

THE STATE  
versus  
HILLARY RUDOLPH

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE, 15 December 2004

### **Criminal Review**

BHUNU J: The accused was convicted on his own plea of guilty on a charge of housebreaking with intent to steal and theft. He was sentenced to 20 months imprisonment of which 6 months imprisonment was suspended on the usual conditions of good behaviour.

When presiding over the case the trial magistrate did not keep a comprehensive accurate record of the proceedings as he is required to do by law.

All what the magistrate did was to scribble a few unintelligible notes leaving blank pages which he intended to fill in later after the proceedings. He however never brought himself up to fill in the blank spaces. The record of proceedings was forwarded for review with 1½ blank pages.

Section 271 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] requires and directs the trial magistrate to keep an accurate and comprehensive record of the proceedings where the accused tenders a plea of guilty.

Under subsection 3 it provides that:-

“(3) Where a magistrate proceeds in terms of paragraph (b) of subsection (2)

- (a) the explanation of the charge and the essential elements of the offence and
- (b) the statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and
- (c) the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and
- (d) any statement made to the court by the accused in connection with the offence to which he has pleaded guilty: shall be recorded.” (my emphasis)

Section 5(1) of the Magistrates Court Act [*Chapter 7:10*] provides that, “5(1) Every (Magistrate) Court shall be a court of record.” (my emphasis)

The long and short of it all is that every trial magistrate is duty bound to record the proceedings before him with assiduous care and diligence. See *S v Chirodzero* HH 14-88.

There has been a furore of judgments from the superior courts on this point and yet some magistrates still continue to flagrantly disregard their sworn duty. In the case of *S v July Moyo and 7 others* HB 15-93 CHEDA J as he then was had occasion to remind magistrates that:-

“The confirmation procedure and the putting of essential elements to the accused and the recording of replies given is the most important part of the proceedings where an accused person has pleaded guilty.

The questions put and the replies given should be recorded to reflect what elements were put to him and what answers he gave to show that he admitted all the essential elements.

This is not a very long process and there is no excuse for not recording the questions and answers with sufficient clarity.”

There is therefore no substance in the trial magistrate’s lame excuse to the effect that his dereliction of duty was due to pressure of work.

The trial magistrate left blank pages to be filled in after the trial in his office. This in effect amounted to a serious irregularity. In the case of *S v Sailos Ndlovu* HH 219-2003.

UCHENA J was at pains to give guidance to magistrates as to when the recording must take place. In his own words he had this to say:-

“Judicial officers in that court should keep an accurate record of proceedings. The recording should take place during the proceedings.” (my emphasis)

Thus failure to record the proceedings contemporaneously and accurately amounted to a serious irregularity which vitiates the proceedings.

In his response the trial magistrate confessed that he inadvertently forwarded the record of proceedings for review without filling in the blank pages. This betrays a casual approach to one’s judicial responsibilities if not gross dereliction of duty.

Had the trial magistrate taken the trouble to look at the case of *S v Killian Mafukidze* HB 56-92 it would have dawned on him that it was his responsibility to check and ensure that the record was complete and in order before submitting it for review. This the trial magistrate did not do.

Review and appeal procedures are safety devices meant to protect litigants against incorrect or irregular proceedings emanating from lower courts and tribunals. Failure to keep

comprehensive and accurate records of proceedings has the undesirable effect of subverting and undermining the due administration of justice which every judicial officer is sworn to achieve.

Undoubtedly this case is fraught with serious procedural irregularities warranting the intervention of this court on review. But because of administrative hick-ups and delays the accused must by now with remission have completed serving the sentence. Despite that fact it is necessary to set aside the proceedings if only for the purpose of putting the record straight.

It is accordingly ordered:-

- (1) That the proceedings in this case be and are hereby quashed and set aside.
- (2) That as the accused has completed serving the sentence it shall not be necessary to charge him again with the same offence.

BHUNU J.....

UCHENA J, agrees:.....