What is on record is that the trial

court did not ensure that the relevant stages of the trial are explained to an unrepresented accused. This constitutes a gross irregularity necessitating the quashing of the conviction and setting aside of the sentence in count 2.

[7] A criminal trial is not a game where the magistrate plays the role of an umpire. He has to ensure the fairness of the whole proceedings. In this regard it is helpful to call to mind what Curlewis JA said in *R v Hepworth* 1928 AD 265 at 277, viz:

“A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done”.

The need for judicial officers to “assist” unrepresented accused throughout the trial cannot be over-emphasized.

[8] For the reasons outlined above, I am satisfied that the proceedings were not in accordance with real and substantial justice and have to be set aside. A substantial miscarriage of justice has actually occurred. This is a typical textbook example of how a criminal trial should not be conducted.

[9] I have considered whether it would be appropriate to further order that in the event of the accused being convicted he was not to be visited with a sentence in excess of that originally imposed upon him. I do not consider it advisable to so fetter the discretion of the subsequent trial court; for the degree of the accused’s moral blameworthiness may conceivably be shown, on the evidence adduced before that court, to be greater or lesser than that which emerged at his former trial. See: *Lambat v The State* SC 102/83.

In the result, I order as follows:

1. The conviction and sentence in count 1 be and is hereby confirmed.
2. The conviction in count 2 is quashed and the sentence is set aside.
3. The Prosecutor-General may in his discretion commence proceedings against the accused in respect of count 2 *de novo* before a different magistrate.

It is so ordered.

DUBE-BANDA J:

KABASA J:AGREES