

THE STATE  
versus  
LIBERTY MUSIIWA

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 14 January 2020

### **Criminal Review**

CHITAPI J: The criminal justice trial system in Zimbabwe has satisfactory in built safeguards which ensure that criminal proceedings in the Magistrates Court are subjected to a quick control measure that protects an unrepresented person from judicial irregularity and excesses. This is done by requiring as a matter of law that depending on the nature of proceedings and/or threshold of sentences imposed at trial, the proceedings are thereafter automatically scrutinized by the Regional Magistrate or reviewed by a judge of this court in terms of respectively ss 58 and 57 of the Magistrate Court Act [*Chapter 7:10*]. In regard to both processes, the scrutinizing regional magistrate or the reviewing judge as the case may be will go through the completed proceedings and certify them as being in accordance with real and substantial justice, decline to do so or correct them. In the case of a criminal review by a judge of this court, the powers of the court are set out in s 29 of the High Court Act [*Chapter 7:06*]. I will not burden this judgment with listing individually the powers of the judge as set in the said section. However, one of the powers which the judge exercise is to correct the proceeding and make such comments as may guide future proceedings.

It is my view that it is good practice for the judge to make positive comments where the conduct of proceedings deserve such comments. A positive comment can also act as a learning tool for others and as a stimulant to strive for excellence by the person receiving positive comments. In this review, what first struck me as deserving mention was the framing of the charge. The proceedings were presided over by M Makati Esquire, senior magistrate sitting at Bindura Magistrates Court. The charge and state outline were hand written on lined examination pad sheets. The details of the police station, CR, CRB, FR, PPs Ref etcetera were neatly written out, boxed and underlined. Spaces were left for the magistrate to insert his or her name and rank. For the discerning reader the charge sheet in the Magistrates Court

styled is a summary jurisdiction sheet. It is printed by the Government Printer. Having to copy it in long hand clearly indicates that there is shortage of stationery for police at Bindura to use. I say so because apart from this case, I also reviewed as part of the same batch, other records of proceedings where the summary jurisdiction sheet is either similarly reproduced in long hand or details which are normally typed in, are in long hand. Again, this signifies a shortage or non-availability of computers or other typing gadgets. The handwritten reproduced forms and the state outlines are however very legible. Additionally, the magistrate herein complimented the police effort by also legibly completing in long hand in the spaces left for the magistrate to fill in. The shortage of stationery has not dampened the spirits of the police to pursue justice despite such a scenario obviously affecting moral. Such resilience is deserving of commendation. The situation must however be corrected to increase morale and not overwork the police officers who prepare the documents for court. Therefore, I must exhort the responsible authorities to provide the necessary budgetary support so that police functions are enhanced

Another feature which presented itself to me for positive comment was the way that the charge was drafted. Of recent, this court has had to deal with a number of applications made by accused persons through their legal practitioners for quashing of charges for a variety of reasons which *inter-alia* include deficiency in such detail as would inform the accused sufficiently of the nature of the charge which the accused must meet. In *casu* the case concerns a charge of assault. In very legible handwriting the summary jurisdiction or charge sheet read as follows:

“ASSAULT AS DEFINED IN SECTION 89 (1) (A) OF THE CRIMINAL LAW  
CODIFICATION AND REFORM ACT, [CHAPTER 9:23]

In that on the 5<sup>th</sup> day of August, 2019 and at Mupandenyama Shopping Centre, Bindura LIBERTY MUSIIWA committed an assault upon SHADRECK TAMBU by hitting him with a hoe handle once on the back, twice on the right thigh and once on the left leg, also hit the complainant with a pool stick three times on the forehead and kicked him with a booted foot once on the upper lip intending to cause bodily harm upon Shadreck Tambu or realizing that there was a real risk or possibility that bodily harm might result thereby causing pain on SHADRECK TAMBU’S BODY.”

If one considers the manner in which the above charge is framed, barring negligible grammar errors, the charge easily satisfies the essentials of a charge as set out in s 146 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] which provides that the charge “... shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any

against whom and the property, if any in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.”

A charge worded as done in his case leaves the accused in no doubt as to the nature and details of the wrong alleged against him, in respect of whom and the date and place of occurrence. The time of the offence ought to have been inserted. However, the omission to do so is not fatal to the charge more so because time was not of the essence in the charge.

In regard to the trial proceedings themselves, there are two issues which deserve comments. The first issue concerns the duty of the magistrate to explain to the accused the accused’s right to legal representation. The right to legal representation is a constitutional right provided for in s 70 (1) (d) and (e) of the Constitution. In para (a) the accused has a right to choose a legal practitioner and be represented by such legal practitioner at the accused’s expense. In para (e), the accused has right of legal representation by a legal practitioner assigned by the State at the State’s expense if, “substantial injustice could otherwise result.” The right to legal representation is provided for in s 191 of the Criminal Procedure & Evidence albeit not with as much detail and clarity as in s 70 (1) (d) and (e) of the Constitution. A related s 163A of the Criminal Procedure Act, provides as follows:

**“163 Accused in magistrate court to be informed of s 191 rights**

At the commencement of any trial in a Magistrates 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 s 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.”

Section 191 of the Criminal Procedure and Evidence Act provides 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 a accused person under the age of sixteen years who is being tried in the magistrates 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.”

It can therefore be accepted that there are three classes of persons who can represent an accused person in the Magistrates Court in term of s 191. These are, a legal practitioner representing the accused, a natural or legal guardian of the accused of the accused is under 16 years of age, and any other person subject to the court determining that the assistance of that

person is required and the accused has consented to such person to represent him. As to the principles governing the invocation of the provisions of s 191 (c) on the accused being represented by any other person as envisaged therein, the subject requires jurisprudential argument and in any event is beyond or outside the scope of this review. Having interrogated the provisions of ss 163 A and 191 aforesaid, I then considered whether the trial senior magistrate complied with the peremptory provisions of s 163 A.

The record shows the following recorded detail which preceded the putting of the charge and recording of a plea.

“Right to legal representation explained and understood – I will be a self-actor.

Charged read and understood.

Plea – Not guilty

Facts read and understood.

Provisions of ss 188 and 189 of the CP & E explained and understood.”

Thereafter followed a recording of the defence outline and the evidence of witnesses and the accused’s evidence in his defence.

Whilst, I am inclined to accept, given that the magistrate in question is a senior magistrate and therefore sufficiently experienced in conducting trials procedurally did comply with the provisions of ss 163A and 188 and 89 as recorded by him, I must caution that the recording done by the senior magistrate falls short of what should be recorded in compliance with the requirements of procedure. The provisions of s 163A are peremptory as with section 188. For fullness of record, s 188 (b) is the one which is relevant to the protection of the accused’s right to remain silent as provided for in s 70 (1) (i).

The provisions of the same provides as follows-

**“188 Outline of State and defence cases**

In a trial before a magistrate, if the accused pleads not guilty or a plea of not guilty is entered in terms of section one hundred and eighty-two—

(a) .....

(b) The accused shall be requested by the magistrate to make a statement, if he wishes, outlining the nature of his defence and the material facts on which he relies and, if he is not represented by a legal practitioner, his right to remain silent, and the consequences of exercising that right, shall be explained to him.”

The senior magistrate recorded that he had explained the provisions of ss 163A and 188 and that the accused understood the explanation. The question remains; what was the content of the explanation given and how did the accused signify or indicate that he

understood the unrecorded content of the explanation? I need not overemphasize that the procedures in ss 163A and 188 are central to the ensuring and safeguarding of a fair trial as envisaged in s 69 (1) of the Constitution. In terms of s 86 (3) (a) of the Constitution, the rights to a fair trial is absolute. No law may limit, and no person may violate the right to a fair trial. This includes the court. A fair trial inter alia is one which is conducted in accordance with the law both procedurally and substantively. Since the Magistrates Court is a court of record, the record of proceedings especially where the proceedings are not on tape should show the details of what has transpired and been said by the court to the accused and vice versa. One easily appreciates the pressure under which magistrates work in that they are expected to clear many cases placed before them daily. Due to lack of resources, not all courts have recording facilities and the recording of proceedings is through and through in long hand. Expediency dictates that the recording of proceedings is curtailed as in this case by making a note that accused's rights have been explained without recordings the explanation in full and the response given. Such practice should be desisted from. Fair trial procedures must be strictly adhered to because a fair trial is a fundamental or foundation to the rule of law. Justice should not be compromised for expediency. Where a statute requires that certain procedures should not only be followed but recorded, this must be done. A failure to record what has been done may lead to the review court quashing the proceedings as there is no way for the court to be satisfied that the proceedings under review are regular and in accordance with real and substantial justice.

It will be noted that in terms of s 188 (b) of the Criminal Procedure & Evidence Act which deals with a defence outline

“the accused shall be requested by the magistrate to make a statement, if he or she wishes, outlining the nature of his defence and the material facts on which he relies and, if he is not represented by a legal practitioner, his or her right to remain silent and the consequences of exercising that right, shall be explained.”

The right to remain silent is a constitutional right which is available to the accused upon

his arrest in terms of s 50 (4) (a) and (b) as well as at trial as provided for in s 70 (1) of the Constitution. Significantly, the latter provision provides that the accused has the right–

“to remain silent and not to testify or be compelled to give self-incriminating evidence”

The right against self-incrimination is one of the pillars of a fair criminal trial. It is intertwined with the right to remain silent. In my view such important right cannot be inferred to have been properly explained by a mere recording which is given as “provisions of s 188

of the Criminal Procedure & Evidence Act explained and understood.” The explanation given should be recorded in detail. Most unrepresented accused persons are ignorant of procedural law. It is therefore important that the review court is satisfied that the accused has not been a victim of his ignorance. Without a detailed recording of the explanation given by the magistrate and the response thereto, it is not possible to say that the proper explanation was given and the accused’s rights concomitantly protected as mandated by s 44 of the Constitution.

That said, in relation to the rest of the proceedings, the accused was properly convicted on overwhelming evidence. His defence that he was restraining others from assaulting the complainant was rightly rejected. An independent witness corroborated the evidence of the complainant and 2 other witnesses that the accused struck the complainant with a hoe handle on the buttocks and on his leg. The court determined the matter on credibility of witnesses and there was nothing in the evidence to suggest that a wrong assessment of the evidence was made by the court *a quo*.

In regard to sentence, the accused was sentenced to 18 months’ imprisonment with 6 months suspended on condition of future good behaviour. Although the accused was a youthful offender aged 22 years, the court *a quo* took into account the seriousness of the assault and injuries suffered by the complainant. Further, the accused used a weapon which aggravated his conduct and moral blameworthiness. The accused also assaulted a person who tried to assist the complainant. The complainant suffered a fracture of the right tibia and fibula bones. Severe force was used and the injuries were described as serious in the medical report prepared by the doctor who examined the complainant. Assault constitutes inhuman and degrading punishment. Section 89 of the Criminal Law (Codification and Reform Act) provides severe penalties wherein the court can impose a fine exceeding level fourteen or imprisonment up to 10 years’ or both. Zimbabwe must be a violent free society and crimes like assault call for exemplary and deterrent sentences so that people’s rights to human dignity and personal security are promoted and protected.

In the circumstances, despite the pointers I set out on the need for magistrates to make a detailed record of the explanations of rights which they are required by statute to give to the accused and similarly record the accused’s responses, I am satisfied that the shortcomings did not result in a failure or miscarriage of justice. I am persuaded to hold so because the magistrate was alive to the court’s duty to explain the rights though the magistrate did not record the details of the explanation and the accused’s answers. I accordingly issue my

certificate confirming the proceedings as being in accordance with real and substantial justice.