

THE STATE
versus
OBERT SAKATARE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 6 March 2013

CRIMINAL REVIEW

BHUNU J: This is perhaps a classical case of how not to conduct a trial based on a plea of guilty in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Cap. 9:07*]. In this case the accused a 17 year old juvenile had consensual sexual intercourse with a fellow juvenile in contravention of s 70 (1) of the (Criminal Law codification and Reform) Act [*Cap. 9:23*]. The complainant's age was assessed by a medical practitioner to be between 14 ½ and 15 ½.

He appeared before the trial magistrate at Rusape Magistrates court on a plea of guilty. The section requires the trial magistrate to canvass the essential elements of the offence charged and for him to satisfy himself that the plea of guilty is an unequivocal admission of the accused's guilt. The section is designed to avoid the conviction of an unrepresented accused person through ignorance or inadvertence. It reads:

“271 Procedure on plea of guilty.

(1) ...

(2) When a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea –

(a) ...

(b) The court shall, if it is of the opinion that the offence merits any punishment referred in subpara (i) of para (a) or if requested thereto by the prosecutor –

(i) Explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not

apparent from the charge, on what acts or omissions the charge is based; and

- (ii) Enquire 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 the acts or omissions stated in the charge or by the prosecutor;

And may, if satisfied that the accused understands the charge and the essential elements of the offence and the acts or omissions the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law.”

In short a trial magistrate is obliged to strictly observe the above laid down procedures before convicting an accused person on his own plea of guilty. The procedure to be followed was amply summarised by GUBBAY CJ in the case of *William Ndlovu v The State* SC 223/91. In that case the learned Chief Justice made it clear that the section enjoins the trial Court before convicting an accused person on his own plea of guilty to:

- (a) explain the charge and the essential elements of the offence to the accused;
- (b) Ask the accused person if he understands the charge and whether his plea is an admission of all the elements of the offence;
- (c) Record the explanation of the charge, the essential elements and any explanation the accused may give.

Unlike in the *Ndlovu* case *supra* the trial magistrate to his credit substantially complied with the need to maintain a full and comprehensive record of the proceedings. In canvassing the essential elements of the offence he however misdirected himself and went overboard resulting in a serious miscarriage of justice. The relevant portion of the record of proceeding reads as follows:

“E/E

Q. Correct on 26/08/11 you unlawfully had extra marital sexual intercourse with a girl under the age of 16?

A. Yes.

Q. You knew very well she was bellow the age of 16?

A. I was not aware.

Q. Does she go to school?

A. No.

Q. What is she doing for a leaving?

A. She is a vendor.

Q. But you could see that she was a young girl?

A. No.

Q. Did you pay lobola for her?

A. No.

Q. So you knew very well what you were doing was unlawful?

A. ~~No~~ Yes.

Q. Any right to behave in that manner?

A. No.

Q. Any defence to offer?

A. No.

~~Guilty as charged~~

PP I intend to tender medical report.

Q. Were you served with a medical affidavit?

A. Yes.

Q. Did you read it?

A. I did not read it.

Q. Why?

A. I did not have the time to read.

Q. When were you served?

A. June last year.

Q. It's almost a year now?

A. I was only shown once.”

Without much ado the affidavit was then read to the accused, tendered in evidence as an exhibit and he was then found guilty purportedly on his own plea of guilty. It is needless to

say that before an accused person can be found guilty on his own plea of guilty the court must satisfy itself that his plea of guilty is an unequivocal admission of his guilt.

The purpose of canvassing essential elements of the offence is for the court to satisfy itself that the accused is tendering a genuine plea of guilty from an informed position of his liability at law. Where an accused person pleads guilty but goes on to deny an essential element of the offence charged, the court is duty bound to alter the plea to one of not guilty and proceed to trial in the normal way. It is not the duty of the presiding magistrate to panel beat the accused into submission in order to convict the accused on his own plea of guilty as happened in this case.

It is trite that an act does not constitute guilt unless done with a guilty frame of mind. Thus in this case it was not enough for the accused to admit that he had sexual intercourse with the minor child below the age of consent. He had also to admit the mental aspect of the offence in the sense that he intentionally had sexual intercourse with the minor child well knowing that she was below the age of 16 years.

To this end s 70 (3) provides that, "It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that he or she had reasonable cause to believe that the young person concerned was of or above the age of sixteen years at the time of the alleged offence." (My emphasis).

It follows therefore, as a matter of logic and common sense that once the accused had stated that he did not appreciate that the complainant was below the age of sixteen years at the material time, he was proffering a valid defence to the charge. In legal parlance he was denying that he had the requisite *mens rea* that is to say, the necessary intention to commit the crime. At that juncture, the trial magistrate was duty bound to alter the plea of guilty to one of not guilty instead of embarking on a lengthy cross-examination of the accused apparently calculated to extort a confession from him so as to avoid the rigors of a fully fledged trial.

For that reason alone I come to the conclusion that it was a serious misdirection and fatal miscarriage of justice for the trial magistrate to convict an accused person on a plea of guilty in circumstances where he was tendering a valid defence to the charge. That being the case, the conviction and sentence cannot stand. It is accordingly ordered:

1. That the conviction and sentence be and are hereby quashed and set aside.
2. That the decision as to whether or not to prosecute the accused person on the same charge be left entirely to the discretion of the Attorney-General.

3. In the event that the accused is again prosecuted and convicted on the above charge the sentencing court must take into account the period of community service already served by the accused.

BHUNU J

MANGOTA J agrees