

THE STATE**Versus****WILLARD MUTYORAURI**IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 31 OCTOBER & 1 NOVEMBER 2018**Review Judgment**

TAKUVA J: This record was placed before me by the Registrar pursuant to a request by the Regional Magistrate Gokwe. Attached to the record of proceedings are the following comments by the Regional Magistrate

“The accused person was convicted on his own plea of guilty to a charge of assault in consequence whereof was sentenced to 6 months imprisonment of which 3 months imprisonment was suspended on usual condition of good behaviour.

The gist of the charge is that the accused person lifted the complainant up and threw him on the ground. When the essential elements of the offence were being canvassed, the accused person said that “... I just pushed him and he fell on the ground”. During mitigation he repeated the same and said that, “I only pushed the complainant and he fell down.”

From accused person’s answer, I am of the view that the accused person’s plea of guilty is not unequivocal, unqualified and genuine admission of guilt. The accused person’s plea of guilty is a qualified one hence, the trial magistrate was duly bound to either ascertain whether the state accept the qualified plea or alter the plea of guilty to one of not guilty in terms of section 272 of the Criminal Procedure and Evidence Act (Chapter 9:07) [the Code].

In light of this, it is my considered view that the proceedings are not in accordance with real and substantial justice. Accordingly, I hereby forward the record of proceedings for review in terms of section 58 (3) (b) of the Magistrates’ Court Act (Chapter 7:10).”

Earlier in answer to the Regional Magistrate’s query the trial magistrate had *inter alia* said;

“I stand guided from the Regional Magistrate’s wisdom. Accused person admitted to the conduct of lifting up and throwing complainant on the ground as per outline of the state case during the question and answer exchange. The court was satisfied that accused had admitted to the essential elements of the offence though it is accepted that accused later told a version of how it occurred.” (my emphasis).

These proceedings are a typical example of non-compliance with section 272 of the Code.

The section provides:

“272. Procedure where there is doubt in relation to plea of guilty

If the court at any stage of the proceedings in terms of section two hundred and seventy-one and before sentence is passed –

- (a) Is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or
- (b) Is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or
- (c) Is not satisfied that accused has no valid defence to the charge; the court shall record a
- (d) plea of not guilty and require the prosecution to proceed with the trial ...” (my emphasis)

See also *S v Dube & Anor* 1988 (2) ZLR 385 (S) and *S v Mubvumbi & Ors* 2011 (2) ZLR 251 (H).

In casu, the gravamen of the charge according to the charge sheet and state outline is that the accused committed an assault upon the complainant, “by lifting him up and threw him on the ground ...”

The following exchange took place between the court and the accused while canvassing the essential elements:

“... Q You admit that you lifted up the complainant and threw him on the ground?

A - Yes

Q - What did you intend by lifting complainant and throwing him on the ground

A - There was commotion and I did not know what happened to me as I just pushed him and he fell on the ground”.

After a series of questions the court found the accused guilty as charged. However, in mitigation of the sentence the accused said;

“There was no misunderstanding between myself and the complainant. I only pushed the complainant and he fell down ...” The accused was sentenced to 6 months imprisonment of which 3 months imprisonment was suspended for 5 years on condition accused does not within that period commit any offence involving violence upon the person of another from which upon conviction is sentenced to imprisonment without the option of a fine.

The trial magistrate’s view if I understand it correctly is that since the accused initially admitted to lifting up the complainant and throwing him down, whatever he said later which directly contradicts this admission is immaterial. This attitude is wrong in that it goes against the letter and spirit of section 272 *supra*. For example, can it be said that the accused correctly admitted all the essential elements of the offence or all the acts, or omissions on which the charge is based in circumstances where he admits lifting up the complainant and throwing him down? The answer is certainly in the negative and the misdirection by the court *a quo* lies in answering that question positively. In my view where an accused admits a fact that forms an essential element of a crime but later gives an answer that is in direct conflict with that earlier admission, a plea of not guilty must as a matter of law be entered. On the facts therefore, I agree with the Regional Magistrate that the plea cannot be described as unequivocal, unqualified and genuine admission of guilt. In the result, the conviction and sentence are improper and incompetent in that the court *a quo* was required by the mandatory provisions of section 272 to alter the plea to one of not guilty.

Accordingly, I make the following order:

1. The conviction is set aside.
2. The sentence is quashed

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3. In view of the fact that the accused has already served 1 month in prison, he is entitled to his immediate release as it is unjust to order a trial *de novo* in the circumstances.

Makonese J I agree