THE STATE
versus
ROBSON KAMBA
And
GIBSON MARANGE

HIGH COURT OF ZIMBABWE
MUZOFA & MUSAKWA JJ
HARARE, 12 June 2019

Review Judgment

MUZOFA J: The two accused persons were found in possession of a 50 centimetre Telone cable in contravention of s 89 (4) (c) of the Postal and Telecommunications Act [*Chapter 12:05*] as amended by s 3 of the Criminal Law Amendment [Protection of Power, Communication and Water Infrastructure Act (Act 1/11)]. The cable was valued at $8.00.

The accused pleaded guilty to the charges. Following their conviction each accused person was sentenced to the minimum mandatory sentence of 10 years imprisonment.

The relevant provision reads:

"Any person who –
(a) ……..
(b) ……..
(c) receives or takes possession of any telecommunication infrastructure material-
(i) knowing that it has been stolen; or
(ii) realizing that there is a real risk or possibility that it has been stolen;
Shall be guilty of an offence and if there are no special circumstances peculiar to the case as provided for in subsection (10), be liable to imprisonment for a period of not less than ten years."

After the accused persons pleaded guilty, the court proceeded in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act [Chapter *9:07*] (the Act). In terms of the Act the Magistrate is required to explain the essential elements of the offence to the accused and enquire whether he understands the charge and essential elements and whether his plea of guilty is an admission of the elements. The statutory provision is couched in mandatory terms. In this case the Magistrate took a very cursory approach which is evident from the following exchanges:-

'Q On 17 January 2019 and along Tweed road, Eastlea, Harare you received and took into possession, 50 cm Telone Cable?

Accused I Yes
Accused II Yes
Q Did you know this was Telone cable used in telecommunication?
Accused I Yes
Accused II Yes
Q Any right
Accused I No
Accused II No
Q Any defence?
Accused I No
Accused II No
Verdict – Both Guilty as pleaded"

The Magistrate did not comply with the mandatory provisions of the Act. The rationale is obvious; the court has to be satisfied that the elements of the offence which constitute the *actus reus* and the *mens rea* are satisfied. For this offence there must have been an act of receiving or taking into possession the telecommunication infrastructure material and the knowledge that it was stolen or that there was a real risk or possibility that it had been stolen. The questions by the learned Magistrate elicited information confirming possession or receiving into possession. That was the *actus reus.* It is a settled principle that the *actus reus per se* does not establish an offence in the absence of the requisite *mens rea.* The accused persons were not facing a strict liability offence. Thus it was necessary and indeed required of the Magistrate to establish whether the accused persons had the necessary mental element. The important questions to establish *mens rea* were not put to the accused persons. The accused persons cannot therefore be said to have understood the offence and its essential elements as envisaged by s 271 (2) (b) of the Act.

In this case, the penalty section provided for a minimum mandatory sentence of 10 years imprisonment, where no special circumstances are found. The court being fully aware of the possibility of such a lengthy prison term, made a cursory examination of the essential elements. This approach should be corrected, this is about freedom and liberty of people. Imprisonment is a rigorous form of punishment and justice demands that , for the offenders who plead guilty they should understand the charges and the essential elements before being sent to prison.

This superficial approach by Magistrates in canvassing essential elements has been condemned in numerous review judgments but the practice seems to continue. In the case of *S v Murimwa* HH-8-83 DUMBUTSHENA AJP (as he then was) had this to say on a similar provision at page 2 of the cyclostyled judgment,

> "I must, however, hasten to point out that the practice of those magistrates who are fond of abridging the provisions of s 255(2)(b) as read with s 255(3) by cursorily putting down one - sentence entries in the record proclaiming compliance with the requirements of ss (2)(b) E and (3) of s 255 cannot be condoned. This creates doubts in the mind of the reviewing court as to whether the accused understood the particulars, acts or omissions and elements of the offence.

See also *S* v *Gore* 1999 (1) ZLR 177 (HC) *S* v *Milanzi and Another* (2) ZLR 212(HC); *Nkana Simon and Others* HH715/17; *S* v *Magore* 1996 (2) ZLR SC. In *Dube* v *Another* 1988 (2) 385 (SC) the court faced with a similar situation had this to say;

> "The purpose of canvassing the essential elements of the offence when a plea of guilty is tendered is to satisfy the court that the accused committed the offence charged. In doing so the court seeks to satisfy itself that the accused is not tendering an ill-informed plea of guilty. It does so by explaining the essential elements of the crime charged and verifying the accused's admission of those essential elements by putting them to him in a series of questions covering each essential element of the crime, and ensuring that he has no defence to the crime charged".

A failure to canvass the essential elements is a procedural misdirection that warrants interference by this court. The accused did not admit that they knew that the cable was stolen or that there was a real risk that the cable was stolen. There is an obvious serious miscarriage of justice, the accused persons are now serving a long prison term of 10 years when they did not fully appreciate the charges and its essential elements. In short there was no genuine plea of guilty. This cannot be in the interests of justice. I am unable to certify the proceedings as in accordance with real and substantial justice.

Accordingly the conviction and sentence by the court *a quo* is quashed.

MUZOFA J ……

MUSAKWA J Agrees ……