

- |     |  |                |
|-----|--|----------------|
| (1) | STATE<br>versus<br>VICTOR TAVONGA                                | CRB NTN 331/21 |
| (2) | STATE<br>versus<br>NYASHA MATIBIRI                               | CRB NTN 311/21 |
| (3) | STATE<br>versus<br>MUNYARADZI MAPIRA                             | CRB NTN 333/21 |
| (4) | STATE<br>versus<br>DOUGLAS CHURUCHA<br>and<br>SIMBARASHE MBUNJWA | CRB NTN 317/21 |

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 13 October 2021

### **Review Judgment**

CHITAPI: The proceeding in the above cases were presided over by the same learned magistrate C. Nyandoro Esquire sitting at Norton. The accused persons in each of the four cases were convicted upon their guilty pleas to the charges alleged against them in terms of the provisions of s 271(2)(b) of the Criminal Procedure & Evidence, [*Chapter 9:07*]. In each of the records, I raised a query for the learned magistrate to comment upon.

In CRB NTN 331/21, the accused was charged with the offence of assault as defined in s 89(1)(a) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. The brief facts of the case were that the accused unlawfully assaulted the complainant with open hands and fists in circumstances of the realisation by him of the real risk or possibility that his actions would result in bodily harm. The accused was convicted on his own plea of guilty and on 7 June 2021, the accused was sentenced to perform community service.

In CRB NTN 311/21, the accused was charged with the offence of theft as defined in s 113(2)(b) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. The brief facts

of the offence were that on 29 May 2021 at Katanga Shops in Norton, the accused unlawfully converted to his own use, a cellphone handset which had been given to him in trust for purposes of repair. The accused pleaded guilty to the charge. He was on 10 June 2021 convicted and sentenced to 24 months imprisonment with 8 months suspended on condition of restitution leaving an effective sentence of 16 months imprisonment.

In CRB NTN 333/21, the accused was charged with the offence of assault. The brief facts forming the basis of the charge were that on 3 May 2021 at Ngoni Business Centre, Norton, the accused unlawfully assaulted the complainant with booted feet, on the left leg intending to cause the complainant bodily harm or realizing the real risk or possibility that bodily harm might result. The accused pleaded guilty to the charge. He was convicted and sentenced to 16 months imprisonment with 6 months suspended on conditions of future good behaviour and the remaining 10 months on condition of community service.

In CRB NTN 317/21, the accused was charged with the offence of theft from motor vehicle. The facts surrounding the charge were that on 31 May 2021 at Johannesburg suburb, Norton, the accused stole a tyre and pressure pump from the complainant's motor vehicle intending to deprive the complainant of such ownership or realizing the real risk or possibility that the complainant might be deprived of the property. The accused pleaded guilty to the charge. He was convicted and sentenced to 13 months imprisonment with 6 months suspended on conditions of future good behaviour leaving the accused to serve an effective 7 months imprisonment.

In my review of the four records of proceedings, I raised a query that the learned magistrate had not complied with the peremptory provisions of s 271(2)(b) as read with s 271(3) of the Criminal Procedure and Evidence, the latter section being peremptory in requiring the magistrate to record inter-alia the explanation of the charge to the accused and to record the details of the explanation given to the accused. The learned magistrate conceded the omission made and undertook to be guided on the correct procedure to follow set out in the review judgement, *S v Mangwende* HH 695-20.

The learned magistrate addressed a minute to the Registrar dated 31 July 2021 in which the learned magistrate commendably addressed a minute to the Registrar dated 30 July 2021 in which the learned magistrate addressed her omissions in the four (4) records of proceedings. The learned magistrate individually addressed the four (4) cases and the minute of 30 July 2021 reads:

“May you place all the four records before the Honourable CHITAPI J with the following comments:

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.

I stand guided accordingly.”

There is no doubt from the minute that the learned magistrate has embraced the guide given in the *S v Mangwende case*. The only issue which remains to be addressed is what becomes of the impugned proceedings. It was held in the *Mangwende case* that since the failure to conduct a guilty trial as set out in the peremptory provisions of s 271(2)(b) as read with s 271(3) was in breach of a fair trial, the proceedings could not be salvaged. The same must apply in relation to the four cases reviewed herein. The proceedings must unfortunately be quashed. The quashing of the proceedings is described as unfortunate because it has a negative effect on the smooth operation of the justice delivery system. Accused persons are entitled to their immediate release yet they will have pleaded guilty and been adjudged to be guilty but unprocedurally. Even if the Prosecutor General has a discretion to institute fresh prosecutions, the process involves a strain on the Prosecutor-General, the court and witnesses. Related to the process are the cost considerations which are incurred in the process of instituting a repeat prosecution. It is, therefore, important that the court gets the procedure for trials by guilty plea right at first instance and implements the procedure strictly.

The following order is therefore made to dispose of the reviewed cases.

**IT BE AND IS HEREBY ORDERED THAT:**

- (a) The proceedings in the following cases are quashed and the convictions and sentences set aside.
  - (i) *S v Nyasha Matibiri* CRB NTN 311/21
  - (ii) *S v Victor Tavonga* CRB NTN 331/21
  - (iii) *S v Munyaradzi Mapira* CRB NTN 333/21
  - (iv) *S v Douglas Churucha and Alias Simbarashe Mbunjwa* CRB NTN 317/21
- (b) The accused persons in each of the cases shall forthwith be liberated if in custody or discharged from serving alternative sentences like of community service in the case of the *S v Victor Tavonga* CRB NTN 331/21 and *S v Munyaradzi Mapira* CRB NTN 333/21.

(c) In the event that a fresh prosecution is instituted by the Prosecutor General and the accused is convicted, the sentence already served by the accused shall be taken into account as part of an already served portion of the new sentence which may be imposed.

MUSITHU J AGREES:.....