TAFADZWA MUTUMWA 1ST APPELLANT
and
MOLLY MAKA 2ND APPELLANT
and
THE STATE RESPONDENT

HIGH COURT OF ZIMBABWE
MAKARAU JP AND BERE J
HARARE, 30 October 2008

Criminal Appeal

L.T. Musekiwa, for appellant
R. Chikosha, for respondent

THE FACTS

BERE J: The facts of this case can be summarised as follows:

The two appellants were arraigned before the provincial court sitting at Mutare on 27 July 2008. The two were being charged with contravening s 170 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*], in that they offered some police officers a bribe in the sum of $1200 000-00 (One million and two hundred thousand dollars) as an inducement to the police officers to enable the appellants to enter the restricted Chiadzwa diamond fields for purposes of illegal diamond mining.

In the court *a quo* the appellants pleaded guilty to the offence charged and proceeded to provide their statements in mitigation of sentence before being sentenced.

Before the learned Magistrate could sentence the two appellants, the two sought and secured the services of a legal practitioner who sought to make an application for change of pleas in respect of both appellants.

The application for change of pleas was dismissed by the Court before the appellants had even been heard and the learned magistrate proceeded to sentence the appellants. The first appellant was sentenced to 20 months imprisonment, 8 months of which were suspended on the usual conditions of good behaviour. The second appellant was slapped with a 12 months gaol term 9 months of which were suspended also on the grounds of good behaviour.

It is against these facts that on 4 July 2007 the appellants filed the instant appeal against both conviction and sentence.

As against conviction it was contended on behalf of the appellants that the court *a quo* had erred by accepting the appellants' pleas when all the evidence pointed to the fact that the pleas of guilty were given under circumstances of duress and that the learned magistrate had failed to properly explain the essential elements of the offence of bribing the two unrepresented appellants.

As against sentence, the argument was basically that the sentence imposed by the learned magistrate was too severe and needed to be interfered with.

At the time of hearing this appeal, the second appellant had already served her term of imprisonment while the first had been granted bail pending appeal after serving three months of the custodial term.

Counsel for the appellant sought to withdraw the second appellant's appeal and proposed to proceed with the first appellant's appeal on the strength of the appeal papers filed of record.

There was unanimity by both the appellants' counsel and the State Counsel that the best course of action was to have the proceedings quashed and the matter remitted to the court *a quo* for a trial *de novo*.

The issues before the court having been narrowed by the position adopted by both legal practitioners, the court's task was left to consider whether the concessions made by the state counsel were proper in the circumstances.

Ad CONVICTION

It is most significant in this case that once it was intimated to the learned magistrate that the appellants intended to make an application for change of their pleas, the magistrate was quick to dismiss the application even before affording the appellants an opportunity to put across their applications.

The learned magistrate was simply unwilling to entertain the application as evidenced by his "judgment" which went as follows:

"Judgment

After hearing submissions by the defence – I dismiss the application."

THE LEGAL POSITION RE: CHANGE OF PLEA

The legal position in this country has developed over the years and is now settled. The learned judge CHINHENGO J[1] aptly summed up the development of our law to its current position when he stated:

[1] S v Jackson 2002(2) ZLR 683(H)

"The law with regard to a change of plea has a chequered history in this country, arising from the question whether the accused had an onus to discharge in order to succeed in an application to change his plea. The law was for a long time one thing in this respect. See *S v Haruperi* 1984(1) ZLR 258(H); *S v Maseko* 1986(2) ZLR(S) and *S v Nyajena* 1991(1) ZLR 175 (S) ……. The law as enunciated in these cases was altered in *S v Matare* 1993(2) ZLR 88(S) by a majority of GUBBAY CJ, KORSAH JA and MUCHECHETERE JA.

In Matare (supra), at 97B-G GUBBAY CJ after reviewing the authorities on the subject and analysing the relevant provisions of the code, said:

> "It necessarily follows that the contrary decision in *S v Haruperi* (supra) was wrong.
> In the second place, I have no hesitation in accepting that in so far as a common law application to alter a plea of guilty is concerned, whether made before conviction or after conviction but prior to the passing of sentence, there is no onus on the accused to show anything on the balance of probabilities. He must simply offer a reasonable explanation for having pleaded guity……." (the emphasis is mine)_

The approach in the Matare case (supra) clearly represents the current legal position in this country in dealing with an application to change the accused's plea.

Section 272 of the code[2] gives the court the power to change a plea of guilty to one of not guilty once the court entertains doubt as to the genuiness of the recorded plea of guilty.

In the instant case it was brought to the attention of the learned magistrate who was seized with the matter that the appellants intended to make a formal application to change their pleas. The basis of the application was the alleged assault on the appellants by the police officers who were alleged to have sat in the court presumably to keep "vigil" of the conduct of the appellants in court during the recording of the pleas. There is no doubt that the allegations raised by the appellants through their legal practitioners were of a serious magnitude.

This court takes the firm view that once such allegations were raised, it was incumbent upon the trial magistrate to immediately conduct an enquiry into such allegations. It was certainly not competent for the magistrate to simply adopt a casual approach and dismiss the application without even hearing the application from the appellants themselves.

The attitude exhibited by the Magistrate was tantamount to riding roughshod over the constitutional rights of the appellants who were entitled to a fair trial before an

[2] Criminal Procedure and Evidence Act [*Cap 9:07*]

impartial court. Such conduct on the part of the Magistrate was unacceptable and was fatal to the proceedings.

The canvassing of the elements of bribery

There is yet another complication which arises from the manner in which the court *a quo* conducted itself in recording the pleas of the two accused persons.

The record of proceedings shows that in recording both appellants' pleas the trial Magistrate proceeded in terms of s 271(2) b of the Criminal Procedure and Evidence Act[3]. For clarity's sake it is important to reproduce the relevant pages of the record of proceedings which deal with the manner in which the presiding Magistrate canvassed the elements of the offence of bribery. The recording went along the following lines:

> "Essential elements
> Unlawful offering to police officers money in the sum of $120 000-00 as bribes to induce them not to assist you or to allow you to enter an area to dig for diamonds,
>
> Q. Do you understand the elements?
>
> A. Yes (1) 2 (Yes)
>
> Q. Did you offer police officers $1 200 000-00 as bribes as alleged?
>
> A. 1 Yes 2. yes
>
> Q. Did you appreciate that your bribing of the policemen was unlawful?
>
> A. 1. Yes 2. Yes
>
> Q. If you know your actions were unlawful do you accept you are wrong?
>
> A. 1. Yes 2. Yes
>
> Q. Sure
>
> A. 1. Yes 2. Yes
>
> Q. You both know meaning of guilty?
>
> A. 1. Yes 2. Yes
>
> Q. So do you have any defence to offer?
>
> A. 1. No defence. 2. No defence
>
> Q. Are you saying you are guilty of bribery?
>
> A. 1. Yes 2. Yes
>
> Q. Why did you commit this offence?
>
> A. 1. I wanted to acquire diamonds to sell so as to get money.
> 2. I wanted to dig, find some diamonds sell them and make money for my family.

[3] Chapter 9:07

V.G. Both accused as pleaded 271(2)(b).”

It is this manner of canvassing the

elements of the offence of bribery to satisfy the trial court of the genuineness of the appellants’ pleas which has caught the attention of the Appeal Court, of course urged by both counsels.

It is apparent from the sampled portion of the record of proceedings that the Magistrate did not even make an attempt to explain to the unrepresented appellants what this offence called bribery was all about. The factors which constitute this offence were not explained. It will be noted that the very second question put to the appellants by the Magistrate was:

“Do you understand the elements?” to which the appellants answered in the affirmative.

It is ironic though that at that stage no elements had been put across to the appellants by the Magistrate.

By definition bribery (as briber) consists in unlawfully and intentionally offering to or agreeing with a State official to give any consideration in return for action or inaction by him in an official capacity .

The essential elements of this offence are (a) unlawfully (b) intentionally (c) a State official (d) offering or agreeing to give any consideration (e) return for action or inaction[4].

These are the elements which ought to have run through the questions put to the appellants in this matter by the court *a quo*.

The need to avoid cursory compliance with the provisions of s 271(2)(b) of the code first finds firm expression in that same section which makes it peremptory for the presiding Magistrate to among other things:

> “(ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor, ….”[5]

It is only when the court is satisfied that the accused understands the charge and the essential elements of the offence and the acts or omissions on which that charge is based can the court return a verdict of guilty.

It is clear from the record of proceedings that the Magistrate did not assiduously comply with the Provisions s 271(2)(b) of the code.

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[4] South African Criminal and Procedure, volume H II, See Edition, Juta and Co Ltd, 1982, by P.M. Hunt and J.R.L. Milton pp 219 and 220

[5] [*Cap 9:07]*

A plethora of authorities have stressed the need for courts to fully comply with the provisions of the above referred section in recording of pleas under it. One can safely lean on the case of *S v Tachiona and Anor*[6], per CHATIKOBO J. The same approach is further highlighted by the learned judge DUMBUTSHENA CJ (as he then was) with the concurrence of the full bench in the case of *S v Dube and Anor*[7] where the need to comply with the provisions of s 255 (2)(b) of the code (now s 271(2)(b)) was summarised in the following:

> "The provisions of s 255(2)(b) of the Criminal Procedure and Evidence Act [*Cap 59*] require that the court explain the charge and the essential elements of the offence to the accused and inquire from him whether he understands them[8]" .

See also the case of *S v Milanzi and Anor*[9] , The *S v Bishop Choma*[10] , The *S v Chibvongodze and Ors* (for further guidance).

The court *a quo* was attacked by the appellants' counsel for having proceeded to sentence the appellants at a time when an application for review to challenge the proceedings in the Lower Court had been filed in the High Court. Counsel's view was that the Magistrate was obliged to either stay the proceedings to await the outcome of the application for review or alternatively to refer the matter to the High Court for determination. With all due deference I do not agree with the submissions made by the appellants' counsel, in this regard.

In the absence of a proper application to stay proceedings pending the outcome of a review application the trial Magistrate was not obliged to defer sentencing of the accused persons whom he had already convicted. In my view, the criticism of the trial Magistrate on this point was therefore unfair and counsel's position does not quite represent the accepted legal position in this regard.

Whilst the review jurisdiction of the High Court in un-terminated criminal proceedings from the Magistrates Court is unquestionable, it should be borne in mind that, that avenue must only be pursued in extremely rare situations. The preferred or ideal situation seems to be that superior courts should only intervene at the conclusion of the criminal proceedings in the lower court. One finds instructive guidance from STEYN CJ in the case of *Ismail and Others v Additional Magistrate, WYN BERG and Another*[11] where the learned judge stated:

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[6] 1994 (2) ZLR 402
[7] 1988 (2) ZLR 385
[8] 1988 (2) ZLR 385 (SC) at p 390
[9] 1998 (2) ZLR 212
[10] HH 135-90
[11] 1963 (1) SA at pp 5-6

> "I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Anor*1959(3) S.A. 113 (A.D) at p. 119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the Magistrate's decision under appeal at a stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or error which are to be dealt on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in un-terminated proceedings in a court below, and should, generally speaking, confine the exercise of its powers to "rare cases where grave injustice might otherwise result or where justice might not by other means be attained" (my emphasis)

The same legal position was restated in the case of *Masedza and Ors v Magistrate, Rusape & Anor*[12] per DEVITTE J.

The bottom line is that the filing of an application for review proceedings *per se* in un-terminated criminal proceedings does not compel a presiding magistrate to suspend the conclusion of a matter he is seized with. A magistrate can only suspend the proceedings in circumstances where a proper application for stay of proceedings has been made and order granted to that effect.

The manner in which the two appellants were questioned by the trial Magistrate is undesirable. The record shows that both appellants gave strikingly identical responses to the questions put to them by the court *a quo*. Their responses were captured throughout as "Accused 1 – yes; Accused 2 – yes". It is not usual that accused persons would respond to questions put to them in such an automated fashion.

The ideal approach would be to deal with one accused at a time and when the verdict is pronounced, to then proceed to deal with the next accused whose responses must be properly recorded .

The cumulative effect of the concerns highlighted in this judgment clearly show that the conviction of the appellants was improper. The court is of the firm view that the decision by the respondent not to support the conviction was well informed. It is therefore not necessary for the appeal court to consider the sentences imposed.

Consequently the conviction is quashed and the sentence imposed on the appellant is set aside. The matter is remitted for a trial *de novo* before a different Magistrate.

MAKARAU JP: ……..

[12] 1998 (1) ZLR 36(H)

Musekiwa & Associates, appellants' legal practitioners
Criminal Division of the Attorney General's Office, respondent's legal practitioners