HB 180/18
HCAR 681/18
CRB FIL 33/18

THE STATE

Versus

SHEPHERED SIBANDA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 19 JULY 2018

Review Judgment

TAKUVA J: This matter was placed before me by the Registrar with a request from the National Prosecuting Authority that the proceedings be reviewed.

The memo reads:

> "We request that you place this minute before the Honourable Reviewing Judge, with the following comments:
>
> It is trite that the High Court reviews Magistrates' Court decisions where the sentence is over twelve months or where there has been a procedural error. *In casu* the learned magistrate initially passed a judgment wherein he found the accused guilty. He then went on to pronounce at a later date that he had made a mistake thereby altering his own conviction to that of Not Guilty. Thus there is a procedural irregularity."

The facts which are common cause are that the accused appeared before a magistrate at Filabusi facing two counts as follows:

Count 1 – Contravening section 131 (1) (b) of the Criminal Law (Codification & Reform) Act Chapter 9:23 unlawful entry into premises in that on a date unknown to the prosecutor but during the period between 12 December 2017 and 5 January 2018, the accused unlawfully and intentionally entered the storeroom at Denje Primary School and without permission or authority from Denje Primary School authorities, the lawful occupiers of the premises concerned, or without other lawful authority.

Count 2 – Contravening section 113 (1) of the Criminal Law (Codification and Reform) Act. In that on a date unknown to the prosecutor but during the period between 12 December 2017 and 5 January 2018 the accused stole property listed on the annexure to the charge belonging to Denje Primary School intending to deprive Denje Primary School permanently of its ownership, possession or control, or realising that there is a real risk or possibility that they may so deprive Denje Primary School of its ownership, possession or control.

The accused pleaded not guilty to both counts and the state called three witnesses before it closed its case. The accused gave evidence and called one witness. After the accused closed his case, the court returned a verdict of "guilty as charged". "Reasons to follow". The matter was then remanded for sentence. At a later stage the magistrate wrote what he termed "judgment" in which he returned a verdict of "not guilty and acquitted".

Quite clearly what the magistrate did was to alter his verdict. The question is, was he entitled to do so? A magistrate is not entitled to alter his verdict or sentence other than in terms of section 201 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The sub-section states:

> "When by mistake a wrong judgment or sentence is delivered, the court may, before or immediately after it is recorded, amend the judgment or sentence, and it shall stand as ultimately amended."

This provision was interpreted by NDOU J (as he then was) in *S* v *Musundulwane* 2006 (1) ZLR 294 (H). The learned Judge held that a magistrate is not entitled to alter his verdict or sentence after it has been pronounced. The only exception is provided for in s201 (2) of the Criminal Procedure and Evidence Act which gives the trial court the power in regard to a wrong verdict or sentence delivered "by mistake". That implies a misunderstanding or an inadvertency resulting in an order not intended or also a wrong calculation. The correction must be done immediately on the same day, preferably before the magistrate leaves the bench.

These comments apply with equal force to the present case. I should add that the "mistake" envisaged in the sub-section does not relate to a verdict arrived at deliberately after an assessment of the evidence. The verdict of guilty *in casu* was not delivered by mistake, it was deliberately returned. There was no error when the first verdict was returned. The magistrate seems to have taken a different view of the evidence on second thoughts. Surely, judicial officers cannot be allowed to do that. This scenario is not what sub-section (2) of section 201 provides for.

For these reasons, the latter verdict is incompetent. While the 1st verdict is competent, its correctness is now in serious doubt. In my view, the interests of justice demand that a trial *de novo* be ordered. Accordingly, it is ordered that:

1. The proceedings before the court *a quo* be and are hereby quashed.
2. The matter be and is hereby remitted to the court *a quo* for a trial *de novo* before a different magistrate.
3. A copy of this judgment should be referred to the Chief Magistrate.

Makonese J ……. I agree