

THE STATE
versus
PANASHE RAKATA

HIGH COURT OF ZIMBABWE
CHITAPI AND MUSITHU JJ
HARARE, 14 March 2022

Criminal Review

MUSITHU J: The accused person was charged with contravening s 66 of the Criminal Law Codification and Reform Act,¹ (the Code) that is “Aggravated Indecent Assault”. He was convicted on his own plea of guilty. He was sentenced on 31 May 2021 to

“3 years imprisonment wholly suspended for 5 years on condition the accused does not during that period commit any offence of a sexual nature and for which upon conviction he is sentenced to imprisonment without the option of a fine.”

The brief circumstances founding the charge were that on 7 August 2018 and at Karimuswa Village, Chief Chinamhora, the accused committed the offence by inserting his finger into the vagina of Sharon Changa a female juvenile. At the trial, the accused aged 17 then, was assisted by his mother Getrude Kapfudza. Having explained the accused person’s rights to legal representation, and having recorded his response, the learned Magistrate proceeded as follows:

“PLEA: Guilty, Section 271(2)(b).

FACTS

Q. Do you understand the facts?

A. Yes.

Q. Do you agree with the facts?

A. Yes.

Q. Any additions or subtractions?

A. We were playing together with the complainant in the kitchen. We were playing chase.”

The record of proceedings was placed before me on review in October 2021. I noted that the learned Magistrate may not have complied with the provisions of s 271(2)(b) as read with s271 (3) of the Criminal Procedure and Evidence Act (the Code).² On 14 October 2021, I raised the following query with the trial magistrate:

¹ [Chapter 9:23]

² [Chapter 9:07]

“Having proceeded in terms of section 271(2) (b) of the Criminal Procedure and Evidence Act [Chapter 09:09], did the Court comply with the provisions of section 271(3) of the said Act? See also *S V Mangwende* HH 695/20.”

The learned Magistrate responded through her letter of 10 November 2021. The letter reads in part as follows:

“.....

The court concedes that it did not comply with the provisions of section 271(3) of the Criminal Procedure and Evidence Act. This was an oversight on the part of the court not to explain the charge to the accused, record such explanation given.

I will guard against making such irregularities in future.”

It is highly commendable that the learned Magistrate quickly acknowledged her error and undertook not to repeat it in the future.

Section 271(2) and (3), which the trial court was required to comply with provides as follows:

“271 Procedure on plea of guilty

- (1)
- (2) Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea—
 - (a) the court may, if it is of the opinion that the offence does not merit punishment of imprisonment without the option of a fine or of a fine exceeding level three, convict the accused of the offence to which he has pleaded guilty and impose any competent sentence other than—
 - (i) imprisonment without the option of a fine; or
 - (ii) a fine exceeding level three;or deal with the accused otherwise in accordance with the law;
 - (b) the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (a) or if requested thereto by the prosecutor—
 - (i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and
 - (ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor;and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law:

.....

- (3) Where a magistrate proceeds in terms of paragraph (b) of subsection (2)—
 - (a) the explanation of the charge and the essential elements of the offence; and
 - (b) any statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and
 - (c) the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and

(d) any statement made to the court by the accused in connection with the offence to which he has pleaded guilty; shall be recorded.” (Underlining for emphasis).

The import of the above provision was explained by CHITAPI J in the review judgment of *S v Mangwende*³, where at page 6 of the judgment the learned judge said:

“In *casu* the learned regional magistrate recorded that “charges – Put to accused and understood”. That is not what the learned regional magistrate was supposed to do. He was in terms of the provisions of s 271 (3) required to *inter alia* explain the charge to the accused and record the explanation so given in content. This and other requirements in s 271 (3) aforesaid make the plea procedure cumbersome and involved. The rationale is understandable. The accused would by his admission essentially be convicting himself and relieving the State of the burden to prove the charge against the accused beyond a reasonable doubt. The provisions of subs (3) of s 271 aforesaid are intended to ensure fairness to the accused by ensuring that the guilty plea is tendered deliberately and knowingly.

Further, in the same judgment, the learned judge reasoned that:

“The failure to comply with s 271 (3) of the Criminal Procedure and Evidence Act have again further rendered the trial unfair because it cannot without the charge having been explained to him, to hold that the accused understood what the charge entailed since no explanation as required in terms of s 271 (3) was recorded as having been given to the accused.”⁴

In my view, that interpretation of the law by the learned judge accords with the letter and spirit of the law, and it has since been followed in a long list of cases⁵. The failure to comply with the requirements of section 271(3) renders the trial unfair, and consequently unconstitutional. It amounts to a substantial miscarriage of justice. In the case of *S v Masendeke*⁶, a review judgment which I concurred with, CHITAPI J held as follows:

“The effect of the admitted failure by the magistrate to strictly comply with the peremptory procedural provisions for disposing of the trial by way of guilty plea procedure as legislated in ss 163 and 271(2)(b) as read with s 271(3) renders the trial unfair. An unfair trial is unconstitutional and contravenes s 69 of the Constitution. The provisions of s 29(3) of the High Court Act, [*Chapter 7:06*] do not assist to serve the proceedings. The provision reads as follows:

‘29(3) No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record of proceedings unless the High Court or a judge thereof as the case may be considers that a substantial miscarriage of justice has actually occurred.’”

The same fate that befell the proceedings in the cases that I have alluded to must also befall the current proceedings. The conviction and sentence must be quashed. The proceedings were not

³ HH 695/20

⁴ At page 6 of the judgment

⁵ See also *S v Nhamburo* HH557/20; *S v Mudzviti* HH 55/22; *S v Marimo and S v Mandaza* HH 58/22

⁶ HH 577/21

in accordance with real and substantial justice. The Prosecutor General retains his discretion to prosecute the accused person afresh should he be so inclined.

Resultantly, it is ordered as follows:

1. The proceedings in case No. CRB No. R101/21 are not in accordance with real and substantial justice and are hereby quashed.
2. The conviction and sentence imposed on the accused person are set aside.
3. The Prosecutor General retains his discretion to institute a fresh prosecution against the accused if he is so inclined.
4. The Registrar shall serve a copy of this judgment on the Prosecutor General.
5. The trial Magistrate shall cause the accused person to be summoned to court and informed of the outcome of this review.

MUSITHU J:.....

CHITAPI J agrees:.....