

**THE STATE**

**Versus**

**LEVIOUS MOYO**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 13 JANUARY 2022

**Criminal review**

**DUBE-BANDA J:** This is a review at the instance of the trial magistrate. The accused was charged with the crime of contravening section 89 of the Criminal Law Codification and Reform Act [Chapter 09:23] “Assault.” It being alleged that on the 9 January 2021 he unlawfully struck complainant with an axe on the head, and with a knobkerrie once on the mouth and several times on the left shoulder.

This review is at the instance of the presiding learned magistrate. The learned magistrate in her letter to the Registrar of the High Court dated 9 November 2021 says that after finding the accused not guilty and acquitting him she noted that there was an error in the conduct of the proceedings. She avers that first she should have proceeded with the trial rather than acquitting the accused, and second that she ought not to have sentenced the accused since a plea of not guilty had been entered. She has approached this court ostensibly for the quashing of the said proceedings.

It appears to me that the letter by the trial magistrate is an answer to a letter dated 1 November 2021 from the public prosecutor and addressed to the Clerk of Court Nkayi and copied to the provincial magistrate, resident magistrate and to the trial magistrate. In his letter the public prosecutor requested to be furnished with a transcribed record of proceedings for the purposes of forwarding it to the Prosecutor-General’s office for either filing of a review or an appeal. This is the letter that must have prompted the learned magistrate on the 9<sup>th</sup> November to send the record of proceedings to this court for review.

The facts of this case are that the accused appeared in court on two occasions i.e. day one and day two. Day one was on the 13 October 2021, accused appeared before the trial court and the charge was put and explained to him. He pleaded guilty. He however disputed using an axe and agreed that he used a knobkerrie to assault the complainant. The prosecutor informed the court that the State accepted the “partial plea” on the basis that the medical report shows that a blunt instrument was used in the assault of the complainant. In the process of canvassing the essential elements to the charge the court was not satisfied that accused’s plea of guilty was a demonstration of an unequivocal admission of guilt. The court then entered a plea of not guilty and remanded the matter for trial.

On the 1<sup>st</sup> November 2021 i.e. day two at the commencement of the proceedings the following exchange ensued between the learned magistrate and the public prosecutor:

Prosecutor: Matter is coming in for a plea recording your worship.

Court: No, it’s a trial, he pleaded not guilty.

Prosecutor: The State does not wish to go for trial as accused pleaded guilty to everything.

Following this exchange the trial court warned the accused of his right to legal representation, the charge was put and again he pleaded guilty. Facts anchoring the charge were read to him and he agreed with such facts. All in all what unfolded up to this point was a complete repetition of the proceedings of day one. For the purposes of completeness and clarity I record verbatim what transpired thereafter before the trial court, it is this:

Court: I will ask you questions to ascertain if you understand the charge.

Court: Why did you attack complainant?

Accused: He attacked me with a knobkerrie.

Court: How did you attack complainant?

Accused: I did with a knobkerrie.

Court: Who attacked who first?

Accused: It was complainant.

Court: What did he use?

Accused: He used a knobkerrie to attack me.

Court: Anything else to tell the court?

Accused: No, except that I was ready to pay him and I had sent somebody to ask for forgiveness for me to him.

#### Sentence

The court find you not guilty as a complete defence of self-defence has been raised by you. Accused is therefore acquitted.

The learned magistrate *erred* by capitulating to the demand by the prosecutor that the matter was for plea recording. The prosecutor's conduct was equally strange and ill-informed. I say so because on day one all the procedural formalities were observed, the accused was warned of his right to legal representation, the charge was put, he pleaded guilty and the court was not satisfied that his plea of guilty was an unequivocal admission of guilty as required by the law and it then entered a plea of not guilty and remanded the matter for trial.

On the date set for the trial the court committed an irregularity by repeating the same procedural formalities observed on day one. On day one the court had entered a plea of not guilty. On day two the matter should have just proceeded to trial. However what happened on day two is somehow very strange. After tendering a plea of guilty the court asked the accused a series of questions and on the basis of his answers he was found not guilty and acquitted. The State was not afforded an opportunity as required by law to adduce evidence to prove its case.

A court cannot just ask an accused a series of questions and on the basis of his answers return a not guilty verdict. The State had to be afforded an opportunity to prove its case. This is elementary. This is basic. The trial magistrate says what happened is an error. A very strange and unusual error indeed! There are in essence many issues that are unsatisfactory about the conduct of these proceedings in the trial court, e.g. the manner in which the essential elements were put. Again under the sub-heading "sentence" there is a verdict of not guilty. However I do not intend to overburden this review judgment with all these issues, I confine it only to the irregularity of acquitting the accused without a trial. The proceedings in the trial court are an affront and a stain and cannot be allowed to stand.

In conclusion I note that the accused was found not guilty and acquitted without a trial. The irregularity was so fundamental in that there had been no trial at all. The discharge and acquittal of the accused was as a result of a gross irregularity. It is an irregularity so fundamental that this court must set-aside the proceedings without reference to the merits, and order a trial *de novo* before a different magistrate.

In the premises, the failure by a trial court to conduct a trial is an irregularity that is fatal to the proceedings. In terms of s 29 (2) (b) (i) of the High Court Act [*Chapter 7:06*], I find that the proceedings in the court *a quo* were not in accordance with real and substantial justice, as a result a substantial miscarriage of justice actually occurred.

In the result, I make the following order:-

1. The proceedings in CRB NK193/21 be and are hereby quashed and set aside.
2. The accused to be tried *de novo* before a different magistrate.

Kabasa J ..... I agree