Judgment No. HB 4/06

Case No. HC 1896/05

CRB REG 175/05

**THE STATE**

**Versus**

**JOHN CLAUDIUS MUTIZWA**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 19 JANUARY 2006

Criminal Review

**NDOU J:** The accused person was convicted by a Bulawayo Regional Magistrate of theft of a motor vehicle and two counts of extortion. In respect of count 1 he was sentenced to ten(10) years imprisonment and three(3) years for each of the extortion charges. At the commencement of the trial, without much sophistication and articulation, the accused applied for the recusal of the learned trial magistrate. He felt, rightly or wrongly, that he would not be subjected to a fair trial. He gave his reasons. In short the basis of the application is that there is perception that learned Regional Magistrate imposes very stiff sentenced. It appears that the perception is in accused persons but certainly not in the magistrates' peers. The fear is premised on "prison talk" so to speak. There is nothing concrete placed before the learned magistrate by the accused and she summarily dismissed the application.

I queried the propriety of the conviction in theft charge. The

accused, had, in answer to a question by the trial magistrate indicated that he did not intend to deprive the owner permanently of vehicle. The learned magistrate did not seem to accept this defence and embarked on



further questioning of the accused. Still the accused gave the impression that he was sticking to the said defence.

Further, the extortion charges were formulated in court during the court of the trial.

I referred the matter to the Attorney-General specifically to get an opinion on the propriety of the theft charge.

I am indebted to Ms C Moyo who responded on behalf of the Attorney-General. Her response is the following:

A. "Application for recusal

It is a trite rule of law that no person who has an interest in or harbours any prejudice in respect of the matter to be tried should adjudicate on such matter. It was held in Herbst 1980(3) SA 1026 (E) that the principle involved in an application for recusal is that "no reasonable man should, by reason of the situation or action of a judicial officer, have grounds for suspecting that justice will not be administered in an impartial and unbiased manner."

The case of [*S* v *Malindi* }1990(1) SA 962 A 969 G-I further fortifies the argument above. In that case it was held that; the fact that in reality the judicial officer was impartial or is likely to be

impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.

In *Maseko* 1990(1) SACR 107(A) it is propounded that the criterion for recusal is an objective one i.e. whether the presiding officer's conduct



leaves a right thinking observer or litigant the impression that the accused did not receive a fair trial.

In the cases cited above the requirements of the test for the presence of judicial bias have been laid down as:

1. There must be a suspicion that the judicial officer <u>might be, not would be, biased</u> (the emphasis is mine)
2. The suspicion must be that of a reasonable person in the position of the accused.
3. The suspicion must be based on reasonable grounds
4. The suspicion is on which the reasonable person referred to would, not might, have. (emphasis is mine)

It is argued therefore that if the application conforms to the requirements as stated above the magistrate or judicial officer ought to recuse himself/herself. Should a judicial officer refuse to recuse him/herself in a case where he/she should properly have done do, his/her refusal would create a good ground for review of the case – Burns 1988(3) SA 366(C).

Coming closer home, in the case of *Associated Newspapers of*

*Zimbabwe (Pvt) Ltd and Anor* v *Diamond Insurance Co (Pvt) Ltd* 2001(1) ZLR 226(H) the Honourable Justice Hlatswayo after considering a plethora of case authorities from both Zimbabwe and South Africa; held that a judicial officer should not unduly take a recusal application as a personal affront, for it is in the general interest of the judiciary for an individual judicial officer to recuse himself where a reasonable apprehension of bias is



perceived. At the same time, a judicial officer's duty to sit where he is not disqualified, is as compelling as the duty to sit where disqualified. The test for bias was propounded in the same case as the one stated in the case of *Leopard Rock Hotel Co (Pvt) Ltd & Anor* v *Walem Construction (Pvt) Ltd* 1994(1) ZLR 225 (S); namely whether there exists circumstances which may engender a belief in the mind of a reasonable litigant that in the proceedings concerned he would be at a disadvantage. The test contains a two-fold objective element; the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Can it be argued then ,that in the case under consideration the accused harboured a reasonable misapprehension that the magistrate would be biased in dealing with his case? And that accused was reasonable in harbouring such a misapprehension? And that the magistrate acted unreasonably in dismissing the application? Whilst it can be argued that the magistrate erred in summarily dismissing the accused's

application without profering cogent reasons for having so done and putting such reasons clearly on record; the end result cannot be said to have been improper considering the reasons advanced by the accused person for not wanting to be tried by tat court [fear for a possible harsh or severe sentence i.e. the trial magistrate is perceived to impose heavy sentences]. It is trite law that issues of sentence are discretionary and may vary from court to court. Harsh sentences by a court do not necessarily portray bias on the part of that court. The sentence may be harsh but competent on considering the



merits of the case and the accused person's personal circumstances. It is therefore submitted that accused's application was without any merit or substance, it does not conform to the test for bias laid down in the cases cited above. It is further submitted that the magistrate was completely in order in dismissing the application through the procedure adopted can be faulted.

B. Defence raised in respect of the theft charge

It is trite law that during plea proceedings under section 271(2) (b) [of the Criminal Procedure and Evidence Act Chapter 9:07] the magistrate must in terms of subparagraph (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 acts or omissions stated in the charge by the prosecutor."

It is therefore submitted that the responses proffered by an accused as a result of the inquiry conducted in terms of the cited section, should amount to an irrevocable admission of the essential elements of the offence as preferred. Where there is uncertainty as to what accused is admitting to the court must probe further and satisfy itself that all the essential elements of the offence have been admitted to. Where the court has any doubts or the accused raises a defence the court is obliged to alter the plea to that of not guilty and order that a trial be held to determine the contentious issues.

In the present case, the accused categorically indicated that "he did not intend to deprive the owner permanently" of his motor vehicle and



explained how he would have made it certain that the owner recovered his motor vehicle. The magistrate should have stopped there. She should have simply altered the plea to that of not guilty and ordered that a trial be held. The element of appropriation is very critical in establishing permanent deprivation of an owner, which is one of the essential elements of theft. The magistrate did not do that but instead proceeded to ask a long winding and confusing question to which the accused answered "No your Worship". It is however, not clear what the accused was saying "NO" to. The fact that the accused had in no

uncertain terms indicated to the court that he had not intended to deprive the owner permanently the court should have been placed on the guard and should have sought to verify what accused meant by his later response which was at variance with the previous expressly stated intention.

In view of the foregoing it is submitted that the conviction on count 1; on the basis of accused's plea of guilty cannot stand. The plea of guilty in question cannot be said to have been irrevocable. It was vitiated by the accused's intimation of lack of intention to deprive the owner permanently. The accused's vacillation debased the plea of guilty which he had initially tendered. It was liable to alteration to that of not guilty at that stage. The conviction on count 1 on the basis of accused's plea of guilty cannot be supported.

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C. Formulation of charges in court

As regards the formulation of charges in court, it is submitted that, that instance is covered by the provisions of section 202(1) up to and including subsection (3) of the Criminal Procedure and Evidence Act. There was no prejudice caused to the accused person.

Subsection (1) of section 202 … provides that:

"Where on the trial of any indictment, summons or charge

> there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or particulars that ought to have been inserted in the indictment, summons or charge have been omitted or any wards or particulars that ought to have been omitted have been inserted or that there is any other error in the indictment, summons or charge, the court may at any time before judgment, if it considers that the making of the indictment or summons or charge will not prejudice the accused in his defence, order that the indictment, summons or charge, whether or not it discloses an offence be amended" ... (the emphasis is my own)

After the amendment, the essential elements were properly put to the accused person, of which he admitted. That conviction it is respectfully submitted, cannot be defaulted.

If his Lordship agrees with my submissions may he quash the proceedings in respect of count one and have the sentence set aside and remit the matter for a trial *de novo* before a different magistrate in respect of count 1.

I agree *in toto* with the above observations. On recusal, it is trite that an impartial judicial officer is a fundamental prerequisite for the fair trial and a judicial office should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the



judicial officer, for whatever reasons, was not or will not be impartial – *President of the Republic f South Africa & Ors* v *South African Rugby Union & Ors* 1999(4) SA 147 (CC).

According to CORBETT CJ in the *Malindi case, supra,* at 969G-L, the duty of recusal arises as follows:

> "The common law basis of the duty of the judicial officer in certain circumstances to recused himself was fully examined in the cases of *S* v *Radebe* 1973(1)SA 796(A) and *South African Motor Acceptance Corporation (Edms) Bpk* v *Oberholzer* 1974(4) SA 808(T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he may not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer, was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important." See also *Council of Review, SA Defence Force* v *Monning* 1992(3) SA 482(A); *Silwana* v *Magistrate for District of Piketberg* [2003] 2 ALL SA 350(C); *Sager* v *Smith* 2001(3) SA 1004 (SCA) and *S* v *Basson* 2005 (1) SA 171 (CC). In other words, not only actual bias but also the appearance or apprehension of bias disqualifies a judicial officer from presiding or continuing to preside over judicial proceedings – *Sager* v *Smith, supra* at 1009, *Southern Commercial Catering and Allied Workers Union and Ors* v *Irvin & Johnson Ltd (Seafood Division Fish Processing)* 2000(3) SA 705 (CC) and *S* v *Roberts* 1999(4) SA 915 (SCA) at 923.

*In casu,* it is common cause that the issue of actual bias does not arise. But has the accused established an appearance or apprehension of bias? Even from his own statement in court he has not. The basis for the application is that the learned trial magistrate is known for imposing severe sentences. He, in other words seeks recusal so that he can be tried by a magistrate who is perceived to impose lenient sentence. This "fishing" of judges or judicial officers is not what this principle is intended



to achieve. Severe sentences are not indicative of bias and neither are lenient sentences indicative of fairness or lack of bias. It is the competence of the sentence that matters, and the judicial officer

has wide discretion on the question of punishment – *S* v *Ramushu & Ors* SC-25-93; *S* v *Matanhire* HH-18-02; *Mavhundwa* v *S* HH-91-02; *Musindo & Ors* v *S* HH-25-02 and *S* v *Ndlovu* HB-66-03. From the foregoing, there is no reasonable appearance or apprehension on the part of the accused.

On count 1, I agree that since the accused raised a lawful defence, his plea of guilty should been altered to that of not guilty – *Criminal Procedure in Zimbabwe* – J R Rowland at 17-10.

As far as the amendment of the charge in court, I agree that section 202, *supra* is applicable. The object of section 202 is to correct technical errors in the charge or a situation where more particulars emerge from the evidence than those given in the original charge – *S* v *Ndlovu & Ors* 1979 RLR 236(G). But such amendment should not be one that prejudices the accused in his defence. Prejudice must relate to the accused's defence – *S* v *Smith* 1975(2) RLR 77 (A) and *S* v *Van Wyk en Andere* 1994(1) SACR 183 (NC). See also *R* v *Ngcobo* 1957(1) SA 377(N). The accused is not prejudiced by the amendment as he has admitted all the essential elements of extortion.

In the circumstances I order as follows:

Count 1 - The conviction is hereby quashed and the sentence of 10 years imprisonment is set aside. A fresh trial is ordered before a different magistrate.

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Count 2 - The conviction and sentence of 3 years imprisonment are confirmed.

Count 3 - The conviction and the sentence of 3 years imprisonment are confirmed.

Of the total sentence of 6 years imprisonment, 2 years is suspended for a period of 3 years on condition the accused in that period does not commit an offence of extortion and for which he is convicted and sentenced to imprisonment without the option of a fine.

Bere J ..... I agree