STATE

versus

GIVEMORE MAZAMBANI

HIGH COURT OF ZIMBABWE

UCHENA AND CHITAKUNYE JJ

HARARE, 28 November 2012.

**Criminal Review**

UCHENA J: The convicted person pleaded not guilty but was convicted on a charge of theft as defined in s 113 (1) (a) of The Criminal Law (Codification and Reform) Act [*Cap* *9:23*]. He was jointly charged with two others who were acquitted at the end of the trial. The record of proceedings was forwarded to a Regional Magistrate for scrutiny. It was placed before the Senior Regional Magistrate Harare, who raised issues of record keeping and compliance with the provisions of s 198 (6) and 199 (1) of the Criminal Procedure and Evidence Act [*Cap 9:07*] (The CP&E Act) with the trial magistrate.

The issue of record keeping was on the review cover indicating that the convicted person’s co-accused had been convicted and sentenced as was the convicted person. The issue of compliance with the provisions of s 198 (6) and 199 (1) of the CP&E Act was on there being no record in the record of proceedings that these provisions had been explained to the accused persons.

In his response to the issues raised by the Senior Regional Magistrate the trial Magistrate said;

“I indeed explained the accused’s rights in respect of s 198 and 199, however, I erred in that I did not endorse this on the record of proceedings. I overlooked that the other accused persons had been included on the scrutiny cover. Next time I will check my scrutiny cover before submitted my work.”

The Senior Regional Magistrate was not satisfied by the trial Magistrate’s response. He forwarded the record of proceedings to this court for guidance, with the following comments;

“I queried whether the trial Magistrate complied with the provisions of s 198 (6) of the Criminal Procedure and Evidence Act, [*Cap 9:07*] and checked with the accused person whether “it was intended to adduce evidence for the defence and whether he intended himself to give evidence”

The relevant information is not part of the record and worse still there is no mention of the court’s compliance with the peremptory provisions of s 198 (6) of the Criminal Procedure and Evidence Act [*Cap 9:07*] on p 15 of the trial notes;

While the trial Magistrate claimed not to have endorsed the explanation to the accused person only, it is noticeable that the court did not ask the accused the relevant questions. None of the accused persons told the court that they had no witnesses to call before they closed their respective cases.”

I am not persuaded to accept that the accused could have been convicted before he was given the chance to call defence witnesses (if any).

I seek your guidance:”

**Record Keeping.**

This review raises two issues on record keeping. Failure to submit a correct record for review and failure to maintain an accurate record of the trial, if the magistrate’s claim that he complied with s 198 (6) is to be believed. The later is more critical as it has an effect on whether or not real and substantial justice has been done.

The Magistrate’s Court is a court of record. Section 5 (1) and (2) of the Magistrate’s Court Act [*Cap 7:10*] provides as follows;

“(1) Every court shall be a court of record

(2) Subject to this Act and except as provided in any other law-

(a) ------------

(b) the records of the proceedings of the court shall be kept in the English

Language and shall be accessible to the public under the supervision of the

clerk of the court at all convenient times and upon payment of such fees as

may be prescribed in rules;”

The trial court was therefore duty bound to keep an accurate record of the proceedings and of the scrutiny cover. The record of proceedings must be considered by the scrutinizing Regional Magistrate and reviewing Judge, as it appears and not as the trial Magistrate interprets it on inquiry being made. In this case the proceedings were initially sent for scrutiny as the magistrate’s manuscript notes without any remarks from the trial magistrate, as per s 58 (1)’s proviso of the Magistrate’s Court Act.

Members of the public who have access to the record of proceedings will understand the proceedings as per the record. It is therefore important that judicial officers presiding over courts of record keep an accurate record of the proceedings.

A court record should tell the whole story of what happened during the trial. It can not be supplemented by an explanation from the trial magistrate, on details which should be in it. MUCHECHETERE J as he then was commenting on record keeping in the case of *S* v *Ndebele* 1988 (2) ZLR at 254 C – G said;

“All courts are courts of record and are required to keep full and comprehensive record of all proceedings. The proposition is self-evident and accords with reason and justice. In *S* v *Besser* 1968 (1) SA 377 (SWA), the court held that a failure to keep a proper record of any proceedings or any part thereof amounted to a gross irregularity cognizable under the court’s powers of review as envisaged in provisions such as s 27 (1) (c) of the High Court Act No. 29 of 1981. In addition s 163 (4), 190 and 255 (3) of the Code compel him to record those matters mentioned in them.

See also: *S* v *K* 1974 (3) SA 857 (C); *R* v *Khumalo* 1947 (4) SA 156 (N); *R* v *Sikumba* 1955 (3) SA 125 (E) at 128; *S* v *Maxaku* 1973 (4) SA 248 (C ); *Pheiffer* v *Landdros*, *Warrenton* 1977 (4) SA 127; *R* v *Parmanand* 1954 (3) SA 833 (A); and *R* v *Neto* 1965 RLR 656.

The need to do so is quite obvious. In the absence of such a record how is a review or appellate tribunal to assess the correctness and validity of any proceedings placed before it for adjudication? The instant case is an eloquent expression of the importance of such a rule and the necessity for strict compliance therewith.

The rationale for the rules prohibiting review and appellate tribunals from having recourse to matters extraneous to the actual record becomes clear, as does the prohibition against the correction, and reconstruction of records except in accordance with defined rules and in only exceptional cases. See *S* v *Mavuma* 1964 (1) SA 369 (N); *S* v *Brandt* 1972 (4) SA 70 (NC); *S* v *Booi G* 1972 (4) SA 68 (NC); *S* v *Mtetwa & Ors* 1964 (4) SA 29 (N); *S* v *K supra*; *S* v *Mkize* 1962 (2) SA 457 (N); Ex p Magade: in re *R* v *Mugade* 1948 (1) SA 109 (E).”

In the case of S v Davy 1988 (1) ZLR 386 at 393 C – E GUBBAY JA (as he then was) said;

“Before concluding on this aspect, I wish to sound a note of warning to judicial officers who find themselves, presiding at a trial in which the facility of a mechanical recorder is no available. **It is their duty to write down completely, clearly and accurately, everything that is said and happens before them which can be of any relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says. They must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done.** See *R* v *Sikumba* 1955 (3) SA 125 (E) at 128E – F; *S* v *K* 1974 (3) SA 857 (C) at 858 H. a failure to comply with this essential function, where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction.”

See also the cases of In Re E.T & Ors 1992 (1) ZLR 300 at 302 G to 303 C (H), In Re Eight Juveniles 1998 (1) ZLR 362 at 363 B – E and *S* v *Manera* 1989 (3) ZLR 92 at 94 F.

In view of these authorities it is apparent that the trial magistrate erred by failing to maintain an accurate record of the proceedings and of the review cover. As already said the inclusion of the convicted person’s co accused who were acquitted at the end of the trial on the review cover was not proper, as their case was not subject to scrutiny. This however is not fatal as is does not affect the convicted person’s conviction. Only cases referred to in s 58 (1) of the Magistrate’s Court Act, are subject to scrutiny.

**Effect of not recording what happened as required by s 198 (6) of the CP&E Act**

In his response the trial magistrate conceded that he did not record his explanation of the provisions of s 198 (6) and 199 (1) of the CP&E Act to the convicted person. He also did not record the convicted person’s responses to such explanations and questions related to them if they were given or asked. The record is therefore silent about this crucial part of the convicted person’s trial.

Section 198 (6), (8) and (9) and s 199 (1) provides as follows;

“(6) Subject to subs (3), at the close of the case for the prosecution the court shall-

1. Ask the accused or, if he is legally represented, his legal representative

whether it is intended to adduce evidence for the defence and whether the accused intends himself to give evidence; and

1. If the accused is not legally represented, inform him of the provisions of the

proviso to subs (8) and of subs 9 and of sub (1) of s *one hundred and ninety-nine*.

(7) -----------

(8) Subject to Part XIVA, any witnesses called for the defence shall be examined by

the accused or his legal representative and the accused, if he gives evidence

himself, shall be examined by his legal representative, if any, and the accused or

his legal representative shall put in and read any documentary evidence which

may be admissible:

Provided that no evidence shall be adduced for the defence before the accused is

called to give evidence or is, in terms of subs (9), questioned by the prosecutor or

the court, unless the court in its discretion otherwise allows.

(9) If the accused declines to give evidence, the prosecutor and the court may

nevertheless question him and, if the accused is legally represented, his legal

representative may thereafter question him subject to the rules applicable to a party re-examining his own witness.

199 (1) If an accused who gives evidence or is questioned in terms of subs (7), (8)

or (9), as the case may be, of s *one hundred and ninety-eight* refuses to answer any

question, he shall be asked to give his reasons for so refusing and, if he persists in

his refusal, the court, in determining whether the accused is guilty of the offence

charged or any other offence of which he may be convicted on that charge, may,

unless satisfied that he had just cause for so persisting, draw such inferences from

the refusal as appear proper and the refusal may, on the basis of such inferences,

be treated as evidence corroborating any other evidence given against the

accused."

The convicted person in this case was not legally represented. The record of proceedings on p 1 indicates that he was acting in person. He should therefore have been asked if he intended to adduce evidence for the defence and if he himself intended to give evidence. As an unrepresented accused he should have been asked these questions in digestible portions. Two questions should have been asked and answered on this aspect. The provisions of s 198 (8), (9) and 199 (1) should have been explained to the convicted person. The fact that such explanations had been given should have been recorded. The convicted person should then have been asked if he understood the explanations. His answer to that question should have been recorded.

The record of proceedings indicates that when the state closed its case the convicted person was sworn and asked the following questions.

“Q Do you remember what you said in your defence outline

A Yes

Q Do you abide by it

A Yes

Q Any variations

A No

Defence outline adopted as evidence in chief Cross exam”

This means the explanations and the questions referred to above were not given or asked as the court started the defence case by administering the oath and asking the convicted person questions about his defence outline and its adoption as his evidence in chief.

There is no indication that he was informed of the provisions of s 198 (8) and (9) and s 199 (1). The absence of such explanations and warnings from the record are indicative of how the trial proceeded.

I am aware of the trial magistrate’s attempt to place them on record through his response to the Regional Magistrate’s inquiry. That in my view is not a permissible way of reconstructing or correcting a record. It also boggles the mind how a magistrate who hears several cases per day can recall what happened in a particular case two months later on being questioned by a scrutinizing Regional Magistrate. A scrutinizing Regional Magistrate or reviewing Judge can not rely on such a belated and unprocedural reconstruction or correction of the record. In the case of *S* v *Ndebele* (*supra*) at p 254 E to 255A MUCHECHETERE J as he then was) dealt with the prohibition against; review and appellate tribunals from having recourse to matters extraneous to the actual record and the prohibition against the correction, and reconstruction of records except in accordance with defined rules and only in exceptional cases.

The failure to explain the provisions of s 198 (6) to the convicted person is apparent. I do not accept the magistrate’s explanation. There were therefore gross irregularities in these proceedings. The convicted person gave his defence case without the statutory explanations and warnings he was entitled to be given. He can not in those circumstances be said to have properly defended himself.

John Reid Rowland in his book “Criminal Procedure in Zimbabwe” at p 16-34, commented on the court’s duties in terms of the provisions of s 198 (6) of the CP&E Act as follows;

“This procedure is mandatory. The failure to ask the accused whether he wishes to give evidence is an irregularity necessitating the setting aside of a conviction, though in proper cases an appeal court may remit the matter for the correct questions to be put. The failure to explain to an accused who has misunderstood his right to give evidence or the other courses open to him, what his rights really are is also an irregularity justifying an appeal court in setting aside the conviction. The fact that the accused has been informed of these matters should be recorded; it has been held a fatal irregularity not to record this fact.”

See also the cases of *R* v *McDonald* 1964 RLR 124 (A). *Nyikadzino* v *A-G* 1964 RLR 543 (A); *R* v *Simon* 1948 SR 7; *S* v *M & Ors* 1975 (2) RLR 270 (A); *R* v *Rushinga & Ors* 1947 SR 1; and *R* v *Barnard* 1951 SR 215, which were referred to by John Rowland in the above quoted passage.

It is therefore apparent that the trial court committed several fatal irregularities. The convicted person’s conviction and sentence must be set aside. The failure of this trial is attributable to the trial magistrate’s failure to comply with the trial procedures laid down by statute. The case must therefore be remitted back to the magistrate’s court for trial de novo before a different magistrate.

The convicted person’s conviction and sentence are set aside. The case is referred back to the magistrate’s court for trial de novo before a different magistrate. Should the convicted person be convicted at the subsequent trial the portion of the sentence he has already served should be taken into consideration in passing sentence.

CHITAKUNYE J concurs ---------------------------------------