THE STATE
versus
TAKUDZWA NHAMBURO

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU J
HARARE, 31 September 2021

Review judgment

CHITAPI J: The accused appeared before the learned regional magistrate for Eastern Division sitting at Chitungwiza on 2 June, 2021 to answer to a charge of attempted murder as defined in s 189 as read with s 47 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The brief facts of the charge were that, on 22 December, 2020, the accused unlawfully attempted to cause the death of the complainant at Mvuri Village, Chief Nyandoro Mahusekwa by striking the complainant whom he accused of stealing his money, on the head several times with a log in circumstances where the accused foresaw the real possibility that death could result from the accused's conduct.

The accused pleaded guilty to the charge. The learned regional magistrate convicted the accused as charged and sentenced the accused to 8 years imprisonment of which 2 years imprisonment was suspended on the usual conditions of good behaviour.

When the record of proceedings was initially placed before me for review, I raised a query on the procedural propriety of the manner in which the learned regional magistrate had disposed of the accused's trial by way of guilty plea in terms of s 271 (2) (b) of the Criminal Procedural Evidence Act [*Chapter 9:07*]. I addressed the query in the following wording

> "Was the trial magistrate informed to comply with section 271 (3) of the Criminal Procedure and Evidence Act, that is, to record explanation given on the charge. Refer to *S* v *Mangwende* HH 695/20."

The learned magistrate responded to the query as follows-

> "Trial Magistrate makes a concession that indeed there was no compliance with the peremptory provisions of section 271 (3) of the Criminal Procedure and Evidence Act. This might be due to the fact that I only got a copy of *S* v *Mangwende* HH 695/20 sometime late June 2021.

The omission is however regretted and will guard against it in future."

With the learned regional magistrate having conceded the omission the only issue that remains to be addressed is what should happen to the proceedings. Are they certifiable or confirmable as being in accordance with real and substantial justice? In the *Mangwende* case, *supra*, it was held that proceedings which do not comply with sections 271 (2) (b) as read with s 271 (3) render a trial unprocedural and therefore unfair. An unfair trial is a violation of s 69 as read with s 86 (3) (e) of the Constitution which entrench the right to a fair trial and provides further than no law may qualify the right. The provisions of s 29 (3) of the High Court Act, Chapter 7:06 which provide that no conviction or sentence should be set aside on review unless failure to do so would result in a substantial miscarriage of justice, do not save the situation because s 29 (3) is a qualifying law and cannot apply where the irregularity applies to an entrenched provision of the Constitution.

The same approach which was followed in *S* v *Mangwende* will be followed *in casu*. Accordingly the following order ensues-

(a) The proceedings in case No CRB CHT MRDR 66/21 are not in accordance with real and substantial justice.
(b) The conviction of the accused and sentence imposed are set aside.
(c) The Prosecutor General retains his discretion to institute a fresh prosecution against the accused, provided that in the event that the accused is convicted, the sentence which may be imposed shall take into account the period of imprisonment already served by the accused.
(d) The accused is to be liberated forthwith.

MUSITHU J Agrees ……