

THE STATE  
versus  
WITNESS BONDE

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 7 August 2017

### **Criminal Review**

MUSAKWA J: The scrutinizing regional magistrate addressed a minute to the Registrar in which he highlighted some irregularities in the proceedings. Following an exchange between the scrutinizing regional magistrate and the trial magistrate, the latter conceded the anomalies that were highlighted to him.

The background is that the accused person was charged with one count of contravening s 3 (1) (a) as read with s 4 of the Domestic Violence Act [*Chapter 5:16*] and another count of contravening s 140 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The accused pleaded guilty to both counts but in the course of canvassing essential elements in the second count, the plea was altered to that of not guilty. Ultimately the accused was convicted of the first count and acquitted of the second count. In acquitting the accused on the second count the court reasoned and ruled thus-

“Accused is acquitted on a technicality. He was charged under s 140 (a) instead of s 140 (b) of the Codification (*sic*).  
Verdict : Count 2- Not Guilty.”

In respect of the first count the accused was sentenced to 4 months’ imprisonment of which 3 months’ imprisonment was suspended for 5 years on condition of good behavior. The remaining 1 month was suspended on condition of performing 35 hours of community service.

The facts of the second count were that the accused and the complainant are residents of Marondera. The accused person is a tenant of the complainant. On 9 March 2017 the accused’s daughter locked him inside the house as he was being violent towards his wife. In fact, count one relates to assault that was committed against the wife. The accused person then broke the door and lock and went outside. The damage inflicted was worth \$85.

When trial proceeded on the second count the accused outlined his defence, which was to the effect that he pulled the door with force as he wanted to take a breather. He did not want to continue quarrelling with his wife. He further stated the following-

“I have spoken to the landlady and I promised to repair the door. I’m staying in the house in question. I am not denying anything. I want to maintain good relations with the landlady. I ask the court to forgive (sic) for offence I committed. I want to repair damage I caused.”

The prosecutor applied to seek admissions from the accused in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. After permitting so the court then proceeded to ask the accused person the following questions-

“Q - Do you admit you reside at complainant’s house?

A - Yes.

Q - Do you admit that on the day in question you were locked inside that house?

A - Yes.

Q - Do you admit that you forcefully opened door from inside?

A - Yes.

Q - Do you admit that there was real risk that the door could be damaged as a result of your conduct?

A - Yes.”

After this the state closed its case. The court recorded that s 199 of the Code (sic) was explained to the accused. The accused person stated that he did not want to take the oath but would tell the truth. When the prosecutor was invited to cross-examine he or she declined to do so. The accused person then stated that he did not intend to hurt the complainant’s feelings as he simply wanted to go out. Following that the defence case was closed and the court gave its brief judgment.

The scrutinizing regional magistrate flagged a number of issues. These are:

- 1) Whether the trial court explained to the accused that he was not obliged to make any admissions and the consequences of making any admissions.
- 2) Whether the accused understood the explanation that was given in respect of s 199 and whether it was not necessary to record the explanation. Related to this was why the trial court did not explain s 198, subsections (7), (8) and (9).
- 3) Whether the accused was given the opportunity to testify or to adopt his defence outline as his evidence.
- 4) When the accused declined to take the oath, why the trial court did not proceed in terms of s 250 (1) or s 251.
- 5) Why the court did not ask the prosecutor to explain the decline to cross-examine.
- 6) Why the record did not reflect that the accused was acquitted.

7) Whether sections 140 (a) and 140 (b) create two separate offences and whether it was proper to acquit the accused on the stated technicality.

8) If the two are separate offences, why the court did not invoke s 274 of the Criminal Code.

Section 314 of the Criminal Procedure and Evidence Act provides that-

“(1) In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact.

(2) If he considers it desirable for the purpose of clarifying the facts in issue or for obviating the adduction of evidence on facts which do not appear to be in dispute, the judge or magistrate may, during the course of a trial and on application by the prosecutor, the accused or his legal representative ask the accused or his legal representative or the prosecutor, as the case may be, whether any fact relevant to the issue is admitted in terms of this section.

(3) Subject to this Act, an accused who is not represented by a legal practitioner shall be warned that he is not obliged to make any admission.”

In the case of *S v Makhado* 1999 (1) ZLR 467 (HC) GELLESPIE J made the following incisive observations at 470-471-

“The admissions sought and obtained from the accused are formal admissions as opposed to informal ones. That is to say, they are admissions of fact made in response to formal requests, as opposed to concessions contrary to his interest made by the accused in the course of his evidence. The former, once made, constitute proven fact concerning which no evidence need be led. The latter are evidence, to be accorded whatever weight is proper, of the circumstances acknowledged. The formal request for an admission is a procedure appropriate only to a plea of not guilty. It constitutes a departure from the fundamental principle *nemo tenetur se ipsum accusare*, a departure permitted by statute. It follows that such a departure will be tolerated only within the circumstances ordained by statute and that the statute will be restrictively construed.

The provisions of statute are that:

"if he considers it desirable for the purpose of clarifying the facts in issue or for obviating the adduction of evidence on facts which do not appear to be in dispute, the judge or magistrate may, during the course of a trial or preparatory examination and on application by the prosecutor, the accused or his legal representative ask the accused or his legal representative or the prosecutor, as the case may be, whether any fact relevant to the issue is admitted in terms of this section."

If an accused is unrepresented then he must be warned that he need not do so before being asked to admit a fact. Of course, an accused may volunteer a formal admission without being requested to do so but concessions in defence outlines or evidence ought not to be construed as such and never in the case of an unrepresented accused who has not been warned.”

In the present case the trial magistrate conceded that the provisions of s 314 were not explained to the accused person. He also conceded that he did not maintain a comprehensive record of proceedings, despite it being a mandatory requirement.

Concerning the scrutinizing regional magistrate’s query on whether the accused was given an opportunity to testify or to adopt his defence outline as his evidence, this approach has been criticized as being unfair to an accused person. Again in *S v Makhado* at 473-474 GILLESPIE J made the following remarks-

“I have also intimated criticism of the manner of adducing the accused's evidence. It has come to the attention of the superior courts that the procedure in criminal trials in the magistrates courts is degenerating into an insidious perversion of accepted procedure. The ancient right of an accused to

remain silent has been considerably altered by statute. An accused, after pleading to a charge and hearing an outline of the state case, is effectively obliged to make a "statement outlining the nature of his defence and the material facts on which he relies". I say "effectively obliged" because failure to do so, or omission of a material averment, in the absence of reasonable explanation, justifies an inference adverse to the accused.

This diminution of the right to silence is designed to curb the evil of an accused, falsely tailoring a defence to meet the evidence as it unfolds. The procedure really ought to be strictly controlled so as to further that legitimate aim without putting unfair compulsion on the accused. Thus, it is unfair to impose upon an accused a greater standard of accuracy and detail in outlining his defence than is expected of the State in its outline. Yet, that is precisely the unintended result of the dictum of KORSAN JA, who, when cautioning against too strict an approach to a State outline, said that since it is:

"often a précis of the testimony of the State's witnesses, often compiled by a policeman with no legal training (as opposed to the defence outline being a categorical assertion by the accused person of facts upon which he relies for his defence) the divergence between the State outline and the testimony of a State witness must be so gross as to be utterly unreasonably, so as to invite an adverse conclusion."

One sees the sparsest, and on occasion most contradictory, of State outlines pass without question by an unrepresented accused (and worse, by a magistrate) and an accused questioned in parsing detail on the most innocuous divergences in evidence from his defence outline.

The consequence of this tendency to demand more and more of the accused in admitting his defence is that the invariable practice in the magistrates courts is now to take a full discursive and unsworn narration of events from the accused, down to the finest detail, before the State leads evidence. Then, once the State case is closed, the accused is driven, by a series of questions such as those suggested by the record in this case, to "adopt the defence outline as his evidence in chief". The sole justification for this apparently being the tedium avoided by not having to listen to the same story all over again. Having done thus, the accused is then immediately exposed to cross-examination, which can frequently be expected to bring to light some new details. Upon these, the prosecution then pounces. There typically follows a string of questions, "Why was this not said in the defence outline ... the evidence in chief ..." and so on. Badgering the accused.

This sort of procedure is simply not found in the High Court. I know of no judge who would tolerate it. It is conducive to a serious denial of the right to silence. It exposes the accused to unequal treatment vis-à-vis the State. It either requires him to give too much detail in a defence outline or lures him into giving inadequate and incomplete testimony. It does not afford him the opportunity of giving evidence in his own words in answer to the State evidence. It obscures the incidence of the onus. It creates an inquisitory and inequitable proceeding differing toto caelo from the intent in the legislative changes mentioned above.

For this reason, as the practice has spread its infection, it has been criticised by the Supreme Court. In criticism of a magistrate for this course, the following has been said:

"His method of letting the appellant give his evidence-in-chief was simply to ask if he adhered to the defence outline and confirm he had nothing to add to it. This might be convenient to the court, but is not a satisfactory way of allowing an unrepresented accused to conduct his

defence. It is bound to lead to confusion, and accusations of omitting things, as indeed happened here."

In this court too, the practice has been condemned.

"To ask an accused if he has anything to add or subtract from his defence outline is not another way of asking him to give evidence ... [T]he question may be construed as an invitation to amplify or correct errors in his defence outline. It must be borne in mind that before he gives his defence outline the provisions ... which require the accused to outline the material facts were explained to him ... When it came to the defence case it should have been explained to the accused that the time had come for him to give evidence under oath to give flesh and blood to the skeleton of his defence. It was equally wrong in my view, to ask if the accused wishes to adopt his defence outline as his evidence-in-chief. His defence outline is no more than a summary of the facts upon which he relies. It is not a full account of the accused's defence."

Concerning the issue of the accused declining to take the oath, in his minute to the scrutinizing regional magistrate, the trial magistrate stated that he explained the significance of an oath to the accused. However, he again conceded that this was not recorded. Section 5 (1) of the Magistrates Court Act [*Chapter 7:10*] provides that every court is a court of record. What that plainly entails is that the proceedings before the court must be recorded. Failure to maintain a comprehensive record of proceedings is an act of gross irregularity. There was not even an indication that the court made any explanation to the accused person in that regard.

As regards why the accused did not take an affirmation, the trial magistrate commented that-

"The court took it that the accused had affirmed that he will tell the truth when he said;  
"I do not want to take the oath but I will tell the truth."

Section 250 of the Criminal Procedure and Evidence Act provides that:

"(1) In any case where any person who is or may be required to take an oath objects to do so, it shall be lawful for such person to make an affirmation in the words following:— "I do truly affirm and declare that" (*here state the matter to be affirmed or declared*).

(2) An affirmation or declaration made in terms of subsection (1) shall be of the same effect as if the person making it had taken an oath.

(3) Every person authorized, required or qualified by law to take or administer an oath shall accept in lieu thereof an affirmation or declaration made in terms of this section.

(4) The same penalties, punishments and disabilities which are respectively in force and are attached to any refusal or false or corrupt taking or subscribing of any oath administered in accordance with section *two hundred and forty-nine* shall apply and attach in like manner in respect of the refusal or false or corrupt making or subscribing respectively of any such affirmation or declaration as in this section mentioned."

Whatever the accused said did not amount to an affirmation. In any event the accused was not even told that he could make an affirmation in lieu of an oath. This amounted to an irregularity.

I do not think that the trial magistrate can be faulted for not asking the prosecutor why he or she did not want to cross-examine the accused. The prosecutor is *dominus litis* and is empowered to stop the prosecution at any stage before conviction. See s 8 of the Criminal Procedure and Evidence Act. However, if a trial magistrate thinks there is impropriety in the manner in which a prosecutor has conducted himself, this can be highlighted in the judgment, and additionally this may be brought to the attention of the Prosecutor In-Charge or the National Director of Public Prosecutions. Thus ineptitude on the part of the prosecutor can lead to an acquittal, but the manner in which he goes about his business should not be of concern to a court unless it is tainted with impropriety. I do not think the court should take to task a prosecutor who decides not to cross-examine. Any prosecutor who knows the purpose of a criminal prosecution should know the consequences of failing to cross-examine.

Concerning the charge of malicious damage, s 140 of the Criminal Law (Codification and Reform) Act provides that-

“Any person who, knowing that another person is entitled to own, possess or control any property or realising that there is a real risk or possibility that another person may be so entitled, damages or destroys the property—

(a) intending to cause such damage or destruction; or

(b) realising that there is a real risk or possibility that such damage or destruction may result from his or her act or omission;

Shall be guilty of malicious damage to property, and liable to—

(i) a fine not exceeding level fourteen or not exceeding twice the value of the property damaged as a result of the crime, whichever is the greater; or

(ii) imprisonment for a period not exceeding twenty-five years; or both.”

It is evident that the offence can be committed with actual intention (s 140 (a)), or recklessly (s 140 (b)). In this respect see sections 13 and 15 of the Code. Realization of real risk or possibility replaced the common law principle of constructive intention. In this respect see s 15 (4). The actual averments of the charge against the accused person related to realization of real risk or possibility although the citation was s 140 (1) (a) instead of s 140 (b). This certainly was a minor imperfection. Therefore the technical error would not have warranted an acquittal. Nonetheless, whether or not it was proper to acquit was already tainted by the procedure through which admissions were sought from the accused person. That means invoking s 274 of the Code would not have mattered. The provision in question states that-

“Where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he or she committed the crime charged.”

At the end of it all, a review of these proceedings in as far as the acquittal of the accused is concerned does not arise. The learned regional magistrate should have confined himself to the provisions of s 58 (1) of the Magistrates Court Act which provides that-

“(1) Where any court, other than the court of a regional magistrate, sentences any person—

(a) to be imprisoned for any period exceeding three months but not exceeding twelve months;

or

(b) to pay a fine exceeding level four but not exceeding level six;

the clerk of the court shall forward to a regional magistrate, not later than one week next after the determination of the case, the record of the proceedings in the case together with such remarks, if any, as the magistrate may desire to append:

Provided that—

(i) where any of the evidence in the case has been taken down in shorthand writing or recorded by mechanical means, it shall, unless the magistrate otherwise directs, be a sufficient compliance with this subsection if the clerk of the court forwards to the regional magistrate the manuscript notes of such evidence made by the magistrate in accordance with the rules;

(ii) this subsection shall not apply in relation to—

(a) any person—

(i) who is represented by a legal practitioner; or

(ii) which is a company as defined in the Companies Act [*Chapter 24:03*];

(b) any person who has made a request in terms of subsection (3) of section *fifty-seven*;

(c) a conviction and sentence in terms of subsection (1) of section 356 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. ”

The learned regional magistrate should have confined himself to the first count which is the reason why the proceedings came before him. Apart from the other procedural improprieties that have been discussed, the issue of whether the accused was incorrectly acquitted was for the Prosecutor General to consider.

The issue of the wording of the verdict is of no consequence. It cannot be said that a verdict of not guilty is not an acquittal. As pointed out by the trial magistrate s 198 (3) of the Criminal Procedure and Evidence provides that-

“If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.”

The record of proceedings is accordingly returned to the regional magistrate to attend to the first count in terms of s 58 (1) Magistrates Court Act.