THE STATE

versus

MAXWELL MOYO

And

LEEROY NDLOVU

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 2 JULY 2020

Criminal Review

DUBE-BANDA J: This matter was placed before me on automatic review. The accused persons were arraigned before the Regional Court- Central Division. Accused person *Maxwell Moyo* was charged with two counts of contravening section 65 of the Criminal Law [Codification and Reform] Act Chapter 9:23, it being alleged, as follows:-

> That on a date unknown to the prosecutor, but during the period extending from January to March 2019 and at Ndabambi grazing area, Headman Madigani, Chief Sogwala, Lower Gweru, Maxwell Moyo, a male adult person unlawfully had sexual intercourse twice with Sigcnweyinkosi Ncube, a female juvenile without her consent knowing that she had not consented to it or realising that there is a real risk or possibility that she had not consented to it.

Accused person *Leeroy Ndlovu*, was charged with several counts of contravening section 65 of the Criminal Law [Codification and Reform] Act Chapter 9:23, it being alleged, as follows:-

> That on a date unknown to the prosecutor, but during the period extending from January to March 2019 and at Ndabambi grazing area, Headman Madigani, Chief Sogwala, Lower Gweru, Leeroy Ndlovu, a male adult person unlawfully had sexual intercourse several times with Sigcnweyinkosi Ncube, a female juvenile without her consent knowing that she had not consented to it or realising that there is a real risk or possibility that she had not consented to it.

Both accused persons had no legal representation. Both pleaded not guilty. At the conclusion of the trial they were both found guilty as charged. In respect of *Maxwell Moyo,* the two counts were taken as one for the purposes of sentence, and he was sentenced to 20 years imprisonment, of which 3 years were suspended for 5 years on the usual conditions. Effective 17 years imprisonment. In respect of *Leeroy Ndlovu,* count 1 – 3 were taken as one for the purposes of sentence and sentenced to 20 years, count 4 – 6, taken as one and sentenced to 20 years, of the total of 40 years, 6 years were suspended on the usual conditions. Effective 34 years imprisonment.

The trial of the accused persons commenced at the Regional Court- Central Division on the 10 March 2020, and it opened in this way:-

Charge read, to accused, explained

Plea: Accused 1 Not Guilty
Accused 2 Not Guilty

State outline read…….. Marked Annexure A
Section 188 and 189 Code explained

After the explanation given in terms of sections 188 and 189 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CPE Act), which is said to have been understood, the accused persons presented their defence outlines. I have noted from the record of proceedings that the accused persons were not informed of their right to legal representation.Section 163 A (1) of the Criminal Procedure and Evidence Act provides that:

> At the commencement of any trial in a magistrate's court, before the accused is called upon to plead to the summons or charge, the accused shall be informed by the magistrate of his or her right in terms of section 191 to legal or other representation in terms of that section.
> (2) The magistrate shall record the fact that the accused has been given the information referred to in subsection
> (1), and the accused's response to it.

> Section 191 of the CPE Act says "Every person charged with an offence may make his defence at his trial and have the witnesses examined or cross-examined—(*a*) by a legal practitioner representing him.

By operation of s 163A (1) of the CPE Act as read with s 191 of the CPE Act, at the commencement of the trial an accused must be informed, by the court of his right to legal

representation. The court shall record the fact that the accused has been informed of such right and his response must also be recorded. This is a peremptory requirement. See *Tinashe Kambarami v The State* HB 119/20.

Section 69 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (Constitution) guarantees every accused person the right to a fair trial. This means that the entire process of bringing an accused person to trial and the trial itself needs to be tested against the standard of a fair trial. The right to a fair trial is anchored on the right to legal representation.

The right enacted in the s 163A of the CPE Act is procedural. The substantive right is located in s 69 (1) of the Constitution, which provides that every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum. Therefore, the right to legal representation is a right of substance, not form, and it is the cornerstone of a fair trial. In my view, the starting point in determining the fairness of a trial, as envisaged in s 69 (1) of the Constitution, should always be whether or not the accused is informed of his right to legal representation. He must be properly informed, and his answers recorded so that if there is a waiver of such right, it would be an informed one. See: *The State v Zvidzai Manetaneta* HH 185-20; *Potifa Sawaka v The State* HH 262-20.
In the Namibian case of *James Gadu v The State* 2004 (1) NCLP 48 at 56, MANYARARA AJ suggested a simple format to inform an accused person of his right to legal representation, i.e. he must be informed that he has a right to be defended by a lawyer, and that he has the right to hire and pay a lawyer of his choice. In *Potifa Sawaka v The State* HH 262-20 CHITAPI J underscored the point that in the interests of justice, where the accused is facing a serious charge, the court should not just inform him of his right to legal representation, but should encourage the accused to seek it. I agree with this observation. In the Namibian case of *S v Kasanga*2006 (10 NR 348, HEATHCOTE AJ remarked at 360 D – E as follows:

> In my view, the starting point in determining the fairness of a trial, as envisaged in art.12, should always be whether or not the accused is informed. Without an accused being properly informed, one cannot even begin to speculate whether or not rights have been exercised or indeed waived.

There is a duty on a judicial officer presiding at criminal proceedings to inform an unrepresented accused of his right to legal representation. Our law recognizes as fundamental the right of the individual to legal advice and to legal representation. It is clear, therefore, that in the present case each of the two accused had a right to be informed of their right to

legal representation. However, none of them was informed of such right. There is a duty on the part of judicial officers to ensure that unrepresented persons fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.

In any democratic criminal justice system there is tension between, on the one hand the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which puts them beyond pale. *In casu* the accused persons, by any standard were facing very serious offences. However, I cannot even start discussing whether the trial court should have encouraged the accused to seek legal representation, because the first step of information giving was not complied with, i.e. they were not informed of their right to legal representation.

The enquiry now is whether the failure to inform the accused of their constitutional right to legal representation is an irregularity so fundamental and serious to the extent that it can be regarded as fatal to the proceedings in which it occurred. As I made the point in *The State v Zvidzai Manetaneta* (*supra*), I am of the view that the failure to inform the accused persons of their right to legal representation amounts to an irregular or illegal departure from those formalities, rules and principles or procedure in accordance with which the law requires a criminal trial to be initiated and conducted, and that such irregularity is fatal to the proceedings. It is an irregularity so fundamental that the court must set-aside the conviction without reference to the merits, and leave the issue to the Prosecutor-General to decide whether the accused should be retried.

I take the view that magistrates must be trained, until it becomes second nature to them to inform the accused persons who appear before them of the requirements of section 163A (1) of the Criminal Procedure & Evidence Act and also to understand the consequences of an omission to strictly comply therewith.

In conclusion, I find that the failure by a trial court, to inform the accused persons of their constitutional right to legal representation, is an irregularity that is fatal to the proceedings. In terms of s 29 (2) (b) (i) of the High Court Act, [*Chapter 7:06*], I find that the proceedings in the court *a quo* were not in accordance with real and substantial justice, as a result, a substantial miscarriage of justice has actually occurred. The conviction cannot stand.

In the result, I make the following order:-

1. The conviction is hereby quashed and set aside.

2. The Prosecutor-General may in his discretion commence proceedings against the accused afresh, provided however that should the accused be convicted, the period of sentence already served must be taken into account as a portion of any new sentence which may be imposed.

Dube -Banda J……....

Kabasa J …….. I agree