

STATE
versus
GRACE BHIZIMONI

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA AND KWENDA JJ
HARARE, 12 March 2019

Criminal Review

CHIRAWU-MUGOMBA J: The record of proceedings was placed before me in terms of section 27(1) (c) of the High Court Act [*Chapter 7:06*]. The section reads as follows;-

27 Grounds for review

- (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
- (c) gross irregularity in the proceedings or the decision.

The facts of this matter are that the accused person appeared at the Chivhu Magistrates Court on the 3rd of December 2018 charged with contravening s 89(1) (a) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] –‘assault’. She pleaded guilty in terms of s271 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. She was sentenced to a fine of \$50/20 imprisonment. The accused paid the fine. It was subsequently brought to the attention of the court that the accused had on the 10th of October 2018 paid an admission of guilt fine of \$10 at Chivhu Police Station. Evidence of the admission and payment of the fine was furnished to the court. The accused person also wrote a letter to that effect which forms part of the record.

A peace officer, defined in s2 of the Criminal Procedure and Evidence Act to include a police officer can act in terms of s 356 and impose a fine for minor offences. The relevant section reads as follows;-

356 Payment by accused persons of fines which may be imposed for minor offences in lieu of appearance in court

- (1) When any person has been summoned or warned to appear in a magistrates court or has been arrested or has been informed by a peace officer, by written notice referred to in subsection (1) of section *one hundred and forty-one* or otherwise, that it is intended to institute criminal proceedings against him for any offence, and a prescribed officer has reasonable grounds for believing that the court which will try

the said person for such offence will, on convicting such person of such offence, not impose a sentence of imprisonment or a fine exceeding level three, such person may sign and deliver to such prescribed officer a document admitting that he is guilty of the said offence and—

- (a) deposit with such prescribed officer such sum of money as the latter may fix; or
- (b) furnish to such prescribed officer such security as the latter thinks sufficient for the payment of any fine which the court trying the case in question may lawfully impose therefor; not exceeding level three or the maximum of the fine with which such offence is punishable, whichever is the lesser, and such person shall thereupon not be required to appear in court to answer a charge of having committed the said offence.

That however, is not the end of the matter. Section 356 (2) mandates that the admission of guilt form be transmitted to the Magistrate Court through the Clerk of Court as follows:-

- (2) The document, when signed and delivered in terms of subsection (1), shall forthwith be transmitted to the clerk of the court before which the person was summoned or warned to appear or, where he has not been summoned or warned to attend a particular court, to the clerk of any magistrates court and shall be entered by the clerk in the records of that court.

The purpose is to ensure that the rights of the accused person have not been trampled upon and that the peace officer has not exceeded their mandate. This layer of protection and the need to ensure that the peace officer has acted in accordance with the law is confirmed by what the court is expected to do after the transmission of the admission of guilt form as outlined in s356 (3) of the Criminal Procedure and Evidence Act as follows:-

- (3) As soon as the document has been recorded in terms of subsection (2) it shall be laid before the court and the court shall thereupon—
 - (a) proceed to convict such person of the offence charged and forthwith sentence him to a fine not exceeding level three in accordance with law, whether or not it has jurisdiction in terms of section 56 of the Magistrates Court Act [*Chapter 7:10*]; or
 - (b) by endorsement on the document signify its refusal to convict such person in accordance with this section.

This means that the court has two choices: - (1) convict the accused and sentence him accordingly **or** refuse to convict the accused. The court is not therefore expected to merely rubber-stamp the fine but to exercise its mind on the appropriateness or otherwise of the admission of guilt by an accused. It is pertinent to note that it is only the court that convicts the accused person. In other words, the admission of guilt only becomes a conviction upon its endorsement by the court. The court can also impose a fine which is not the same as the admission of guilt one as long as it does not exceed level 3. If the fine imposed by the court is less than the admission of guilt fine paid, the accused is entitled to a refund of the difference-

see s 356 (6) of the Criminal Procedure and Evidence Act. If the fine imposed by the court is more than the admission of guilt fine paid, the balance shall be recovered from the accused in the manner provided for in terms of s 348 of the Criminal Procedure and Evidence Act. In *casu*, it seems that the admission of guilt form was not transmitted to the Chivhu Magistrates Court forthwith resulting in the accused being brought to the court for trial on the 3rd of December 2018.

The procedure to take if the court refuses to convict is set out in s 356 (7) of the Criminal Procedure and Evidence Act as follows:-

Where the court has refused to convict the person concerned, as provided in paragraph (b) of subsection (3), the sum deposited shall be refunded to the person concerned and he may be prosecuted in the ordinary course and, in that case, if he has already been summoned or warned, he shall be summoned afresh to answer such charge as the public prosecutor may prefer against him.

In *casu*, the proceedings of the 3rd of December 2018 were not held in accordance with the provisions of s 356 (3) of the Criminal Procedure and Evidence Act but were premised on the wrong assumption that this was a fresh matter. Accordingly, such proceedings are grossly irregular and cannot be allowed to stand. In placing the matter for review before a judge, the Magistrate was under the mistaken view that this matter falls within the realm of the *autrefois convict* plea. He stated that, the ‘convicted person would not have been tried, convicted and sentenced for the second time’. This plea is now part of the 2013 Constitution in s70 (1) (m) that no one should be tried twice for the same offence (*nemo debet bis vexari pro una et eadem causa*). That plea is not applicable in this matter. The correct procedure is for the admission of guilt form to be placed before the court so that it acts in accordance with s 356 (3) of the Criminal Procedure and Evidence Act. In so doing, the court is guided by s356 (9) of the Criminal Procedure and Evidence Act as follows:-

For the purpose of deciding whether to convict the person concerned in accordance with this section or determining the amount of the fine to be imposed, the court may have regard to any statements relevant to the offence charged which have been given to the police by any person having knowledge thereof.

It is only the outcome of the determination made in terms of s 356(3) of the Criminal Procedure and Evidence Act that will impact on how the matter will proceed.

Disposition

It is ordered as follows:

1. The proceedings of the 3rd of December 2018 are quashed and the conviction and sentence be and are hereby set aside.
2. The record of proceedings is remitted to the Chivhu Magistrate court so that it acts in terms of section 356 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]

KWENDA J agrees:.....