

Judgment No. S.C. 1/87

Crim. Appeal No. 502/86

JEREMIAH MUNDINGI V THE STATE

SUPREME COURT OF ZIMBABWE,  
HARARE, JANUARY 14, 1987.

Before: McNally, JA, In Chambers, in terms of s 23 of the Supreme Court of Zimbabwe Act 1981.

This matter came before me by way of an application for leave to prosecute an appeal in person against conviction. I was disturbed by several aspects of the proceedings and referred the matter to the Attorney-General for his comments. His representative has concurred with my proposed course of action and I will therefore set aside the proceedings and remit the matter for trial de novo before another magistrate. Before doing so I will set out the relevant facts and the reasons for my intervention.

The applicant was charged with 29 counts of theft by conversion. He was an Auxiliary Constable and Barman at the Police canteen, Chiredzi, and between July 1985 and June 1986 he allegedly sold, on 27 occasions Chibuku Beer, and on one occasion cigarettes, and converted the proceeds to his own use and benefit. The 29th count involved a stock shortfall.

The applicant pleaded not guilty to all these

Immediately after this defence outline the matter was stood down, perhaps because the plea was unexpected. On the resumption two weeks later, the State decided to seek admissions in terms of the provisions of section 291 of the Code. The provisions of sub-section 3 of section 291 were explained to the applicant. He then proceeded to admit that he had made a series of statements to the Police, freely and voluntarily and without undue influence. These statements amounted to admissions of the allegations against him. He agreed to the production of these statements and confirmed their correctness.

The magistrate then said and recorded the following: -

"I will therefore alter all your pleas of not guilty to guilty, and find you guilty on all counts on your own admission."

Unfortunately, in so proceeding, the magistrate made two errors, the one perhaps not important, the other however being fundamental.

He should have asked the applicant whether in view of his admissions he wished to change his plea. However, the magistrate may be forgiven for assuming that the applicant's conduct could mean only that he wished to change his plea.

The more important failure was the failure to follow the procedure on a plea of guilty laid down by sections 255(2)(b) 255(3) of the Code.

It is particularly important in a charge of theft by conversion to explain the essential elements, because it is not impossible that an accused person in circumstances like these will think he is guilty simply because money for which he is responsible has disappeared. It is important therefore to ensure that he is not pleading guilty simply because the money was his responsibility or because he was negligent, or believes he cannot disprove his negligence.

I do not say that these comments are necessarily applicable in the present case. But my unease is not dispelled by the wording of the 29 "confessions" which are all very brief and amount to a statement that "I sold the goods and used the money in question". Those words do not to my mind demonstrate unequivocally an intent to steal.

Finally, it seems to me, and to the Attorney-General's representative, that for the theft of some \$3 000, a sentence of 24 years' imprisonment, even when reduced by various devices to 5 and a half years' effective imprisonment, is excessive. For this, among other reasons, I have decided, despite the fact that the applicant has not sought leave to appeal against conviction on count 29, to set aside the proceedings as a whole.

Accordingly, with the concurrence of my brother GUBBAY, and with the already indicated agreement of the Attorney-General, I make the following order:

1. The convictions and sentences are set aside:
2. The matter is remitted for trial before a different magistrate

3. The accused should be invited to plead afresh;
4. If he pleads not guilty, the proviso to section 255<sup>^</sup> of the Code shall apply to the admissions already recorded subject of course to any further evidence or explanation which may be given;
5. If the accused is convicted, any period he has already spent in prison shall be taken into account.

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