TIRIVASHOMA CHIGWAJA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI AND MUSITHU JJ
HARARE, 18 March 2022

Criminal Review

T Kangai, for the State
Accused in person

CHITAPI J: The accused then a 53 year old quinquagenarian is a lucky person. This shall become apparent later. He was convicted by the Regional Magistrate at Chinhoyi for the crime of rape as defined in s 65 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] on 24 June,2015. He was sentenced to 20 years imprisonment with 1 year suspended on condition of future good behaviour. The details of the charge from the charge sheet and state outline in summary were that the accused on 19 June, 2015 at or about 2300 hours at Nyamugomba Farm, Chinhoyi, raped the complainant, a 13 year old female juvenile after entering the room in which the complainant was sleeping alone. The accused allegedly sneaked into the complainant's blankets, held her by the neck and had forced sexual intercourse with the complainant once.

The accused threatened to ingest poison and kill himself should the complainant disclose the rape to anyone. The complainant reported the rape to her brother and true to his threat to end his life should the rape be disclosed, the accused ingested poison. He did not die. He survived. He was lucky to survive. The fact that he survived was his first time luck. From the record the accused was shedding tears when the trial commenced. When asked by the regional magistrate why he was crying, he answered that he regretted the wrong he did and had wanted to kill himself. The fact that the accused had forced sexual intercourse with the complainant was a *fait accompli*. The substantive offence was committed but the matter does not end there. The accused has an absolute constitutional right to a fair trial hearing. This aspect

of a fair trial is where the accused is second time lucky. This judgment is concerned with the procedural aspects of the accused's trial. It concludes that the accused's conviction and in consequence the sentence be set aside for procedural irregularity.

This matter was placed before me as an application for condonation of late noting of appeal filed by the applicant as a self-actor. The applicant seeks to appeal against sentence. On the hearing of the application the state fairly in my view did not oppose the application for reasons set out in the response filed on 23 February, 2022 by Mr *Kangai* for the State. An issue arose whether or not the conviction itself was proper. I gave Mr *Kangai* at his request time to consider the propriety of the conviction from a procedural perspective

The trial of the accused was disposed of by way of guilty plea. The plea proceedings in the material particulars that fall for criticism reads as follows:

> "Proceedings
> Charge read to the accused and understood.
> Pleaded : Guilty
> By the court (to accused)
> Q Why are you weeping
> A I wanted to kill myself for doing such a wrong thing
> Facts : 271 (2)(b) of the code
> ……..

The regional magistrate then asked the accused whether the accused had understood the facts and other questions in the nature of extrapolating the essential elements of rape.

The proceeding did not comply with the provisions of s 271(2)(b) as read with s 271(3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. This case was determined before the decision in *State* v *Mangwende* HH 695/20 was passed. There appears to be no problem presently with the disposal of trials by guilty pleas in the magistrates. The procedure set out in *Mangwende's* case and in subsequent cases like *State* v *Masendeke.* HH 577/21 would be the correct procedure to have been employed in this case.

The procedure for trial by guilty plea must be considered as a fair trial standard which should be followed to the letter. In a guilty plea trial conducted in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act, the provisions of subs 3 of s 271 should be strictly followed. The Magistrate must *inter alia* explain the charge and record the explanation which he will have given to the accused. This is what s 271(2)(b) as read with s 271(3)(a) provides in clear language. A failure to comply simply means that the trial is not procedurally in accordance with the law. Can such omission and/or irregularity be remedied. It cannot be remedied because s 86(3)(e) of the constitution provides that no law may limit the right to a

fair trial. Section 29(3) of the High Court Act [*Chapter 7.06*] which provides that no conviction or sentence shall be quashed or set aside because of any irregularity or defect in the proceedings unless the court considers that there has been a substantial miscarriage of justice which has actually occurred, does not apply to a mistrial because a mistrial results in proceedings being a nullity. See *State* v *Masendeke HH* 577/21.

Mr *Kangai* for the state in his submissions on whether the conviction could be supported submitted as follows in para 6 of his response;

> "6 *In casu*, a reading of the record indicates that the individual responses to the particular elements were not recorded, but instead, the applicant was merely asked if he agreed to the charge and or the facts. It is therefore difficult for a reviewing court to fully appreciate the interaction between the applicant and the court and whether or not the plea was genuine and unequivocal, and whether or not applicant may have had any defence at law.
>
> "7 the court is therefore at liberty in the result to set aside both the conviction and sentence imposed and order that the matter be remitted back to the magistrate court for a new trial, and to exercise any other remedy at law it may see fit"

The observations of Mr *Kangai* are pertinent. However it is not necessary to interrogate them at any length for the reason that the failure to comply with s 271(2)(b) and 271(3) has the effect of rendering the mistrial a nullity. The accused has been second time lucky in that his conviction and sentence must be set aside. However his luck maybe short lived because the setting aside of the conviction and sentence is not an acquittal. The Prosecutor General will retain his prerogative to institute a fresh trial against the accused. If a trial has been declared a mistrial and a nullity nothing comes out of it. It is as if no trial took place. This is the reason why the Prosecutor General must retain his prerogative to institute a fresh prosecution. The fact that the accused may have as in this case served a sentence imposed on him as a consequence of a mistirial necessarily means that, that aspect becomes a factor to take into account in imposing sentence in a ritual should the Prosecutor General decide to institute fresh proceedings.

Having determined that the proceedings are a mistrial and therefore grossly irregular and incapable of correction, the following order is made.

IT IS ORDERED THAT:

1. The proceedings in case number CRB CHNR 112/14 be and are hereby set aside for gross procedural irregularity which cannot be condoned.

2. The conviction and sentence imposed are set aside and the accused entitled to his immediate release.
3. The Prosecutor General's prerogative to prosecute the accused and therefore to institute fresh proceedings remains open to him to exercise.
4. In the event that a fresh prosecution is instituted and the accused is convicted, the Trial Magistrate in assessing an appropriate sentence shall take into account the sentence already served by the accused up to the date of his release as part of an already served portion of the new sentence which the Magistrate may impose.

National Prosecuting Authority, state's legal practitioners

MUSITHU J: Agrees:……