HB 211-17
HCA 20-16
XREF GWERU 245-16

MAXWELL NTINI
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 10 JULY 2017 AND 13 JULY 2017

Criminal Appeal

C Mhuka for the appellant
W Mabaudhi for the respondent

MATHONSI J: The appellant appeared before a magistrate at Gweru on 2 February 2016 facing a charge of theft as defined in s113 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] it being alleged that on 31 January 2016 at Mkoba 14 Business Centre in Gweru, he had stolen a white Huawei Ipod tablet belonging to his friend. A plea of guilty was entered by the magistrate who went on to convict the appellant and sentence him to 12 months imprisonment.

The court also brought into effect a 3 months imprisonment sentence which had been previously suspended leaving him with an effective 15 months imprisonment.

The appellant has noted an appeal. Although the notice of appeal could have been drafted in a more elegant manner- the preamble states that the appeal is against sentence while the prayer seeks the setting aside of the conviction and the reduction of the sentence to 6 months imprisonment – the appellant is in essence appealing against both conviction and sentence. He attacks the conviction on the ground that the court *a quo* failed to appreciate that he was raising certain defences. It should have entered a plea of not guilty and proceeded with the trial.

In my view, the manner in which the proceedings were conducted is not only alarming it is a living example of how criminal proceedings should not be conducted. The truncated proceedings are record as follows:

> "PLEA
> Court – Charge read to accused and understood.
> Q: How do you plead?
> A: I admit

Court - Plea of guilty

- S 271 (2) (b)
- Facts read to accused and understood.

Q: Any additions or subtractions?
A: No.
Q: On 31/01/16 you took the complainant's Huawei tablet?
A: Yes
Q: Without permission?
A: Yes
Q: With an intention to permanently deprive the complainant?
A: No
Q: What do you mean?
A: I intended to return it.
Q: When?
A: After taking a bath.
Q: At what point did you return it?
A: After bathing I intended to return it?
Q: You took without permission.
A: Yes
Q: Any right to act in the manner?
Q: Why commit the offence?
A: I don't know what really transpired since both of us were drunk.
Q: On 28/08/15 you were convicted of theft?
A: Yes
Q: You were sentenced to 12 months imprisonment?
A: Yes
Q: Of which 3 months were suspended for 5 years on condition of good behaviour?
A: Yes
Q: Have the 5 years lapsed?
A: No
Q: Any good reason why the 3 months should not be put into effect?
A: No

Court – Guilty as pleaded.

P.P Accused is not a first offender. We tender certificate of previous convictions.

Court- Read them to accused
Q: Any objection to the previous convictions being tendered.
A: No
Court – Marked exhibit 1."

So many questions come rushing to mind upon reading the record. At what stage was the plea of guilty entered? Was it immediately after the accused said "I admit"? Was it after canvassing the essential elements? Who was conducting the prosecution? Is it the magistrate or the public prosecutor.? If the accused did not intend to permanently deprive the complainant of the tablet, was theft established? Why would a court deprive an accused person the opportunity to answer an essential question as to whether he had a right to act in the manner that he did and proceed to bombard him with more questions without waiting for him to answer?

The whole exercise was turned into a circus when the magistrate, who certainly had prior knowledge of the accused persons previous convictions before the prosecution made submissions on it, smuggled questions relating to his previous convictions at the stage of canvassing essential elements. Surely the accused person's previous convictions where not an essential element of the charge of theft. In any event what would have been the purpose of investigating the essential elements of the offence if, whatever the accused person said would be ignored.?

This was a truncated trial because the accused person was allegedly tendering a plea of guilty and therefore relieved the prosecution of the usual burden of having to prove, through *viva voce* evidence, the accused person's guilt beyond a reasonable doubt. The accused person bore no onus whatsoever to prove anything and was unrepresented. The duty then lay squarely on the court to ensure that the truncated procedure did not lead to an injustice. She then proceeded in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07]. It provides:

> "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 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."

What it means is that in offences meriting the imposition of a prison term without the option of a fine or a fine exceeding level three, the magistrate must first satisfy himself or herself that the charge and the essential elements of the offence have been explained and understood by the unrepresented accused person. He or she must exercise care bearing in mind that a plea recording is fraught with inherent dangers of convicting a person who may not necessarily be pleading guilty. For that reason the magistrate must satisfy himself or herself that the admission of guilt is a genuine, unqualified and unequivocal admission of guilt. This is done by examining each essential element of the offence one by one and recording the responses of the accused person. It is only after the accused person has unequivocally and genuinely admitted all the essential elements of the offence that the magistrate should be at liberty to return a verdict of guilty. See *S* v *Choma* 1990 (2) ZLR 33 (H).

Where an accused person has pleaded guilty but then denies an essential element of the offence or equivocates even in the slightest manner in response to questions put to him or her in the process of confirming an essential element, the magistrate is obliged to immediately stop the process. The magistrate should alter the plea to that of not guilty and require the prosecution to proceed with the trial. The magistrate has no right to force the accused person to plead guilty. See *S* v *Sakatare* HH-105-13 (unreported); *S* v *Madyamoto* HB 174-16 (also unreported).

It is therefore surprising that the magistrate in this case did not entertain a doubt that the plea was not genuine when the appellant stated that he did not intend to permanently deprive the complainant of the tablet but intended to return it after taking a bath. Even when the appellant stated that he did not know what transpired because he was drunk, the magistrate still did not find anything amiss with convicting. Surely certain defences were proffered by the appellant calling for a trial to determine their merits or demerits. There was therefore a glaring misdirection in the conviction.

That is not all. As Mr *Mabaudhi* for the respondent has correctly pointed out the court *mero motu* inquired into previous convictions in the process of canvassing essential elements before the prosecution had tendered a certificate of these. It means that she was already privy to intricate details of the previous records and therefore approached the matter from a biased stand point. This may explain the magistrate's impatience with the appellant which led to a serious adulteration of the proceedings. This was a gross irregularity which vitiated the truncated proceedings.

The production of previous convictions is dealt with in s327 of the Act. It is the duty of the prosecution and not the court, to state only after conviction whether the convicted person has any previous convictions. The onus is again on the prosecution to prove the previous convictions and therefore the prosecutor has a responsibility to produce the certificate and to read it out to the convicted person. Only then should the court ask the convicted person if he or she admits them. If he denies them the prosecution has to prove them. Therefore the unsolicited involvement of the court even before conviction in conducting an inquiry over previous convictions is a disturbing phenomenon. There is a lot of merit in the appeal.

In the result, it is ordered that;

1. The appeal succeeds.

2. The conviction of the appellant is set aside and the sentence quashed.

3. The matter is remitted to the court *a quo* for a trial *de novo* before a different magistrate.

Bere J agrees……..

H Tafa and Associates, C/o Mlweli Ndlovu and Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners