FEBBIE MUKOTODZI
and
NYASHA JORDAN
and
RODRICK TICHAONA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 May 2021

Criminal Review

CHITAPI J: The three matters above were dealt with by the same Provincial Magistrate sitting at Mbare. The trials of the accused persons were disposed of by guilty plea procedure in terms of s 271(2)(b) as read with s 271(3) of the Criminal Procedure & Evidence Act, ([Chapter 9:07]. In the case of *S* v *Febbie Mukotodzi* CRB 2422/21 the accused on his guilty plea was convicted of assault as defined in s 89(1)(a) of the Criminal Law (Codification & Reform) Act, [Chapter 9:23] ("Criminal Code"). It was alleged that the accused slapped the complainant several times on the face on 15 April 2021 at Glen Norah B Shopping Centre. The accused was sentenced to 18 months imprisonment wholly suspended in part on condition of good behaviour and in part on condition that the accused performed community service.

In the case of *S* v *Nyasha Jordan* CRB 991/21 the accused was convicted of theft as defined in s 113(1)(a) of the Criminal Code. It was alleged that on 24 February 2021 the accused stole a purse with money at Mbudzi roundabout, Waterfalls, Harare. The accused was sentenced to 24 months imprisonment. 12 months of the sentence was suspended on conditions of restitution and a further 6 months on condition of good behaviour leaving an effective sentence of 6 months imprisonment.

In the case of *S* v *Roderick Tichaona Meki* CRB 228/21, the accused was on his plea of guilty convicted of robbery as defined in s 126 of the Criminal Code. It was alleged that he robbed the complainant of a lap top, phone handset and charging accessories on 9 April, 2021 at Lord Malvern High School in Waterfalls. The accused was sentenced to 36 months imprisonment with 6 months suspended on conditions of future good behavior leaving an effective prison term of 30 months.

In the case of *Nyasha Jordan*, the accused was charged with and convicted of the offence of theft as defined on s 113 (1) (a) and (b) and of the Criminal Code. The allegations against him were that the accused was self-employed as a tout at Mbudzi roundabout, Waterfall, Harare. On 24 February, 2021, he stole the complainant's satchel with US$2 000.00 and ZAR 2000.00. The complainant was a traveller looking for transport. The accused was convicted on his plea of guilty and sentenced to 24 months imprisonment of which six months was suspended on conditions of future good behavior and 12 months on conditions of restitutions leaving an effective prison term of 6 months imprisonment.

In all the three records of proceedings, the trial on plea was done in the same fashion or pattern. The following appears recorded:

> "charges – put and understood
> Plea – G 271 (2)(b)
> Facts – read and understood
> ……."

The procedure followed was wrong. It did not conform to the peremptory provisions of s 271(3) of the Criminal Procedure and Evidence which sets out what the court is required to do in guilty plea proceedings. There have now been several review judgments of this court wherein proper direction has been given on how guilty plea proceedings ought to be conducted.

The guilty plea procedure is simple and straight forward but cumbersome or involved in terms of what the court is required to do. Whenever a case is to be disposed by way of guilty plea other than summarily in terms of s 271(1)(a), that is if the plea proceedings are to be conducted in terms of s 271(2)(b), the court should always keep in mind the provisions of s 271(2)(b); 271(3) and 272 of the Criminal Procedure and Evidence Act. It is not necessary to quote the sections extenso. Section 271 (2)(b) is the enabling section in regard to the guilty plea procedure whilst s 271(3) provides for the procedure to follow. Central to s 271(3) is that the matters provided for therein must be recorded. Critically, and relevant to the review herein is the provision which requires that the magistrate must "EXPLAIN THE CHARGE and RECORD THE EXPLANATION MADE." (own emphasis.) This is what the magistrate failed or omitted to do in all the three cases. The omission to do so is a gross irregularity because firstly the requirement to do so is peremptory. Secondly, the procedure ensures a fair trial which is an inalienable right of the accused. No law may qualify the right as is evident

upon a reading of s 86(3)(e) of the Constitution. Section 272 of the Criminal Procedure & Evidence Act provides for the requirement that in dealing with a trial on a guilty plea basis, if in the course of proceedings, there is doubt on the part of the court that the accused's guilty plea is genuine or that he is guilty as pleaded, the court should alter the plea to not guilty and direct the prosecutor to proceed to trial. Significantly, any admission made by the accused up to the stage of the change of plea are treated as evidence against the accused. *S* v *Enock Mangwende* HH 895/20, *S* v *Moyo* 697/20.

It appears to me that despite this court's guidance on the need for magistrates to strictly comply with the provisions of s 271 (2) (b), 271 (3) and 272, the guidance falls on deaf ears and the blind. The situation is akin to a refusal to heed the advice or to read cases where such direction has been given. The trend wherein the same errors in procedure are made is worrying and constitute threat to the criminal justice system. The threat arises from the fact that the irregular proceedings are invariably set aside on review and the accused persons are released back into society without serving their sentences in full. Re-trials are then instituted by the Prosecutor General in his discretion. The retrials clog the court rolls and increase the backlog. All this can be avoided if the magistrates properly and procedurally conduct the guilty plea trials. Such trials form the bulk of cases disposed of in the magistrates court. It is unacceptable for the court to preside over an irregular trial on account of lack of knowledge of trial provisions. It is in my view an act of incompetence for a judicial officer to fail to comprehend steps required to be followed in holding a guilty plea trial when such procedure is legislated in black and white in s 271(2)(b) as read with s 271(3) of the Criminal Procedure & Evidence Act. It is worse so where the superior court has interpreted the trial procedure and given guidance to the magistrates through judgments issued and the judicial officer is not guided by the judgements either by design or by default to keep abreast with important judgments of this court on procedure.

The failure by the magistrate to strictly comply with the provisions of s 272 (2) (b) as read with s 271 (3) should be censured because the accused person was by such failure to comply with the law subjected to an unfair trial. As has been done in proceedings where the misdirection by the magistrate pertains to a procedural irregularity in the nature of a failure to comply with s 271 (3), the impugned proceedings have invariably been set aside. The same process will ensue.

The following order, made-

(a) The convictions and sentences in the following cases

(i) *S* v *Febbie Mukotodzi* MBR CRB 2422/21

(ii) *S* v *Roderick Tichaona Meki* MBR CRB 2281/21

(iii)*S* v *Nyasha Jordan* MBR CRB 991/21

are set aside and the accused persons entitled to their immediate release from serving the imposed sentences.

(b) The Prosecutor General may in his absolute discretion institute fresh prosecutions against the accused persons in the same matters, subject to the proviso that if the accused persons are retried, they shall not be sentenced to sentences more severe than the ones to which they were sentenced and the served portions of their sentences shall be taken into account in any sentence which may be imposed.

(c) The Registrar shall forward a copy of this judgmental to the Chief Magistrate for dissemination to magistrates for continued guidance.

MUSITHU J agrees……..