TAWADZWA MUBVUMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU JJ
HARARE, 30 September 2021

Review Judgment

CHITAPI J: The record of proceedings in this matter was placed before me on review and on 25 August, 2021. I raised a query for the trial magistrate's comment as follows:

> "1. There is no compliance with s 163A and 271 (3) of the Criminal Procedure and Evidence Act.
> 2. Provincial magistrate to comment on the apparent non-compliance. See *S* v *Sawaka* HH 262/20 and cases referred to therein and *S* v *Mangwende* HH 695/20."

The trial magistrate responded as follows in a minute dated 6 September 2021.

> "Kindly place the attached record before Honourable CHITAPI J, with my comments below. I concede that the charge was not explained elaborately before plea. However, I respectfully draw your attention to the elaborate questioning after plea. I have since taken note of recent interactive review minutes on the aspect of compliance with s 271 (3) of the Criminal Procedure and Evidence Act and I undertake to avoid the error in future."

Let me quickly disabuse the Provincial Magistrate of his insinuation that his "elaborate questioning after plea" has a corrective effect on the magistrates' failure to comply with the clear provisions of s 271 (3) which require that the matters set out therein are recorded. The section provides as follows:

> "271 (3) Where a magistrate proceeds in terms of para (b) of ss (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 sub para(1) of that para; and
> c) The reply by the accused to the enquiry referred to in sub para (ii) of that para; and
> d) Any statement made to the court by the accused in connection with the offence to which he has pleaded quality shall be recorded."

In relation to the query I raised on whether the charge was explained and the explanation recorded, the grammar is simple. To record an explanation is plain enough. How one has explained the charge is what must be recorded. The words used or *ipsissima verba* is what must be recorded. What the magistrate did was to record that the charge had been put to the

accused and understood. That may well have been the practice followed for a long time. The fact that a certain procedure has been wrongly followed for a long time does not then displace the correct legislative position.

The magistrate did not comment on the first part of my query. He was supposed to comment on why he did not comply with the provisions of s 163A of the Criminal Procedure and Evidence Act. The provisions thereof are very clear and they are peremptory in their wording. They read thus:

"163A. accused in magistrates' court to be informed of s 191 rights"

1. 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 ss (1) and the accused's response to it."

It is not clear as to why the magistrate did not address the fact of his omission to comply with s 163A. By failing to acknowledge the query and address it, it is not possible for the judge to then be satisfied that the errant magistrate has seen the light on the point. In regard to the need to comply with the provisions of s 163A aforesaid, the provisions are clear that informing the accused of s 191 rights precedes the putting of the charge in every trial in the magistrates' court. See *S* v *Sawaka* (supra); *S* v *Manetaneta* HH 185/20, *S* v *Maxwell Moyo* and another HB 139/20, *S* v *Kambarami* HB 119/20. Simply put if one were to ask for an outline of the steps that must be followed in conducting a trial involving an unrepresented accused in the magistrates court, the answer would be that the first step would be to inform such accused of the rights to legal and other representation as provided for in s 163A of the of the Criminal Procedure and Evidence Act [*Chapter 9:07*]

In casu, the magistrate recorded the trial proceedings as having proceeded in this manner:

"Trial.
Charges: Put and understood
Plea: Guilty
271 (2)(b)
Facts- read and understood
Q. Are the facts true and correct
A. Yes"

It is clear therefore that the charge was put to the accused before the first step was complied with which was to inform the accused of his right to legal representation. It is not expected that a magistrate of the level of Provincial Magistrates is found wanting in complying

with basic steps of a trial in the magistrates court. It is hoped that the magistrate will be properly directed henceforth.

To dispose of the review, it is necessary to set out the background to the case. The accused was charged with negligent driving as defined in s 52 (2) (a) of the Road Traffic Act, [*Chapter 13:11*]. It was alleged that he drove his Honda fit motor vehicle negligently at Kuwadzana Shopping Centre, Harare and caused an accident on 17 February, 2021. He was convicted on his plea of guilty and sentenced to 12 months imprisonment wholly suspended for 3 years on conditions of good behaviour. The rest of the details of the accident are not important in view of the fact that the trial of the accused was done unprocedurally as I have outlined. The only issue is to determine what must become of the proceedings.

These proceedings are grossly irregular. They can't be saved. As was done in the *S* v *Mangwende* case (*Supra*), the proceedings must be set aside. The following order shall issue.

1. The proceedings in case No. CRB MBR 2864/21 are hereby quashed and the conviction and sentence are set aside.
2. The Prosecutor General may in his discretion institute the prosecution of the accused afresh.

MUSITHU J AGREES ……