

WILLARD CHAWIRA  
versus  
THE STATE

HIGH COURT OF ZIMBAWE  
UCHENA and MWAYERA JJ  
HARARE, 27 and 29 September 2011

### **Criminal Appeal**

*C Mavhondo*, for the Appellant  
*Mrs S Fero*, for the Respondent

UCHENA J: The appellant was convicted on a charge of contravening s 3 (1) (a) of the Sexual Offences Act [*Cap 9:21*]. He appealed to this court against both conviction and sentence. After hearing submissions from counsel for the parties we upheld his appeal and set aside his conviction and sentence. We indicated that our reasons for judgment would follow. These are they:

The appellant fell in love with the complainant who was then aged thirteen. He early in, the morning of 17 April 2006 invited her to his house where it is alleged he raped her. He was charged with rape, but, was convicted of contravening s 3 (1) (a) of the Sexual Offences Act [*Cap 9:21*]. He was convicted by a regional magistrate sitting at Harare Regional Magistrate's Court, who sentenced him to 36 months imprisonment of which 12 months were suspended on conditions of good behaviour.

The appellant appealed to this court against conviction and sentence. His appeal against conviction is based on irregularities and evidential deficit. On irregularities the appellant alleged that his trial was fast tracked to his prejudice and the State failed to produce the complainant's first statement to the police in which she denied having been raped by the appellant. Mr *Mavhondo* also challenges the medical report on the ground that it was produced without giving the appellant three days' notice as required by s 278

(11) of the Criminal Procedure and Evidence Act [*Cap 9:07*], and without seeking his consent for its production without the requisite notice.

On evidential deficit Mr *Mavhondo* for the appellant submitted that the trial court erred by relying on the evidence of the complainant who came to court with visible injuries, having been assaulted by her uncle for this case. That the complainant had freely and voluntarily made an initial statement to the police denying having been raped by the appellant. He submitted that the complaint was examined by a doctor four days later and the report does not state that the appellant is the one who had sexual intercourse with her. He also argued that there was no basis for the magistrate preferring the complainant's and her uncle's evidence to that of the appellant and his witness.

### **Irregularities**

Mr *Mavhondo* for the appellant raised two main grounds on which he alleged that there were irregularities in the appellant's trial before the court *a quo*. He submitted that the case was unduly fast tracked and the Doctor's report on the complainant was improperly produced.

Mr *Mavhondo* for the appellant submitted that the appellant was brought to court by the police and his case was heard on the same day. This is not disputed by the respondent. It is in fact confirmed by the record of proceedings. The issue is simply whether or not it is permissible to fast track trials in the magistrate's court in the manner the appellant's trial was conducted. The fast tracking of cases started in the early 1990's as a means of reducing the courts' backlog. It is not specifically provided for by that name in the Criminal Procedure and Evidence Act [*Cap 9:07*], which I will refer to in this judgment as the CP&E Act. This however does not mean it is an unlawful procedure. It is in fact a useful procedure which if well managed helps to contain and or reduce the courts' backlogs of criminal cases, and ensures the delivery of timeous justice. All that has to be done is to ensure that it is used in compliance with the provisions of the CP&E Act, and other laws which provide for a fair trial.

Section 163 of the CP&E Act provides for the timing of an accused person's trial in the magistrate's court as follows:

“Any person to be prosecuted on a criminal charge in a magistrate’s court shall be brought for trial at the next possible court day.”

This in my view means when an accused person is arrested and is to be prosecuted in the magistrate’s court he shall be brought to trial on the next possible court date, which means on the day when the court will be sitting next after the decision to prosecute him in the magistrate’s court will have been made. This however does not mean the trial has to start on that day without fail. It is desirable that it should, but regard should be had to the provisions of s 165 of the CP&E Act which provides for postponements where necessarily. The provisions of s 163 are therefore in general consistent with the fast tracking of trials in the magistrate’s court. The wording is such as can justify the trial of an accused person once he is brought before a magistrate.

John Reid Rowland in his book “Criminal Procedure in Zimbabwe” commending on section 163 of the CP&E Act said:

“This does not necessary mean that his trial will take place on that date, it may very well be postponed. Undue haste in bringing a case to court may be prejudicial to the accused and thus constitute an irregularity”.

Undue haste can be due to the refusal of an accused person’s request for a postponement to enable him to prepare for the trial or to engage the services of a legal practitioner. It can also be due to the trial proceeding without complying with the requirements of a fair trial. In the absence of a valid request for the postponement of the pending trial, and if the trial complies with the requirements of a fair trial a magistrate’s court can proceed with an accused person’s trial on the “next possible court day”, as provided by s 163.

In the present case Mr *Mavhondo* for the appellant argued that the trial court should have asked the appellant who was facing a serious charge of rape whether or not he wanted to be legally represented, and if he had said he did the case should have been postponed for that purpose. He argued that the fact that the appellant needed the services of a legal practitioner is confirmed by his engaging one on the following day, but when his trial had already been completed. He submitted that the appellant’s friend discovered that the appellant was being tried without legal representation, and arranged for it. He also submitted that the appellant was not given three days’ notice for the production of

the Doctor's report, and that even though he consented to the production of the report he did so without having been advised that he was entitled to three days' notice of its production.

Every accused person is ideally entitled to legal representation at his trial. This becomes more compelling if he is facing a serious charge for which if convicted he can be sentenced to a long term of imprisonment. Generally, such legal representation would be, at the accused's own expense. It is only in exceptional cases when a magistrate may be required to order legal representation through the Legal Aid system. Judicial officers should in appropriate cases ask the accused person if he needs the services of a legal practitioner at his own expense. Justice can however still be done if the trial magistrate ensures that justice is done by making sure the trial complies with the statutory requirements for a fair trial. This issue was dealt with by the Supreme Court in the case of *S v Dube & Anor* 1988 (2) ZLR 385 (SC) at pp 392 H to 393 F where DUMBUTSHENA CJ without laying a hard and fast rule, said:

"In our view judicial officers trying such cases should ask themselves three questions:

1. Where the accused has pleaded guilty, would it be appropriate nonetheless to enter a plea of not guilty in terms of the provisions of s 255A of the Criminal Procedure and Evidence Act?
2. Where the accused is unrepresented, would it be fair and appropriate to advise him of the complexities of the matter and enquire whether he has considered obtaining legal representation?
3. If satisfied that the accused should have legal representation but cannot afford it, should the court certify that he should have legal representation in terms of the provisions of s 3 of the Legal Assistance and Representation Act [*Cap 66*], as amended by s 2 of Act 21 of 1974.

We do not mean to suggest, far less to lay it down as a rule of practice, that magistrates should recommend legal aid in every case where a long sentence is possible. In most cases a plea of guilty is quite clear and unequivocal, and the procedures laid down in s 255 will ensure a fair hearing. Equally, there will be many cases where a fair hearing can be ensured by using the procedure set out in s 255A and changing the plea to "not guilty" so that questions of law and admissions of fact can be explored and clarified (see *S v Nyamweda* 1983 (1) ZLR 131 (SC); *S v Malili & Anor* 1988 (4) SA 620 (T)).

Finally, there will be some cases where it will be enough for the magistrate to explain the complexities and enquire whether the accused does not want to engage legal representation at his own expense. This should be done at the earliest possible stage, ideally when the accused is first remanded.

It will thus only be in a minority of cases that the magistrate will conclude that there cannot be a fair trial without representation. In such cases his duty is to act in terms of *Chapter 66* and recommend legal aid. Even then, of course, an accused person can waive his right to representation, provided, he does so on a properly informed basis.”

I am therefore satisfied that the magistrate’s failure to ask the appellant if he needed the services of a legal practitioner is on its own, not a sound ground for upsetting the appellant’s conviction. The commencement of the trial without affording the appellant a postponement for him to engage the services of a legal practitioner is also not an irregularity as the appellant had not asked for a postponement. He had in fact come to court with his witness who testified. He was apparently ready for the trial. If he had applied for a postponement, the magistrate would have erred if he had ignored the appellant’s request and ordered the trial to proceed in spite of such a request as the request would have been made on the appellant’s first appearance in court. A refusal could not have been justifiable in those circumstances.

The issue of substance, which was dwelt on towards the end of the appeal hearing, is the magistrate’s failure to observe the requirements of s 278 (11) of the CP&E Act. Mr *Mavhondo* for the appellant submitted that the appellant’s trial was conducted with such haste that his right to three days notice before the production of the Doctor’s report on the complainant’s examination, was not complied with. Mrs *Fero* for the respondent conceded, that the appellant was not given three days’ notice of the State’s intention to produce the Doctor’s report, and that his consent to its production without such notice was not sought. It was also conceded that the law on the production of such documents was not explained to the appellant. The concessions were properly made as the magistrate’s omissions are apparent from the record of proceedings. Section 278 (11) of the CP&E Act provides as follows:

“(11) An affidavit referred to in this section shall not be admissible unless the prosecutor or the accused, as the case may be, has received three days’ notice of its intended production or consents to its production.”

In terms of s 278 (11) of the CP&E Act two things must happen for the affidavit to be admissible in evidence. The three days’ notice should have been given or the appellant should have consented to its production without his having been given such notice. The consent of an unrepresented accused person can only be valid if his right to such notice is explained to him before he is asked whether or not he consents to its production without the requisite three days’ notice. It is not enough to merely ask if he consents to the production of the Doctor’s report as there is need for him to consent to its production in general and to consent to its production without the statutorily required three days notice of its production. If the affidavit is produced without the requisite notice or consent, it will not have been properly produced and cannot be used as evidence against the accused.

In this case the Doctor’s affidavit on the examination of the complainant was not properly produced. That evidence was not properly before the trial court. Its use in convicting the appellant should therefore affect the regularity of the proceedings and the propriety of the conviction. Its production without the requisite three days’ notice or his informed consent is an example of the court proceeding with a trial with undue haste to the prejudice of the appellant. This is an example of how fast track trials should not be conducted.

Mrs *Fero* for the respondent submitted that in the circumstances the appellant’s conviction and sentence should be set aside and the case be referred back to the trial; court for trial *de novo*. She submitted that this court could use its review powers in terms of s 35 of the High Court Act to do so. Mr *Mavhondo* for the appellant agreed with her.

Section 35 of the High Court Act [*Cap 7:06*] provides as follows:

“When an appeal in a criminal case, other than an appeal against sentence only, has been noted to the High Court, the Attorney-General may, at any time before the hearing of the appeal, give notice to the registrar of the High Court that he does not for the reasons stated by him support the conviction, whereupon a judge of the High Court in chambers may allow the appeal and quash the conviction

without hearing argument from the parties or their legal representatives and without their appearing before him.”

The procedure provided by s 35 is not applicable in this case as it refers to concessions made by the Attorney- General “before the hearing of the appeal”, and such concessions are channeled through the registrar for consideration by a judge in chambers. When we brought this to the attention of Mrs *Fero* for the respondent and Mr *Mavhondo* for the appellant they both agreed that s 35 was inapplicable and urged us to use our common law review powers. While it is correct that this court has inherent jurisdiction and can use it to refer this case back to the trial court for trial *de novo*, s 41 (d) and (h) as read with s 29 (2) (b) (v) of the High Court Act gives this court supplementary powers to deal with a situation such as has arisen in this case. Section 41 (d) and (h) provides as follows.

“For the purposes of this Part, the High Court may, if it thinks it necessary or expedient in the interests of justice—

- (a) ...;
- (b) ...;
- (c) ...;
- (d) having set aside the conviction, remit the case to the court or tribunal of first instance for further hearing, with such instructions as regards the taking of further evidence or otherwise as appears to it necessary;
- (e) ...;
- (f) ...;
- (g) ...;
- (h) exercise any of the powers of review conferred upon the High Court by section *twenty-nine*:

Provided that, whenever the High Court receives further evidence or gives instructions for the taking of further evidence, it shall make such order as will secure an opportunity to the parties to the proceedings to examine every witness whose evidence is taken.”

Section 29 (2) (b) (v) provides as follows:

- “(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings—
- (a) ...;
  - (b) are not in accordance with real and substantial justice, it may, subject to this section—
    - (i) alter or quash the conviction; or

- (ii) reduce or set aside the sentence or any order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal:

Provided that—

- (i) ...;
  - (ii) ...
  - (a) ...
  - (b) ...
- or
- (iii) ... or
  - (iv) ... or
  - (v) remit the case to the inferior court or tribunal with such instructions relative to the further proceedings to be had in the case as the High Court thinks fit; or”

This court can therefore act either in terms of s 41 (d) or (h) if it finds it appropriate to refer the case back to the trial court. This however depends on our findings on the appellant’s grounds of appeal on evidential deficit. It is in my view not proper to refer a case back to the trial court for trial *de novo* when the evidence led before the first trial was such as would not sustain a conviction. This would be tantamount to sending the appellant for another trial in circumstances where he should have been acquitted at the first trial.

### **Evidential deficit**

Mr *Mavhondo*’s Heads of Arguments raises issues on the reliability of the complainant’s uncle’s evidence on his having seen the appellant and the complainant in the appellant’s bedroom through a keyhole. He in submissions argued that the trial court erred when it preferred his evidence to that of the appellant and his witness. At p 11 of the record James Kwecha the complainant’s uncle said he advised the police officer that he had seen the appellant and the complainant in the appellant’s bedroom. They then ordered Chamunorwa Jenyu the appellant’s witness who he said had shown them other rooms to open the door. He told them he did not have keys to that room. James then went to look for a screw driver he wanted to use to open the door. He said that is when the complainant sneaked out of the appellant’s bedroom. Chamunorwa disputed James’



evidence when he testified for the appellant. The complainant's uncle's evidence is not reliable on this aspect. He said he was with a police officer to whom he had reported that his brother's daughter was being abused in the appellant's bedroom. He had told the officer that he had seen the complainant and the appellant through a keyhole. He then went to look for a screw driver, and the complainant sneaked out during that period. This sounds untruthful as according to his evidence he went to look for the screw driver implying that the police officer remained at the door. If that was the case how could the complainant have sneaked out in the presence of the police officer. It is also inconceivable that a police officer would be so inefficient as to allow the complainant to sneak out of the appellant's bedroom when he had been called to witness that fact and arrest the appellant. The State did not call the police officer leaving the appellant's word in contestation with James' word.

The record reveals that James could have had a motive to exaggerate against the appellant. He in his own evidence said he also wanted to take a knobkerrie so that he could kill the appellant. He in fact admits attacking the appellant and wanting to assault the complainant and being restrained by the police. His aggression towards the appellant and the complainant strengthens the appellant's evidence that he was refusing to open his door because he was afraid of him and not because the complainant was in his bedroom. The State's failure to call the police officer who came with James to the appellant's house entitles the appellant to the benefit of the doubt, especially in view of the complainant having initially made a statement in which she denied having had sexual intercourse with the appellant. The appellant's evidence that he had spoken to the complainant at the gate and had not taken her into his bedroom becomes probable.

It is for these reasons that we upheld the appellant's appeal and set aside his conviction and sentence.

MWAYERRA J: agrees .....

*Sawyer & Mkushi*, appellant's legal practitioners  
*Attorney-General's Criminal Division*, respondent's legal practitioners