

THE STATE
versus
X (A Juvenile)

HIGH COURT OF ZIMBABWE
MABHIKWA J
HARARE, 6 June 2018

Criminal Review

MABHIKWA J: This matter was placed before me for review. The accused is a 16-year-old juvenile, a girl residing at No. 180 Shinga Street, Dombotombo, Marondera and doing form 3. On 12 February 2018, at around 1400 hours, she is alleged to have been picked up at Chizori farm bus stop by the complainant, one Tawanda Tizora who was driving a Mazda Bongo vehicle registration No. AEO 1179, most likely a combi. At Muniwa Business Centre, she asked for the complainant's eco-cash number so that she could pay the fare. The complainant parked his vehicle at a garage and went to relieve himself at a nearby bush. When he returned, the accused had stolen the vehicle and disappeared. She allegedly was involved in a road accident in Kadoma along the Harare-Bulawayo road and was advised by Kadoma Police to produce her driver's licence within seven days. She was later arrested in Kwekwe.

She was then arraigned before a regional magistrate at Murehwa Court on 16 April 2018. She pleaded guilty and was sentenced to six years which was wholly suspended for 5 years on condition that during that period, she does not commit any offence involving dishonesty for which she is convicted and sentenced to prison without the option of a fine.

It is the manner in which the regional magistrate handled the plea recording which raises concerns.

Firstly, I noted that the learned magistrate did not, at the commencement of trial explain to the accused the provisions of s 191 of the Criminal Procedure and Evidence Act, in

compliance with the requirements of s 163 A of the same Act. Section 163 A provides as follows;

“163A

Accused in magistrate’s court to be informed of section 191 rights

(1) At the commencement of any trial in a magistrate’s court, before the accused is called upon to plead to the summons or charge, the accused shall be informed by the magistrate of his or her right in terms of section 191 to legal or other representation in terms of that section.

(2) The magistrate shall record the fact that the accused has been given the information referred to in subsection (1), and the accused’s response to it.

It is important to note that the requirements of s 163 A are made peremptory by the use of the term “shall” and it is apparent that the trial magistrate failed to do what was required of him by the law in appraising the accused of his rights.”

In failing to comply with s 163 A, the learned magistrate apparently went on to flout yet another of the young person’s rights. I say so because s 191 reads as follows;

“191 Legal representation

Every person charged with an offence may make his defence at his trial and have the witnesses examined or cross-examined—

(a) by a legal practitioner representing him; or

(b) in the case of an accused person under the age of sixteen years who is being tried in a magistrate’s court, by his natural or legal guardian; or

(c) where the court considers he requires the assistance of another person and has permitted him to be so assisted, by that other person.”

There is no doubt that the rights of the minor accused person were literally run over. The magistrate was correctly assisted by a probation officer’s report but there is no indication that the minor’s natural or legal guardian was even in court though it may be argued that s 191 says “below the age of sixteen.”

The plea recording itself did not help matters Magistrates should be reminded that the fact that an accused person, especially a minor, wishes to plead guilty to the charge is no reason at all to be cursory in dealing with the case.

The following is what is shown by the court record when the learned regional magistrate put the elements of the offence to the accused minor.

Elements

Q Correct that on 12 February 2018 at Murewa Business Centre, you stole complainant’s vehicle registrar on charge sheet?

A Yes

Q What did you intend to do with the vehicle

A Personal use.

Q Did you have any lawful right to act as you did

A No

Q Any defence to offer?

A None

Verdict

G.A.P.

The above four, very routine and all familiar questions are all that the magistrate asked in a typical fast track and cursory way of plea recording.

The crime of theft of motor vehicle is a very serious one. The elements of the offence are equally complex especially for a 16 year old school girl. The magistrate should have probed the minor more, for instance.

- (a) The magistrate did not even ask whether she intended to take the vehicle to be hers and forever thereby permanently depriving the owner of the same.
- (b) The magistrate could have asked whether the minor appreciated exactly what it is to steal a motor vehicle and the consequences thereof. Terms like “correct that you stole” are not enough.
- (c) The magistrate could have even asked whether indeed it was the minor who actually drove the vehicle from the garage, what was going through her mind and whether people around said anything.
- (d) In short, the magistrate should have canvassed a number of issues which would leave no doubt as to whether the minor stole or not.

In *S v Machokoto* 1996 (2) ZLR 190 (11) CHINHENGO and GILLESPIE JJ held that

“That the plea of guilty was not properly entered because there was a failure to explain the charge and the essential elements must be explained in such a way as is calculated to inform the accused if he is 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.”

See also *S v Matumbe and Ors* 1984 (10 ZLR 283).

In my view, it was imperative for the magistrate to deal with the essential elements in sufficient detail as to the date of the alleged offence, specific nature of the

actions taken, the *mens rea* of the accused and so on in order to satisfy the requirements of s 271 (20) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. From the record, the trial magistrate was in a haste to convict. No meaningful inquiry was made either in relation to the circumstances surrounding the commission of the offence or circumstances peculiar to the offender. Our courts have always emphasised the need to carry a full and meaningful enquiry before convicting and sentencing an accused. More diligence is obviously expected when it is a minor facing serious criminal charges.

These are the short comings which my brother MAWADZE J lamented and sought to correct in his review of two separate cases by the same provincial magistrate in HH 139-11 being *State v Morrison Ncube & 3 Ors and S v Michael Rusondo and Anor* – MAWADZE J stated thus;

“The common threat which runs through both matters *in casu* is the failure by the learned magistrate to deal with cases involving children in conflict with the criminal law. Judicial officers should always understand and bear in mind that children in conflict with the criminal law are a special category of offenders for which there are specific and peculiar legislative provisions designed to deal with such offenders both within our jurisdiction and other international conventions.”

The judge further quoted with approval GILLESPIE J in the case of *S v C* 1997 (2) ZLR 395 H at p 400 G-401 A, that;

“The concept of placing a juvenile, particularly a very young child, unrepresented and unassisted by its parents on trial before a magistrate is one that is inherently repugnant. The same juvenile would be regarded in a civil court as incapable of enforcing or defending its rights. What is different is that the criminal system of justice affords the unassisted minor the capacity to defend himself. It might well be thought that to place such a child in a position where he or she is expected to conduct his own defence in an alien environment, in adversarial proceedings is the expect for two much.”

The honourable judge went on to refer in our jurisdiction to ss 191, 195, 196, 197, 351, 352 and 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as well as ss 6, 7, 8, 63, and 70 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] as some of the sections that specifically far way the courts should deal with juvenile offenders or witnesses who are both in contact or conflict with the criminal law.

On the question of sentence, I am cognizant of the fact that the minor was sentenced to a non-custodial sentence (6 years wholly suspended for 5 years). I however notice that the sentence still was on the high side so as to warrant inference. Half the sentence (3 years wholly suspended for 5 years) would meet the justice of the case.

In the circumstances, I am unable to certify the proceedings as being in accordance with real and substantial justice.