

MIRIAM KWASWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU JJ
HARARE, 29 September 2021

Review Judgment

CHITAPI J: The record of proceedings in the above matter was placed before me on automatic review. The accused was convicted on his plea of guilty to the charge of negligent driving as defined in s 52 (2) (a) of the Road Traffic Act, [Chapter 13:11]. The facts were that on 7 June, 2021, the accused drove her motor vehicle, a toyota corolla along Waterfalls Ave, Harare negligently and caused an accident. The accused's driving conduct was negligent in that she failed to keep a proper lookout and rammed into a vehicle being driven in front of her thereby causing a vehicle pile-up.

The accused pleaded guilty and the learned provincial magistrate, Mr Vitorini, Esquire convicted the accused as charged on guilty plea trial on 16 June, 2021. The accused was sentenced to pay a fine of ZWL\$ 20 000.00 in default of payment, 5 months imprisonment. In addition the accused was sentenced to 10 months imprisonment wholly suspended on the usual conditions of good behaviour.

I raised issue with the learned magistrate on whether he acknowledged that he did not comply with the provisions of s 271(2) (b) as read with s 271(3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. I also referred the magistrate's attention to the case of *S v Mangwende* HH 695/20 which discussed the correct procedure to adopt upon a guilty plea trial. It was clear from the record of proceedings that the learned magistrate did not follow the peremptory procedures of explaining the charge to the accused and recording the explanation made. It is the duty of the review Judge to ascertain whether the correct explanation of the charge was given to the accused before the accused is then called upon to plead. This requirement is separate from putting the essential elements of the offence to the accused. The putting of essential elements is intended to satisfy the magistrate that the guilty plea was knowingly made and that accused indeed committed the offence as charged.

In his response to the query which I had raised, the learned magistrate stated as follows:

“I concede that the charge was not explained elaborately before plea. I respectfully draw your attention to the elaborate questioning after plea. I have since taken note of recent instructive review minutes on the aspect of compliance with s 271 (3) of the Criminal Procedure and Evidence Act and I undertake to avoid the error in future.” (own underlining)

Firstly the learned magistrate did not explain the charge at all from what appears on record. The record shows the following:

“.....Charges: Put and understood
Plea: s 271 (2) (b)
Facts: read and understood

The learned magistrate then dealt with the essential elements of the offence. It is therefore misleading for the learned magistrate to have responded that “the charge was not explained elaborately.” The charge was not explained at all but only read to the accused. The learned magistrate must stand ready to concede errors and be corrected. It is the justice system which is the winner and not the magistrate’s ego or his views that the review Judge is wrong and the magistrate is the one who is correct. It is clear that the learned magistrate sought to justify his misdirection by stating.

“I respectfully draw your attention to the elaborate questioning after plea.”

Clearly the learned magistrate fails to distinguish between the requirement to explain the charge and record the explanation and the requirement to put essential elements of the offence to the accused. Section 271 (2) (b) (1) aforesaid provides as follows:

“ the court shall if it is of the opinion that the offence merits any punishment referred to on sub para (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 based, and
- ii)

It is therefore apparent from the quoted provisions that the explanation of the charge is separate from the explanation of the essential elements. The two processes must not be conflated. The learned magistrate was misdirected on the failure to explain the charge.

Section 271 (3) is a follow up on s 271 (2) (b) (1) as quoted. It provides in para (a) that the explanation of the charge and the essential elements shall be recorded. The use of the word

“and” separates the explanation of the charge from the explanation of the essential elements. The two explanations are to be separated. Therefore there was no need for the learned magistrate to then refer in his minute to what he called an “elaborate questioning after plea” because that questioning related to essential elements which the review Judge did not query.

It is important to achieve consistency and certainty in the conduct of plea proceedings. This will be achieved if the magistracy follow the precedent of the superior court. Belligerence on the part of the inferior court to superior court precedent will not further the interests of justice but will portray a judiciary system which is divided instead of achieving seamlessness. The learned magistrate herein was clearly misdirected and did not have to qualify his error in a manner intended to question the superior court precedent.

All having been said, this review will be disposed of in the same manner that was done in *S v Mangwende*.

- i) The proceedings in case No MBR 3399/21 are quashed for gross irregularity and the sentence imposed is set aside.
- ii) The Prosecutor General may in his discretion prosecute the accused afresh.
- iii) In the event of a fresh prosecution, a different magistrate should preside over the accused’s trial and if the accused is convicted, account must be taken of any portion of the already served sentence arising from the quashed proceedings.

MUSITHU J Agrees