THE STATE

Versus

MBEKEZELI BHEBHE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 26 JULY 2007

Criminal Review

NDOU J: The accused was convicted on his own plea of guilty on a charge of theft by a Bulawayo Magistrate. The summary trial was conducted pursuant to the provisions of section 271(2)(b) of the Criminal Procedure and Evidence Act [Cap 7:10]. The learned scrutinising Regional Magistrate queried the propriety of the conviction and addressed a minute to this court in the following terms:

> "On scrutiny I noted with increased concern that this is the sixth record where in plea recording the trial magistrate puts questions to accused and no response is recorded. In this particular case the following questions were put:
>
> Question: Anything to add or subtract (from the facts)?
> Question: Correct you are employed at Bakers Inn as a driver?
> Question: Correct on 22 November 2005 you drained 10 litres of diesel from the truck your were driving?
> Question: Any defence?"

I queried why he continuously makes the same mistake. In his response he stated that the learned Regional Magistrate is assured that the questions will have been put to the accused persons and answered by them. However, the trial magistrate erred in failing to record the answers, he explained. He promised and undertook to stop making the same error again. The trial magistrate did not explain why if the questions are answered by accused he fails to record the answers to these questions. There is no way the Regional Magistrate, the High Court Judge or any other reader of the record can be assured that the accused answered the recorded questions when no recorded answers exist on the record. This explains why it is called a record. To record in these circumstances is to write and write all what has transpired in that matter. If no answer is recorded how can it be known that an answer was given? It is not a matter of the trial magistrate being trusted. It is a matter of trial magistrate complying with the requirements of law and regulations. The trial magistrate can only be trusted if what is recorded on the record of proceedings shows all what transpired in court …"

I agree with the learned Regional Magistrate's observations. Section 271(3) of the Criminal Procedure and Evidence Act, *supra*, provides:

"(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) any 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 the 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"

The matters referred to in subsection (3) of section 271, *supra*, should be recorded accurately – *S* v *Mhondiwa* 1976(1) RLR 134 (GD) at 135H to 136A.

In *Criminal Procedure in Zimbabwe*, John Reid Rowland at 17-5 the trial court's duties in this regard are captured by the learned author as follows:

"(i) Accused not legally represented

The magistrate must carefully explain the charge and the essential elements of the offence to the accused. If the acts or omissions on which the charge is based are not sufficiently apparent from the charge itself, the court must require the prosecutor to state what the acts or omissions are. In particular, the magistrate must explain those aspects of essential elements which involve concepts of law. A failure to give this explanation is fatal to the prosecution case. The court must also ask the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor." See also *S* v *Sibanda* 1989(2) ZLR 329(S); *S* v *Collet* (2) 1978 RLR 288 (G); *S* v *Tshuma* 1979 RLR 356 (G); *S* v *Svondo* 1984 (1) ZLR 140 (H) and *Prosecutors Handbook* (3 Ed) page 182.

In any event it is trite that the record of the trial court should be a complete and accurate record of the proceedings. In *S* v *Davy* 1988 (1) ZLR 386 (SC) at 393 C-E GUBBAY JA (as he then was) had this to say:

> "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 not 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 858H. 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 *S* v *Mataruse* HH-219-03.

In casu, the deficiencies in the record of proceedings are not only substantial but also material. The accused's answers were not recorded at all.

Accordingly the conviction is quashed and the sentence set aside. A trial *de novo* is ordered before a different magistrate.

Cheda J …….. I agree