

THE STATE  
versus  
WISDOM MULE  
and  
SHOW ADAM

HIGH COURT OF ZIMBABWE  
CHINAMORA & CHITAPI JJ  
HARARE, 21 May 2020

### **Criminal review**

CHINAMORA J: The accused were convicted on their own pleas of guilty of stock theft as defined in s 114 (2) (a) of the Criminal Law [Codification and Reform] Act, [*Chapter 9:23*]. The stole one bovine and slaughtered it. After finding that there were no special circumstances, the court sentenced each accused to 11 years imprisonment, 2 of which were conditionally suspended for 5 years. The accused were unrepresented in the court *a quo*.

The matter came before me by way of automatic review in terms of s 57 of the Magistrate's Court Act, [*Chapter 7:10*]. On examining the record of proceedings, I was skeptical that the trial matters had adequately dealt with the case in a manner that safeguarded the rights of the accused persons. The judgment of CHITAPI J in *Potifa Sakawa v The State* HH 262-20 is pertinent in this respect, and it is worth quoting my brother judge's remarks in *extenso*:

"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".

On the same point, see also *State v Zvidzai Manetaneta* HH 185-20 cited with approval in the above judgment. I agree with the learned judge's view that the magistrate has a general duty to ensure that an unrepresented accused is made aware of his pre-trial and post-conviction rights. Referring to the case of *The State v Bvuto* HH 94-18, CHITAPI J endorsed the obligation on

judicial officers to act as the primary bulwark to eliminate the potential injustice which can accrue if an accused person is unrepresented. I hasten to add that the need for protection by the court is even more imperative where the conviction calls for a mandatory sentence.

In *casu*, there is nothing *ex facie* the record to show that the magistrate explained to the accused their right to legal representation. What appears on the record is an endorsement that the right was explained. How it was explained is not shown. A critical shortcoming of this approach is exposed by *S v Dube & Anor* 1988 (2) ZLR 385 at 391F-393G where DUMBUTSHENA CJ posed the question:

“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?” **[My own emphasis]**

My view is that the accused should be advised of the complexities of the matter and likely penalties in the event of a conviction. Given the vexing issue of special circumstances and possibility of imposition of a mandatory sentence of 9 years the explanation ought to have been detailed and recorded. Recording that the right to legal representation has been explained and understood can hardly be what was contemplated by s 163A of the Criminal Procedure and Evidence Act. I find that there was non-compliance with the said provision.

In relation to “*special circumstances*”, the magistrate endorsed on the record that they had been explained and understood. What is apparent, however, is that after pronouncing the verdict of guilty the court asked:

“Are there any special circumstances justifying the court to impose a sentence which is below the 9 year benchmark...What factor(s) which is out of the ordinary which motivated you to slaughter and skin that beast?”

The second accused’s response exposes the inadequacy of the explanation of what constitutes special circumstances. In my view, the court ought to have unpacked, possibly with examples, what was meant by the elusive expression “out of the ordinary”. It is no wonder that the accused gave the answer: “*I blame the evil spirits*”. In *The State v Manase* HH 110-15, MUREMBA J suggested that the court should explain to the accused that he was entitled to lead evidence from witnesses to establish special circumstances. I associate myself with this approach. Lamentably, this was not done, in *casu*, and the accused’s answers in their bare form were recorded without

further interrogation. It is glaring that the magistrate handled the case in a regrettable and cursory manner. Thus, it is inescapable for me to conclude as MABHIKWA J did in *S v X (A Juvenile)* HH 298-18 that no meaningful inquiry was made either in relation to the circumstances surrounding the commission of the offence or circumstances peculiar to the offender. (See also *S v Mhungu* HMA 09-16). Quite clearly, the magistrate did not explain special circumstances in a manner understood by the accused. In this connection, in *S v Dube & Anor supra* at 391G, in very directory terms, DUMBUTSHENA CJ opined that:

“Some explanation of special circumstances should then have been proffered, including that they may be circumstances peculiar to the offender himself or to the commission of the offence.”

To compound matters, the magistrate *a quo* neither explained the consequences of failure to provide special circumstances, nor recorded his explanation. I am left in an unenviable position where I am unable to tell its adequacy or otherwise. Yet the requirement to record the explanation is not an optional choice, but a statutory imperative. In this regard, s 114 (3) of the Criminal Law (Codification and Reform) Act expressly provides:

“(3) If a person convicted of stock theft involving any bovine or equine animal stolen in the circumstances 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).”  
**[My own emphasis]**

Besides, this court has stressed that need. We must look no further than the review judgment in *Ziyadhuma v The State* HH 303-15, where BERE J with the concurrence of HUNGWE J remarked:

“It is imperative in my view that where there is need to deal with the issue of special circumstances, the actual explanation given by the magistrate be recorded to avoid the appeal court having to speculate on what was explained to the appellant before sentencing. ... The proper approach should be for the magistrate to explain what special circumstances are and also the consequences of a failure by the convicted person to give such special circumstances. Both the explanation given by the magistrate and the responses given by the convicted person must be recorded.” **[My own emphasis]**

Evidently, the trial magistrate did not follow the statutory dictates. The consequences of not doing so were aptly summarized by CHITAPI J in *Potifa Sakawa v The State supra* as follows:

“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”.

I respectfully adopt my brother judge’s summation of the legal position. The logic is self-commending. As this case dealt with special circumstances, the statutory compulsion ensures that the fair trial rights of the accused are protected. Secondly, the compelling rationale is that an appellate or review judge does not have to speculate what was explained to the accused. Finally, it becomes easy to assess whether or not a mandatory sentence was justified.

Among other things, s 29 of the High Court Act [*Chapter 7:06*], provides that, if on review the judge considers that the proceedings of the inferior court are in accordance with real and substantial justice, he shall confirm them. However, s 29 (3) states that no conviction or sentence shall be quashed or set aside by reason of any irregularity or defect in the record or proceedings unless the review judge is satisfied that a substantial miscarriage of justice has actually occurred.

It is apparent from the record that the court *a quo* not only ignored a mandatory statutory directive, but additionally failed to satisfactorily explain to the accused what is meant by special circumstances. These failures cannot be glossed over. I say so because the right to a fair trial enshrined in s 69 (1) of the Constitution enjoins a trial court to comply with statutory provisions that safeguard an accused person’s rights. Also of relevance in this context is s 86 (3) (e) which prescribes that no law may limit the right to a fair trial. Thus, any act or omission by a court which effectively inhibits a fair trial results in a miscarriage of justice. Consequently, the omissions which I have identified, arising as they did from the magistrate’s failure to follow the law, certainly frustrated the achievement of real and substantial justice. It is obvious that, as the accused had not understood the meaning of special circumstances, they were unable to place information before the court that could have excluded the imposition of the mandatory sentence of 9 years.

I am therefore satisfied that a substantial miscarriage of justice occurred by reason of that irregularity. For this reason, I find that the magistrate misdirected himself to an extent which impels the intervention of this court. The sentence cannot be allowed to stand and ought to be set

aside. The order which I make with the concurrence of my brother, CHITAPI J will, in my view, satisfy the interests of justice.

Accordingly, it is ordered as follows:

- (1) The proceedings in *The State v Wisdom Mule & Show Adam* concluded in the Magistrates Court at Mbare under CRB No. 1601-4/20 in respect of Wisdom Mule and Show Adam 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] and s114 (3) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].
- (2) The accused persons, namely, Wisdom Mule and Show Adam, are entitled to their immediate release from custody.
- (3) The Prosecutor General retains the prerogative to cause the accused, Wisdom Mule and Show Adam, 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 accused up to the date of their release by virtue of this judgment should be factored into any sentence that may be imposed in the event that convictions ensue and terms of imprisonment are imposed.
- (4) A copy of this judgment shall be availed to the Chief Magistrate for him 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 s 114 (3) of the Criminal Law (Codification and Reform) Act, for them to appreciate the consequences of an omission to strictly comply therewith.

CHITAPI J agrees.....

*National Prosecution Authority*, respondent's legal practitioners