THE STATE
versus
SHINGIRAI MUENDAWOGA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 28 January 2004

Criminal Review

BHUNU J: The accused was charged and convicted of theft on the 4th of September 2003. Nothing much turns on conviction.

It is the sentencing procedure adopted by the trial magistrate which the learned scrutinising Regional Magistrate has brought to question.

The record shows that on the 4th of September 2003 the accused was remanded to 8th September for sentence. On the 8th the accused was further remanded to the 10th for sentence.

He was eventually sentenced on the 10th September 2003. Against that date the trial magistrate endorsed:

"Sent(enced) *in absentia*."

Upon a query being raised by the learned Regional Magistrate whether it was appropriate to sentence a convict in absentia, the trial magistrate made an about turn and denied that he sentenced the accused in absentia.

He explained that the endorsement related to the 8th September because on that date the accused was not brought to court from prison necessitating a further remand to the 10th September. He was adamant that the accused appeared before him on the 10th September when he sentenced him.

That might very well be so, but the trial magistrate is bound by the four corners of the written record of proceedings. He cannot supplement or correct it by written or oral evidence.

In the recent case of *Sailos Ndlovu v The State* and *The State v* Tawanda *Mataruse,* HH 219/2003, UCHENA J after surveying a number of authorities was at pains to emphasise the need for magistrates to

keep a comprehensive and accurate record of proceedings made at the time of the proceedings.

It is not necessary to regurgitate what the learned judge said in that judgment as it is sufficiently lucid, self-explanatory and instructive.

The long and short of it all, is that judicial officers save in exceptional circumstances are strictly bound by the four corners of the written record of proceedings made during the course of proceedings. They cannot subsequently supplement, amend or vary the record of proceedings. Once the proceedings are recorded the record becomes *res ipsa loquitor*, that is, it speaks for itself. No one can speak on its behalf including the author. The record should be left to speak for itself at all material times without interference or adultration.

A record of proceedings is evidence of the proceedings presided over by the magistrate. That being the case the rules of evidence come into play. The rule forbidding the supplementing of the record of proceedings is akin to the parole evidence rule.

This rule is a rule of contract which stipulates that once a contract is reduced to writing the written document is deemed to be the exclusive memorial of the parties' agreement. No evidence to prove its terms may be given - See *Union Government v Vianini Ferro Concrete Pipes (Pty) Ltd* 1941 AD 43. In the context of court proceedings the general rule becomes:

> "Once a judicial officer has made a written record of court proceedings the written record shall constitute the exclusive memorial of the proceedings."

It is a legal requirement that the court proceedings be recorded in writing. Section 5(1) of the Magistrates' Court Act [*Chapter* 7:10] provides that every magistrate's court shall be a court of record.

Thus the trial magistrate is required to keep a comprehensive and accurate record of proceedings. It is also trite that

the proceedings are as recorded by the magistrate. That being so noone can alter, vary, amend or rectify the record of proceedings without the consent of all the parties concerned without offending against the record as contemporaneously recorded by the magistrate.

To allow the record to be amended willy-nilly after the proceedings is to open the door to errors, distortions and inaccuracies arising from faulty memory or down right dishonesty.

In so saying I am by no means suggesting that patent errors many not be corrected or rectified. This may be done with the concurrence of all the parties concerned. The trial court may seek rectification of the record from the reviewing court after providing sufficient basis for the amendment or variation sought.

For instance if the trial magistrate apart from his mere say so had produced prison records showing that the accused was not brought to court on the 8th but on the 10th when he was sentenced the reviewing court could accept that the endorsement on the record was a patent error and allow rectification of the record. This he did not do.

His explanation defies logic and as such cannot possibly be correct. If the endorsement was prompted by the accused's non appearance at court on the 8th then the magistrate would undoubtedly have recorded "remanded in absentia" against that date instead of recording "Sent(enced) in absentia" against the 10th.

The accused was sentenced to a wholly suspended sentence. In the normal run of things I would have quashed the proceedings and remitted the matter to the trial court to reconsider sentence in the presence of the accused as is required by law. I however consider it unduly vexatious to recall the accused when he now considers the mater to be over and done with. There will be no serious prejudice because from the record it appears that the accused had addressed the court in mitigation of sentence at the time of his conviction on the 4th September 2003. The fact however still remains that there was no strict adherence to the legal requirements in that according to the

record sentence was pronounced in his absence without him being appraised

of the reasons thereof. That being the case I am unable to certify these proceedings as being in accordance with real and substantial justice.

I accordingly withhold my certificate.

BHUNU J:.....

UCHENA J, agrees:.....