JOSEPH MUCHAI KAMAU
AND
SAMMY DUKE
Versus
THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI & NDLOVU JJ
BULAWAYO 10 OCTOBER 2024 and 13 DECEMBER 2024

Criminal appeal

MUTEVEDZI J: Sub-sections (2) and (3) of s 271 of the Criminal Procedure and Evidence Act [Chapter 9:07] (the CPEA) do not oblige a magistrate to create a fictitious defence for a palpably guilty accused person who admits his/her guilty. It is equally wrong for a legal practitioner to seek to invent a defence for an accused person who is unequivocally pleading guilty to a charge against him/her. And to imagine that one can succeed in such circumstances is having an inflated idea of the value of counsel's assistance to his/her client. A court which allows that to happen permits the ends of justice to be severely jeopardised.

[1] In this case, in a massive drug haul, police detectives from the ZRP's Central Investigations Department (CID) intercepted almost sixty (60) kilograms of mbanje on the Zimbabwean side of Kazungula Border Post. They had been alerted by an informer that the two appellants in this appeal were trafficking mbanje. They swopped on them and recovered the dagga from a Mercedes Benz vehicle with registration numbers KDA6240V which the appellants were driving. The dagga was packaged in what the prosecution described as sixty-seven (67) huge sachets. After the appellants' arrest the drugs were weighed at Victoria Falls Post Office in the presence of the appellants.

[2] The two of them were subsequently arraigned before the court aquo. They were formally charged with contravening section 156(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (The Code) in that on 2 February 2024 at Kazungula Border Post, each or both of them unlawfully imported 59.7 kilograms of dagga into Zimbabwe from South Africa for purposes of transporting it to Kenya.

Proceedings in the court aquo

[3] When the appellants appeared before the trial magistrate, it was clear to them and the record of proceedings bears testimony to it, that the first accused was *Joseph Muchai Kamau* who is the first appellant in this appeal and that the second accused was *Sammy Duke* who equally is the second appellant in these proceedings. The charge was read to them. The magistrate additionally explained that charge to them. Thereafter, they were both requested to plead to the charge. Their pleas were as follows:

> Accused 1- I admit
>
> Accused 2- I admit we were only transporting it to Kenya the owner is in Kenya we would be paid in Kenya.

[4] The trial magistrate duly entered pleas of guilty for both of them and indicated that the court was proceeding in terms of s271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07] (the CPEA). The facts of the case were read to both appellants and each of them indicated in no uncertain terms that they understood the facts as alleged by prosecution. Before the essential elements of the crime were explained to the appellants, the prosecutor sought to tender the certificate of weight relating to the dagga which formed the subject of the charge. The magistrate once more elaborately explained to the appellants their rights to have been served with the certificate of weight at least seventy-two hours before the trial and that they had two choices in regards to that. He said, the court could either defer the trial to allow them to study the certificate or if they so wished, they could waive their right to that notice period and have the case proceed. Both appellants chose the latter course.

[5] In its explanation of the essential elements of the crime, the trial court once again went out of its way and completely separated the explanations. The record of proceedings shows that it first explained the essential elements to the first appellant. It clearly stated:

> **Essential elements for accused 1**

[6] Because of the arguments raised in this appeal, it is necessary that I repeat in full the exchange which took place between the court aquo and the first appellant. It went thus:

> Q. Confirm that on 2 February 2024 at Kazungula Boarder Post, Kazungula your imported 59.7 kilograms of dagga from South Africa

A. Yes

Q. Did you have a license or permit to import the dagga into Zimbabwe?

A. No

Q. Why did you import the dagga into Zimbabwe?

A. I am just a driver. We took the dagga from South Africa where we were carrying it to Kenya he will pay us when we get to Kenya

Q. Did you have a right to act in the manner that you did?

A. No

Q. Any defence?

A. No

Verdict

Guilty as pleaded

[7] The above questions were similarly asked of the second appellant. The court aquo indicated when it did so that it was dealing with the second appellant. His answers to the questions were essentially the same as those of the first appellant except that in answer to the question why he had imported the dagga into Zimbabwe, the second appellant's answer was that:

> "The owner of the dagga is a senior government person in Kenya. We were only transporters, he will pay us when we get to Kenya."

[8] Both appellants were duly convicted after those proceedings. They were each sentenced to 10 years imprisonment of which 6 years imprisonment was suspended for 5 years on condition of future good behaviour. I will not belabour this judgment with what transpired during the presentencing hearing or the trial magistrate's reasons for sentence because it is not necessary. As will be shown, counsel for the appellants did not persist with the appeal against sentence.

Proceedings before this court

[9] Needless to state, both appellants were dissatisfied with the above turn of events. I am not sure what else they expected. They appealed against both the conviction and the attendant sentences to this court. In their notice and grounds of appeal the appellants raised three grounds of appeal against conviction and one against sentence. The grounds of appeal were couched as follows:

Ad conviction

a. The court aquo erred at law by accepting and relying on a state outline containing extra-curial statements of the appellants
b. The court aquo erred in convicting the appellants of contravening s 156(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] where the court had failed to comply with the provisions of s 271(3) of the CPEA in that the record of proceedings did not show which of the two appellants responded to the canvassing of essential elements
c. The court aquo erred in convicting the appellants on their own pleas of guilty where the court had failed to comply with the provisions of s271(2)(b) of the CPEA in that it did not ascertain from the appellants whether or not they knew that the exhibit recovered from them was dagga

Ad Sentence

The learned magistrate erred in imposing a shocking sentence in the circumstances in that he paid lip service to the mitigatory circumstances.

[10] At the hearing Mr *Vhitorini* who appeared for both appellants persisted with the first and third grounds of appeal against conviction. He abandoned the second ground. He was right to do that given the exchanges which transpired in the court aquo as illustrated above. Counsel also conceded that if the conviction is upheld there would be nothing to complain about the sentence imposed by the trial court. In short, he also abandoned the appeal against sentence. Once more, it appeared the right course to take because even if he had persisted, the sole ground of appeal raised against sentence posed serious challenges. Its validity was more than questionable.

[11] In regards to the first ground, the appellants' argument was that the court aquo was wrong to accept and rely on their statement to the police that they were transporting the dagga from South Africa to Kenya without verifying whether the statement had been given to the police freely and voluntarily. Their counsel referred the court to the cases of *S v Tau* 1997 (1) ZLR 93(H) and *S v Zvakuomba* HMA 34/21. Both those authorities spell out a court's duties towards an unrepresented accused person. The position is settled in our law. One of such duties is that when explaining the essential elements of a crime, the court must break down technical language to enable the accused to understand the constitutive elements of the offence. Reference was equally made to the authorities of *Tinodya and Others v The state* 2008(1) ZLR 410 (H) whose ratio counsel said was that a court must adopt a procedure which was most likely to suggest a defence to the accused where there was one. A reading of the case of *Tinodya* showed that it is a case that dealt with when a court must proceed in terms of s 271(2)(b) instead of 271(2)(a). It cannot therefore be related to the issues at hand in this appeal. Counsel said in line with those authorities, in the present case, the importation of dagga as implied in s 156(1) of the Code is a complex

term. He said it implied possession, which the Supreme Court in the case of *S v Dube and Anor* 1988(2) ZLR 385 described as a difficult legal concept. In this case, so the argument continued, the court aquo did not explain the charge but simply restated it as it appeared in the charge sheet. Instead, it must have proceeded to break down both the terms importation and possession. Further, it was argued that the court aquo asked the appellants complex and multi-factual questions in a manner which does not comply with s 271(2)(b) of the CPEA. In the end those failures by the trial court resulted in it omitting to ask the appellants whether or not they knew that what they had was dagga. Counsel rounded off by alleging that the 'yes answer' that was given by the appellants was out of their desire to draw the sympathy of the police and the court authorities. They believed that they would get a 'caution and discharge' if they agreed to the allegations without question.

[12] It was Mr *Vhitorini*'s further argument that paragraph 5 of the state outline contained extra-curial statements made by the appellants to the police. He said the court ought to have established the circumstances under which the appellants had confessed to the crime.

[13] On its part the respondent said it conceded that the conviction could not stand. That concession, so it said, was based on the realisation that the crime in question involved the concept of possession which the court aquo ought to have explained to the appellants. Counsel for the respondent was of the view that possession involved two sides namely the physical and the mental elements. In other words, a person has possession of something if he/she knows of its presence and has physical control over it or has power and the intention to control it. In support of that position Mr *Ngwenya* who appeared for the respondent referred the court to a line of authorities such as *S v Smith* (4) CPD 1966; *S v Mpa* 2014(1) ZLR 572 and *S v Munsaka* HB4/20 among others. He then said in this case, there was no evidence that the appellants knew that what they had was dagga as they had only been hired to transport it to Kenya from South Africa.

[14] Section 35 of the High Court Act [Chapter 7:06], allowed us in the face of the concession by the state, to summarily deal with the appeal in chambers and quash the conviction without hearing argument. We found that course inappropriate. We heard argument in the appeal on 10 October 2024. Soon thereafter we delivered an *extempore*

judgment, dismissing the appeal in its entirety. On 14 October, 2024, the appellants through their counsel requested the court's full reasons for the decision. That request culminated in this judgment.

The Law

[15] The plea procedure is on paper one of the easiest yet it can result in untold complications and ultimate prejudice to the administration of criminal justice. I find so, because the injustice may not only be that innocent persons may be convicted but that guilty people who are unequivocally admitting to their guilty may be let free on unjustifiable technical arguments. Clearly, the starting point in this appeal must be to refer to s 271 (2) (b)of the CPEA. Its essence is simply that a court must explain the charge and its essential elements to the accused. The court is also obliged to inquire from that accused whether in pleading guilty he/she is admitting to the charge and all the elements which constitute that crime. S271(2) does not exist autonomously. It must always be read with s 271(3) of the same Act which requires that:

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

[16] In regards the above, perhaps the exposition by CHITAPI J in the case of *Febbie Mutokodzi and Others v the State* HH 299/21, best summarises the procedures which are presupposed by ss 271, 272 and 273 of the CPEA. At pp. 2-3 of the cyclostyled decision, he said:

> "The guilty plea procedure is simple and straight forward but cumbersome or involved in terms of what the court is required to do. Whenever a case is to be disposed by way of guilty plea other than summarily in terms of s 271(2)(a), that is if the plea proceedings are to be conducted in terms of s 271(2)(b), the court should always keep in mind the provisions of s 271(2)(b); 271(3) and 272 of the Criminal Procedure and Evidence Act…Section 271 (2)(b) is the enabling section in regard to the guilty plea procedure whilst s 271(3) provides for the procedure to follow. Central to s 271(3) is that the matters provided for therein must be recorded. Critically, and relevant to the review herein is the provision which requires that the magistrate must "EXPLAIN THE CHARGE and RECORD THE EXPLANATION MADE." (own emphasis.) This is what the magistrate failed or omitted to do in all the three cases. The omission to do so is a gross irregularity because firstly the requirement to do so is peremptory. Secondly, the procedure ensures a fair trial which is an inalienable right of the accused."

[17] In the case of *Noah Ndlovu v the State* HH522/23, I emphatically approved the above views and said they were the correct law. I restate what I remarked in that judgment that the machinations by litigants who seek to stretch the decision in *Febbie Mutokodzi* to require magistrates to define to offenders the crimes with which the offenders are charged before the charge is formally read to them is disturbing. I equally noted that the argument, had gained a lot of traction resulting in two schools of thought which run parallel with the one advocating for an explanation of the charge to an accused the moment he sets foot in the dock and the other supposing that the explanation of the charge envisaged by s 271(2) (b) is an account simply intended to ensure that the accused genuinely admits that he/she committed the offence and must necessarily flow from his/her plea of guilty. I embraced the latter view because it was supported not only by Supreme Court authorities but by the statute itself and by common sense. To demonstrate that, I retrace once more the genesis of the guilty plea procedure. It was not invented by s 271(2)(b). Instead it has always been part of this jurisdiction's criminal procedure. Section 255 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 59] preceded it. The two provisions are in *pari materia*. As a result, authorities such *S v Collet* (2) 1978 (G.D.) RLR 288 which acquired the Supreme court's imprimatur in *S v Tshuma* 1979 RLR 356 remain instructive in the guilty plea procedure. In *Tshuma* (supra), the question arose as to whether the magistrate had explained the charge and its essential elements to the accused. The finding of the court was that:

> "It was of vital importance in this case to make a finding as to the specific instrument used by the accused, as the nature of the instrument would have a vital bearing on what the intention of the accused was when he inflicted these injuries. It was also essential… for the magistrate to question the accused closely and make certain, he really intended when he delivered the blows, to do grievous bodily harm and not merely to commit a common assault."[1]

[18] The authorities show that the explanation of the charge and that of the essential elements is rolled up into one. More than defining a charge, the magistrate is simply required to ensure, either from questioning the accused or by other means, that the accused understands the charge and that by pleading guilty he/she is genuinely admitting to the charge and its essential elements. The case of *S v Alberto* HH 128/86 equally suggested that the requirements of the plea procedure are satisfied by a proper explanation of the essential elements of the charge.

[19] Read properly, s 271(2) (b) shows that it does not seek an explanation of the charge independent of the essential elements. It is couched as follows:

[1] See also *Ahmed Mahamed Lambat v The state* SC 102/83

> "(2) Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea—
>
> (a)…
>
> (b) the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (a) or if requested thereto by the prosecutor—
>
> (i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based;

[20] It is apparent from the provision, that in this timeless procedure, the magistrate's obligation to explain the charge requirement commences if and AFTER the accused has pleaded guilty to the charge. The statement *"where a person arraigned before a magistrate's court on any charge pleads guilty to the offence"* is not synonymous with *"before a person arraigned before a magistrate's court on any charge pleads guilty to the offence."* To me, there cannot be any doubt that the procedure only kicks in after the accused has pleaded guilty. If a court explains the charge before an accused has pleaded guilty to it, it only does so for other purposes and not as compliance with the requirements of s 271(2)(b). The procedure is used for the trial of persons who plead guilty. The explanation referred to in s 271(2) (b) must therefore follow after an accused has already pleaded guilty.

[21] The word that keeps recurring in the procedure is *'explanation.'* The Merriam-Webster Dictionary, 2024 gives the words elucidate, explicate, expound and interpret as the synonyms of explain. The absence of the term 'define' from that list of synonyms leads me to conclude that there is a difference between a definition and an explanation.[2] I understand a definition to be different from a definition. Put differently, an explanation is simply a narrative designed to make something more understandable than the way it is expressed.

[22] Given the above, to require a magistrate to explain a charge in any way other than explaining the components that make up that charge is a jejune expectation. it is not correct that an explanation of a charge means that the court must attempt to paraphrase the charge. Such fanciful and apocryphal reasoning has seen legal practitioners attempting to redefine the guilty plea procedure. The requirement is not concerned with or characterized

[2] See similar sentiments expressed in the case of *S v Yeukai Graham Mutero* HH 173/23

by rigorous adherence to form. Instead, it must be viewed as a sensible and realistic way of ascertaining the guilt of an accused who admits his/her wrong doing. There is nothing technical about it. Like with any other criminal trial, the court must at the end of recording a plea of guilty be satisfied beyond reasonable doubt that the accused is guilty. In conclusion, I find that where a court explains the essential elements of charge, it would, in the same broadness be giving an exposition of the charge itself. It adopts the rolled-up approach which I alluded to earlier. Accordingly, the procedure does not require the court to define the offence and thereafter to explain the essential elements one after the other.

Application of the law to the facts

[23] Section 156(1) of the Code under which the appellants were charged is phrased as follows:

> (1) Any person who unlawfully –
>
> (a) Imports, exports, sells, offers or advertises for sale, distributes, delivers, transports, or otherwise deals in a dangerous drug; or
>
> (b) …; or
>
> (c) …; or
>
> (d) …; or
>
> (e) …
>
> shall be guilty of unlawful dealing in a dangerous drug…

[24] The question of dealing in a dangerous is expressed in very broad terms in the provision. In this case, the appellants were charged with importation of the cannabis. I did not hear counsel for the appellants to argue that they did not import the dagga or that they did not know that what they were doing was importing dagga. What he argued was that the appellants were not asked whether they knew that what they were carrying was dagga. Contrary to that assertion, the facts of the matter demonstrate otherwise. To begin with, when the appellants were arrested, the police advised them that they were being arrested for possession of dagga. Both appellants never raised the defence that they did not know that what they had was mbanje. The drugs were then taken to the post office for weighing. That process was done in the presence of both appellants. The certificate whose admission as an exhibit they both consented to spelt out that they had 59.7 kilograms of mbanje. Once again, they never protested their lack of knowledge that the contraband was cannabis. Nothing can demonstrate more that the two knew exactly what they were carrying in the car. Their only defence to that was their claim that the dagga was not theirs because they were only transporters.

[25] In court the same scenario played out. Admittedly, the trial magistrate repeated the word import in his questions to the appellants. Counsel argues that he could have used a synonym of the word. But to me, it would have made no difference. What is important is that an accused understands the issue which is being dealt with. The appellants did. In the court's explanation of the essential elements the meaning of the word import was clearly not lost to both of them. In its ordinary usage, the word import simply means bringing into the country goods from another country. It is legal. In the sense of s 156(1) of the Code, it means bringing into the country a dangerous drug from another country. There is nothing technical about the word at all. The magistrate asked the appellants to admit that they had imported the drugs from South Africa. They both affirmed so. He further inquired if they were authorised to import the dagga into Zimbabwe. Both said they were not. That exchange left no doubt in the minds of the appellants and in our minds at the hearing of the appeal that what was in issue was that the appellants had brought dagga from South Africa into Zimbabwe. If that was in doubt, then the answer to the question why the appellants had imported the drugs cleared any of it. The first appellant said: -

> "I am just a driver. We took the dagga from South Africa where we were carrying it to Kenya he will pay us when we get to Kenya."

The second appellant's answer was that:

> "The owner of the dagga is a senior government person in Kenya. We were only transporters, he will pay us when we get to Kenya."

[26] The above explanations by both appellants illustrate that they got in possession of the dagga in South Africa and that they were carrying it to Kenya. Their route unfortunately took them through Zimbabwe where they were apprehended whilst still in the country. They personally defined importation. The explanations show beyond doubt that they knew that what they were transporting was dagga. At no time did they raise a finger to protest that they did not know that they were transporting mbanje. They both were willing and knowing drug mules. S 156(1)(a) does not require that the person who imports or transports the dangerous drug must be their owner. Even if the appellants would have argued (which they could not do) that they were not importing the dagga, they would have still been guilty of transporting it. It would have been different had the appellants alleged that they did not know that there were drugs in their vehicle. If they had done so,

then the argument about their possession of the dagga would have arisen. It did not and could not in this case. The drugs were in their car. Thy both had full knowledge that the mbanje was there. They both intended to take it to Kenya for payment. I do not see how else the trial magistrate was expected to have put the essential elements of the crime to the appellants. That counsel would have used different words from those that were used by the trial court is neither here nor there. What is important is that the appellants understood what constitutes the offence with which they were charged and that they both agreed that their conduct fitted squarely into those elements.

[27] There can be no doubt that the appellants' admission of the issues put to them by the trial magistrate was a genuine admission of the charge of importing a dangerous drug into Zimbabwe and all its essential elements. The magistrate was not duty bound to create the defence that the appellants did not know that what they had was mbanje. The courts have repeatedly said it is unethical for a legal practitioner to railroad an accused who is admitting to committing an offence to plead not guilty to that charge where there clearly is no defence. Contrary to the assertions by Mr *Vhitorini,* the appellants cannot be equated to the simple rural folk that this court referred to in *Tinodya and others.* Instead, they appear to me to be sophisticated cross border transporters. They had come from South Africa into Zimbabwe. There were about to exit Zimbabwe into either Zambia or Namibia which are the two countries that border Zimbabwe at Kazungula. Either way they would have gone through another if not other border control points to get to Kenya. Those are not feats that can easily be achieved by a simpleton like counsel wanted us to believe. Further, that an accused is surprised or outraged by the severity of the punishment which is imposed subsequent to his/her plea of guilty is not a basis for having second thoughts about the daftness of having pleaded guilty.

[28] If the attempt by counsel to create a non-existent defence for the appellants took us aback, then the concession that the conviction in this case could not be supported as alleged by Mr *Ngwenya* for the respondent was the height of disingenuity. For the reasons that we stated above, that concession could not have been well thought out. If counsel who represent the state in criminal appeals would be easily hoodwinked by such red herrings

as raised in this appeal then something needs to be done to make them see the law differently.

[29] In the end it was for these reasons that we dismissed the appellants' third ground of appeal as being meritless.

The law on extra curial statements in re appellants' first ground of appeal

[30] In the case of *S v Nkomo* 1989 (3) ZLR 117 (S) at p. 123 the Supreme Court remarked that:

> "However, and with total disregard for all the rules about the procedure to be followed when extra-curial statements are proposed to be introduced by the prosecution, the State outline contains detailed allegations about confessions allegedly made orally by the appellant to the investigating officer. This officer clearly had not the faintest idea about the procedure relating to the admissibility of statements by accused person. It is equally astonishing that the prosecutor should allow such statements to be part of the State outline, and that the defence did not object to them."

[31] It is clear from the above holding, that a prosecutor commits a fundamental irregularity if he/she includes in the outline of the state's case the contents of a statement by the accused in his/her statement to the police or any other person in authority outside court. The law is that where extra-curial statements are improperly admitted in any proceedings, an appellate court is legally empowered to exclude such evidence. See *S* v *Mazano & Anor* 2000 (1) ZRL 347 (H) at p. 349, *S* v *Chinembiri* HH–272–24, *S* v *Sunukwe and Others* HH–268–24 at p. 2 and *S* v *Mlauzi and Others* HH–100–23 at p. 3, para. 13. An appellate court is empowered to so exclude the evidence because there are strict rules which govern the admissibility of extra-curial statements. In *Chinembiri* (*supra)* at p. 5 it was held that:

> "The confession and statement are not admitted into evidence until the State proves beyond reasonable doubt that they were made freely and voluntarily, without undue influence."

In *Mazano* (supra), the court remarked thus:

> "It is clear from the language used in the section [section 256(1)], which is clear and allows of no ambiguity, that any statement made by an accused person, verbal or written, cannot be admitted in evidence unless it is first proved that the statement was made freely and voluntarily. This has been stressed in a number of decided cases within this jurisdiction."

[32] I accept that there is and that there must be adherence to these rules. But the principle which cuts across all those cases is that where an extra curial statement has been

irregularly admitted, an appellate court does not rush to overturn an appellant's conviction solely on that basis. Instead, what I read from the authorities is that the court must simply exclude the evidence of that irregularly admitted extra curial statement. It then assesses if there is any other evidence on which the conviction can still be supported. Put in another way, the practice of the courts is that a holistic approach must be taken in determining whether or not the extra-curial statement contaminates the conviction of the appellant.

[33] In the case of S v *Mangoma* SC36/20, the Supreme Court criticised the admission of an extra-curial statement by emphasising that the Magistrates' Court had failed to meticulously consider whether the accused person's confession was given voluntarily. The court highlighted that the confirmation of the appellant's confession was questionable due to the same officers being involved in both the unconfirmed and confirmed statements, raising concerns about the reliability and voluntariness of the confession. But, notwithstanding that criticism, the Supreme upheld the conviction on the basis of other evidence. At p. 13 of the cyclostyled judgment, it proceeded to state that:

> "It is important to note, that notwithstanding, the confession was not the only evidence linking the appellant to the commission of the offence. I have said that the evidence of the State was circumstantial."

[34] Similarly, in the case of *S* v *Sunukwe and Others* HH–268–24 at p. 3, this High Court upheld the conviction of the accused person despite its censure of the admission of extra-curial statements, holding thus:

> "However, as already noted there is other evidence that led to the convictions of the first to fourth accused persons other than the confessions and indications evidence. ... all the four accused persons were identified by the complainant and his wife after their arrest. The two clearly explained the role that each accused person played during the robbery. For these reasons, I am satisfied that the guilt of these four accused persons was proven beyond reasonable doubt."

[35] Once again, the principle derived from the above decisions is that a conviction can be upheld regardless of the improper admission of extra-curial statements as long as there is other compelling evidence proving the accused's guilt beyond reasonable doubt.

Application of the law to the facts

[36] In this case, Mr *Vhitorini* rightly protested that what is contained in paragraph 5 of the state outline that the *"accused indicated that they were transporting the dagga from South Africa via Zimbabwe, Zambia and Tanzania,"* was an inadmissible extra curial statement made by the appellants to the police. It should not have been contained in the state outline. But that is as far as it all goes.

[37] The appellants were convicted on their own pleas of guilty. Earlier in this judgment I demonstrated the instances when a plea of guilty may be disregarded. A guilty plea must follow the laid down procedural guidelines to avoid a miscarriage of justice. It is only when the procedures are not followed, that the plea of guilty may be invalidated. Ultimately, what matters when a plea of guilty is entered is the procedure followed in verifying that the accused is properly pleading guilty to the offence charged.

[38] In this case, the inclusion of the extra-curial statement in the state's outline became irrelevant once a plea of guilty was entered. Needless to repeat, the appellants were charged with dealing in an illegal drug and admitted to the offence during both the investigation of the crime and the proceedings in the court *aquo.* As demonstrated earlier, the trial magistrate meticulously followed the provisions of s 271(2)(b) of the CPEA when canvassing the essential elements of the charge. The appellants confirmed their possession and transportation of the illegal drug. In fact, their explanations in court aligned with their extra-curial statements. As a result, the appellants were not convicted on the basis of the extra curial statements but on the strength of their unequivocal admissions of guilt in court. They made the same statements in court. An extra curial statement is a statement made to a person in authority outside court. If the statement is repeated in court, the statement in court is not an extra curial statement. As a result, the appellants were convicted on their own pleas of guilty.

[39] As already stated, once a plea of guilty is entered, the focus shifts to the procedure followed in verifying the plea. The court must simply ensure that the plea is made freely and voluntarily, without undue influence, and that the accused fully understands and admits to the essential elements of the offence. In the instant case, the inclusion of the extra curial statement is rendered irrelevant by the plea of guilty. The court aquo assessed

that plea based on its own merits. It followed the proper procedure to ensure that the appellants were genuinely admitting to the charge.

[40] In the premises, notwithstanding the fact that it was improper to include the impugned extra-curial statement in the outline of the State's case, the plea of guilty was assessed independently. The court *aquo* ensured that the appellants fully understood and admitted the essential elements of the offence of dealing in a dangerous drug. In effect, that procedure rendered the inclusion of the extra-curial statement irrelevant. The conviction of the appellants was justifiable on grounds other than the extra curial statements in the outline of the prosecution's case. The convictions, were therefore unassailable in utter contrast to the views of counsel for the state.

[41] It was for the above reasons that we once again, held that the appellants' first ground of appeal against conviction was hopeless and dismissed it. In the end we found the appeal against conviction without merit and dismissed it in its entirety. The appeal against sentence stood abandoned.

MUTEVEDZI J……..

NDLOVU J……Agrees