THE STATE

Versus

JAPHET NCUBE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4 May 2023

Review judgment

DUBE-BANDA J:

[1] This is a review matter that came before me in terms of s 57(1) of the Magistrates' Court Act [Chapter 7:10]. The accused was charged with the crime of rape as defined in section 65(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He was convicted and sentenced to twenty (20) years imprisonment of which two (2) years were suspended for five (5) on condition of good behaviour.

[2] At the commencement of the trial the accused pleaded guilty to the charge. The trial court then proceeded to canvas with him the essential elements of the charge. His answers were not categoric. He prevaricated and the trial court was not satisfied that his plea was an unequivocal admission of guilt and proceeded to alter his plea to one of not guilty.

[3] The trial ensued and, in his defence outline he said:

> "On the day in question, I proceeded to complainant's homestead. I told her that the child was ill. We then went to my homestead. We arrived thereto. We (*sic)* had sex with the complainant without her consent. That is all."

[4] The prosecutor opened the State case by tendering a copy of the medical report, which was received as an exhibit. The prosecutor then sought admissions from the accused in terms of section 314 of the Criminal Procedure and Evidence Act, [Chapter 9:07] (CP&E Act). The record of proceedings reflects as follows:

> Public prosecutor: State applies to admit evidence in terms of s 314 of the CP & E Act, that is;
>
> Paragraph 13 line 2: "…. inserted his erect penis into the complainant's vagina and had sexual intercourse with her consent without protection.

Paragraph 14: After the act the complainant went to report the matter to the kraal head Danger Ngwenya, who alerted his brother Bhekimpilo Ngwenya.

Paragraph 15: The two escorted the complainant to file a report at ZRP Tshefunye base Tsholotsho and complainant was referred to Tsholotsho District Hospital for medical attention.

Court: Any objection to the State's application on admission paragraph 13,14 and 15 of the State outline.

Accused: No objection.

Court: State outline Annexture "A" paragraphs 13, 14 and 15 admitted by consent in court – as evidence in terms of s 314 of the CP & E Act.

[5] The court enquired from the accused whether he had any objection to the admissions sought by the prosecutor. He replied that he had no objection.

[6] No witness was called and the State closed its case. The accused was then put on his defence. The court convicted the accused on the basis of his admissions and the incriminating evidence adduced in the defence case. In cross examination he admitted that he had sexual intercourse with the complainant without her consent. He was then sentenced as outlined above.

[7] Unfortunately, in so proceeding, the learned magistrate made two errors, the one perhaps not important, the other however being fundamental. The fundamental error was the failure to comply with the s 314 of the CP & E Act.

[8] The legislative framework is provided in s 314 of the CP & P Act which states that:

> (1) In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact.
>
> (2) If he considers it desirable for the purpose of clarifying the facts in issue or for obviating the adduction of evidence on facts which do not appear to be in dispute, the judge or magistrate may, during the course of a trial and on application by the prosecutor, the accused or his legal representative ask the accused or his legal representative or the prosecutor, as the case may be, whether any fact relevant to the issue is admitted in terms of this section.
> [Subsection as amended by s. 28 of Act No. 9 of 2006]
>
> (3) Subject to this Act, an accused who is not represented by a legal practitioner shall be warned that he is not obliged to make any admission. (My emphasis).

[8] Section 314 (3) is clear and in peremptory language say that an accused who is not represented by a legal practitioner shall be warned that he is not obliged to make any admission. See: *Mundingi V The State* SC 1 /87. Section 314 of the CP & E Act is intended to relieve the

State of the necessity of proving allegations admitted by the accused. The effect of formal admissions is drastic in that it dispenses with the need for proof and results in the shortening of the criminal trial. Because of the drastic effect of this section, the courts have been at pains to insist on various measures to protect an unrepresented accused. See: Du Toit *at al Commentary on the Criminal Procedure Act* p. 24-79 to 24-82.

[9] In *S v Mavundla* 1976 (4) SA 713 (N) at 732E-F the court in respect of a similar provision in the South African legislation, set out the duty of a judicial officer in respect of an unrepresented accused as follows: must satisfy himself before accepting the admission in evidence, that the accused's decision to make it has been taken with full understanding of its meaning and effect, and that he is under no misapprehension that he is obliged or expected to supply the State or the court with it. It must also appear to be truly voluntary in all other respects. See: Du Toit *at al Commentary on the Criminal Procedure Act* p. 24-81 to 24-82.

[9] Applying the above principles to the present matter, my view is that the trial court failed in its duty to explain to the accused the effect of making formal admissions; and that he was not compelled to assist the prosecution in proving its case. The accused must be properly informed, and his answers recorded. However, this did not happen in this case. Instead, after the learned Regional Magistrate was informed that the prosecution was seeking certain formal admissions from the accused, the trial court asked whether he had any objection, and he said he had no objection. The admissions were then received.

[10] The accused was unrepresented and the trial court in non-compliance with s 314 (3) of the CP & E Act did not warn him that he was not obliged to make any admission. And did not explain that he was not compelled to assist the State with the burden of proving its case against him; and that the effect of making formal admissions was to relieve the state of the burden of proving the admitted facts. Again, trial court did not record that it was satisfied that the admissions were truly and voluntary in all other respects. It was important in this case for the trial court to be satisfied that the admissions were truly and voluntary in all other respects. I say so because the accused informed the court that he was severely assaulted by the police. And for the whole day he was neither given food nor water to drink. These serious allegations where not disputed, and are taken as if they have been admitted. In light of these serious allegations there is nothing on record that shows that the trial court satisfied itself that the admissions were truly and voluntary in all other respects.

[11] Because the effect of formal admissions is drastic in that it dispenses with the need for proof and results in the shortening of the criminal trial, the trial court must ensure an

unrepresented accused understands the effect of making admissions. Without an explanation to and an inquiry whether the admissions were truly and voluntarily in other respects, to only ask an unrepresented accused whether he has objections or not serves no useful purpose. It is of no consequence.

[12] The other error was the failure to warn an unrepresented accused that he had a right to apply for a discharge at the close of the State case. At the close of the case for the prosecution it appears to me that there was no evidence that the accused had sexual intercourse with the complainant without her consent. Therefore, there was no case to answer. The admitted paragraphs of the State outline read thus:

i. (13) The accused pinned her down on the ground and covered her mouth with his hand and inserted his erect penis into the complainant's vagina and had sexual intercourse with her once without protection.
ii. (14) After the act the complainant went to report the matter to the kraal head Danger Ngwenya who alerted his young brother Bhekimpilo Ngwenya.
iii. (15) The two escorted the complainant to file a report at ZRP Tshefunye base, Tsholotsho and the complainant was referred to Tsholotsho District Hospital for medical examination.

[12] There is no statutory provision requiring the court to inform the accused of his right to ask for a discharge. On the other hand, a judicial officer has a duty to ensure that an unrepresented accused understands his rights and the options open to him at all stages of the trial, so in appropriate cases a judicial officer should invite an unrepresented accused to apply for his discharge. (s 198(3) CP & E Act). Without the evidence of the complainant and the admitted paragraphs of the State outline not speaking to sexual intercourse without consent, it seems to me that at the close of the case for the prosecution the accused had no case to answer. The trial court failed in its duty to examine whether at the close of the case for the prosecution there was a *prima facie* case against the accused, and did not inform him of his right to apply for a discharge. However, nothing much turns on this error. I say so because in the defence case the accused gave incriminating evidence. See: S v *S v Kachipare* 1998 (2) ZLR 271 (S).

[13] Due to the fact that the procedure in taking formal admissions was riddled with irregularities the conviction and sentence cannot be allowed to stand. See: *S v Tsei-Tseib* (CR 29 /2022 [2022] NAHCMD 183 (11 April 2022). I take the view that the proceedings at the

magistrates' court were not in accordance with real and substantial justice, as a result, a substantial miscarriage of justice has actually occurred.

[14] It is a fundamental principle of our law that an accused person is entitled to a fair trial. The trial should be fair in substance as well as form. However, trial fairness is not only confined to the position of the accused, but extends to society as a whole, precisely because society has a real interest in the outcome of a criminal case. The principle of a fair trial presents the court with two competing interests that a court has to balance. The court engages in a balancing exercise. On one hand an accused person who is manifestly and demonstrably guilty should not be allowed to escape punishment simply because some irregularity was committed in the course of the proceedings but in circumstances which showed clearly that the conviction of the accused would inevitably have followed even if the irregularity would not have been committed. On the other hand, this is juxtaposed with the equally important interests that a fair trial is not confined to the punishment of guilty persons, it extends to the importance of insisting that the procedures adopted in securing such punishments are fair and lawful. One interest does not override another, each survives and is given its due. In *casu* the striking of a balance between these two competing interests entails that the proceedings be set aside and the matter remitted to the trial court for trial *de novo*.

[15] I have considered whether it would be appropriate to further order that in the event of the accused being convicted he was not to be visited with a sentence in excess of that originally imposed upon him. I do not consider it advisable to so fetter the discretion of the subsequent trial court; for the degree of the accused's moral blameworthiness may conceivably be shown, on the evidence adduced before that court, to be greater than that which emerged at his first trial. See: *Lambat v The State* SC 102/83.

[16] In the circumstances the conviction must be quashed and the sentence set aside, and the matter remitted to the trial court for trial *de novo* before a different magistrate.

In the result, I make the following order:

i. The conviction is quashed and the sentence is set aside.

ii. The matter is remitted to the trial court for trial *de novo* before a different magistrate, provided however that should the accused be convicted, the period of sentence

already served must be taken into account as a portion of any new sentence which may be imposed.

DUBE-BANDA J:

KABASA J: …… AGREES