

1. THE STATE
versus
PATRICK MISHECK
CRB. MBR 1337/21

2. THE STATE
versus
TRINITY NYASHA
CRB. MBR 1341/21

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 September 2021

Review Judgment

CHITAPI J: The same learned magistrate C Nyandoro Esquire sitting at Mbare magistrates court dealt with the two matters herein respectively on 17 and 18 March 2021, upon pleas of guilty offered by the accused persons in terms of s 271(2)(b) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. The proceedings suffer from the same irregularity in trial procedure on a guilty plea. When the records were first placed before me, I raised a similarly worded query in respect of the two records as follows:

“Section 271(3) of the Criminal Procedure & Evidence Act requires Magistrates to explain the charge and record explanation given to accused. Was this done? Refer to *S v Mangwende* HH 695-20.”

In response the learned magistrate responded as follows in relation to each of the record of proceedings:

“... I have taken note of the omission and have been informed through other review minutes on the same subject matter. I have since amended my ways and will ensure strict compliance with the rules.”

In case no. MBR 1337/21 the accused aged 19 years old was charged with theft of trust property as defined in s 113(2)(A) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. It was alleged that the accused unlawfully converted to his own use and failed to return to the complainant, a cellphone handset which the accused had been given by the complainant to repair. The accused pleaded guilty and was convicted and sentenced to 14 months imprisonment with part of the sentence suspended on the usual conditions of future good behaviour and the remainder on condition of performance of community service. The learned magistrate did not record the explanation of the charge, if any, that she gave to the accused before the accused was called upon to plead. Section 271(3) aforesaid lists various matters which the magistrate is required to specifically record. The learned magistrate

acknowledged her error and noted that she had now acquainted herself with the correct procedure as discussed in *S v Mangwende* HH 695-20.

In respect of CRB MBR 1341/21, the accused a 23 year old male adult was charged with the offence of theft of trust property. It was alleged that the accused was given the sum of US\$250.00 to purchase jeans and t/shirts for the complainant and to hold the same in trust. The accused however converted the money to her own use. She was convicted on her guilty plea to the charge and sentenced to imprisonment with part suspended on condition of future good behaviour and part suspended on condition of performance of community service.

As stated in *S v Mangwende* HH 695-20 the admitted omission by the learned magistrate to comply with the peremptory provisions of s 271(3) of the Criminal Law (Codification & Reform) Act, results in a trial where there has been committed such omission, being quashed as invalid.

It may be prudent going forward to outline the procedure for trial upon a guilty plea in terms of s 271(2)(b) as read with s 271(3) in the magistrates court as follows where the accused is a self-actor:

- (i) Comply strictly with s 163A of the Criminal Procedure & Evidence Act, that is, inform the accused of his or her right to legal or other representation as set out in s 191 of the same enactment.
- (ii) Explain the charge and record the explanation that has been given of the charge. What is recorded is the explanation NOT that the explanation was given.
- (iii) If the accused has understood the explanation and that fact is also recorded, the accused should then be called upon to plead to the charge.
- (iv) Thereafter the usual procedure of putting the essential elements of the offence and ascertaining the genuineness of the guilty plea as required in terms of s 271(2) (b) and recorded as required in s 271(3) of the Criminal Procedure & Evidence Act should be followed.

It was pointed out in *S v Mangwende (supra)* that the omission in the nature of a failure to conduct a trial as legislated by law, impacts upon the fairness of a trial. As such, a trial conducted unprocedurally is an unfair trial. A court must treat such a trial as invalid. The issue of whether or not there has been caused a substantial miscarriage of justice by following an irregular procedure does not apply to an unfair trial because a fair trial is an absolute right in terms of s 69 as read with s 86(3)(a) of the Constitution.

In the premises the following order is hereby made:

- (i) The proceedings in case nos. MBR 1337/21 and MBR 1341/21 are quashed and the sentences imposed set aside.
- (ii) Should the Prosecutor General in his discretion decide to institute the prosecution of the accused persons, he is free to do so.
- (iii) If the accused persons are again prosecuted and are convicted, the convicting court shall consider the served portions of the sentences imposed in the quashed proceedings as part of a served portion of any new sentence which may be imposed.

MUSITHU J agrees:.....