THE STATE
Versus
NORMAN GWANDE AND ANOTHER

HIGH COURT OF ZIMBABWE
OMERJEE J
HARARE, 15 November 2008

Criminal Review

OMERJEE J: The accused person, Norman Gwande, was jointly charged with one Tafanana Dangarembizi on a charge of stock theft as defined by s 114 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("Criminal code").

On the date of arraignment his co-accused pleaded not guilty whereas he tendered a guilty plea necessitating a separation of trials.

The trial court proceeded to carry out what it purported to be an enquiry in terms of s 271(2)(b) of the CP & E Act ("the code") and convicted the accused on his own plea of guilty. He was sentenced to 10 years imprisonment of which 12 months were suspended on the usual conditions.

The record has come before me by way of automatic review.

The State outline captures the facts, which brought rise to the charges against the accused, in the following terms:

> 01. The complainant in this case is Cyprian Tsuro a male adult who resides at Plot 4 Cotter farm, Marondera and is the plot holder.
>
> 02. The accused persons in this case are Norman Gwande a male adult who resides at Bemba farm, Marondera and accused person two is Tafanana Dangarembizi a male adult who resides at Rapid farm, Marondera and is employed.
>
> 03. On the date to the prosecutor unknown but in the month of May 2008 the two accused persons proceeded to the complainant's cattle pen and stole one black ox. The accused persons slaughtered the beast near the bush and sold the meat to some locals.

04. On 12th of June 2008, the accused person was spotted with *[sic]* members of neighbourhood watch committee within the scene looking for transport to Marondera. The accused person was arrested who leads to the arrest of the other accused person who was at the residence in Rapid farm, Marondera.

05. The hide of the stolen ox was recovered at the scene and can also be produced in court as an exhibit.

06. The value of the stolen one ox is $ 600 billion and nothing was recovered.

07. The State would submit that the accused persons had no right to act in the manner they did.

Based on these inelegantly drafted, scanty and meaningless facts the magistrate proceeded, with indecent haste, to conduct what he purported to be the enquiry envisaged by s 271(2)(b) of the code.

Before I deal with the magistrate's enquiry, I think it is important to once again remind magistrates that they owe enormous duties toward unrepresented accused persons. As stated in *S* v *Tau* 1997 (1) ZLR 93 (H) at 99:

> "The vast majority of criminal prosecutions are against unrepresented persons. The magistrate is the primary bulwark defending the ignorant or impoverished against the potential injustices wrought through an excess of zeal; pressure of work; administrative inefficiency or plain ineptitude in the investigation and prosecution of offences."

One such duty of a magistrate directly emanates from the requirements of s 271(2)(b)(i) of the code i.e. that a magistrate has a duty to *"explain the charge and the essential elements of the offence to the accused and to that end require the prosecution to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based."*

A magistrate is therefore duty bound to ensure that the prosecutor has disclosed sufficient and adequate facts, which are capable of informing not only the court but also the accused, precisely what the allegations against him are. The accused has the right to be fully appraised of the facts relied upon by the prosecution to enable him to make an informed decision as to what plea to tender in answer to the charge. Similarly the magistrate needs to know the full facts because it is from these that he will

formulate meaningful questions when canvassing the essential elements of the charge in fulfilment of the requirements of s 271(2)(b).

In circumstances where the prosecution fail to provide or disclose adequate facts in support of the charge, they must be directed to do so, that is to say, a magistrate must *mero motu* invoke the provisions of s 177(1) of the code and direct the prosecution to provide further particulars. This section reads:

> *"The court may either before or at the trial, in any case, if it thinks fit, direct that particulars be delivered to the accused of any matter alleged in the indictment, summons or charge, and may, if necessary, adjourn the trial for the purpose of the delivery of such particulars."*

Failure on the part of a magistrate to ensure prior disclosure of adequate and sufficient facts amounts to a misdirection and offends against the accused persons constitutional right to be afforded a fair trial. In particular the right to be informed, in detail, of the nature of the offence charged as guaranteed by s 18(3)(b) of the Constitution.

Turning to the present case, I have already quoted *verbatim* the state outline produced by the prosecution in support of the charge against the accused. It is obvious from its brevity that it failed to adequately inform the accused and for that matter the magistrate of the acts or omissions on which the prosecution were basing the charge. The outline as can be seen raised more questions than answers. Questions such as –

1. Did complainant identify the recovered hide as that belonging to his stolen ox?
2. Was it the accused who, through indications, led to the recovery of the hide?
3. Were any of the buyers identified and questioned?
4. Was accused identified by any of the alleged buyers as the person who sold them the meat from the stolen ox?
5. In short how was the accused linked to the theft?

The scanty information contained in the state outline fails to answer a single one of these pertinent questions resulting in the magistrate's purported canvassing of

essential elements to be similarly scanty, as a consequence of which there was a complete failure to achieve the object of the enquiry envisaged by s 271(2)(b) of the code.

In this regard the purported enquiry conducted by the magistrate comprised six short questions prompting an equal number of monosyllabic responses from the accused. The sufficiency of the responses could not inspire any confidence that the accused *'understood the charge and the essential elements of the offence and that his plea of guilty was an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor'* (see s 271(2)(b)(ii)).

To demonstrate the magistrate's failure I will recite the full enquiry as appears on record. It went like this:

> Q. Are the facts true and correct?
>
> A. Yes
>
> Q. Any variations?
>
> A. No
>
> Q. Do you admit that on a date unknown to the prosecutor but in the month of May 2008 and at Plot 4 Cotter farm Marondera you took one ox belonging to Cyprian Tsuro?
>
> A. Yes
>
> Q. Intending to deprive complainant permanently of his property?
>
> A. Yes
>
> Q. Any lawful right?
>
> A. No
>
> Q. Any defence to offer?
>
> A. No

I consider that these questions failed to explain to the accused the essential elements of the particular charge he was facing. The enquiry, it must be remembered, is the mechanism used to ensure that "prior to conviction the magistrate satisfies

himself, beyond doubt, that the accused's plea of guilty or admission to the charge is an unqualified or unequivocal and genuine plea". *S* v *Matimbe & Ors* 1984 (1) ZLR 283. The magistrate can only satisfy himself if he asks questions which are carefully formulated by marrying the charge, essential elements and the particular facts of the case. As stated by Gillespie J in *S* v *Machokoto* 1996 (2) ZLR 190 –

> "Where it is necessary to invoke this provision, then the essential elements of the offence must be explained in such a way as is calculated to inform the accused, if unrepresented, of the nature of the charge in sufficient clarity and detail as will suggest to him, in his knowledge of the matter, whether he has a defence to offer. Obviously, I do not intend to imply that the magistrate should be suggesting defences to the accused. On the other hand, it must not be overlooked that where a person on trial has not had the benefit of legal advice, the only possible source of independent assistance towards an understanding of the nature of his predicament will be the bench. The mere fact that the person wishes to plead guilty is no reason to be cursory in the explanation of essential elements. On the contrary, it is precisely because an admission of guilt is tendered that it is necessary to ensure that the accused has applied his mind to the true import of the charge and is properly aware that anything he may wish to say in his behalf could not constitute a defence."

The accused was facing a charge of theft. An essential element of theft is the unlawful *contrectatio* of property capable of being stolen. *In casu* it will be seen that the third asked question fell far too short of explaining to the accused that the taking must be unlawful. It is thus difficult to be satisfied that the terse response "Yes" that it elicited was an admission to an unlawful taking. One would have expected the magistrate to follow up on this question but surprisingly he simply proceeded to regurgitate, without attempting to simplify, another element of theft in his next question. Magistrates are implored to always remember that the questioning of an accused is a mechanism that is used to reveal exactly what it is the accused is admitting to and demonstrate that he is understandingly admitting the elements of the offence. Thus merely paraphrasing the definition of an offence will not assist an accused to understand the import of the elements, moreso if they are of a technical legal nature such as "intent to deprive the owner permanently". As was stated in *S* v *Member Matimbe* HH 215/03 –

> "What is important when canvassing essential elements is not the slavish regurgitating of the words 'intention to deprive the owner permanently' but to establish that intention by suitable questions and answers."

The long and short of it is that *in casu* the magistrate dismally failed to satisfy the requirements of s 271(2)(b) thus rendering the conviction unsafe. On this basis alone the conviction cannot be confirmed and must be set aside.

In addition to the above there is another glaring irregularity evident on the record. The magistrate without conducting any enquiry into the existence or otherwise of special circumstances proceeded to sentence the accused to the mandatory minimum sentence provided by s 114(2)(e) of the Criminal code. That it is a requirement to make an enquiry into special circumstances is made clear by the provisions of s*ubs.* (3) of s 114. It reads –

> *"If a person convicted of stock theft involving any bovine or equine animal stolen in circumstance described in paragraph (a) or (b) of subsection (2) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be recorded by the court, why the penalty provided under paragraph (e) of subsection (2) should not be imposed, the convicted person shall be liable to the penalty provided under paragraph (f) of subsection (2)."*

In his reasons for sentence the magistrate made a passing statement that he found no special circumstances, but what is conspicuous is the absence of any evidence that he carried out an investigation on the question. It would appear that this magistrate is either unaware of the need to conduct an enquiry or was just derelict in his duty.

On this basis also even if the conviction had been sound the sentence imposed could not be confirmed.

In the result I have no choice but to set aside both the conviction and sentence imposed and order that the matter be remitted back to the magistrates' court for a new trial, on a plea of not guilty, should the prosecution wish to pursue it. In addition it is ordered that the accused should be released from prison forthwith. I have accordingly issued a warrant for his liberation.

Before ending this judgement I wish to make one other observation. Magistrates and prosecutors should desist from the practice, which appears to be common, of

simply using the state outline when an accused tenders a guilty plea having been arraigned for a contested trial. It must be remembered that a state outline is not based on facts, which the accused has given prior agreement to. The use of a state outline exposes an accused to the dangers of being convicted on facts that he has not been given an opportunity to carefully reflect on. This has the real potential of an accused being severely prejudiced in the sense that he may be convicted on some facts which he may not agree with but which facts aggravate the offence and lead to a more severe punishment than warranted.

The correct procedure should be that if, in a contested trial an accused tenders a guilty plea in answer to the charge, a magistrate should take a short recess to allow the prosecutor to interview the accused and draw up a statement of agreed facts based on the information gathered

HUNGWE J agrees.