RICHARD MUSURUDZWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 16 May 2017 & 29 May 2019

Criminal Appeal

T. Biti, for the appellant
E. Mavuto, for the respondent

HUNGWE J: The appellant was convicted of fifteen counts of robbery as defined in s 126 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*] on his own plea of guilty. He was sentenced as follows:

Counts 1-5 : 12 years imprisonment

Counts 6-10 : 12 years imprisonment

Counts 11-15 : 12 years imprisonment.

Of the total of 36 years imprisonment, 10 years were suspended for five years on condition of good behaviour leaving an effective 18 years imprisonment. He appeals against both conviction and sentence.

The relevant notice and Grounds of Appeal were couched as follows:

"1. The court *a quo* erred and misdirected itself in convicting the appellant on acts that constituted the same cause and purpose as if they were acts perpetrated independently, distinctly and severally, this condoning a splitting of charges and committing a duplication of convictions.

2. The court *a quo* erred and misdirected itself in failing to discharge its statutory duties to an unrepresented accused by not advising and assisting the appellant in the conduct of the trial and advising him of the substance of the charges preferred against him.

3. The court *a quo* further erred and misdirected itself in treating the split charges separately for sentence when there was no just basis for doing so.

4. Further, the court *a quo* erred and misdirected itself in failing to give proper weight to the appellant's mitigatory circumstances."

From the above it is clear that there is one ground advanced in the appeal against

sentence. The first three grounds of appeal are against conviction.

The appellant framed the issues raised in this appeal as being whether the court *a quo* breached the appellant's constitutional rights by:

(a) failing to advise the appellant of his right to legal representation;

(b) proceeding to trial in the case without legal representation; and

(c) afford the appellant the benefit of a fair trial as required in terms of the Constitution.

Factual Background

The appellant was charged with multiple counts of robbery arising from the following admitted facts.

On 7 April 2009, a commuter omnibus with eighteen passengers, including the appellant and his three accomplices, left Harare for Hwedza. When they arrived at Chineyi Business Centre, the appellant produced a live bullet and gave it to the driver at the same time threatening him with death as he withdrew a pistol. One of the appellant's accomplices produced a knife and threatened the passengers who he ordered to strip and leave their belonging inside the bus. They forced the driver to drive them to Marondera where they dropped off the bus together with their loot. The driver was ordered to drive back to Harare.

On 19 April 2009 the appellant together with his accomplices boarded a Marondera bound commuter omnibus. They indicated that they wanted to drop off. Using the same method, they again robbed the passengers and the driver of their various items of property. They then drove the bus back to Harare and dumped it. The passengers and driver were left stark naked and stranded.

The appellant, upon being asked to plead, admitted his guilt. Upon the appellant tendering his guilty plea, the court *a quo* canvased the essential elements, as it was obliged to do. The record reflects that the charge sheet carries two omnibus charges of robbery each with five and ten counts respectively. There are fifteen complainants. After canvassing the essential elements the appellant was convicted of fifteen counts of robbery. There is an endorsement that each count was treated separately. There is also an endorsement that the State accepted that a toy gun or toy pistol was used. It was not recovered.

In order to determine the issues as framed in the arguments, I will restate and rephrase what I consider as pointedly raised in each ground of appeal.

Ground 1: Whether the Court *a quo* condoned the improper splitting of charges and thereby committed a duplication of charges.

The appellant was indicted on two robbery charges on the same indictment. The first charge related to the events of 7 April 2009 where he was part of the gang that robbed five passengers riding in the same commuter omnibus with the gang. The charges identified five counts in respect of the complainants in that charge. In the second charge, in respect of the events of 19 April 2009, where, using the same *modus operandi*, the same gang robbed ten people. The second charge consisted of ten counts. This approach is permitted by section 144(1) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] which provides:-

> "**144 Joinder of counts**
> (1) Any number of counts, for any offences whatever, may be joined in the same indictment, summons or charge and where separate indictments, summonses or charges have been presented against an accused person, the court may, with the consent of the prosecutor and the accused, treat the separate indictments, summonses or charges as being a number of counts joined in the same indictment, summons or charge.
> [Subsection amended, by repeal of proviso, by section 5 of Act 8 of 1997.]
> (2) When there are more counts than one in an indictment, summons or charge, they shall be numbered consecutively, and each count may be treated as a separate indictment, summons or charge.
> (3) ……
> (4) ……..
> (5) ……"

The appellant contended that there was improper splitting of charges. Counsel for the appellant argued that the appellant should have been charged with only two counts of robbery. Mr *Biti*, for the appellant, relied on the reasoning by GARWE JP (as he then was) in *S* v *Zacharia*[1] wherein he says:

> "There are basically two tests as to whether there has been an improper splitting of charges or duplication of convictions. There is the single intent test or continuous transaction test and the same evidence or dominant intent test. McNally J applied the dominant intent test. This test means that where the accused performs a series of acts or more than one act which standing alone would constitute an offence but which are a necessary adjunct or necessarily incidental to the commission of the offence which he intends to commit, then then the accused should be charged with one offence. In my view, the dominant purpose test is not related to the accused's intention as regards the one act in the literal sense so as to say that a person who, for example, steals from three people different kind of property at different times should be charged with one count of theft. Rather, it relates to the intention of the accused person as he performs the several acts which are logically and intrinsically connected to the one offence which he then commits."[2]

[1] 2002 (1) ZLR 48 (H)
[2] Note 1 supra @ p50

It seems to me that in the particular context of this matter, there is no splitting of charges to speak of as only one charge is in issue: robbery. Therefore, whether one applies the single intent or continuous transaction test, or the same evidence or dominant intent test, the result is the same. The State was entitled to present its case as it did. No prejudice could have resulted in the lumping of five and ten counts as they related to the different times and places. That there were fifteen complainants is not in doubt. I therefore am unable to agree with Mr *Biti* insofar as the contention regarding splitting of charges goes. He is not correct because only two charges of robbery, with a number of counts per charge, were preferred. Improper splitting occurs where, if in the indictment the State had elected to separately draw up each indictment as a separate count alleging the same name of the accused; the same place of occurrence; the same time of occurrence the crime of robbery, against individual complainants, and alleging the same method of commission of the offence all in the same indictment. Clearly, the mischief against which the rule was designed would be defeated as the accused would be exposed to multiple convictions and sentences for what is essentially a single transaction involving several counts. One does accept that there is nothing wrong in identifying the victims of the crime charged in each charge but that identification should not be used to separately enter independent convictions as this would result in a multiplicity of convictions from a single incident of robbery. Clearly, the threats uttered were directed at all the passengers. They were not, during the robbery, individually confronted with separate threats. They were, as a group of victims, threatened with harm simultaneously and by the threatened use of the same weapons at the same time, if they did not each part with their belongings.

Where a person commits two acts of which each standing alone will be criminal but does so with a single intent and both acts are necessary to carry out that intent then he ought to be indicted for only one offence because the two acts constitute one criminal transaction. This is the single intent test or the continuous transaction test. The second test is the same evidence test or the dominant intent test. These two tests were mooted in *S* v *Grobler and Another* [3] where WESSELS JA stated:

> "The test or combination of tests to be applied are those which are on a common sense view best calculated to achieve he object of the rule. In so far as the single intent' test is concerned, the distinction between motive and intent and the different intents inherent in different offences must not be overlooked."

[3] 1996 (1) SA 507 (A.D) @ 519

That is not the end of the matter. The inconsistencies in the decisions of courts in respect of how to formulate a hard-and-fast-rule on this point serve to demonstrate that it is difficult, if not impossible, to formulate a rule which will apply with fairness and justness in every instance that has already been adjudicated upon or which may arise in future for decision. What can be distilled from the cases in both Zimbabwe and South Africa is that the approach may be aided by the application of two practical tests, namely-

(1) Whether the acts alleged in the charges were committed with a single intent or in the course of a single criminal transaction; and

(2) Whether the evidence necessary to establish the one of the acts involves proof of the other.

Applying this test, the indictment clearly does not expose the appellant to multiple charges. The counts were conveniently grouped so as to specifically avoid duplication of convictions and consequent multiple sentences. The court *a quo* however committed an error when it decided to split the two charges into three groups as if appellant had been convicted of three charges. In that regard the mischief meant to be avoided was adopted. This was prejudicial both to the appellant as it was to the rule against duplication of convictions.

Counsel argued that the effect of splitting of charges ought to render the trial a nullity as the procedural error is reviewable. As such the conviction ought to be set aside and the appellant released. I disagree. A procedural error, such as there was in this matter, could not be a basis for the setting aside of a conviction. Unless a procedural error resulted in a serious miscarriage of justice, an appeal court may not quash a conviction on that basis. An appeal court may only set aside such a conviction and remit the matter for a trial *de novo*, if it is demonstrated that the error resulted in a miscarriage of justice. The High Court Act[4] confirms this approach.

The State conceded that in fact the court *a quo* erred in entering multiple convictions in respect of what essentially are two incidents of robbery. It will be clear that this concession, in my view, has no basis in law. The fact is the appellant robbed fifteen complainants. He ought to be found guilty on fifteen counts of robbery as pleaded. Where, however, the matter does

[4] Section 29 (2) and s 38 of the High Court Act, *[Chapter 7:06]*

not yield to one or other of the two tests. The decision ought to be guided by a consideration of the following factors:

(1) the period or periods over which the acts or transactions were carried out;

(2) the place or places where they were carried out;

(3) the nature of the accused's actions; the inquiry being whether there was one *actus reus* covering the whole operation, or several *acta rea*;

(4) the intention of the accused in carrying out the course of conduct.

In my judgment, the robberies which are subject matter of the two charges, were committed within the framework of a single intent. In respect of each charge, the evidence necessary to prove the one count was indispensable for the purposes of sustaining the other counts in that charge. The force used to overcome the resistance of one of each complainant was the same force in respect of each of those complainants in that charge which enabled the appellant and his co-conspirators to deprive the complainants of their property. There is no basis for the complaint to submit that there was improper splitting of charges as these were lumped together in the indictment. There was no basis for the subsequent revision of the two charges into three groups at sentencing. In the exercise of this court's review powers, the sentence imposed by the court a quo is clearly liable for review. It is therefore set aside and an appropriate one substituted in its place in the order that will follow. Therefore in respect of the first ground I do not find that there was any condonation of improper splitting of charges. The duplication of charges in my view does not arise. There was none. The court merely adopted a wrong sentencing principle which entitles this court to interfere with the sentence in the exercise of our review powers.

Ground 2 and 3: Whether the court *a quo* failed to afford the appellant a fair trial by its failure to advise him of his right to counsel and by proceeding to trial without the State providing appellant with counsel.

Appellant couched this ground in the general right to a fair trial, contending that the trial court erred in failing to assist him as an unrepresented accused. This is not the argument put forward at the hearing. We assumed that because the right to a fair trial is an all-encompassing right, the two aspect which counsel settled on in argument were the strongest points upon which appellant decided to argue the appeal.

Appellant predicated his constitutional argument on the provisions of section 18 of the old Constitution which were expanded in section 70 of the new Constitution.[5] That section in the provisions relevant to the appellant's contentions states:

> "**70 Rights of accused persons**
> (1) Any person accused of an offence has the following rights—
> (*a*) to be presumed innocent until proved guilty;
> (*b*) to be informed promptly of the charge, in sufficient detail to enable them to answer it;
> (*c*) to be given adequate time and facilities to prepare a defence;
> (*d*) to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner;
> (*e*) to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result;
> (*f*) to be informed promptly of the rights conferred by paragraphs (*d*) and (*e*).
> (g)…….
> (h)……..."

When interpreting the provisions of the Declaration of Rights in Chapter 4 of the Constitution, regard must be had to the tools of interpretation which are laid out in that Chapter. (s 46 of the Constitution). Among other tools, a court must take into account international law and all treaties and conventions to which Zimbabwe is a party. I turn to consider the position in the international legal framework, of the right to free legal aid and assistance

International Legal Framework on the Right to Free Legal Aid and Assistance

The right of an accused person to a fair trial is included in the Universal Declaration of Human Rights ("UDHR")[6] where, in Article 10 it provides that a person charged with a criminal offence is entitled to "a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations."[7] Article 11 goes on to state that:

> "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial which he has had all the guarantees necessary for his defence."

However no reference is made in the UDHR to the right of an accused person to free legal aid. The International Covenant on Civil and Political Rights ("ICCPR")[8] also recognises

[5] Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[6] General Assembly Resolution 217 A (III) of 10 December 1948 also known as the International Bill of Human Rights.
[7] Article 10 of the UDHR
[8] General Assembly Resolution 2200A (XXI)

the right to a fair trial but it goes further than the UDHR by including the right to free legal aid. The ICCPR states that a person charged with a criminal offence has the minimum right:

> "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."[9]

These principles are echoed in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.[10] ("Principles and Guidelines"). The Principles are derived from best practices and international standards in the provision of criminal legal aid. Legal and for the purposes of the Principles and Guidelines, includes any:

> "legal advice, assistance and representation for persons detained, arrested or imprisoned, suspended, or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require."

The Principles and Guidelines state that a person should be entitled to legal aid where they are 'arrested, detained, suspected of or charged with criminal offence' and where the punishment is a term of imprisonment or the death penalty.[11] They go on to provide that States should consider the provision of legal aid their duty and responsibility and to that end enact specific legislation and regulations to ensure that a comprehensive legal aid system that is accessible, effective sustainable and credible is in place.[12] This include the provision to ensure that prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards as well as being informed of the potential consequences of voluntarily waiving there rights.[13]

Whilst the Principles and Guidelines are guidelines and therefore do not bind States, I make reference to them as they authoritatively declare the ideals to which State parties commit themselves. Eventually, these declarations crystalize into binding treaties. As such, because of their law-making nature, the guidelines contribute in the interpretation and development of domestic law. They are standard-setting and contribute in law development at the domestic level.

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[9] Article 14 (3) (d) of the ICCPR
[10] Adopted in December 2012 by the UN.
[11] Principle 3
[12] Principle 2
[13] Principle 8

Regional Legal Framework on the Right to Free Legal Aid and Assistance

The African Commission on Human and Peoples Rights ("ACHPR") formulated Principle and Guidelines on the Right to a Fair Trial and Legal Assistance.[14] These are aimed at strengthening and supplementing the provisions in the African Charter relating to fair trial and to reflect international standards. The African Principles and Guidelines specifically address the right to legal representation and assistance. They confirm that an accused person has a right to have legal assistance assigned to him if the interest of justice so require, and without any payment by the accused if he or she does not have sufficient means to pay for it. The principles provided for the right to be informed of the right to counsel of own choice or that provided by the State. These Principles have been considered by the African Court on Human and Peoples Rights. ("The African Court").

In *Alex Thomas* v *Tanzania*[15] the African Court on Human and Peoples Right ("the African Court") had occasion to deliberate on the content of the right to legal aid and the right to counsel, among other rights under examination. On the duty of the Republic of Tanzania to provide counsel, the African Court held that although the African Charter does not specifically require a State to provide free legal counsel for indigent defendants, it could interpret the Charter to include such a requirement. This ought to follow as a fact in light of Tanzania's ratification of the ICCPR which provides for free legal counsel for indigent defendants. The court reasoned that the seriousness of the allegations faced by the applicant required and persuaded it to make such a finding. In its analysis, the African Court examined the doctrine of the African Commission, European Court of Human Rights and the United Nations Human Rights Committee. Moreover it took notice of the fact that domestic law required defendants to be provided with legal aid.[16]

Domestic Legal Framework on the Right to Free Legal Aid and Assistance

[14] Adopted in 2003
[15] Application No. 005/2013 Judgment of 20 November 2015
[16] Note 8 supra para 116-122.

Zimbabwe is a signatory to most, if not all, international and regional instruments on the right to a fair trial and legal assistance. Consequently, our courts must interpret the constitutional and legislative provisions so as to achieve consistency with Zimbabwe's treaty obligations.[17]

The right to a fair trial is enshrined in the Constitution which provides:

"**69 Right to a fair hearing**

(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
(2) ……
(3) ……
(4) Every person has a right at their own expense to choose and be represented by a legal practitioner before any Court tribunal or forum."

The constitutional and legislative framework recognizes the right to a fair trial as a distinct and separate right from the right to choose and be represented by a legal practitioner before any court. The right set out in s 69 (4), it must be observed, does not extend to the right to free legal aid or to the payment of legal fees by the State where the person is exercising the right to legal representation of his choice. However, the Constitution restates the same right in s 70 (1) when enumerating the rights of a person accused of an offence. A reading of s 70 (1) will show that this is a detailed enumeration of the same trial rights in s 69. Section 70 (1) (d) relates the right to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner. Then s 70(1) (c) ensconces the right to be represented by a legal practitioner assigned by the State and at State's expense, if substantial injustice would otherwise result. The person must be informed promptly of the rights conferred by paragraphs (d) and (e) above.

Mr *Biti,* for the appellant, submitted that the right to legal representation is a fair trial right aimed at protecting the right to silence which must be read into s 70. I am unable to agree for the following reasons.

In my view, the right to remain silent is a separate procedural right aimed at preserving the right against self-incrimination to be exercised by any person suspected of having committed an offence.[18] This right is implicated the moment police confront him with the suspicion. As such, it is a right which must be advised to the suspect by police before he or she is asked to answer any question. At the same time, the right to be informed of the right to

[17] Section 46 (1) (c); s 326 (2) of the Constitution of Zimbabwe.
[18] See s 50 (4) (a), (b) and (c) of the Constitution.

counsel in s 70 (1) (d) must also be advised. Therefore s 70 (1) (d), (f) and (i) constitute the core rights which a suspect must be informed of at the time of arrest. Depending on whether, and how, the matter proceeds at trial, the effect of how these rights are exercised will have a bearing on the fairness or otherwise of a subsequent trial. The right to silence assumes chameleonic character depending on the stage at which it is implicated: whether it is at pre-trial or at trial. Therefore as a separate right, the right to silence attracts different considerations in respect of its role on the fairness of a trial.

Whilst the right to a fair trial is absolute, in that s 86 (3) (e) provides that no law may limit the right to a fair trial, the rights set out in s 70 (1) to (5) appear not to be absolute as the limitations in s 86 (2) apply to those rights. Section 86 (2) of the Constitution reads:

> **"86 Limitation of rights and freedoms**
> (1) …….
> (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity equality and freedom, taking into account all relevant factors, including:-
> (a) the nature of the right or freedom concerned;
> (b) the purpose of the limitation, in particular whether it is necessary in interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
> (c) the nature and extent of the limitation;
> (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
> (e) the relationship between the limitation and its purpose, in particular whether it improves greater restrictions on the rights or freedoms concerned than are necessary to achieve its purpose; and
> (f) whether there are any less restrictive means of achieving the purpose of the limitation."

In the particular context of the present case, I understood Mr *Biti* to submit that the court a *quo* and the State "had a duty to advise the appellant of the right to remain silent and the right not to convict himself"[19] If by this statement counsel intended to convey that an accused enjoys such rights as he stated at the pre-trial stage, then I am in total agreement with him. At that stage the court hardly has a role to play in either affording or denying a suspect their rights. He or she is not yet before the court.

[19] Paragraph 23 of the Applicant's Heads of Argument

When appellant was arraigned in 2009, and indicated that he wished to plead guilty, I doubt the correctness of the submission by counsel. An accused person who has decided to admit his guilt has, by implication, waived his right to remain silent. Therefore a court conducting the summary trial procedure under the Criminal Procedure and Evidence Act,[20] is confirming an admission of guilt. The question and answer process seeks a confirmation by the accused, of his admission of guilt by exploring the genuineness of his guilty plea. This constitutes a clear limitation on the right to remain silent envisaged by s 86 (2) of the Constitution. Clearly, a plea of guilt is a clear manifestation of the limitation of the right that an accused may have against self-incrimination. I find therefore that where, as here, an accused pleads guilty, the argument advanced on appellant's behalf is a *non sequitur*. I therefore do not find that the court *a quo* and the State, in 2009 when the appellant was arraigned, infringed on the appellant's right to remain silent.

Mr *Biti* submitted that appellant's rights to a fair trial were infringed by reason of State's failure to provide legal counsel. It is important, however, to always bear in mind that the fairness of a trial, where a trial has already taken place, as opposed to an instance where a trial is pending, must be assessed by reference to the specific instances of fairness or unfairness as may have occurred, in light of the provisions of s 70 (1) to (5).[21] Where a trial has taken place, as in the present case, an appeal court will take into account the question whether substantial justice has been done in assessing other notions of fairness and justice outside those listed in s 70 of the Constitution. Those other notions of justice must reflect the normative value systems upon which our Constitution is founded.

It was submitted, on behalf of the appellant, that the absence of counsel at his trial was prejudicial to appellant's interests. Mr *Biti* submitted that the right to a fair trial and the right to equal protection of the law entailed that, in cases which were serious, the State be obliged to provide free legal assistance. As such, where the matter is complex and the severity of the potential sentence is huge, coupled with the ignorance and indigence of the accused, such an accused was entitled to legal representation as of right. I was referred to several South African case law.

I observe that the case authority to which I was referred do not support the appellant's proposition. What those cases establish is that since the right to legal representation is

[20] Section 271 (2) (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]
[21] Section 70 of the Constitution

constitutionally entrenched, the court or presiding officer, must ensure that the right to legal representation is explained to the accused. In *S* v *Mathebula and Another*[22] the court held that the onus rested on the accused to show that their constitutional rights actually existed and were indeed infringed. In that regard the court held that a court must also ensure that the content of that right has been understood. In order for an appeal court to be certain that in fact the appellant was informed of the right to legal representation, such an explanation ought to appear *ex facie* the record. This requirement was made mandatory in our jurisdiction by legislative provision in 2016, the same year the present appeal was filed.[23]

Those cases do not, however confirm that an accused has a right to have legal representation paid for him by the State. My reading of the case law indicates that there is no such right in both South Africa and Zimbabwe at this point in time. What abounds is the right to be informed of the right to be represented by a legal practitioner of one's own choice or, if one cannot afford to pay for such, to have one provided by the State, if it is in the interests of justice to do so, is evidently entrenched in both jurisdictions.

As already discussed, international conventions provide that in the determination of any criminal charge, everyone shall be entitled to

> "[h]ave legal assistance assigned to him, in any case where the interests of justice so require and without payment by him in any such case if, he does not have sufficient means to pay for it."[24]

The European Convention on Human Rights ("ECHR") also provides for the right of a person not having

> "sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."[25]

Unlike other international human rights conventions, the American Convention on Human Rights[26] expressly refers back to the provisions of national law in its respect. Therefore it does not guarantee this right but relies on what national laws provide. The African Charter on Human and People's Rights is silent on the question of free legal aid. However, the principles and guidelines on legal assistance in Africa specifically provide that an accused

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[22] 1997 (1) SACR 10

[23] Section 163A of the Criminal Procedure and Evidence Act, inserted by Act 2 of 2016 requiring, at the commencement of a trial in the Magistrates court, an explanation of the rights set out in s 191 of the same Act.

[24] Article 14 (3) (d) of the ICCPR.

[25] Article 6 (3) (c) of the European Convention on Human Rights.

[26] Article 8 (2) € of the American Convention on Human Rights.

person has a right to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by the accused, if he does not have sufficient means to pay for it. These guidelines are merely that; guidelines. They do not binding States but constitute an important source for interpreting domestic law.

Before free legal aid is granted, both the ICCPR and the European Convention set two pre-conditions; first the unavailability to an accused of sufficient funds to pay for a lawyer, and, second, that the interests of justice require that legal aid be provided in light of the seriousness and complexity of the case.

In interpreting the interest of justice the European Court of Human Rights ("ECtHR") in *Quaranta* v *Switzerland*[27] stated that

> "the right of an accused to be given, in certain circumstances, free legal assistance constitutes one aspect of the notion of a fair trial in criminal proceedings."

It held that in determining whether the interests of justice require the granting of free legal aid, the European Court has regard to various criteria such as "the seriousness of the offence" committed, "the severity of the sentence" the accused person risks and "the complexity of the case."

Clearly, at the international level this right has not been interpreted as an absolute right. Its existence will depend on those factors which a court is entitled to consider before finding that such a right existed and was infringed.

Application of the Principles to the Facts

Whilst on the basis of this criteria it is clear that the appellant may have qualified for free legal aid had he indicated, upon being informed of the right to legal representation, it is not clear whether or not in fact the appellant indeed made such an election. Since he was pleading guilty, it may well be that an application for free legal aid may not have met the criteria for eligibility in light of the competing demands on the legal aid fund set up in terms of the Legal Aid Act, [*Chapter 7:16*].

All these factors however, are subject to the assessment criteria of whether or not substantial justice was done. In the view that I take of this matter, I am unable to find that the appellant's right to a fair trial were infringed by virtue of the court's failure to advise him of his right to counsel when he appeared.

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[27] Judgment of 24 May 1991, Series A, No. 205 p 16 para 27

I come at that conclusion on the following basis.

The appellant was sentenced on 5 May 2009. He filed the present appeal on 15 April 2016. The present Constitution came into force on 22 May 2013. Section 9 (a) of the Sixth Schedule to the Constitution titled "*Savings and Transitional Provisions*" provides that any case pending before the effective date may be continued before that Court but the procedure to be followed in such a case must be the procedure that was applicable to them immediately before the effective date and that such a procedure applies even if it is contrary to any provision of Chapter 4 of the 2013 Constitution.

Consequently, the constitutional imperatives applicable in the present matter are those that applied to the old Constitution. As such, I do not find that the failure to inform the appellant of his right to legal counsel and the failure by the appellant to exercise such rights as he may have wished to exercise consequent to the knowledge he may have gained from the advice on his rights caused any substantial prejudice such as to trigger the requirement of justice for the provision of free legal aid.

Therefore, in respect of the alleged breach constitutional right to fair trial I am unable to find that any such breach occurred.

As previously pointed out, the appropriate verdict ought to have been guilty of two counts of robbery.

Ground 4: Whether the Court *a quo* erred in failing to give due weight to appellant's mitigatory circumstances when assessing sentence.

On behalf of the appellant, Mr *Biti* submitted that a sentence that is proportional cannot be said to be an infringement of an accused's right to human dignity or a subjection of the accused to cruel and degrading treatment. On the other hand, he urged us to consider that a sentence that is shocking and disproportionate is an infringement of the right to human dignity and the right not to be subjected to torture cruel and degrading treatment. He cited South African case authority for the support of this submission. *S* v *Makwanyane and Another*[28] *and S* v *Dodo.*[29]

An important distinction in the principles of sentencing between our courts and South African courts ought to be made at the outset. Our criminal laws have been codified by the

[28] 1995 (3) SA 391
[29] 2001 (3) SA 382

Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] ("the Criminal Law Code") whereas the South African courts does not have such codification. This difference is important because most of the crimes in Zimbabwe will have some basic maximum sentence prescribed in the Criminal Law Code. In the South African arena, common law crimes do not have minimum sentences prescribed. Statutory offences would have sentences prescribed under the relevant legislation. Only certain common law offences have prescribed minimum sentences. For example, life imprisonment awaits anyone convicted of rape or murder unless certain factors are found to exist in the case. As a result, it is unsafe to rely foreign jurisprudence when it is clearly distinguishable in both its doctrinaire and substantive provisions. In the present case, any court sentencing a person for robbery is obliged to apply the guidelines in the penalty provisions of the Criminal Law Code.[30] In terms of that section, where robbery was committed in aggravating circumstances, such an offender is liable to life imprisonment.[31] Aggravating circumstances are defined for this purpose as including situations where the offender or his accomplices possessed a fire-arm or a dangerous weapon during the commission of the offence.[32] Where life imprisonment is not imposed, then a court may impose a maximum sentence of 20 years imprisonment. Next a sentencing court has a wide discretion in respect of what sentence it may impose. In assessing that sentence the court is expected to take into account both the aggravating and mitigating circumstances of the case. This will invariably include whether or not an accused is a first offender, or a repeat offender, the seriousness of the crime, the impact of the crime on the victim, any loss of property or recovery thereof. The list is endless. The principle is that a court must consider only those factors that are relevant in the assessment of sentence and balance them against the interests of the offender, society and the general administration of justice. This weighing must result in a sentence that is fair both to the accused as well as to society as represented by the legislative intent expressed in the penalty provisions of the Criminal Law Code.

I did not understand Mr *Biti* to criticise this approach which is soundly grounded in our principles of sentencing and underpinned by various judicial pronouncements in a wide range of cases. It is a nuanced approach which has stood the test of time. Before an appeal court can interfere with a sentence on appeal, the factors set out in the High Court Act must be

[30] Section 126 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23].
[31] Section 126 (2) note 30 supra
[32] Section 126 (3) note 30 supra

examined.[33] Unless it can be said that the sentencing court erred in a particular way, for example, by taking into account factors which it ought not to have taken into account or vice-versa, an appeal court may not substitute a sentence merely because had it been the sentencing authority, it would have imposed a different sentence. I have pointed out already that the error committed by the court *a quo* warrants interference by this court on the basis of the principles that I have discussed. That court committed an error of law in splitting what was essentially charged in a globular manner. It ought to have adopted the same approach. In not doing so an error was committed which can be corrected in the exercise of this court's review powers. I have considered submissions made on appellant's behalf. I am satisfied that while these may be meritorious in another setting, they are of no assistance to his present circumstances. I have considered that even at the time of sentencing in 2009, appellant could not have benefitted from the submissions of lack of proportionality taking into account the following factors.

This was a well-planned and executed crime in which it was decided to isolate the victims by identifying travellers as their target. The appellant and his accomplices in crime acquired live ammunition, a knife and a toy gun for this purpose. They posed as fellow passengers and chose isolated spots to commit their heinous crimes. During the commission of the crimes, the complainants feared for their lives as they genuinely believed that they faced a real threat of loss of life or limb. They decided to inflict maximum humiliation after the robbery by ordering complete strangers to strip to the skin in each other's presence. Nothing they stole was recovered. The fact that the amounts stolen were small is only fortuitous as the choice of a group was designed to reap maximum criminal rewards. I am unable find that the sentence was not proportional to and therefore a deserved and just dessert for the heinous crimes they all committed.

It is consequently ordered as follows:

1. The appeal against conviction be and is hereby dismissed.
2. The sentence imposed by the court a quo be and is hereby set aside and in its lace the following is substituted:

(a) Count 1 – 5 (as one for sentence) 10 years imprisonment.

(b) Count 6 -15 (as one for sentence) 12 years imprisonment.

[33] Section 38 (4)of the High Court Act (supra)

Of the total of 22 years 6 years imprisonment is suspended on condition the accused is not, during that period, convicted of any offence of which an assault and/or theft is an element and for which he is sentenced to imprisonment with without the option of a fine.

MUSHORE J agrees……..

Tendai Biti Law, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners