

THE STATE  
versus  
ZVIDZAI MANETANETA

HIGH COURT OF ZIMBABWE  
CHITAPI & DUBE-BANDA JJ  
HARARE 26 February 2020

### **Criminal review**

DUBE-BANDA J: This matter was placed before me on automatic review. The accused was arraigned before the Magistrate's court sitting in Goromonzi. He was charged with the crime of contravening section 368(1) as read with section 368 (4) of the Mines and Minerals Act [*Chapter 21:05*], it being alleged that on the 5<sup>th</sup> day of January 2020, and at Gwensay Farm Acturus, Goromonzi, the accused unlawfully prospected or searched for gold without a licence or permit in contravention of the said Act.

Section 368 (4) provides -

- Any person who contravenes subsection (1), (2) or (3) shall be guilty of an offence and liable—
- (a) if there are no special circumstances in the particular case, to imprisonment for a period of not less than two years; or
  - (b) if the person convicted of the offence satisfies the court that there are special circumstances in the particular case why the penalty provided under paragraph (a) should not be imposed, which circumstances shall be recorded by the court, to imprisonment for a period not exceeding two years or a fine not exceeding level ten.
- (5) A court sentencing a person under paragraph (a) of subsection (4) shall not order that the operation of the whole or any part of the sentence be suspended.

The accused pleaded not guilty. At the conclusion of the trial he was found guilty as charged. The trial court was unable to find any special circumstances, and in terms of section 368 (4) the accused was sentenced to an effective period of imprisonment of two years.

I have noted from the record of proceedings that the accused was not informed of his right to legal representation. The trial commenced on the 17<sup>th</sup> January 2020, and it opened in this way:-

Q. Any complaints against the Zimbabwe Republic Police?

A. No.

Q. Have you understood the charge?

A. Yes.

Q. How do you plead?

A. I don't admit.

Q. Have you understood the facts?

A. Yes.

Court: Defence outline

Provisions of s 188 (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (CPE Act) explained by court and understood. After the alleged explanation which is said to have been understood, the accused presented his defence outline.

Section 163 A (1) of the CPE Act says

At the commencement of any trial in a magistrate's court, before the accused is called upon to plead to the summons or charge, the accused shall be informed by the magistrate of his or her right in terms of section 191 to legal or other representation in terms of that section.

(2) The magistrate shall record the fact that the accused has been given the information referred to in subsection

(1), and the accused's response to it.

Section 191 of the CPE Act says "Every person charged with an offence may make his defence at his trial and have the witnesses examined or cross-examined—(a) by a legal practitioner representing him."

By operation of s 163A (1) as read with s 191 of the CPE Act, at the commencement of the trial an accused must be informed, by the court of his right to legal representation. The magistrate shall record the fact that the accused has been informed of such right and his response must also be recorded. This is a peremptory requirement.

The Constitution of Zimbabwe Amendment (No. 20) Act 2013 (Constitution) guarantees every accused person the right to a fair trial, this includes the right to legal representation. The right enacted in the s 163A of the CPE Act is procedural. The substantive right is located in s 69 of the Constitution, which provides that every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum. Therefore, the right to legal representation is a right of substance, not form, and it is the cornerstone of a fair trial. In my view, the starting point in determining the fairness of a trial, as envisaged in s 69 (1) of the Constitution, should always be whether or not the accused is informed of his right to legal representation. He must be properly informed, and his answers recorded. So that if there is a waiver of such right, it is would be an informed one.

The enquiry is whether the failure to inform the accused of his constitutional right to legal representation is an irregularity so fundamental and serious to the extent that it can be regarded as fatal to the proceedings in which it occurred. I am of the view that the failure to inform the accused of this right amounts to an irregular or illegal departure from those

formalities, rules and principles or procedure in accordance with which the law requires a criminal trial to be initiated and conducted, and that such irregularity is fatal to the proceedings. It is an irregularity so fundamental that the court must set-aside the conviction without reference to the merits, and leave the issue to the Prosecutor-General to decide whether the accused should be retried.

In conclusion, the failure by a trial court, to inform the accused of his constitutional right to legal representation, is an irregularity that is fatal to the proceedings. In terms of s 29 (2) (b) (i) of the High Court Act, [*Chapter 7:06*], I find that the proceedings in the court *a quo* were not in accordance with real and substantial justice, as a result, a substantial miscarriage of justice has actually occurred. The conviction cannot stand.

In the result, I make the following order:-

1. The conviction is hereby quashed and set aside.
2. The Prosecutor-General may in his discretion commence proceedings against the accused afresh, provided however that should the accused be convicted, the period of sentence already served must be taken into account as a portion of any new sentence which may be imposed.

DUBE-BANDA J:.....

CHITAPI J AGREES:.....