

**TINASHE KAMBARAMI**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE AND MABHIKWA JJ

BULAWAYO 15 AND 18 JUNE 2020

**Criminal Appeal**

*D Moyo*, for the appellant

*B Gundani*, for the respondent

**MAKONESE J:** The appellant appeared before a Magistrate sitting at Tredgold, Bulawayo facing a charge of contravening section 113 (1) (a) of the Criminal Law Codification and Reform Act (Chapter 9:23). He pleaded guilty to the charge and was convicted and sentenced to pay a fine of \$80, in default of payment 18 days imprisonment. Appellant was not legally represented at the trial. He now appeals both against conviction and sentence.

The State does not support the conviction and sentence and concedes that the conviction and sentence cannot stand. It is our view that the concession is indeed proper.

**Background**

The brief facts surrounding this matter as gleaned from the state outline are as follows. In August 2017 the appellant assigned the complainant to undertake some work at his business premises. The appellant advised the complainant to leave his tools inside his offices in a safe under lock and key. When the complainant turned up to resume work at the appellant's premises the following day he discovered that an electrical extension cord was missing. The appellant admitted having taken the extension cable and promised to return it. The appellant apparently failed to replace or return the extension cord. The complainant reported the matter

to the police leading to the arrest of the appellant. The extension cable was valued at \$74. It is on these facts, that appellant was arraigned before the court *a quo* facing a theft charge.

In his Notice of Appeal, the appellant argues that the court *a quo* erred in returning a guilty verdict when the appellant had raised triable issues in the process of the recording of the plea. In this regard, the appellant contends that he alerted the trial Magistrate that he had permission to take the complainant's property. This issue was never explored by the trial court. The appellant further argues that the court *a quo* misdirected itself by returning a verdict of guilty without satisfying itself on the genuineness of the plea of guilty that was being tendered by an unrepresented accused. The learned Magistrate, it has been argued, did not comply with the peremptory provisions of section 272 of the Criminal Procedure and Evidence Act (Chapter 9:07).

It is necessary to indicate that the provisions of 272 of the Criminal Procedure and Evidence Act are to be followed in all cases to ensure that before a guilty plea is entered the court is satisfied that all the essential elements of the charge have been put to the accused and that he understands them. This provision must not be taken lightly or casually by trial magistrates as this is the whole purpose of the plea recording procedure. For the avoidance of doubt, the court shall restate the provisions of section 272 which are in the following terms:

“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 the essential elements of the offence or all the facts or omissions on which the charge is based; or
- (c) Is not satisfied that the accused has no valid defence to the charge;

the court shall record a plea of not guilty and require the prosecution to proceed with the trial.”

In the present case, the appellant had this exchange with the trial Magistrate before the guilty plea was entered:-

“Q. Correct that you took one extension code without his permission?

A. Yes

Q. What was your intention in taking it?

A. To use it, my employee needed it

The court put the further question to the appellant:-

“Q Any right to take it without his permission?

A. Yes

The responses by the appellant should have triggered the court into enquiring further into the genuineness of the appellant’s plea. The court ought to have observed that there were material contradictions in the answers which were being given by the appellant. The court needed to satisfy itself that the admission of guilt was unequivocal, genuine and unqualified. The court clearly, in our view, erred in taking a cursory approach to the plea recording procedure, resulting in the conviction of the accused. It must be noted that even during mitigation, the appellant raised something which should have alerted the Magistrate to the fact that the plea was not genuine. The appellant stated the following:

*“We ended up using the cable since accused left his tool box behind. I had requested to replace the cable. But the complainant kept changing the price.”*

The explanation given in mitigation of the appellant left a lot of unanswered questions as to what had really transpired. It is our view, that the trial Magistrate ought to have assisted the unrepresented accused as he appeared to have been raising a defence to the charge. It is trite law that when an accused person pleads guilty to an offence and then goes on to deny an essential element of the offence charged, the court must proceed to alter the plea to one of not guilty. The matter must proceed to a full trial in order to canvass the issue of criminal intent. See *State v Chirodzero* HH 14-88.

In the case of *State v Chirodzero* (supra) REYNOLDS J emphasized that the court must constantly bear in mind the dangers inherent in convicting persons upon guilty pleas. Magistrates must do everything in their power to ensure that injustice does not occur. A trial Magistrate must ensure that the guilt of the accused is established both in fact and law. The accused must admit all the essential elements of the charge before a plea of guilty is entered.

In *State v Samson Phiri* HB 133-17, this court remarked that:-

*“It was therefore unnecessary and totally uncalled for and indeed inappropriate for the learned trial Magistrate to extract an admission of guilt from the unrepresented accused. Once the accused has given answers that show that the plea of guilt is not unequivocal then the matter is supposed to end there. The matter must proceed to trial.”*

These remarks apply with equal force in this matter. The appellant indicated that he believed that he was authorized to take the electrical cable or that he had the right to take it. In essence, the accused’s responses to questions put to him by the court clearly revealed that he was proffering some defence. His mental intention to steal the property and to deprive the owner permanently was not established.

In any event, the state has made a further concession that the trial magistrate did not comply with the provisions of section 163A of the Criminal Procedure and Evidence Act. A perusal of the record of proceedings indicates that the magistrate recorded the following; *“Right to legal representation explained and understood in terms of section 163 of the Criminal Procedure and Evidence Act.”* It is important to note that the requirements of section 163A are made peremptory by the use of the term *“shall”* in the relevant section. The record reflects that no response was recorded from the appellant. Failure to explain an accused person’s right to legal representation amounts to a misdirection. It is an irregularity in the conduct of the proceedings. For this reason alone, the conviction could not be allowed to stand.

In the result, we conclude that the trial Magistrate erred in convicting the appellant in the absence of an unequivocal plea of guilty, and by reason of the failure to comply with the peremptory provisions of section 163A of the Criminal Procedure and Evidence Act.

We accordingly order as follows:

1. The appeal succeeds.
2. The conviction and sentence of the court *a quo* is set aside.

Mabhikwa J ..... I agree

*Samp Mlaudzi and Partners*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners