

THE STATE

Versus

OBERT NHEMATENA

HIGH COURT OF ZIMBABWE
TSANGA and CHILIMBE JJ
HARARE 5 March 2025

Criminal review judgment

CHILIMBE J

INTRODUCTION

[1] Apart from remedying the court a quo's misdirection, this judgment restates three basic matters. Firstly, the procedure to follow in taking a plea of guilty in the magistrates' court in terms of sections 271 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] ("the CPE Act").

[2] Secondly, the trial court's duty to record such plea accurately, as well as the standard and quality demanded of the court's record of proceedings in terms of s 271 (3) of the CPEA. Thirdly and generally, the judicial officer's critical role as an enabler of the right to a fair trial as set out in s 69 of the Constitution.

[3] These reminders are hardly new. They retrace a consistent thread running through countless decisions handed down by the Superior Courts over the decades. See *S v Mhondiwa* 1976(1) RLR 134 (G), *S v Mteiswa* 1976 (1) RLR 314 (G), *S v Zindonda* AD 15/79, *S v Sibanda* 1989 (2) ZLR 329 (S) and in particular, the survey of applicable authorities carried out by GREENLAND J in *S v Choma* 1990 (2) ZLR 33 (H) where he held as follows in conclusion at page 36; -

"It is apparent that despite numerous judgments on this important matter some magistrates seem unwilling to conform properly to what is a relatively simple but important procedure. For this reason, the attention of the Chief Magistrate is herein

brought to what is largely an unnecessary recurring problem and he is requested to ensure that this judgment is circulated and brought to the attention of all magistrates.”

[4] Thirty-one years later, this court found itself expressing similar concerns. In *Febbie Mutokodzi and Others v the State* HH 299-21, CHITAPI J lamented the failure by trial magistrates not only to follow the peremptory provisions on the CPEA, but to heed the consistence guidance on the matter by the Superior Courts. I quote part of his remarks on the point at pages 2-3; -

“The situation is akin to a refusal to heed the advice or to read cases where such direction has been given. The trend wherein the same errors in procedure are made is worrying and constitutes threat to the criminal justice system. The threat arises from the fact that the irregular proceedings are invariably set aside on review and the accused persons are released back into society without serving their sentences in full. Re-trials are then instituted by the Prosecutor General in his discretion. The retrials clog the court rolls and increase the backlog. All this can be avoided if the magistrates properly and procedurally conduct the guilty plea trials. Such trials form the bulk of cases disposed of in the magistrates court. It is unacceptable for the court to preside over an irregular trial on account of lack of knowledge of trial provisions. It is in my view an act of incompetence for a judicial officer to fail to comprehend steps required to be followed in holding a guilty plea trial when such procedure is legislated in black and white in s 271(2)(b) as read with s 271(3) of the Criminal Procedure & Evidence Act. It is worse so where the superior court has interpreted the trial procedure and given guidance to the magistrates through judgments issued and the judicial officer is not guided by the judgements either by design or by default to keep abreast with important judgments of this court on procedure.” [underlined for further emphasis]

[5] This persistent messaging reflects the gravity with which courts view the need to ascertain that an unrepresented accused’s plea of guilty is genuine, legitimate and properly given and taken. The concerns themselves are drawn from the constitutional right to a fair set out in s 69. This being read together with the principles fundamental to our penal jurisprudence which can be discerned from the window provided by s 70 of the Constitution which provides that ; -

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) to be present when being tried;
- (h) to adduce and challenge evidence;
- (i) to remain silent and not to testify or be compelled to give self-incriminating evidence;
- (j) to have the proceedings of the trial interpreted into a language that they understand;
- (k) not to be convicted of an act or omission that was not an offence when it took place;
- (l) not to be convicted of an act or omission that is no longer an offence;
- (m) not to be tried for an offence in respect of an act or omission for which they have previously been pardoned or either acquitted or convicted on the merits;
- (n) to be sentenced to the lesser of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.

(2) Where this section requires information to be given to a person—

- (a) the information must be given in a language the person understands; and
- (b) if the person cannot read or write, any document embodying the information must be explained in such a way that the person understands it.

THE MATTER BEFORE THE COURT

[6] This matter was referred to me by the scrutinizing Regional Magistrate with the following comments inter alia;

"The accused was convicted on his own plea of the crime of assault as defined in S89 (1) of the Criminal Law (Codification and Reform) Act. He was sentenced to 12 months imprisonment of which 3 months imprisonment was suspended on condition of good behaviour leaving him with an effective 9 months imprisonment. The record of proceedings was duly submitted for scrutiny, but however upon perusal of the record, I observed the following procedural irregularities;

1). The trial magistrate in her recording of the plea did not explain the charge to the accused who was not represented by a legal practitioner as provided for in s 271 2 (b) of the Criminal Procedure and Evidence Act.

2) Secondly, the trial magistrate did not comply with the provisions of s 271 (3) of the Criminal Procedure and Evidence Act in that she did not properly record the accused's response, or any statement made by the accused in connection with the offence to which he has pleaded guilty. In *S v Sibanda* 1989 (2) ZLR 329 (S), it was held that failure to comply with the requirements which are laid down in S271 2 (b) will result in the conviction being set aside."

[7] Hereunder the further facts. This offence was committed barely 3 hours into the new year on 1 January 2025. It was alleged that during those early hours of the morning, the accused, a 23-year-old unemployed man who resides at Duncombe Farm in Concession struck the complainant with an empty beer bottle on the forehead. Neither the fuller circumstances nor motive for the attack were relayed in the papers.

[8] Although not medically examined, it appears common cause that the 22-year-old complainant sustained a cut on the forehead. The accused was sentenced to 12 months imprisonment with 3 months suspended for a period of 5 years on conditions of good behaviour. The sentence generates no issue apart from concerns regarding the conviction upon which the sentence stands.

[9] I set out hereunder exchanges between the court a quo and the accused as well as prosecutor [with annotations in parenthesis]; -

Q – PP [state/public prosecutor] put the charge. State alleges that on.....atyou hit the complainant with an empty beer bottle realising bodily harm would occur

Charge put

Q- Did you understand

A- Yes

Q- Are facts true and correct

A- Yes

Q- Do you wish to vary

A- No

E/E [essential elements of the offence]

Q- Admit on you were at [blank spaces]

A- Yes

Q- Admit you hit the complainant

A-.....[blank]

Q-What did you use

A-[blank]

Q-On which part of his body

A-.....[blank]

Q-You realised bodily harm would occur

A-Yes

I find you guilty as pleaded.

TRIAL COURT'S EXPLANATION FOR THE GAPS IN THE RECORD OF PROCEEDINGS

[10] I invited the trial magistrate to urgently explain the anomaly of blank spaces in her notes recording the proceedings. I took this initiative given the fact that one could almost accurately predict the accused's responses to the trial court's questions. In addition, before and after the above excerpt, the trial magistrate had maintained a coherent account of the proceedings. My expectation being that the trial magistrate would tender some logical explanation for the omissions.

[11] The prompt response by the trial magistrate amounted to an admission of the obvious, expression of compunction and undertaking to avoid such in future. These reassurances-gratifying as they were- offered no explanation for the glaring omissions in the record of the proceedings. Further, and in any event, no reasoning, presumption nor deductions could replace the need to ascertain what the accused actually said in answer to the trial magistrate's questions on essential elements.

THE LAW

THE TRIAL COURT'S DUTY IN TAKING A PLEA OF GUILTY FROM AN UNREPRESENTED ACCUSED

[12] The authorities cited above confirm that the law is settled on the procedure to follow in taking a guilty plea from an unrepresented accused. Where such person faces criminal charges admits to committing the offence concerned, the matter must naturally proceed as an uncontested trial. The CPEA prescribes by s 271 (2), the procedure to guide, and conditions to be observed by the court in conducting such trials.

[13] In essence, the court is required to explain the charge and its components (essential elements), ascertain if the accused fully understands and, in the process, evidence compliance with that procedure by recording the engagements. The procedure is a necessary safeguard which, as the old adage says, feeds three birds with one seed.

[14] Firstly, it serves to assist the unsophisticated and unrepresented accused understand the confounding complexities embedded in the legal technicalities of a criminal charge and its elements. Secondly, a properly elicited guilty plea leads to a safe conviction. And thirdly, a good conviction in turn, opens up the faucets of justice to issue out the requisite sanction which, in many instances including the present, involves the rigours of imprisonment.

[15] Quite clearly, an injustice going to the root of the nation's jurisprudence is committed where criminal liability and punishment derive from a flawed process based on an uninformed or questionable plea of guilty. CHITAPI J's remarks in *Febbie Mutokodzi* were a restatement of this principle; - convict and punish the incontestably guilty, absolve and free the innocent. Such being the desirable state of criminal justice which sidesteps the compromise proposed by Lord Blackstone's "ratio" popularly expressed as; -

“...the law holds that it is better that 10 guilty persons escape, than that 1 innocent suffer (innocent person be convicted).”¹

[16] See also the recent comments on that point by this court per MANGOTA J in *S v Mncedisi Ncube & Anor* HB 25-24. I now set out, for completeness, the relevant provision s 271 of the CPEA below; -

271 Procedure on plea of guilty

(1) Where a person arraigned before the High 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, the court may, if the accused has pleaded guilty to any offence other than murder, convict and sentence him for that offence without hearing any evidence.

(2) Where a person arraigned before a magistrate's 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) the court may, if it is of the opinion that the offence does not merit punishment of imprisonment without the option of a fine or of a fine exceeding level three, convict

¹Commentaries on the laws of England, William Blackstone; - https://avalon.law.yale.edu/subject_menus/blackstone.asp

the accused of the offence to which he has pleaded guilty and impose any competent sentence other than—

(i) imprisonment without the option of a fine; or

(ii) a fine exceeding level three;

or deal with the accused otherwise in accordance with the law;

(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; and

(ii) **inquire from the accused whether he understands the charge and the essential elements of the offence** and **whether his plea of guilty is an admission of the elements of the offence** and of the acts or omissions stated in the charge or by the prosecutor; and may, **if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor**, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law:

Provided that, if the accused is legally represented, the court may, in lieu of the procedure provided in subparagraphs (i) and (ii), satisfy itself that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor by relying upon a statement to that effect by the legal representative of the accused.

(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. [underlined and bolded for emphasis]

[17] I may sound another reminder. The procedure set out in s 271 (2) (b) represents statutory obligations imposed upon the court by the legislature. They are not guidelines derived from the court`s own rules and processes in respect of which the court enjoys the primacy of discretion. The procedural obligations are peremptory and failure to discharge them amounts to a misdirection.

[18] The procedure to record a guilty plea has been variously described by this court as simple, easy and convenient (see *Febbie Mutokodzi and Others v the State, S v Karomo* HH 546-22 and *Kamau & Anor v The State* HB 187-24). Yet this simplicity is deceptive. In *Kamau & Anor v The State* (supra) MUTEVEDZI J adverted to the difficulties embedded in the procedure set out in sections 271, 272 and 273 of the CPEA, observing as follows at [16]; -

[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.”

[19] The court a quo was obliged to explain the charge to the unrepresented accused. For the simple reason that a charge constitutes a formal demand by the State for those arraigned before courts of law to answer to allegations of having transgressed the law so specified. In that regard, a charge fuses the formal demand as well as technical aspects of the criminal conduct alleged.

[20] As noted above, these technical aspects are complicated. So complicated that they oftentimes vex trained legal minds. What more of the simple, unrepresented accused? In *Kamau & Anor v The State*, the term “explaining the charge” was defined as an expression of the essential elements to an accused. The court held thus at [20]; -

“[20] 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 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.”

RECORDING THE GUILTY PLEA

[21] The record of proceedings speaks for itself as it obviously must. It betrays, in that regard, the trial court’s failure to explain the charge and its essential elements to the accused and record same as required respectively by s 271 (2) (b) and 271 (3). The latter implies the former. Failure to record means failure to explain. A somewhat similar situation confronted this court in *S v*

Sailos Ndhlovu & Anor HH 219-03 and *S v Innocent Nemadziya* HH 178-04 where UCHENA J (as he then was) at page 2 of the latter, noted the following peculiarities in the recording of the plea; -

“Nothing else was recorded and the magistrate left half a page on page 1 with nothing recorded on it. She turned over to page 2 where she left half a page with nothing recorded and recorded the following from about the middle of the page..... The magistrate again left 4 unused lines and then recorded..... The magistrate again left the rest of the second page unused and proceeded to page 3 where she recorded the accused person’s mitigation.

[22] The learned judge castigated the trial magistrate’s approach. It amounted to a serious irregularity which warranted the setting aside of the conviction and sentence. He went further to observe that recording the exchanges between the trial court and an accused pursuant to the inquiry canvassing essential elements in terms of s 272 (1) (b) was mandatory. I quote His Lordship’s remarks in extenso below from pages 3-5; -

“This was clearly indicated in the case of *S v Mhondiwa* 1976(1) RLR 134 at 135H-136A where SMITH J said: “It should be pointed out that in terms of subsection 3 of section 255 of the Criminal Procedure & Evidence Act the matters there referred to should be accurately recorded..... In the result the convictions and sentences on all three counts are set aside.” (emphasis added)

In the present case there is no possibility of the magistrate having been able to accurately record her questions and the accused’s answers in her office after convicting the accused during the proceedings. It must be stressed that magistrates should record the proceedings as they progress and not after the proceedings. What happened in this case demonstrates the importance of recording proceedings as they progress. The magistrate forgot to fill in the gaps. She could have also forgotten the answers the accused gave or the questions she asked. Leaving the recording of proceedings till the end of proceedings or to reconstruction in one’s office will lead to cheating and guess work which can seriously erode the quality of our criminal justice system.

In the case of *S v Zindonda* AD 15/79 MACDONALD CJ at p 7 of the Cyclostyled Judgment commented on the need for magistrates to “strictly and meticulously” observe the provisions of section 255(3) which is now section 271(3) of the Act. In the case of *Charles Manday Davy v S* 1988(1) ZLR 386 SC at 393 C-E GUBBAY JA (as he then was) commented on the need for magistrates to keep an accurate record by: - “**Writing down completely, clearly and accurately, everything that is said and happens before them which can be of relevance to the merits of the case.**”

He stressed this need especially in cases which are presided over in the absence of mechanical recording facilities. He explained the importance of accurate recording on the basis that it is the magistrate’s record which: “Is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done.”

I also refer to the case of *S v Sailos Ndlovu* HH 219/2003 where at page (2) of the cyclostyled judgment I said: - “The recording of the accused’s answers is therefore mandatory. The reason for the mandatory recording of the accused’s answers is obvious. It is from the accused’s answers that the court can determine whether the accused’s plea of guilty is a genuine admission of guilty. Failure to record the accused’s answers is therefore a serious omission which can result in the setting aside of the conviction and sentence.” [underlining and bolding for emphasis]

[23] The preceding authorities issue a cornucopia of judicial nuggets. Such guidance should inspire trial magistrates into (i) fastidious adherence to the procedure in taking an unrepresented accused’s guilty plea in terms of s 271 (2) (b) of the CPEA, (ii) punctilious maintenance of the record of proceedings and (iii) generally conducting proceedings as the proud custodians of justice on the coalface. Professor Feltoe found it fitting to commence his very instructive work-
“The Magistrate’s Handbook” by observing that; -

“Magistrates play a vital role in the administration of justice in Zimbabwe. Magistrates’ Courts are situated throughout the country are thus they are the dispensers of justice at the local level. Although particularly in remote places, magistrates operate under conditions that are often far from ideal, nonetheless,

magistrates have onerous responsibilities in criminal matters, and they are required to ensure that they deal with all criminal cases fairly and justly.”²

DISPOSITION

[24] The proceedings of the court a quo were rendered fatally defective by the trial court’s gross irregularity in breach of s 271 of the CPEA. In that respect, they must be vacated. In that regard, it is hereby ordered that; -

1. The conviction is quashed and sentence set aside.
2. The case is remitted to the court a quo before the same trial magistrate for her to conduct the proceedings afresh.
3. In the event of the accused person being convicted after the subsequent proceedings, the trial court shall take into account the length of the prison sentence which the accused has already served.
4. A warrant be issued for the immediate liberation of the accused person from prison.

TSANGA J [signed on original] I agree

[CHILIMBE J 5 March 2025]

² The Magistrates` Handbook, Revised Edition 2021-Prof Feltoe, published by the Judicial Service Commission of Zimbabwe

