

POTIFA SAWAKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI & CHINAMORA JJ
HARARE, 9 April 2020

Chamber application for condonation of late noting of appeal

Applicant in person
W. Badalane, for the respondent

CHITAPI J: The applicant together with his two co-accused were convicted of stock theft as defined in terms of s 114 of the Criminal Law Codification and Reform Act, [*Chapter 9:23*] by the Magistrate at Chinhoyi Court on 28 July 2017. On 31 July 2017, he was sentenced similarly with his co-accused to the mandatory minimum period of 9 years imprisonment following a finding by the court that there were no special circumstances to warrant the imposition of a lesser penalty. The record does not indicate that the applicant was advised of the right to appeal or that the proceedings would be referred for review and the import or essence thereof. The applicant and his co-accused were not legally represented at their trial.

I will briefly discuss the general duty of magistrates to advise the convicted person of the rights to appeal and the process of review. In this regard, the legislature must be commended for enacting s 163 A of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] in 2016. In terms of the provisions of s 163A aforesaid, the magistrate in any trial in the Magistrates Court must, before calling an unrepresented accused to plead to a charge, inform such accused of the accused's rights to legal representation or other representation as set out in s 191 of the same Act. The fact of the magistrate having informed the accused of such rights and the accused's response must be recorded. In this case, the magistrate did not comply with the peremptory provisions of s 163A and it will be demonstrated later in what ways there was non-compliance.

As already noted, s 163A deals with pre-trial duties of the magistrate. As regards post-conviction rights, there does not appear to be in existence a similar provision suffering a magistrate to inform the convicted hitherto unrepresented accused person of his right to appeal or to explain the process of review to the convict let alone to record such explanation and the convict's response thereto. It is however refreshing to note that some magistrates do in fact record that the convict has been advised of his rights to appeal as well as that he or she has been advised that the record of proceedings will be forwarded to the High Court for review by a judge of this court within 7 days of sentence as provided in the Magistrates Court Act, [*Chapter 7:10*].

It has become trite that there is a duty upon judicial officers to inform the accused person of his or her legal right. The fact that the legislature has specifically picked upon the right to legal representation by enacting s 163A as noted does not remove the duty of the judicial officer to inform the accused person or convict of such persons legal rights of taking up the matter further following judgment and sentence of such person's legal rights. In regard to the duties of the judicial officer as aforesaid, there has been a lot of focus and emphasis on the duty of the court towards an unrepresented accused person in pleas of guilty proceedings in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act, see *S v Bvuto* HH 94/18 and a plethora of cases cited and ably discussed therein by HUNGWE J (as then he was).

It is important to appreciate that the unrepresented accused upon conviction and sentence still remains unrepresented. The convict still requires to be assisted to pursue his rights post-conviction. The old adage, "information is power" rings true. Information or knowledge aids decision making. Section 70 (5) of the Constitution provides that-

- "(5) Any person who has been tried and convicted of an offence has the right subject to reasonable restrictions that may be prescribed by law, to
- (a) Have the case reviewed by a higher court, or
 - (b) Appeal to a higher court against the conviction and sentence."

Related to the above constitutional provisions are sections 57 as read with s 59 and also s 60 of the Magistrates Court Act, [*Chapter 7:10*]. Section 57 provides for automatic review of magistrates court proceedings where the accused has been convicted and sentenced to the threshold of punishment set out therein. Significantly, s 59 provides as follows-

"59 Accused's right to submit a statement on review

In any criminal case which is subject of review in terms of s 57 the accused person may, if he thinks the sentence passed upon him is excessive deliver to the Clerk of Court within three days of the date of such sentence any written statements of arguments setting out the grounds or reasons upon which he considers such sentence excessive, which statement or arguments shall be forwarded with the proceedings of the case to the necessary judge and shall be taken into account in the review of proceedings.”

Section 60 provides for the convicts rights of appeal to the High Court against “the conviction, and additionally or alternatively any sentence or order of the court following upon conviction.”

Related to s 70 (5) as aforesaid is s 44 of the Constitution which provides as follows—

“Duty to respect fundamental human rights and freedoms

The State and every person, including juristic persons and every institution and agency of government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter.”

It follows from the provisions of s 44 of the Constitution that the court must take such steps as are sufficient to advance the rights of the convict as given in s 70 (5) of the Constitution. Therein lies the rationale or basis to hold that a judicial officer has a duty to assist the unrepresented convict by conscientising such convict of the convict’s rights on review as given in ss 57 and 59 of the Magistrates Court Act as well as rights of appeal as given in s 60. The constitution has heralded a new order where the Bill of Rights has been expanded. The Bill of Rights exists to safeguard and enhance people’s rights and freedoms. Courts must as constitutionally mandated, play their role to ensure the enjoyment by all persons of the rights which are provided for.

Lest that I am misunderstood in advocating that courts should be proactive in advancing the fundamental; rights and freedoms as provided for in Chapter 4 of the Constitution generally and by s 70 (5) in particular, I am by no means suggesting that the court must turn into legal advisor for the accused or convict. I would in this regard, quote the words of DIDCATT J, in *S v Khanyile and Anor* 1988 (3) SA 795 (N) at 798, when in commenting on the guidance which the magistrate should provide to an unrepresented accused, quoted from the journal *Acta Juridica* (1965-66) at p 70 as follows—

“Of all false and foolish *dicta*, the most trite and the most absurd is that which asserts that the judge is counsel for the prisoner. The judge cannot be counsel for the prisoner, ought not to be counsel for the prisoner, never is counsel for the prisoner.”

I am in agreement with the above *dicta*. The judicial duty should therefore be limited to advising the convict of the avenues available at law to pursue his rights post-conviction and not how to go about them. I therefore suggest that it is indeed a judicial function to advise an unrepresented convict. The magistrate must endorse that such rights have been explained and the convict’s response thereto. Apart from the practice being promotive of the convict’s constitutional rights as given in s 70 (5) of the constitution, it assists the superior court in matters which arise post-conviction as in the present application. It is also noted that in terms of s 46 (2) of the constitution as read with s 176 of the same, this court has a duty to develop the common law. In developing it and in relation to the Bill of Rights, the court is guided by the “spirit and objective of Chapter 4 of which s 70 (5) is part. The duty of the court to assist an unrepresented accused arises from common law. It is, in my view, proper to develop the common law by extending the duty to cover not just pretrial and trial scenarios but post-trial as well.

Reverting to the substance of this application, the discussion I have put across is relevant to the determination I will make. In an application for condonation of late noting of appeal and extension of time within which to appeal, the court considers various factors. The same principles are applicable irrespective of whether or not the appeal intended to be noted arises from criminal or civil proceedings. In *Vigour Busilizwe Fuyana v Ntombazana Moyo* SC 54/16 CHIDYAU SIKU CJ, set out the basic considerations as

- (a) a reasonable explanation for failure to note the appeal within the prescribed period.
- (b) Some prospects of success on the merits; and
- (c) The *bona fides* of the application

Other considerations would be, prejudice to the other party or respondent were the application to be granted (this would equally apply in civil cases) and the need to bring finality to proceedings. See *Florence Chimunda v Arnold Zimuto and Another* SC 76/14; *Tafadzwa Watson Mapfoche v S* HH 438/18; *S v Phiri* HH 121/18; *Wilfred Takaona Mapfumo v S* HH 564/16.

The approach to a condonation application is much the same in this jurisdiction as in South Africa. In this respect, in *Valentine Senkane* 2011 ZASCA 94, NAVSA JA stated in par 27 as follows—

“It is now necessary to consider briefly the criteria to be applied in considering an application for condonation. In *Malane v Santamn Insurance Co Ltd* 1962 (4) SA 531 (A) this court in dealing with whether or not sufficient cause had been shown in terms of r 13 of the then Appellate Court Rules for condonation for non-compliance stated the following (at 532 C-F):

‘In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success, there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the respondent’s interests in finality must not be overlooked. See also *S v Mohlathe* 2000 (2) SACR 530 (SCA) para 9.’”

28 In *S v Di Blasi* 1996 (1) SACR (A) at 3 F-G the following appears:

‘The general approach of this court to applications of this kind is well established. (See, eg *Federated Employers Fire and General Insurance Co Ltd & Anor v Makenzie* 1969 (3) SA 360 (A) at 362 F-H; *S v Adonis* 1982 (4) SA 901 (A) at 908 H – 909 A and *Ferreira v Ntshingila* 1990 (A) SA 271 (A) at 281 D-F). Relevant considerations include the degree of non-compliance, the explanation therefor, the prospects of success, the importance of the case, the respondent’s interest in the finality of the judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.’

In summary, therefore, what can be concluded upon a consideration of the cases I have cited is that the grant of condonation or its refusal is a matter of judicial discretion exercised judiciously upon a cumulative consideration of various factors as set out above. There is however the understanding that if the appeal or review proposed to be filed out of time does not enjoy prospects of success, condonation must be refused.

In *casu*, the applicant herein filed this application on 8 March 2019. The application is therefore being made almost 20 months post his sentence on 31 July 2017. The delay is substantial. The explanation which the applicant gives is that he had been promised by relatives

that they would engage a legal practitioner to assist. The promise was not fulfilled. He stated that he was not aware that he could prosecute his appeal in person and only learnt that this was possible through consultations with other inmates. He also stated that he faced challenges in accessing the record of proceedings. From the prisons date stamp franked on the copy of the record filed with this application, the record was received at prison reception for transmission to the applicant on 4 March 2019. The application was filed 4 days after receipt of the record. The applicant did not state the date that he requested for the record. That omission notwithstanding, it must be accepted as fact that when a convict is incarcerated, his freedom to maneuver around and even communicate with the registrar and clerk of court, as the case may be, for purposes of making arrangements for preparation of the court record is very much curtailed. The convict relies on prison authorities and benefactors outside of prison, the latter whose access to the convict is governed by prison regulations. Access is not granted on an open ticket.

Whilst I fully subscribe to the position that it is incumbent upon litigants who wish to bring their cases before the court to follow or comply with the relevant rules of court, I would hold that the peculiar circumstances of a convict who wishes to pursue his rights on appeal or review to the appropriate court must be considered when the judge considers an application for condonation of late noting of appeal. Prisons do not have in house advocates who provide expert guidance and procedures to follow to bring a case on review or appeal. This is an area where the powers that be should consider visiting. The absence of proper legal aid for indigent convicts who cannot afford to engage legal practitioners is a worrisome phenomenon, because after conviction, the processes which are available to the convict to take, being appeals and reviews, are specialized areas where legal expertise is necessary. The provision of legal aid at this stage should ideally be provided as a matter of course. The advantage of legal representation post-conviction lies in that a convict is informed at this early stage whether there is any point in appealing or seeking a review or to just accept his or her fate. What happens presently is that appeals and reviews by self-actors are filed as a matter of course. Underserved and unmeritorious appeals and review applications which would not otherwise have been filed had the unrepresented convict received legal advice, congest the court system unnecessarily. There is therefore no doubt, in my view, that there is great need for reform in this area. For example in all criminal trials in the High Court, *pro deo* counsel is provided to the accused. The representation

ends there and the accused's right to legal representation on a *pro deo* basis does not extend to appeals and reviews. This area requires reform too.

Reverting again to the application for condonation, it is a requirement of the law, *inter-alia*, that an applicant's proposed appeal has prospects of success. This requirement is most determinant. I have already indicated that the rest of the requirements are no less important. When the lower court record of proceedings is considered in whole, it is clear therefrom, as I have pointed out, that the magistrate did not comply with the requirements of s 163A of the Criminal Procedure & Evidence Act.

Upon the applicant's appearance for trial before the learned magistrate the following is recorded

"17 July 2017
Before Rwodzi
Public Prosecutor Chirambiwa
Interpreter Matiya
All accused persons in person
Charge read and understood
P A1 NG
A2 NG
A3 NG
Facts read and understood
S/O Annexure "A"
Provisions of s 188/189 of Code explained and understood."

Thereafter, the accused persons, of which the applicant was first accused, gave defence outlines and the trial was conducted and concluded without the accused having been advised of their right to legal representation contrary to s 163A. The question which arises is what the effect of the failure to follow the procedure set out in s 163A is and whether such failure can be condoned. I think not. Section 163A complements the principle of our law that the accused is entitled to a fair trial. The right to a fair trial or hearing is entrenched in s 69 (1) and (4) of the constitution which reads as follows:

"69 Right to fair hearing

- (1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court
- (2) ---
- (3) ---
- (4) Every person has a right, at their own expense to choose and be represented by a legal practitioner before any court, tribunal or forum."

The right to legal representation is logically intertwined with the right to a fair trial. The trial procedure in this jurisdiction is adversarial, which means that the accused is pitted against the State represented by a legally qualified and or experienced prosecutor. The two, that is the prosecutor and the accused seek to outdo each other with the magistrate as impartial arbiter. Therefore, since the self-acting accused is invariably ignorant of court procedure, he or she should not fall victim to the ignorance which may prejudice him or her. The prosecutor is legally trained in the job. The accused must, therefore, be promptly and properly informed of his or her right to legal representation by counsel of choice and at own expense and be afforded a reasonable period to secure it. It often happens that an accused will just waive the right, not because the accused does not want to be legally represented, but because the accused is indigent and cannot afford legal representation. The magistracy as a general guide should take time to explain the import and purport of the rights especially in serious cases, like the charge which the applicant was facing herein. The court must bear in mind the minimum sentence of 9 years provided for upon conviction if the accused fails to satisfy the court of the existence of special circumstances warranting the court to impose a sentence below the mandatory minimum sentence.

In *S v Bvuto* HH 94/18, HUNGWE & MUSHORE JJ sat on appeal against convictions of 9 appellants on their guilty pleas to contravening s 368 of the Mines & Minerals Act [*Chapter 21:05*] which attracts a mandatory minimum sentence of 2 years in the absence of the accused showing special circumstances. The learned judges emphasized that magistrates dealing with unrepresented accused persons must act as the “primary bulwark defending the ignorant or the impoverished against the potential injustice that could visit the process.” The court made reference to *S v Tau* 1997 (1) ZLR 93 (H) at p 99 and postulated that it was high time that given the new thrust of giving prominence to the promotion of the rights given in the declaration of rights. They stated that the legislature should consider providing for state assisted legal representation for accused persons facing serious charges including those which provide for mandatory minimum sentences as of right if the accused cannot afford to pay for legal representation. Although the case of *Bvuto* was an appeal where proceedings which the court interrogated as mentioned arose from a guilty plea procedure, the observations made are

apposite. This is because in enacting s 163A, the legislature, in effect, recognized that the magistrates were the bulwark of conscientising the ignorant accused and imposed upon them to duty to appraise of, and accord, the accused the right to legal representation before commencing a trial in the magistrates court.

The applicant herein also filed an application for bail pending the determination of his application for condonation of late noting of appeal under case No. B 1761/19. Since the application for condonation was still pending determination, it became expedient to deal with both applications at the same time. I drew the attention of State counsel Miss *Badalane* to the apparent omission by the trial magistrate to explain to the accused his right to legal representation as required by s 163A of the Criminal Procedure & Evidence Act as aforesaid. I also requested that counsel should make her input on this issue in writing. Counsel dutifully did so. In a written response counsel conceded the omission by the trial magistrate to comply with s 163A. Counsel averred as follows in the material part:

STATE RESPONSE

- “1. The applicant made an application for bail pending the determination of his application for condonation.
2. Upon making his submissions for bail pending appeal, an issue was raised that the right to legal representation was not explained in terms of s 191 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. There is nowhere in the record where it shows that the learned magistrate explained this right to the applicant as is expected by s 163A of the aforementioned Act.
3. Now, it is important to assess the impact of the failure by the magistrate to explain this important right to an unrepresented accused who may decide to represent himself by pleading guilty. The most important question is on whether the failure to explain such an important constitutional right results in a gross miscarriage of justice or not. If it does, then this court is enjoined to exercise its powers in terms of s 26 of the High Court Act and review the proceedings of the lower court with regard to the question on whether any gross miscarriage has been occasioned by the misdirection by the magistrate.
4. It is submitted that the respondent is not opposed to the matter being dealt with on review.”

As evident from the State counsel's response, the State acceded to the disposal of the matter by way of a review. In terms of s 29 (4) of the High Court Act, the powers of review which a judge is given, may be exercised. "Whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

The import of the provisions of s 29 (4), aforesaid, is simply to promote and extend the supervisory role and review powers of the High Court over the Magistrates Court proceedings. In particular, such powers cover situations where despite the proceedings not being subject of a pending application for review or are otherwise not before the court for review, it comes to the notice of the High Court or judge of the High Court that criminal proceedings in any inferior court or tribunal are not in accordance with real and substantial justice.

In the response by State counsel, Miss *Badalane* submitted that the issue to be decided on review is whether the failure by the court to explain to the accused, the right to legal representation resulted in a miscarriage of justice. Counsel did not express her opinion on the question and in that regard was not assistive. The provisions of s 163A are peremptory and not directory. A failure to comply with the peremptory provisions amounts to a gross irregularity in the proceedings as envisaged in s 26 (1) (c) of the High Court Act [*Chapter 9:06*]. This is so because the peremptory provisions statutorily define trial procedure. A purported trial carried out other than in compliance with the peremptory procedural steps cannot qualify to be a trial as envisaged by statute. It becomes some kind of trial not sanctioned by the law. It cannot be sanitized. In my considered judgment, a trial which does not comply with the statute which defines how the trial must be conducted renders the trial a nullity and for that reason a nullity begets a nullity. The infamous judgment of Lord Denning in *Macfoy v United African Company Ltd* (1961) 3 WLR (PC) 1405 at 1409 comes to mind where the learned judge stated; "you cannot put something on nothing and expect it to stay there. It will collapse." See also *Manning v Manning* 1986 (2) ZLR 1 (SC).

I have considered the provisions of s 29 (3) of the High Court Act, which provide as follows

“(3) No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record of proceedings unless the High Court or a judge, thereof, or as the case may be, considers that a substantial miscarriage of justice has actually occurred.”

The above provisions must read in context. I do not read the provisions as intended to sanitize a mistrial. Certainly if a mistrial was to be sanitized by reliance on the above provisions then this would amount to an affront to the rule of law by law. Even if my reasoning is faulty, one would still have to contend with the constitutional provisions in s 69 (1) which guarantees the right to a fair and public trial and s 86 (3) (e) which provides that no law may limit the rights to a fair trial. Thus, where jurisdiction has not been properly exercised by the magistrate by reason of an omission to comply with the statutorily regulated procedure for conducting a criminal trial, then the proceedings must be set aside as a nullity and/or as not being in accordance with real and substantial justice. The invocation of the provisions of subsection 3 of s 29 would not arise in circumstances where there has been conducted what amounts to a sham trial. Even then, a substantial miscarriage of justice arises as a matter of law were the factual scenario is that a trial has been conducted in violation of statutorily legislated trial procedures.

In the recent review judgment by DUBE-BANDA J in the case of *State v Zvidzai Manetaneta* HH 185/20 in which I concurred, the accused was charged with contravening s 368 (1) of the Mines & Minerals Act [*Chapter 21:05*]. It was alleged that he prospected for gold without a permit or a licence issued for the purpose in terms of the Act. In terms of s 368 (4) the offence carries a mandatory minimum sentence of 2 years imprisonment if the accused fails to satisfy the court on the existence of special circumstances. The record of proceedings showed that the case was disposed of upon a guilty plea in terms of s 271 (2) (b) of the Criminal Procedure & Evidence Act. The learned magistrate did not comply with the provisions of s 163A (1) as read with s 191 of the same Act more particularly in that the accused was not advised of his right to legal representation. The following is stated on p 2 of the cyclostyled judgment—

“By operation of s 163A (1) as read with 191 of the Criminal Procedure & Evidence Act, at the commencement of the trial an accused must be informed by the court of his right to legal representation. The magistrate shall record the fact that the accused has been informed of such right and his response thereto recorded. This is a right of substance, not form, and it is the cornerstone of a fair trial. In my view, the starting point in determining the fairness of a trial as envisaged in s 69 (1) of the Constitution, should always be whether or not the accused is

informed of his right to legal representation. He must be properly informed, and his answers recorded so that if there is a waiver of such right, it would be an informed one.

The enquiry is whether the failure to inform the accused of his constitutional right to legal representation is an irregularity so fundamental and serious to the extent that it can be regarded as fatal to the proceedings in which it occurred. I am of the view that the failure to inform the accused of this right amounts to an irregular or illegal departure from those formalities, rules or procedure in accordance with which the law requires a criminal trial to be initiated and conducted, and that such irregularity is fatal to the proceedings. It is an irregularity so fundamental that the court must set aside the conviction without reference to the merits and leave the issue to the Prosecutor General to decide whether the accused should be retried.

In conclusion, the failure by a trial court to inform the accused of his constitutional right to legal representation is an irregularity that is fatal to the proceedings...

The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (Constitution) guarantees every accused person the right to a fair trial. This includes the right to legal representation. The right enacted in s 163A of Criminal Procedure & Evidence Act is procedural. The substantive right is located in s 69 of the Constitution which provides that every person has a right at their own expense to choose and be represented by a legal practitioners before any court, tribunal or forum. Therefore, the right to legal representation is a peremptory requirement.”

I have already indicated that in the aforesaid judgment DUBE-BANDA J sought my concurrence and I was in agreement that the learned judge had captured and interpreted the provisions of s 163A as aforesaid correctly and with remarkable simplicity and eloquence. In regard to the disposal of that case, the conviction was quashed and the matter left to the Prosecutor General in his discretion to have the accused arraigned on a fresh trial, with the order that in the event of a conviction, the sentence already served should count towards any sentence which may be imposed.

The circumstances of this case before me are on all fours with the circumstances which DUBE-BANDA J was faced with save for the fact that the *Zvidzai Manetaneta* case was disposed of by plea procedure and the charge was a contravention of the Mines and Minerals Act. In *casu*, the matter proceeded to full trial and the charge was stock theft. The distinguishing features which I have pointed out do not change the position in that the peremptory provisions of s 163A (1) must be applied irrespective of the fact that the proceedings have been dealt with on plea or contested trial. In the case of *S v Sikhipa* 2006 (2) SACR 439 (SCA) 443 para 10 the Supreme Court of South Africa went a rung further by holding that where the accused was facing a serious charge, the court should not just inform him of his right to legal representation, but

should encourage the accused to seek it. The learned judge LEWIS JA stated as follows in paragraph 10 of the judgment:

“It should be said, however that where an accused is faced with a charge as serious as that of rape, and especially where he faces a sentence of life imprisonment, he should not only be advised of his right to a legal representative but should be encouraged to employ one and to seek legal aid where necessary. It is not desirable for the trial court in such cases to merely appraise an accused of his rights and to record this in notes: the court should, at the outset of the trial ensure that the accused is fully informed of his rights and that he understands them and should encourage the accused to appoint a legal representative explaining that legal aid is available to an indigent accused.”

I cannot help but be impressed by such a progressive pronouncement by the learned appeal court judge. In my view, the magistracy in this jurisdiction should follow the above approach. It is consistent with the court’s duty to promote and fulfil the accused’s right to a fair trial. The duty to safeguard fundamental human rights and freedoms is reposed in every person, living or juristic and all institutions and agencies of Government. The courts must stand out as the last bastion or defender against human rights violations. Indeed, s 164 of the constitution entrenches the independence of courts which are made subject only to the constitution and the law. Therefore, in the application of the law, courts must do so impartially, expeditiously without fear, favour or prejudice.

It is also refreshing to note that this court has not been found wanting in relation to discharging its duty to promote, protect and fulfil the fundamental right of the accused person to legal representation. In this regard, in the case of *Bvuto (supra)* the following appears *per* HUNGWE J (as he then was) a p 7 of the cyclostyled judgment:

“Clearly, the appellants right to a fair hearing were prejudiced by the approach the trial court adopted ---. In all offences for which a minimum mandatory sentence is prescribed, it is an infringement for a trial court to fail to advise an unrepresented accused person of his or her right to legal representation, at his own expense, by a legal practitioner of his choice, or if he cannot afford one to be represented by a legal practitioner assigned by the State at the States expense if substantial injustice would otherwise occur. Section 70 (1) (d) and (e) of the Constitution of Zimbabwe. These rights are entrenched for the obvious reason, to protect, to promote, to uphold and to ensure the realization of the accused’s fair trial rights.”

The learned judge again went a step further to suggest that it was high time that the law maker should consider enacting appropriate legislation which entitles every suspect standing trial on a charge which is punishable upon conviction by the imposition of a mandatory penalty to be

accorded legal representation at the State's expense. This of course is an eminently noble idea. It may however be unnecessary that such separate legislation be enacted because s 70 (1) (e) of the constitution already provides for the right to legal representation at the State expense being accorded to an unrepresented accused person where, in the opinion of the court, substantial injustice may accrue if the accused is not legally represented. Indeed, the legislature has not been wanting in this regard because it enacted the Legal Aid Act [*Chapter 7:16*] which establishes the Legal Aid Directorate. Section 10 of that Act provides as follows:

“10 Legal aid at instance of court or Prosecutor-General

- (1) If it appears to a judge or magistrate or to the Prosecutor-General that—
- (a) it is desirable in the interests of justice that legal aid should be provided to a person who is or will be a party to any civil or criminal proceedings before the Supreme Court, the High Court or a magistrate court, as the case may be; and
 - (b) the person may have insufficient means to obtain the services of a legal practitioner on his own account; the judge or magistrate or the Prosecutor-General, as the case may be, may recommend to the Director that the person should be provided with legal aid and, where the State is or will be a party to the proceedings concerned, may recommend that a legal practitioner in private practice be engaged in terms of section *twelve*.
- (2) Where a recommendation has been made to him in terms of subsection (1), the Director shall forthwith assess the means of the person concerned and, if he is satisfied that—
- (a) the person has insufficient means to obtain the services of a legal practitioner on his own account; and
 - (b) the resources of the Legal Aid Fund will be sufficient to provide the legal aid required; he shall provide the person with legal aid.”

The position therefore is that, there is an enabling law in place for provision of legal aid. The judges, magistrates and the Prosecutor-General should in appropriate cases invoke their powers to recommend State funded legal aid in terms of the quoted section. If any suggestion can be made to the legislature, my respectful view is that it would be in relation to providing sufficient resources for this important state institution, the Legal Aid Directorate to function effectively.

In conclusion therefore, it will be noted that I have had to discuss in some depth the subject of legal representation as a fundamental human right to be promoted, protected and fulfilled in the hope that going forward the magistracy may appreciate the importance of strictly

complying with the peremptory constitutional and other legislative instruments on the conduct of a trial in the magistrate court. A failure to comply with s 163A (1) of the Criminal Procedure Evidence, renders ensuing proceedings a nullity. The resultant consequence, which is undesirable but unavoidable, is the that proceedings in question stand to be quashed and set aside. A guilty accused is released and a re-trial likely ordered (sometimes not, if for example, the sentence imposed on the abortive proceedings has almost been fully served or the case is too old). The retrial means extra work for the court and an additional expense on the State resources as witnesses would need to be subpoenaed and paid their expenses for attending. Some witnesses may have passed on with the result that evidence is now lost and a re-trial would have to be shelved forever. Therefore, it is unarguably important that s 163 A of the Criminal Procedure Evidence be studiously followed in its letter and spirit.

In regard to the disposal of the applications made by the applicant, they must of necessity fall away as the main matter has been disposed of by way of review in terms of s 29 (4) of the High Court Act with the Prosecutor-General being agreeable to such a course. I therefore make the following order:

- (a) The proceedings in case number DRW 78-80/17 are quashed and set aside as they were conducted irregularly on account of the failure or omission by the trial magistrate to comply with the peremptory provisions of s 163A (1) of the Criminal Procedure Evidence Act, [*Chapter 9.07*].
- (b) The applicant is entitled to his immediate release from custody. The release order and quashing of the conviction and sentence covers the applicant's co-accused persons Tawanda Chikohora and Munyaradzi Katepura.
- (c) The Prosecutor General retains this prerogative to cause the applicant and his co-accused to be tried afresh. If a new prosecution is instituted:
 - (i) A different magistrate should preside over the trial.
 - (ii) The period of imprisonment served by the applicant and his co-accused up to the date of their release by virtue of this judgment should be factored into any sentence that the three may be sentenced to in the event that convictions ensue and terms of imprisonment are imposed.

- (d) This order disposes of case numbers CON 62/19 and B 1761/19 and copy of the judgment shall be filed in B 1761/19.
- (e) A copy of this judgment be availed to the chief magistrate to bring the same to the attention of all magistrates to appreciate and note the requirement to comply with s 163A (1) of the Criminal Procedure & Evidence Act and to appreciate the consequences of an omission to strictly comply therewith.

CHINAMORA JI agree

National Prosecuting Authority, respondent's legal practitioners