

TAVENGERWEI TINODYA
and
AGNES MUCHINA
and
BESTI MUNGONO
and
FUNGAI WENGE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 29 March 2018 & 25 April 2018

Criminal appeal

D Mudadirwa, for the appellant
Mrs S Fero, for the respondent

HUNGWE J: The four appellants appeared before the court of the magistrate sitting at Chitungwiza facing a charge of contravening s 7 (1) (a) or (b) of the Communal Lands Act [*Chapter 20:04*] i.e occupying or using communal land without lawful authority. They were unrepresented. They pleaded guilty. They were convicted and sentenced to pay a fine of \$50-00 or, in default of payment 30 days imprisonment. In addition 2 months imprisonment were imposed but were wholly suspended on condition the accused were “evicted from the premises with effect from 30 December 2016.”

Dissatisfied, the appellants noted an appeal to this court. In their notice and grounds of appeal, the appellants pointed out that by virtue of the nature of the charge, the court *a quo* out to have proceeded in terms of s 271 (2) (b) of the Criminal procedure and Evidence Act, [*Chapter 9:07*] rather than s 271 (2) (a). By adopting the later procedure, the court precluded itself from the requirement to canvass the essential constituents of the offence, which procedure would have disclosed a possible defence to the charge. Consequently the court committed an irregularity which entitled this court to set aside the conviction.

Faced with this ground of appeal the respondent properly conceded for the reasons put forward by the appellants, the conviction could not be supported. The respondent filed a notice in terms of s 35 of the High Court Act [*Chapter 7:06*] notifying the Registrar that he did not support the conviction.

This court has on several occasions emphasised that where an accused appears unrepresented on a plea of guilty, it is the duty of the court to safeguard the fair trial rights of the accused by adopting a procedure which was most likely to suggest a defence where there was one, to the accused. See *S v Zishumba & Ors* 1983 (1) ZLR 10 (HC); *S v Choma* 1990 (2) ZLR 33 (HC); *S v Chidawu* 1998 (2) ZLR 76 (HC). This can only be achieved by selecting a trial procedure best suited for the purpose. The summary trial procedures set out in s 271 of the Criminal Procedure and Evidence Act, permit a court to convict an accused on his own admission of guilt. This procedure is fraught with legal hurdles, which, unless meticulously, judiciously and thoroughly adhered to, would vitiate the proceedings.

It requires to be emphasised that with unrepresented accused persons, there is the ever-present likelihood that out of ignorance of the law, most unsophisticated rural people will admit to charges of a complex nature out of a desire to draw the sympathy of the police and or the court authorities. In most cases such simple-minded suspects believe that they stand a better chance of being cautioned and discharged if they agree to all the allegations without question. They do not know that it is their right to challenge each and every allegation of fact or conclusion of law upon which the charges are based. They do not know that there is a presumption of innocence operating in their favour till the state has proved their guilt beyond a reasonable doubt. They are blissfully unaware that even where they admit to a factual situation they may have a lawful excuse to their conduct which would render their conduct not unlawful. This the reason why this court has repeatedly stated that the court of the Magistrate is the last bulwark against procedural unfairness which indigent suspects may suffer at the hands of the law.

Faced with the allegations constituting the offence charged and the fact that the accused tendered guilty pleas, the magistrate, at the behest of the public prosecutor, had a choice on the procedure to adopt. The choice as to whether to proceed in terms of s 271 (2) (a) or 271 (2) (b) of the Criminal Procedure and Evidence Act must be guided by the penalty provisions of the offence charged as well as the attitude of the prosecutor regarding what an appropriate sentence in the case ought to be. Where the court is of the opinion that the offence does not merit a

punishment of imprisonment without the option of a fine or a fine not exceeding level 3, the court may convict the accused and impose any competent sentence other than imprisonment without the option of a fine of a fine not exceeding level three. (Section 271 (2) (a) of the Criminal Procedure Code).

The penalty provisions of the statutory offence charged in the present case provide for punishment of a fine not exceeding level six or imprisonment for a period not exceeding twelve months. Such a provision in practice fixes the choice for the magistrate since, from the *proviso*, a punishment in excess of that stipulated in s 271 (2) (a) becomes a possibility by operation of law. Clearly, the magistrate's choice to proceed in terms of s 271 (2) (a) was ill-advised and in conflict with the provisions of s 271 (2) (a) since s 7 (2) of the Communal Lands Act [*Chapter 22:04*] permitted punishment beyond what could be imposed in terms of s 271 (2) (a).

However what makes the decision to resort to procedure in 271 (2) (a) appear grossly irrational is the fact that the court was dealing with a statutory offence. In the provisions criminalizing certain conduct, (occupying communal land) it also sets out exceptions that would excuse such conduct.

That section states,

7. Restrictions on right to occupy or use Communal Land.

- (1) Subject to ss ten and eleven, no person shall occupy or use any portion of Communal Land—
 - (a) except in the exercise of any previously acquired right subsisting on 1 February 1983, or
 - (b) except in accordance with the terms and conditions of any right, consent, as the case may be, in terms of this Act or any other enactment, or
 - (c) unless he or she is s spouse dependent relative, guest or employee of a person who occupies or uses Communal Land in terms of para (a) or (b).

Section 8 of the Communal Land Act also provides that a person may, subject to that Act or the Regional Town and Country Planning Act [*Chapter 29:12*], occupy or use communal land with the consent of the rural district council established for the area concerned.

The resort to the procedure in s 271 (2) (a) precluded the magistrate from canvassing the essential elements of the offence. Had she proceeded in terms of s 271 (2) (b) and judiciously approached the matter, it may well be that in canvassing the essential elements, the accused would have given some explanation which might have constituted a defence to the charge.

I may add here that in the view that I take of s 271 (2) (a) of the Criminal Procedure Code, a resort to this section should only be had where the offence charged is beyond doubt trifling. I have in mind such offences as set out in municipal by-laws *viz* ticket offences such

as littering, parking etc. It is not suited where complex legal concept associated with most serious statutory offences are involved. Proceeding in terms of s 271 (2)(a) may arguably constitute an infringement of the fair trial right set out in s 70 of the Constitution. That section provides:

70 Rights of accused persons

(1) Any person accused of an offence has the following rights—

- (a) to be presumed innocent until proved guilty;
- (b) to be informed promptly of the charge, in sufficient detail to enable them to answer it;
- (c) to be given adequate time and facilities to prepare a defence;
- (d) to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner;
- (e) to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result;
- (f) to be informed promptly of the rights conferred by paragraphs (d) and (e).
- (g) to be present when being tried;
- (h) to adduce and challenge evidence;
- (i) to remain silent and not to testify or be compelled to give self-incriminating evidence;
- (j) to have the proceedings of the trial interpreted into a language that they understand;
- (k) not to be convicted of an act or omission that was not an offence when it took place;
- (l) not to be convicted of an act or omission that is no longer an offence;
- (m) not to be tried for an offence in respect of an act or omission for which they have previously been pardoned or either acquitted or convicted on the merits;
- (n) to be sentenced to the lesser of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.

In the present charge the statutes provides various exceptions which in effect are defences. The appellants may have invoked these had the fair trial safeguards provided by s 271 (1) (2) (b) of the Criminal Procedure Code been chosen.

In the end the decision by the Prosecutor-General not to support the conviction is justified. We agree with Mrs *Fero*, for the respondent, that the conviction be set aside and the matter be remitted to the court *a quo* for a trial *de novo*.

In the event that the appellants are eventually convicted careful attention must be paid to the provision of s 16 of the Communal Land Act. That section requires that following upon conviction, an order for eviction be granted in favour of the lawful authority of that land. As such, the order of eviction is a separate civil judgment /order which cannot be made a condition for the suspension of a term of imprisonment as had been the case in the present matter.

In the result it is ordered as follows;

1. The conviction is quashed and the sentence is set aside.
2. The record of proceedings is remitted to the court *a quo* for a trial *de novo* before a different magistrate.

WAMAMBO J agrees

Nyikadzino Simango & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners