

THE STATE
versus
SMART KATSUTSO

HIGH COURT OF ZIMBABWE
MUCHAWA & MUNGWARI JJ
HARARE, 30 March 2023

Criminal Review

MUNGWARI J: The matter was referred to this court by the scrutinizing regional magistrate in terms of s 58 (3)(b) of the Magistrates Court Act [*Chapter 7:10*]. She raised issue with the procedure that was adopted by the trial court in light of the fact that the accused is a certified psychiatric patient.

The background of the case is that, on 28 September 2022 the accused requested food from his mother. She in turn asked him to be patient because his supper was not yet ready for consumption as she was still preparing it. Angered by his mother's response the accused assaulted her with fists. Bristling with fury he took a hoe intending to assault her more but was disarmed and restrained from doing so by the timely intervention of a neighbor who responded to the sounds of the scuffle. The complainant sustained bruises on the face and legs.

The accused was subsequently arrested and charged with physical abuse as defined in the Domestic Violence Act [*Chapter 5:16*]. He appeared before a magistrate sitting at Harare who on 5 October 2022 before trial and seven days after the commission of the offence, noted that the accused was showing "signs of mental disorientation." She referred him for a mental examination in terms of the Mental Health Act [*Chapter 15:12*] ("the MH Act") in order to ascertain if he could stand trial. After several postponements of the matter the accused was eventually examined. The two reports alluded to the accused's current mental status. He was said to be mentally stable and on medication. Against this background the trial magistrate decided to take down his plea of guilty as the accused had indicated that he was pleading guilty to the offence.

The accused purportedly pleaded guilty to the charge. The court took his plea in terms of s 271(2)(b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*].

In the process of canvassing the essential elements of the crime the accused informed the court that the reason he had struck the complainant was because he had not taken his medication for mental illness. That response suggested that the unrepresented accused was in fact raising the defence that he was mentally disordered or intellectually handicapped at the time of the alleged commission of the offence. The red flags raised by that response should have triggered the court to stop the proceedings and alter the accused's plea of guilty to not guilty. Thereafter it must have ordered a subsequent medical examination of the accused to ascertain his mental status at the time of commission of the crime.

This court has previously stated that the differences in those procedures are critical. An accused who may have been mentally disordered at the time he committed an offence may be mentally stable to the extent of being fit to stand trial at the time he appears in court. That does not detract from the fact that he may have been mentally disordered at the relevant time. In the case of *S v Rifias Mandiko* HH 836/22 MUTEVEDZI J elaborately explained when and how each of the particular procedures may be adopted. At p 3 of the cyclostyled decision he stated that:

“As can be discerned from the provision, the procedure under s 28 (2) is intended to cover those instances where before or during trial, there is a suspicion or danger that the accused person is mentally disordered or intellectually handicapped. If that were to be the case, the mischief which the statute seeks to deal with is to prevent a court from proceeding with a trial in circumstances where because of mental affliction, an accused does not comprehend the proceedings and or is unable to properly conduct his defence. That scenario speaks to the overall right to a fair trial enshrined in s 70 of the Constitution. Where the judge or magistrate is satisfied that such is the case, the trial does not and cannot proceed. The court adopts the summary procedure of committing the accused to a mental institution for treatment. The procedure allows the judicial officer to conduct an inquiry into the mental state of the accused.”

In other words s 28 is solely concerned with whether an accused is or is not fit to stand trial. It does not afford an accused person a defence to the charge. In contrast to s 29 which provides as follows:

Section 29 of the Mental Health Act is to the following effect.

“29. Procedure where person charged is found mentally disordered or intellectually handicapped at time of committing offence

(2) If a judge or magistrate presiding over a criminal trial is satisfied from evidence, including medical evidence, given at the trial that the accused person did the act constituting the offence charged or any other offence of which he may be convicted on the charge, but that when he did the act he was mentally disordered or intellectually handicapped so as to have a complete

defence in terms of section 248 of the Criminal Law Code, the judge or magistrate shall return a special verdict to the effect that the accused person is not guilty because of insanity.”

In relation to the above provision the court in *S v Rifias Mandiko* (supra) made the following pronouncement:

“The above provision is intended to cover situations where an accused person alleges that he was mentally disordered or intellectually handicapped at the time that he or she committed the offence. In other words, the accused will be alleging that at the material time, he was suffering from mental illness. If he was and has still not recovered from that problem, the procedure under s28 (2) covers him/her. S29 (2) applies where the accused has sufficiently recovered from mental illness and is fit to stand trial but his defence is that he was mentally disordered at the time of commission of the offence.” (My emphasis)

As is clear I restate again that the distinction between s 28(2) and s 29(2) is that the former is intended to test whether an accused can understand the proceedings and properly conduct his defence whereas the latter is a defence which an accused may proffer to a criminal charge.

After being invited to comment on the irregularity in the proceedings, the trial magistrate conceded the error. In any case, this court in the case of *S v Godfrey Karomo* HH 546/22 dealt extensively with what is required when a situation of this nature arises. That case is particularly instructive in this regard. It details that once confronted with the circumstances such as those in the present case, the magistrate is obligated to alter the plea to one of Not Guilty and thereafter to invoke the provisions of the Mental Health Act and order the examination of the accused to ascertain whether the accused was mentally disordered at the time of commission of the offence. Evidence to determine whether the accused was mentally disordered at the time he committed the offence should be availed. In the event that he was, he has a full defence at his disposal and a special verdict would have to be returned.

That procedure was not followed in this case. It is an irregularity in the proceedings. The accused, unrepresented as he was would not have known how to clearly lay out his defence without the assistance of the court. The tell-tale signs that he was mentally ill at the material time straddled all over the record of proceedings and in the accused’s responses. This conviction is predicated upon a serious oversight of a clear defence which was available to the accused. The magistrate must have altered the accused’s plea from guilty to not guilty and ordered the matter to proceed to trial.

DISPOSITION

In the premises, **IT IS ORDERED THAT:**

1. The conviction and sentence of the accused be and are hereby set aside.

2. The matter is remitted to the Magistrates' Court for trial *de novo* before a different magistrate with full observation of the relevant provisions of the Mental Health Act.

MUNGWARI J:.....

MUCHAWA J:.....Agrees