THE STATE

Versus

NECIOUS NDLOVU

HIGH COURT OF ZIMBABWE
SIZIBA J
BULAWAYO 13TH SEPTEMBER 2024

Criminal Review

SIZIBA J:

Introduction

This case came to me for automatic review of the criminal proceedings in terms of section 57 (1) of the Magistrates Court Act (Chapter 7:10) as read with section 29 (1) of the High Court Act (Chapter 7:06). I then noted a litany of irregularities of which the most prominent ones which I invited the trial magistrate to comment upon were that there was no explanation of the purpose of cross examination to the unrepresented convict throughout the trial, there was also no explanation why the convict had not been invited or advised to sum up his case in terms of section 200 of the Criminal Procedure and Evidence Act (Chapter 09:07) and finally the convict was slapped with a shocking and disturbing cumulative imprisonment sentence of forty years over the same victim on two counts when he was a first offender, among other mitigating factors. Upon being invited to comment, the trial magistrate indicated that he had explained the purpose of cross examination to the convict although he forgot to record it. He clearly conceded that he had not explained the purpose of closing submissions to the convict and that no such submissions were made before him at the end of hearing evidence from the parties. On the cumulative sentence of forty years, he said that he was of the view that section 65 (1) has a minimum mandatory sentence and hence he could not order the sentences to run concurrently. A perusal of the penal provision in section 65 (1) of the Criminal Law (Codification and Reform) Act does not support such view. Nonetheless, the learned trial magistrate should be commended for his response.

The proceedings before the trial magistrate

The convict in this case was tried on the 6th of August 2024 by a Regional Magistrate siting at Hwange Magistrates Court. The record of proceedings only reflects that there was an interpreter who was interpreting proceedings but there is no indication as to which language the convict was using. There is no indication whether he was advised to choose a language of his choice or not. The convict was advised that he had a right to be represented by a legal practitioner of his own choice at his own expense and he indicated that he would self – act. From the record, he was not advised that he had a right to apply for legal aid from the State if he so wished. He was facing two counts of rape in terms of section 64 (1) as read with section 65 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). It was alleged that he had non-consensual sexual intercourse with the complainant, a mentally retarded woman aged 39 years. A reading of this statutory provision suggests that it should have been under section 64 (3) of the same Act as read with section 65 (1). It is recorded that the charge was put to him and explained to him but the contents of the explanation is not on the record. There is also no record of the explanation that the charge in question was not the ordinary allegation of rape but one whereby the complainant was deemed incapable of consenting to sexual intercourse due to her mental state. The statutory defenses to that charge were not explained. The record reflects that the convict was advised of his right to give a defense outline and he did give the same.

The State commenced its case by tendering the medical examination reports from both the General Practitioner and the Psychiatrist without objections from the convict. The complainant's evidence in chief then followed. She was cross examined by the accused person. There is no record of any explanation of the purpose of cross examination by the learned magistrate as alluded to above. There was no re examination of the witness. The complainant's mother testified as well and she was cross examined by the convict. There was no re examination by the State. The State case was closed. The defense case followed with the convict being assisted to adopt his defense outline and confirming it. He was asked if he had witnesses and he confirmed that he had one. He was cross examined. There was no self re - examination. The convict then called his witness being his brother one Luis Ndlovu who

confirmed his alibi that on the 4th of December 2023 he had gone to another village being Makuni which is far from Mpofu village in Lupane to share his sister's clothes. This witness was cross examined. There was no re - examination. The defense case was then closed. There were no closing submissions from either side and there is no recorded explanation of the convict being advised of his rights to sum up his case. What then followed was the sentencing procedure. The convict was slapped with a sentence of twenty years for each count and there was no order that those sentences are to run concurrently and as such they culminate to an aggregate of forty years imprisonment with nothing suspended.

As for the evidence, the complainant narrated that the convict had had sexual intercourse with her twice, being the occasion where she was on her way to fetch water from the river and also when she had gone to fetch firewood in the bush. On both occasions, she alleged that she did not consent to the sexual intercourse. The convict did cross examine her. He denied having had sexual intercourse nor having met her on the alleged occasions. The Psychiatrist concluded that the complainant suffered from a moderate intellectual disability, that she cannot consent to sexual intercourse and that she will not understand court proceedings. The complainant's mother was the only other state witness who testified that she discovered that the complainant was pregnant on the 4th of April 2024. The offense had been committed on the 4th and 8th of December 2023. The medical report showed that the complainant's hymen was no longer intact and that she had no injuries in her genitalia. The complainant was vise versing the sequence of the two counts and maintaining that the incident which was alleged on the second count occurred first. The learned trial magistrate concluded that she was competent enough to sustain the conviction.

The proper trial procedure for unrepresented accused persons

The need for judicial officers to safeguard the procedural rights of undefended accused persons in criminal trials, which has been called for time and again in this jurisdiction and abroad does not seem to have been heeded. The call must be made again and again until all judicial officers get converted and comply. As far as the procedural rights of undefended accused persons are concerned, the end does not justify the means. The means must justify the end. A competent verdict and sentence must be preceded by a fair trial procedure which safeguards the rights of

accused persons. Every judicial officer who is faced with the onerous task of presiding over a criminal trial should be alive to the following basic procedural rights of accused persons so as to safeguard them especially where the accused is undefended:

1. The accused's right to be tried in a language of his own choice.
2. The accused's right to be represented by a legal practitioner of his or her own choice and his or her right to apply for legal aid if he or she so desires or if the court advises such considering the complexity of the case.
3. The need to explain any statutory defenses to the undefended accused person.
4. The need to explain any statutory presumptions to an undefended accused person.
5. The need to explain any reverse onus provisions in a statute to the undefended accused person.
6. The need to explain any special circumstances and minimum mandatory sentences to the undefended accused person.
7. The need to explain the purpose of cross examination to the undefended accused person.
8. The need to explain the accused's right to sum up his or her case at the end of the evidence before judgment.
9. The right to give a defense outline as well as the right to remain silent and the exigencies thereof.
10. The right to call witnesses.
11. The right to make objections to the production of documentary evidence.
12. The right to review or appeal to the next higher court and the timelines of filing such appeal or review.

The above are the most basic and elementary rights that the judicial officer must bear in mind when faced with a criminal trial although the list is endless. Some of these rights are codified in the Constitution and other statutes while others are not. If an accused person is denied any of these rights, the trial becomes unfair and irregular and if the violation is gross the proceedings will be vitiated. There is need to emphasize some of the above rights and highlight the consequences of violating them.

The language of one's choice

An accused person has the right to be tried in a language of his or her own choice. Section 70 (1) (j) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013 provides as follows:

"Any person accused of an offence has the following rights-
to have the proceedings of the trial interpreted into a language that they understand."

Before anything else is said when the accused person enters the dock for his first appearance, the magistrate himself or herself must ascertain from an accused person the language which they understand well enough for court proceedings to commence. This responsibility should not be abdicated to a court interpreter to merely ascertain this aspect outside the record. The inquiry by the magistrate and the response from the accused person must be recorded so that there can never be any doubt that this Constitutional right of an accused person was correctly executed. Failure to do such is an irregularity and it may in some circumstances be so gross in its effect as to vitiate the proceedings especially where the accused person was prejudiced by such a transgression on the part of the presiding magistrate.

In *Dikatholo* v *The State* HB – 36 – 07, at page 4 of the cyclostyled judgment, the court, in a matter where the trial court had prevailed upon the accused person to use English language when he had preferred to use Tswana, concluded its remarks on appeal as follows:

"Therefore, this irregularity, is, in my view, of a gross nature as it breaches appellant's constitutional right to a fair trial. In Nyamayevu's case supra it was held that in such circumstances the conviction should be set aside. I find that this irregularity is so gross that it vitiates the proceedings. In other words there is no trial worth mentioning under these circumstances. This is a case where as a result of the gross irregularities committed by the court, the proceedings should be set aside without reference to the merits. Accordingly, the conviction and sentence are set aside and the matter is referred back for trial <u>de</u> <u>novo</u> before a different magistrate."

In *S* v *Mgodli* (2012) ZAECGHC 107 being a South African case before the Eastern Cape Division on automatic review, the magistrate had asked the interpreter if the accused understood Sotho language and the witness testified in Sotho but the accused's language was Xhosa, the court took the view that the magistrate ought to have himself ascertained if the accused understood Sotho. The proceedings were thus vitiated and the conviction and sentence were set aside.

It is on the basis of the above reasons that I wish to add my voice as well among other jurists in emphasizing that in all criminal proceedings, magistrates should ensure that the language of the accused's choice is noted on the record of proceedings so that the proceedings may pass the test of the law.

The right and purpose of cross examination

The right of an accused person to cross examine State witnesses is enshrined in the Constitution of Zimbabwe in section 70 (1) (h) as follows:

"Any person accused of an offense has the following rights –
to adduce and challenge evidence."

Where the need and purpose of cross examination is not explained to an unrepresented accused person, this right is violated and the trial is rendered unfair. The proceedings will be vitiated because the prejudice will occur whether the accused managed to put some questions to the witnesses or not. In the strictest and liberal sense, every violation of an accused person's procedural rights carries some degree of prejudice in it. Where more than one procedural right of an undefended accused person is violated, the cumulative effect and prejudice should be considered in measuring the prejudice to the accused person. The right to cross examination and the purpose thereof should be explained to an undefended accused before the commencement of the trial so that the accused person may listen to the first witness's testimony with a knowledge and appreciation that he will have an opportunity to challenge the witness after his or her testimony. In most cases, an accused person who is aware of this right to cross examine may even take a paper and pen to write his or her own notes in preparation for cross

examination. In our adversarial system, the failure to challenge any material aspect of the witness's testimony carries consequences against the accused person who will be taken to have agreed with the witness's testimony. An accused person who gets informed of the right to challenge the witnesses' testimony after the first witness has testified, as most magistrates do, may spend his time relaxing when the first witness is testifying. He may even be asleep or absent minded and only to regret when he is being appraised of such opportunity when his golden opportunity of framing the relevant questions has passed. This knee jerk approach of being a belated good Samaritan on the part of judicial officers must now stop. I recommend the practice that is followed in other jurisdictions where the right and purpose of cross examination is explained before the first State witness is called upon to testify. In *S* v *Gakeinyatse* (2009) BWCA 107, Moore JA sitting at the Court of Appeal in Botswana, articulated as follows at page 6 of the cyclostyled judgment:

"It may be desirable in such cases for judges or magistrates to explain in brief and simple terms, before the commencement of the trial, the right of the Accused to cross examine prosecution witnesses, to call witnesses on his behalf, to make objections, to address the court, as well as any statutory rights which might be open to him and of which he appears to be unaware. The judge or magistrate may also explain what rights an unrepresented defendant may have in dealing with situations beyond his layman's competence which might arise during the course of the trial such as, for example, his right to challenge the admissibility of a document which the prosecution seeks to produce in evidence."

The learned Justice of Appeal in the above case also proceeded to highlight that in dealing with an undefended accused, the magistrate or judge may assist the accused person to formulate his or her questions and also to point out certain critical areas that he or she may need to cover in his or her cross examination. This is not descending into the arena.

Section 35 (3) (i) of the Constitution of South Africa is worded similar with section 70 (1) (h) of our Constitution and the right to cross examination is equally emphasized to the extent that if it is curtailed, the proceedings may be vitiated. Where, as in the case at hand, there was no explanation of the right to cross examination throughout the trial, the prejudice to the convict is beyond question and the irregularity is so gross as to vitiate the proceedings.

The right to sum up evidence

The accused's right to sum up his case and give closing submissions is captured in the peremptory provisions of section 200 of the Criminal Procedure and Evidence Act (Chapter 09:07) which provides thus:

"After all the evidence has been adduced, the prosecutor shall be entitled to address the court, summing up the whole case, and the accused, and each of the accused if more than one, shall be entitled by himself or his legal representative to address the court, and if, in his address, the accused or his legal representative raises any matter of law, the prosecutor shall be entitled to reply, but only on the matter of law so raised."

The above provision is peremptory. There have been calls time and again for this provision to be adhered to by magistrates but most of them are still struggling to understand the importance of this provision and the need to explain it to undefended accused persons. In stressing the value of this provision, I can do no more than quote the words of my brother Zisengwe J in *S* v *Nguvo* 2020 (1) ZLR 1292 at 1293B-C where he stated thus:

"From a perusal of cases submitted on review there appears to be a tendency to completely disregard this important provision. It is often treated as an unnecessary and time wasting inconvenience, yet it is evidently not, particularly where the accused is unpresented. The section presents an opportunity to tie up all the often discrete pieces of evidence, to comment on the credibility or otherwise of the various witnesses that may have testified. It affords the competing parties a chance to make concessions, if any, and to highlight the strengths and weaknesses of the respective cases. It also gives an opportunity to the parties to persuade the court to accept or reject the versions presented during the trial in light of the nature of the offence and the applicable principles related to onus and burden of proof."

The learned judge continued at pages 1293 to 1294 to state the consequences of failure to advise undefended accused persons of this provision as follows:

"As alluded earlier, the provisions of section 200 are peremptory and there are several implications that flow from this a few of which will be highlighted below. Firstly, the trial court is enjoined not only to bring to the unrepresented accused the provision in question but also to provide a succinct explanation of the same. Failure to explain to the unrepresented accused this right may amount to an irregularity vitiating the proceedings (S v Parmand 1954 (3) SA 833(A), S v Mabote and Another 1983 (1) SA 745 OPD, R v Cooke 1959 (3) SA 449). Some decisions have labelled this right as a fundamental one in a criminal trial and that failure to observe it constitutes a gross irregularity. In the S v Mabote and Another (supra) the headnote reads:

"They are basic principles of our Criminal Law that an accused has the right to address the court which is trying him before judgement on the merits of the offence charged against him and that the opportunity to exercise that right is afforded him regardless of the prospects of success. A failure to afford him that opportunity affects the essence of the administration of criminal justice and cannot be regarded as anything other or less than a gross irregularity. Such an irregularity destroys the fairness and accordingly also the legal validity of the proceedings in question. "See also S v Kwinda 1993 (2) SACR 408 (v) and S v Mbeje 1996 (2) SACR 252 (N)." It is pertinent to note that s175 of the South African " Criminal Procedure Act," 51/77 on which those decisions are based is similarly worded to our Section 200. Some authorities have gone as far as holding that a failure by the court to afford accused the opportunity to address it, even unintentionally, is a serious irregularity which violates his constitutional right to a fair trial unless it can be shown that there was no prejudice to the accused (S v Zingilo 1995 (a) BCLR 1186 (O), S v Mbeje (supra) at 257e-h). The accused can, of course waive his right to so address the court, needless to say that he can do so upon being apprised of its existence and import: suffice it to say that both the explanation and the election to waive it must be recorded and must appear ex facie the record of proceedings. Ultimately, however, the primary consideration whether or not to set aside the proceedings for want of compliance with section 200 is that of prejudice occasioned to the accused thereby."

The right to legal representation

The right to legal representation is enshrined in the Constitution of Zimbabwe and also in the constitutions of all other progressive democracies worldwide. Section 70 (1) (d) of the Constitution of Zimbabwe provides as follows:

"Any person accused of an offence has the following rights –
to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner."

The above provision speaks to those accused persons who have the means to secure legal practitioners at their own expense. All accused persons should be advised of this right as soon as the court has ascertained the language of their own choice after their case is first called out. It should not end there, the court should make a follow up as to whether the unrepresented accused who has elected to look for a legal practitioner has found one as the trial date approaches so that the accused's rights are fully realized. This will also eliminate the need for applications for postponements on the trial date which may turn out at times to be delay tactics. Where an accused person elects to conduct his own defense upon his first date of appearance, a diligent magistrate will confirm whether the accused is still intending to be tried without a lawyer as the trial date gets nearer to avoid applications for postponements as indicated above.

Most democracies, including Zimbabwe, have now added the element of free legal aid to cater for those accused persons who cannot afford legal practitioners of their own choice. Section 70 (1) (e) of the Constitution of Zimbabwe provides as follows:

"Any person accused of an offense has the following rights –
to be represented by a legal practitioner assigned by the Sate and at State expense, if substantial injustice would otherwise result."

The above provision places a burden upon the State to ensure that it caters for those accused persons who do not afford legal representation and yet they are facing serious and complex cases where they may not conduct their defenses in a competent manner and where a failure of justice may result. It is the duty of the State to chip in and provide a legal practitioner for such accused persons and the State should pay counsel. In other words, there should be a proper

budget to cater for legal aid which may include fees for *pro deo* counsel which may either be set or taxed by the Registrar or the clerk of court as the case may be.

In terms of section 69 (4) of the Constitution, the right to legal representation goes beyond the scope of criminal proceedings and it stands out as a basic ingredient of every fair hearing in all forums of adjudication.

In section 31 of the Constitution of Zimbabwe, legal aid is set out as one of the national objectives as follows:

"The State must take all practical measures, within the limits of the resources available to it, to provide legal representation in civil and criminal cases for people who need it and are unable to afford legal practitioners of their choice."

This salutary stance by the framers of our Constitution shows that the nation is gearing towards catering for legal aid to all litigants who choose to apply or require it. The judiciary should not be lagging behind. Calls have already been made that in advising legally unrepresented accused persons of their right to legal representation, they should also be advised of their right to apply for legal aid. Failure to do such is also an irregularity. Furthermore, there are certain complex matters attracting lengthy prison terms where it may be difficult for an undefended accused person to follow up and appreciate the proceedings, then it behooves the magistrate to even advise or recommend that the accused should apply for legal aid. Failure to advise an unrepresented accused of his or her right to legal representation is an irregularity that may vitiate the proceedings. In the Namibian case of *S* v *Malumo and Others* (2011) NAHC 104, at page 7 of the cyclostyled judgment, Hoff J expressed the view that the right to legal aid is intertwined with the ordinary right to legal representation at one's expense as follows:

"The right to legal representation which includes the entitlement to legal aid must in my view not only be explained in such a way that an accused person may make an informed decision, but he must also be informed, especially if he or she is a layperson, how to exercise such right or entitlement."

The right to review and appeal

Post conviction rights are now part of our law. These rights are set out at section 70 (5) (a) and (b) of the Constitution of Zimbabwe as follows:

"Any person who has been tried and convicted of an offense 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 conviction and sentence."

All unrepresented accused persons should, after conviction and sentence, be accordingly advised of these post - conviction rights. A diligent judicial offer will also do the same in every case involving a litigant who is unrepresented. The unrepresented accused person should be told in clear terms where or in which court the appeal lies and the timeframes thereto so that he or she may not be impeded by failure to adhere to proper timeframes in exercising such a fundamental right. Failure to do such on the part of a trial court is an irregularity that can prejudice the accused's postconviction rights. The need to advise an unrepresented convict of his post-conviction rights was stressed by my brother Chitapi J, among other voices in this jurisdiction in *S* v *Sakawa* HH – 262 – 20 at page 3 of the cyclostyled judgment where he stated as follows:

"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."

The record of proceedings

The record of proceedings must reflect that the trial magistrate was alive to and did protect the procedural rights of an unrepresented accused person. To claim that such rights were advised

and that the necessary steps were executed outside of the record is insufficient as the reviewing court will be deprived of assessing for itself whether such explanations or processes were sufficient or proper. Failure to keep a proper record of proceedings which contains the necessary elements of a fair trial by a trial magistrate is itself a gross irregularity which vitiates such proceedings. I am vindicated in this drastic approach by quoting the remarks of Makarau JP (as she then was) in *S* v *Chitavaenzi* HH – 113 – 08 at page 2 of the cyclostyled judgment where she held thus:

"Firstly, magistrates' courts are courts of record. This is specifically provided for in section 5(1) of the Magistrates' Court [Chapter 7.10]. The section proceeds to provide that the record shall be accessible to the public through the office of the clerk of court. There is thus a legal and professional duty on the part of magistrates to always keep full and comprehensive records of the proceedings before them. The record must ex facie, be able to inform the reader of what transpired in court without the aid of verbal explanations from the pressing officer. The rationale behind keeping a full and accurate record of the proceedings in a court of law was aptly summarized by MUCHECHETERE J (as he then was) in S v Ndebele 1988 (2) ZLR 249 (HC) at 254 C-G in the following words:

"All courts are courts of record and are required to keep full and comprehensive records of all proceedings. The proposition is self-evidence and accords with reason and justice. In Sv Besser 1968 (1) SA 377 (SWA), the court held that a failure to keep a proper record of any proceedings or any part thereof amounted to gross irregularity cognizable under the court's power of review as envisaged in provisions such as s27 of the High Court Act No 29 of 1981. In addition, s163 (4), 190 and 255 (3) of the Code compel him to record those matters mentioned in them."

After referring to other cases where the same legal position was adverted to, the learned judge proceeded to remark:

"The need to do so is quite obvious. In the absence of such a record how is a review or appellate tribunal to assess the correctness and the validity of an y proceedings placed before it for adjudication?"

In addition to the reasons given by the learned judge above, I would venture to suggest that the need to keep a full and comprehensive record also reduces arbitrariness on the part of the presiding officer as all questions by the court to the accused and the responses elicited by such

questions are reduced to writing. It would take a criminal minded judicial officer to falsely record the questions he put to the accused and the answers elicited by such questions."

In the Namibian case of *Kativa* v *S* (2022) NAHCND 64, Claasen J also emphasized the point as follows at page 10 of the cyclostyled judgment:

"The record keeping in this matter also deserves a comment. In glancing at the front page of a J-15, once a matter is finalised, the template provides for a recording of each of the accused's pleas, the convictions and or acquittals, the sentences and the dates. In the matter herein the magistrate recorded only part of that information and left the rest to the imagination of the reader. This sloppy approach cannot be endorsed. Accurate and complete recordkeeping is an integral function of the position of a magistrate. We endorse the sentiments as expressed in S v Heibeb[1] *that:*

'It is the duty of the presiding officer to keep a proper record and record the proceedings in a clear and intelligible manner in the first person and also to record the explanation of the rights of the accused fully and clearly.'"

At page 4 of the above case, the learned judge expressed himself as follows:

An accused's rights to a fair trial are entrenched in Article 12 of the Namibian Constitution. In general, a judicial officer has a duty to inform an undefended accused of his or her procedural rights in order to ensure a fair criminal trial. That this was done, should be apparent from the record of the court proceedings. In this regard we endorse what was stated in S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO[2] *at 378A-B:*

'At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights – the right to cross-examine, the right to testify, the right to call witnesses, the right to address

the court both on the merits and in respect of sentence – and in comprehensible language to explain to him the purpose and significance of his rights.'

Further general remarks on the procedural rights of unrepresented accused persons

Trial magistrates should be sensitive to the procedural rights of unrepresented accused persons throughout the trial. Maxwell J expressed this need as follows in *The State* v *Matavo* HH – 581 - 22 at page 2 of the cyclostyled judgment:

"The trial magistrate must explain the procedures to an unrepresented accused. He has a duty to assist an unrepresented accused who shows an insufficient understanding of the various stages of a trial, the requirements of each stage, his rights and the consequences of failure to exercise those rights."

In *S* v *Chitavaenzi* (*supra*), the learned judges in that appeal where the record did not reflect the plea being recorded from an accused person concluded their dissatisfaction with this golden remark at page 4 of the cyclostyled judgment:

"Thus, apart from the misdirection cited above, we were of the view that the failure by the trial court to record a plea from the accused person personally was such a gross irregularity as to vitiate the entire proceedings. ***In our view, it is safer to set one possibly guilty person free than to condone a departure from practice that may set the precedent for the conviction of many innocent people.*** *For the above reasons, we quashed the conviction of the appellant and set aside the sentence and forfeiture order issued by the trial court."* (added emphasis)

The cumulative sentence

In sentencing the convict to twenty years for each count, the trial magistrate has, in the result, subjected the convict to an aggregate prison term of forty years with nothing suspended. Such a harsh sentence being imposed to a convict in relation to an offence perpetrated against the same victim induces a sense of shock to the offender. A convicted person should not be punished until he or she entertains a belief that he or she is already in hell where he or she must fully atone for all the sins of his lifetime on earth. This is exactly one of those cases where this

court has protested that while the individual sentences are not excessive, their cumulative effect is indeed excessive. See *The State* v *Ncube* HB – 100 – 09. On this basis, we cannot certify the sentence imposed by the trial magistrate as being in accordance with real and substantial justice. We would have ordered the sentences on both counts to run concurrently if the trial proceedings had not been vitiated by the procedural irregularities already pointed out above.

Conclusion

Section 69 (1) of the Constitution of Zimbabwe guarantees the fundamental right of a fair trial in every hearing where one is accused of an offence. If the procedural rights of an undefended accused person are not safeguarded or violated in a criminal trial, this Constitutional right will be violated. Section 70 (3) of the Constitution of Zimbabwe pronounces the consequences of such a process where the rights of an accused person have been violated or suppressed in relation to criminal proceedings as follows:

"In any criminal trial, evidence that has been obtained in a manner that violates any provision of this Chapter must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest."

Many a times, the courts have been accommodative in validating trial proceedings where the procedural rights of defended and undefended accused persons have been violated by taking the view that there would have been no prejudice to accused persons. One tends to long for the dawning of a new era and a new chapter in our legal history where the accused persons would be fully accorded their procedural and substantive rights as enshrined in the Constitution such that any violations to those rights will be met with the attendant and intended consequences as spelt out by the above Constitutional provision. This is imperative in our jurisdiction and this dream must be realized in this day and age where our vision as a judiciary is to be a judiciary where world class justice prevails. On this basis therefore, we cannot allow proceedings to stand unvitiated in a case as this one where an undefended accused person was never at any stage advised of the right to cross examine state witnesses, he was not advised of his right to sum up the evidence, he was not advised to have the proceedings conducted in a language of his choice among other related transgressions. These mistakes by trial magistrates can only be

condoned by this court at the cost of the rights of accused persons who continue to be prejudiced thereby.

For the above reasons, I take the view that the present criminal proceedings by the trial magistrate were grossly irregular and that the convict's procedural rights were violated to such an extent that it will be in the interests of justice to order a trial *de novo* in this case. The conviction must be quashed and the sentence set aside. It is accordingly ordered as follows:

1. The trial proceedings before the Regional Magistrate in this case cannot be certified as being in conformity with real and substantial justice.
2. The conviction be and is hereby quashed and the sentence is set aside.
3. The case is remitted to the Magistrates Court for a trial *de novo* before a different magistrate of competent jurisdiction.

SIZIBA J .....

MUTEVEDZI J AGRREES ……..