

MZIMAZISI KHUMALO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 22 MARCH 2018 AND 29 MARCH 2018

Bail Application

K Sibanda for the applicant
Ms S Ndlovu for the respondent

MOYO J: This is an application for bail pending appeal. The appellant was convicted on his own plea of guilt by the magistrate sitting at Kezi, of assault as defined in section 89 of the Criminal Law Codification and Reform Act [Chapter 9:23] (hereinafter referred to as the Code). He was sentenced to 12 months imprisonment.

He has applied for a review of the proceedings in the court a quo and he cited failure by the magistrate to comply with section 163A of the Criminal procedure and Evidence Act [Chapter 9:07] in that he did not explain to the accused person his rights to legal representation. Counsel for the appellant submits that if he had been afforded that opportunity he would have elected to be legally represented and therefore a lawyer would have either assessed the facts and circumstances of the assault in order to present a defence and that even if he would have pleaded guilty, a lawyer would have submitted more meaningfully on sentence so much so that a different sentence would have been meted out.

The respondent has opposed this application on the basis that there are no prospects of success on review.

The facts of the matter are that the accused person who is aged 22 years, went to complainant's homestead on the morning of 2 January 2018 and assaulted complainant in his bedroom hut while he slept. He assaulted complainant with a knobkerrie on the ribs and also

with a knife on the palms and the thigh as well as the right leg. The complainant, according to the medical report, sustained stab wounds on the right palm, right t high and right leg.

A denial of legal representation is a misdirection that could lead to proceedings being set aside on review. It is up to the reviewing court to either set the proceedings aside or make an order as it deems fit. In the case of *Chitepo v City of Mutare and Another* SC 21/04, CHIDYAUSIKU CJ (as he then was), held that

“I have no doubt that denial of legal representation to a party can form the basis of setting aside proceedings on review” SC 21/04.

The former Chief Justice uttered these words in relation to a civil matter, being a disciplinary hearing. This was also during the time when our old Constitution popularly known as the “Lancaster House Constitution” was in operation. Since 2013, we now have a new constitutional dispensation and in that constitution is embodied the right to legal representation. The Criminal Procedure and Evidence Act, (*supra*) was then aligned to the current constitution by the enactment of section 163A. It then means that the right to legal representation is now statutory, driving from the constitution and the statute makes the explanation of such a right peremptory on the part of the learned magistrate. If the review court finds that indeed there was a misdirection, the court is at large as to what to do with the proceedings. It can set them aside and order a trial *de novo*, amongst other things. It would therefore be unfair and prejudicial to the accused person, to leave him to serve the sentence pending his application for review as there is a conceded misdirection on the part of the trial court and such misdirection is a recognized ground for review, and it can actually formulate the basis for the setting aside of such proceedings. It is for this reason that this court finds that there are prospects of success on review and as a result I would grant the application.

I accordingly grant the applicant bail on the terms and conditions as annexed to the draft order.

Mathonsi Ncube Law Chambers’ appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners