

THE STATE

Versus

ASHTON SVUNDU

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 7 JUNE 2021 & 10 JUNE 2021

Criminal review

Accused in person
K. Jaravaza, for the respondent

DUBE-BANDA J: The trial magistrate referred this matter to this court for sentence as she felt that she lacked jurisdiction to sentence the accused. The accused was arraigned before the Magistrate's court sitting in Shurugwi. He was charged with the crime of contravening section 70 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 23rd November 2019, and at Gakata Village, Chief Nhema, Shurugwi, the accused had extra marital intercourse with complainant a female person below the age of 16 years. It turned out that at the material time accused was infected H.I.V. positive. This fact escalated the sentence beyond the jurisdiction of the trial court.

After going through the record of proceedings, I noted that the accused person was without legal representation during the trial, and the court did not comply with the provisions of section 163A of the Criminal Procedure and Evidence Act, [Chapter 9:07]. In terms of the provisions of section 163A aforesaid, the magistrate in any trial, before calling an unrepresented accused to plead to a charge, shall inform such accused of his right to legal representation. The court shall record the fact that the accused has been informed of such a right and the accused's response must be recorded. This is a peremptory requirement. See: *The State v Zvidzai Manetaneta* HH 185-20; *Potifa Sawaka v The State* HH 262-20. The trial before the Magistrate's Court commenced as follows:

Public Prosecutor: Matter is coming up for trial your worship.

Court: Charge C/S 70 of Code.

Charge put to the accused and understood.

By Court to accused:

Q. How do you plead?

A. Guilty section 271(2)(b)

By Court: Facts read to the accused and understood.

By Court: Plea amended to not guilty.

Accused provided his defence outline, and the State opened its case.

At the commencement of what was to be sentencing proceedings, I raised this issue with Mr *Jaravaza*, counsel for the State. Counsel conceded that in the trial before the Magistrates Court there was no compliance with s 163A of the CP & E Act. The State acceded to the disposal of this matter by way of a review. I therefore invoked section 29 (4) High Court Act, which provides that:

Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review.

The import of the provisions of s 29 (4) of the High Court Act is simply to promote and extend the supervisory role and review powers of the High Court over the Magistrates Court proceedings. This empowering provision caters for situations where it comes to the notice of this court or a judge of this court that criminal proceedings of an inferior court are not in accordance with real and substantial justice. This court or a judge of this court is empowered to review such proceedings notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review. See: *Potifa Sawaka versus The State* HH 262-20. In *Praymore Makanda v (1) Magistrate Sande N.O (2) Magistrate Kadye N.O (3) Magistrate Ndiraya N.O (4) The State* SC 03/2021, the Constitutional Court noted that this court is endowed with statutory powers of review that might be invoked and exercised *mero motu* to address or redress patent irregularities.

The Constitution of Zimbabwe Amendment (No. 20) Act 2013 (Constitution) guarantees every accused person the right to a fair trial, this includes the right to legal

representation. The right enacted in the s 163A of the CPE Act is procedural. The substantive right is located in s 69 of the Constitution, which provides that every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum. Therefore, the right to legal representation is a right of substance, not form, and it is the cornerstone of a fair trial. See: *The State v Zvidzai Manetaneta (supra)*. The record shows that the trial court violated this peremptory requirement and thereby denied applicant the right to legal representation. The Constitutional Court in *Praymore Makanda v (1) Magistrate Sande N.O. (2) Magistrate Kadye N.O. (3) Magistrate Ndiraya N.O. (4) The State CCZ 03/21* has observed that such an omission constitutes a gross irregularity.

In conclusion, the failure by a trial court, to inform the accused person of his right to legal representation, is an irregularity that is fatal to the proceedings. In terms of s 29 (2) (b) (i) of the High Court Act, [*Chapter 7:06*], I find that the proceedings in the court *a quo* were not in accordance with real and substantial justice, as a result, a substantial miscarriage of justice has actually occurred. The conviction cannot be confirmed. It must be quashed and set-aside.

Disposition

In the result, I make the following order: -

1. The conviction is and hereby and set aside.
2. The matter be referred for a trial *de novo* before a different magistrate.

Makonese J I agree

National Prosecuting Authority, respondent's legal practitioners