Judgment No. HB 127/05
Case No. HC 2173/05
CRB TSH 403/04

THE STATE

Versus

JABULANI MKANDLA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 8 DECEMBER 2005

Criminal Review

NDOU J: The accused was charged with the crime of malicious injury to property. He was unrepresented by a lawyer. He was convicted on his own plea of guilt by a Tsholotsho magistrate.

On review, I picked up that the accused was described in the state outline, *inter alia*, in the following terms "the accused whose mental state is unstable." I queried whether the accused was dealt with pursuant to the provisions of the Mental Health Act 1996 [Act 15 of 1996]. The trial magistrate responded by stating that the public prosecutor did not apply for the examination of the Mental Health Act. Further, he opined that the accused "did not appear to be insane to me" so he did invoke the provisions of the Act. He further said the accused did not raise defence of insanity. He further stated "the accused who appeared to be a vagrant and was staying alone out of sight of a person who was unstable in mind by the police. No evidence really showed that he was not of a sound mind. In any event if I recall very well the prosecution had asked for

a deletion of that phrase. I think if my memory saves (*sic*) me well I should have forgotten to

do so. I was actually shocked that it got to the Honourable Justice in that state."

I was not satisfied with the explanation given by the trial magistrate. First, because the accused was unrepresented the trial court had an obligation to assist him in ascertaining whether the provisions of the Mental Health Act are applicable to the facts of this case. It is an essential element of a fair criminal trial that the accused is made aware of his rights so that he does not make mistakes of a technical nature to his detriment – *R* v *Muchena* 1966 RLR 731 at 736; *S* v *Musindo* 1997(1) ZLR 395(H) and *Gomera* v *S* HH-92-02. Second, the opinion of the trial magistrate is not based on any sound legal or medical foundation. He arrived at his opinion from a brief observation from the dock. The police investigating the matter (whose opinion the trial magistrate overruled) had the accused in their custody for a longer period of time from his arrest, recording of his statement and bringing him to court. They had a better opportunity to observe his mental state than the trial magistrate.

I sought the views of the Attorney General in this matter. The Attorney-General does not support the conviction and has stated *inter alia*:-

> "The explanation supplied by the presiding magistrate in this mater, is by far and large totally unsatisfactory and unconvincing. The magistrate, when going through the plea recording omitted to include that he had queried from state counsel the phrase contained in the state outline "the accused whose mental state is unstable," in the record. If, he had queried it, why was it not included on the record? This was a very serious misdirection by the magistrate, who should have known that such a phrase, could have meant the accused lacked criminal capacity. If indeed the prosecutor had requested for a deletion why was this not included in the record. These were all serious mis-directions by the magistrate, who
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> appears not to have applied his mind fully and properly to the matter.
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> Since, the accused has already been convicted and it appears that the magistrate grossly misdirected himself, it is respectfully submitted that his Lordship set aside the verdict on review and have the accused medically examined in terms of section 28 of the Mental Health Act. The magistrate was clearly not entitled to arrive at such a conclusion on the accused's mental state".

I agree with the Attorney-General. However, the accused has already served the sentence imposed. In the circumstances the only appropriate course is to decline to certify the proceedings. Accordingly, I withhold my certificate.

Cheda J ..... I agree