STATE
versus
NKANA SIMON & 18 OTHERS
and
State
versus
ELIZABETH SITHOLE & ANOTHER
and
State
versus
SHAME SANGWENI & ANOTHER
and
State
versus
OLIVER PASIPAMIRE & ANOTHER

HIGH COURT OF ZIMBABWE
CHIGUMBA & MATANDA-MOYO JJ
HARARE, 27 October 2017

Criminal Review Judgment

CHIGUMBA J: Four matters were placed before us in terms of s 58 (3) (b) of the Magistrates Court Act [*Chapter 7:10*] (the Act) by the scrutinizing regional magistrate. It is common cause that the accused were jointly charged of various offences, and that they all pleaded guilty, necessitating the recording of their respective pleas and the putting of the essential elements of the offences to each accused. We have been asked to provide guidance on a fundamental question of whether the trial magistrates complied with the provisions of s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA). In the scrutiny minutes addressed to the trial magistrates they were asked to comment on the legal question of

whether the procedure that each of them had adopted, of putting one generic question or aspect of an essential element of the offence to all the jointly accused persons collectively, asking them to respond one by one, then recording a globular response in the record of proceedings did not constitute failure to render 'real and substantial justice'. Put differently, the question which we have been asked to give guidance on is whether the requirements of s 271 (2) (b) of the CPEA necessitate that accused persons who have been jointly charged, and who plead guilty, have each and every essential element of the offence put to them, and have each and every response separately recorded in the record of proceedings. The trial magistrates' view, which was supported by their provincial magistrate, was that if the jointly charges accuseds' responses were similar, there was nothing wrong with recording a globular response when the essential elements of the offence were put to them. The question then becomes, if this view is to be taken as correct, what then happens in a case where 18 accused persons are charged and they all plead guilty, and one of them then decides to appeal against conviction, and as part of the appeal avers that he/she never understood the charge, the essential elements of the offence, or had their rights explained to them by the trial magistrate as an unrepresented accused person. How will the record of proceedings assist the appeal court to ascertain whether indeed accused nine out of the 18 co-accused told the trial court that the charge was understood, that he/she wished to plead guilty, and or that each or all or only one essential element of the offence was admitted to by that particular co-accused?

The concise facts upon which each group of accused persons were convicted are as follows;-

(a) *S* v *Nkana Simon & 18 Ors*

18 Malawian citizens were arrested at dawn at the Shamva turn off tollgate just outside Harare along the Harare-Nyamapande highway. They failed to produce visitors' permits or certificates allowing them to enter or remain in Zimbabwe when they were arrested. They we charged with contravening section 29 (1) (b) of the Immigration Act [*Chapter 4:02*]. They all pleaded guilty and were convicted.

(b) *S* v *Elizabeth Sithole & Anor*

The complainant in this case was a member of the police constabulary who, on his way to Epworth police station to report for duty, passed by the accuseds' residence. He was called by accused 3's wife to assist her to arrest him for perpetrating an act of domestic violence upon her, as he passed. On attempting to arrest accused 3, he became violent and resisted arrest. Accused 1 and 2 then joined the fray and assisted accused 3 to resist arrest. It was alleged that accused 1 brandished an axe, and that accused 2 and 3 had knives, as they assisted each other to assault the complainant. When canvassing the essential elements of the offence the trial magistrate put the following question to all three accused persons;-

> Q: "Do you admit that on 6 February 2017 at house number 2234 Overspill Epworth all you accused persons unlawfully and intentionally assaulted or resisted the complainant by assaulting him with fists and open hands and threatened to stab him with knives?
>
> A: A1: Yes A2: Yes A3: Yes

The three accused were then found guilty notwithstanding that not all of them brandished an axe or had knives.

S v *Oliver Pasipamire & Anor*

The two accused persons boarded a commuter omnibus destined for the western suburbs of Harare. They were spotted at the rank by a conductor who knew them as thieves. The conductor shouted at them and ordered them to disembark. Accused 2 got off the bus and ran away. He was apprehended by members of the public who disposed him of an okapi knife. Accused 1 who had remained seated threw a pair of handcuffs and an okapi knife onto the floor of the bus. He was arrested by a police officer who was a passenger on the bus. The accused were charged with possession of articles for criminal use, that is contravening section 40 of the Criminal Law (Codification and Reform*)* Act [*Chapter 9:23*] *(*the Code*).* The scrutinizing regional magistrate raised three procedural irregularities with the proceedings. The first irregularity was that, in canvassing the essential elements of the offence the trial magistrate

failed to deal with each accused person separately in order to ascertain what each accused was admitting to exactly and to ascertain if each accused understood the admissions they were making. It is common cause that the record of proceedings reflects the following exchange;-

Q. Correct you were in possession of the Handcuffs and Okapi knife?

A- A1: Yes A2: Yes

It is common cause that the second accused was not found in possession of handcuffs. The record shows that he did not understand the question put to him otherwise he would not have admitted to possessing something which he never possessed. It was the scrutinizing regional magistrates considered view that the method adopted by the trial magistrates, of asking one blanket question to all the co-accused and then asking all of them to respond, was an incorrect way of canvassing essential elements of the offence because the fact differed in relation to each accused. This court has said that;-

> "The purpose of canvassing the essential elements of the offence when a plea of guilty is tendered is to satisfy the court that the accused committed the offence charged. In doing so the court seeks to satisfy itself that the accused is not tendering an ill-informed plea of guilty. It does so by explaining the essential elements of the crime charged and verifying the accused's admission of those essential elements by putting them to him in a series of questions covering each essential element of the crime, and ensuring that he has no defence to the crime charged".

See *S* v *Dube & Anor*[1]. We accept as correct, the scrutinizing regional magistrate's contention that, putting one generic question to co accused persons, asking them to respond one by one, BUT RECORDING ONE BLANKET ANSWER IS PROCEDURALLY INCORRECT AND FALLS FOUL OF s 271 (2) (b) of the CPEA. We also accept the contention that, difficult legal concepts which are not easy for laymen to grasp must be explained in a satisfactory man net to unrepresented accused before the element of the offence is put to them. The explanation of the difficult legal concept must appear in the record of proceedings, as well as confirmation by

[1] 1988 (2) 385 (SC)

each co- accused that the explanation has been understood. See *Moses Mubvumbi & Ors* v *The State*[2].

S 271 (2) (b) of the CPEA reads as follows;-

"**271 Procedure on plea of guilty**

(1) Where a person arraigned before the High Court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea, the court may, if the accused has pleaded guilty to any offence other than murder, convict and sentence him for that offence without hearing any evidence.

(2) *Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea—*

(*a*) the court may, if it is of the opinion that the offence does not merit punishment of imprisonment without the option of a fine or of a fine exceeding level three, convict the accused of the offence to which he has pleaded guilty and impose any competent sentence other than—

(i) imprisonment without the option of a fine; or

(ii) a fine exceeding level three; or deal with the accused otherwise in accordance with the law;

(*b*) *the court* ***shall****, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (a) or if requested thereto by the prosecutor—*

(i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and

(ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor; and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law:…."

The trial magistrates, through their provincial magistrate, sought guidance from the scrutinizing regional magistrate as whether the approach adopted in the case of *Elizabeth Sithole & Anor* was correct. Their view was that s 271(2) (b) required that the essential elements of the offence be put and recorded 'separately', not 'one after another'. The question was whether it was necessary that the question be put separately to each co-accused and a separate answer be

[2] HH239-11 @ 2-3

recorded. The case of *Shame Sengweni & Anor* which was used to illustrate the point showed that the record of proceedings relected the following;-

"Q: Admit that on 26 February 2016 and at Omnia Fertilizers Company Mt Hampden one or both of you unlawfully entered the premises at Omnia?

A1: Yes A2: Yes

Q: How did you gain entry to the premises?

A1: There is a wall and I climbed over the wall and also through the shed there is a gap.

A2: *I did as 1st accused.*

The record shows that the trial magistrate did not explain technical legal terms like 'enter', 'unlawfully', 'premises' to the two accused persons, who were unrepresented. This renders the proceedings unjust. See *S* v *Milanzi & Anor*[3]. It is indeed correct that the 2nd accused person's response to the second question, that he had entered the premises the same way as the 1st accused, is not supported by the outline of the state case which read; '….upon entering the shed, he took two bundles of empty sacks of fertilizers and passed it to accused 2, ***who was outside".*** If the question had been repeated separately to accused 2, the appropriate response would have been elicited from him, and a defence possibly been established, that accused 2 did or did not act in common purpose with accused 1. We accept as a correct proposition of the law that the provisions of s 271 (3) are peremptory. They provide that;-

(3) Where a magistrate proceeds in terms of paragraph (*b*) of subsection (2)—
(*a*) the explanation of the charge and the essential elements of the offence; and
(*b*) any statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and
(*c*) the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and
(*d*) any statement made to the court by the accused in connection with the offence to which he has pleaded guilty; **shall be recorded.**

(a) The explanation of the charge
(b) The essential elements of the offence
(c) Any statement of acts or omissions on which the charge is based

[3] 1998 ZLR 212

(d) The accused's reply to the inquiry any statement made by the accused to the court

Shall be, meaning must be recorded. There is no discretion on the part of the trial magistrate. We agree with the contention that the 'clear and unambiguous construction that must be placed to subsection (3), is that everything which is said in the mutual exchange between a magistrate and an accused person must be recorded'. It must not only be recorded, it must be recorded in full, with no shortcuts or abbreviations. The magistrate has no discretion to ask some questions and not others, or to record some answers and not others. It is trite that any failure to comply with the peremptory provisions of s 271 (2) (b) or 271 (3) of the CPEA renders the proceedings fatally defective. It has been held that;-

> " The magistrate having proceeded in terms of s 271 (2) (b) of the act was obliged to record the proceedings as provided by s 271 (3) of the Act… It is therefore mandatory that a magistrate should record the question and answers exchanged between him and the accused during the canvassing of essential elements. A failure to comply with this requirement as happened in this case is a serious irregularity warranting the setting aside of the accused's conviction and sentence. This was clearly indicated in the case of *S* v *Mhondiwa* 1976 (1) RLR 134 at 135 H-136A where SMITH J said;
>
> "It should be pointed out that in terms of subsection (3) of s227 of the Criminal Procedure and Evidence Act the matters there referred to should be accurately recorded….in the result the convictions and sentences on all three counts are set aside".

In the present case there is no possibility of the magistrate having been able to accurately record her questions and the accused's answers in her office after convicting the accused during the proceedings. It must be stressed that magistrates should record as they progress and not after the proceedings. What happened in this case demonstrates the importance of recording the proceedings as they progress. The magistrate forgot to fill the gaps. She could have forgotten the answers the accused gave or the questions she asked. Leaving the recording of proceedings till the end of proceedings or to reconstruction in one's office will lead to cheating and guess work which can seriously erode the quality of our criminal justice system.

In the case of *S* v *Zindonda* AD 15-79 MACDONALD CJ at p 7 of the cyclostyled judgment commented on the need for magistrates to "strictly and meticulously" observe the provisions of s 255 (3) which is now s 271 (3) of the Act. In the case of *S* v *Manday Davy* v *S* 1988 (1) ZLR

386 SC at 393 C-E GUBBAY JA commented on the need for magistrates to keep an accurate record by;-

> "Writing down completely, clearly and accurately everything that is said and happens before them which can be of relevance to the merits of the case".

He stressed this need especially in cases which are presided over in the absence of mechanical recording facilities. He explained the importance of accurate recording on the basis that it is the magistrate's record which;-

> "Is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done"

I also refer to the case of *S* v *Sailos Ndlovu* HH 219-2003 at p 2:

> "The recording of the accused's answers is therefore mandatory. The reason for the mandatory recording of the accused's answers is obvious. It is from the accused's answers that the court can determine whether an accused's plea of guilty is a genuine admission of guilt.
> Failure to record the accused's answers is therefore a serious omission which can result in the setting aside of the conviction and sentence."

We accept as correct, the submission that when canvassing essential elements of an offence in a matter which has several co- accused, each accused person must be dealt with separately. This does not mean putting one question to co- accused collectively and then asking each of them to answer in turn. In the case of *Tafadzwa Mutumwa & Anor* v *The State*[4]n this court explained what 'separately' means, for purposes of canvassing essential elements where there are multiple accused. It was held that-

> "The manner in which the two appellants were questioned by the trial magistrate is undesirable. The record shows that both appellants' gave strikingly identical responses to the questions put to them by the court a quo. Their responses were captured throughout as accused 1 Yes. Accused 2 Yes. It is not usual that accused persons would respond to questions put to them in such an automated fashion. The ideal approach would be to deal with one accused at a time and when the verdict is pronounced to then proceed to deal with the next accused whose responses must be properly recorded. "

[4] HH 04-08@p7 cyclostyled

We therefore find that the convictions of all the accused in these four cases were improper. They are accordingly set aside. The sentences cannot stand where the convictions were not in accordance with real and substantial justice. Be guided accordingly.

CHIGUMBA J……

MATANDA-MOYO J agrees ……