

STATE
versus
SAPAKOTE INASHO

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 31 May 2017

Criminal Review

HUNGWE J: The accused was charged with failure to comply with an order of the Maintenance Court to make regular monthly payments towards the upkeep of his children in contravention of s 23 (1) of the Maintenance Act, [*Chapter 5:09*] (“the Maintenance Act”). He pleaded guilty and the trial proceeded in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. The statement of agreed facts indicate that the accused is currently and was at the time of failure to comply, unemployed. When asked if he had any defence to offer the accused said he had none.

Section 23 (4) of the Maintenance Act provides that proof that any failure which is subject of a charge was due to a lack of means was not due to unwillingness to work, misconduct, or the incurring of unreasonable debts or obligations shall be a defence to the charge. When I queried with the learned trial magistrate whether this defence was explored with the unrepresented accused, the terse response was that she

...“took it like he was physically fit and not willing to work.”

Quite clearly this was a failure by the court in its duty to an unrepresented accused. This court has time and again emphasised that it is the duty of the presiding magistrate to assist an unrepresented accused in presenting his case without descending into the arena. See *S v Cross* 1971 (2) SA 356 (RA).

In putting the essential elements constituting the offence, the court should, where a statute provides a defence, ascertain whether that defence is not available to the unrepresented accused. A failure to so ascertain constitutes a serious miscarriage of justice as it invariably result in a wrongful conviction. In the present case the accused’s failure to keep regular payments was clearly not unlawful as he was unemployed. In the harsh economic

environment, it is idle for a court not to take judicial notice of the fact that failure to work is not always due to unwillingness to work.

In light of the above, the conviction is set aside and the sentence is quashed. The above order is to be brought to the accused's attention by the magistrate.

MUSHORE J: agrees.....