THE STATE
versus
INNOCENT NEMADZIYA

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 15 December 2004

**Criminal Review**

UCHENA J: On the 23rd June 2004 the accused person appeared before a magistrate at Harare Magistrate's Court to answer a charge of assault with intent to cause grievous bodily harm.

The accused pleaded guilty and the court proceeded in terms of section 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] hereinafter referred to as the Act.

The facts were put to the accused who told the court that they were correct and that he understood them. He said he had nothing to add or subtract.

The magistrate proceeded to deal with the elements. She recorded the following:-

"Essential Elements

Q. Admit that on 23rd June 2004."

Nothing else was recorded and the magistrate left half a page on page 1 with nothing recorded on it. She turned over to page 2 where she left half a page with nothing recorded and recorded the following from about the middle of the page.

"Accordingly guilty as pleaded

NR pp

Produce medical affidavit by State.

Axxd – no objections."

The magistrate again left 4 unused lines and then recorded:

"Q Why assault complainant as you did?

A. He assaulted me first and I retaliated by using a plank."

The magistrate again left the rest of the second page unused and proceeded to page 3 where she recorded the accused person's mitigation. She then sentenced the accused person on the 2nd of July 2004 to 15 months imprisonment wholly suspended on conditions of good behaviour and community service.

I raised the issue of the incomplete record and the accused's response to the magistrate that he retaliated to the complainant's assault with the magistrate who responded as follows:-

"(1) The essential elements were put to the accused but the trial magistrate grossly erred in not recording down the responses as is required. This may have been necessitated by the volume of work at hand as well as the minimal time.

2) the trial magistrate further concedes that the explanation given by the accused amounted to a defence of self defence which should have had the plea altered to not guilty and matter proceeded to trial."

It is in the light of the above explanation that the trial magistrate concedes to having grossly erred in not complying with the requirements of court proceedings."

The magistrate's concession that she grossly erred was properly made, but more has to be said about her record keeping and her failure to alter the accused's plea to one of not guilty.

The magistrate having proceeded in terms of section 271(2)(b) of the Act was obliged to record the proceedings as provided by section 271(3) of the Act.

Section 271(3) of the Act provides as follows:-

"(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 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." (emphasis added)

It is therefore mandatory that a magistrate should record the question and answers exchanged between him and the accused during the canvassing of essential elements.

A failure to comply with this requirement as happened in this case is a serious irregularity warranting the setting aside of the accused's conviction and sentence.

This was clearly indicated in the case of *S v Mhondiwa* 1976(1) RLR 134 at 135H-136A where SMITH J said:

> "It should be pointed out that in terms of subsection 3 of section 255 of the Criminal Procedure & Evidence Act the matters there referred to should be accurately recorded…….
>
> In the result the convictions and sentences on all three counts are set aside." (emphasis added)

In the present case there is no possibility of the magistrate having been able to accurately record her questions and the accused's answers in her office after convicting the accused during the proceedings. It must be stressed that magistrates should record the proceedings as they progress and not after the proceedings. What happened in this case demonstrates the importance of recording proceedings as they progress. The magistrate forgot to fill in the gaps. She could have also forgotten the answers the accused gave or the questions she asked. Leaving the recording of

proceedings till the end of proceedings or to reconstruction in one's office will lead to cheating and guess work which can seriously erode the quality of our criminal justice system.

In the case of *S v Zindonda* AD 15/79 MACDONALD CJ at p 7 of the Cyclostyled Judgment commented on the need for magistrates to "strictly and meticulously" observe the provisions of section 255(3) which is now section 271(3) of the Act.

In the case of *Charles Manday Davy v S* 1988(1) ZLR 386 SC at 393 C-E GUBBAY JA (as he then was) commented on the need for magistrates to keep an accurate record by:-

> "Writing down completely, clearly and accurately, everything that is said and happens before them which can be of relevance to the merits of the case."

He stressed this need especially in cases which are presided over in the absence of mechanical recording facilities. He explained the importance of accurate recording on the basis that it is the magistrate's record which:

> "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."

I also refer to the case of *S v Sailos Ndlovu* HH 219/2003 where at page (2) of the cyclostyled judgment I said:-

> "The recording of the accused's answers is therefore mandatory. The reason for the mandatory recording of the accused's answers is obvious. It is from the accused's answers that the court can determine whether the accused's plea of guilty is a genuine admission of guilty.
>
> Failure to record the accused's answers is therefore a serious omission which can result in the setting aside of the conviction and sentence."

In this case the failure to comply with section 271(3) of the Act should result in the setting aside of the conviction and sentence as there is no record justifying the conviction and sentence.

One of the questions and answers recorded by the magistrate indicate the accused was acting in self-defence. In terms of section 272 of the Act, the magistrate must alter the accused's plea to one of not guilty if, he is in

doubt whether the accused is guilty of the offence he pleaded guilty to, or is not satisfied that the accused correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based and is not satisfied that the accused has no valid defence to the charge. Where the magistrate entertains doubts or has reservations as detailed above he should alter the plea to one of not guilty and require the prosecution to proceed to trial.

In the case of *S v Mukumba* 1989(3) ZLR 173 SC DUMBUTSHENA CJ at p 177 E-F said:-

> "It is trite that when a court proceeds in terms of section 255 of the Code , care must be taken that the accused understands the elements of the offence to which he is pleading guilty. If the court is in doubt of the genuineness of the plea the provisions of section 255A of the Code should be applied."

Section 255A is now section 272.

In the case of *S v Alexio Makuvatsine* HH 102/2004 at p 4 of the cysclostyled judgment I commented on this court's concern over magistrates' failure to appreciate and apply the provisions of section 272 of the Act and referred the review judgement to the chief magistrate for him to take corrective measures. It seems some magistrates still do not appreciate the provisions of section 272.

In view of the concessions made by the magistrate on her apparent failure to comply with the provisions of section 271(3) and 272 of the Act, the accuseds conviction and sentence have to be set aside.

The conviction and sentence are set aside. The case is referred back to the same magistrate for trial *de novo*.

In the event of the accused being convicted again the portion of the sentence he had already served should be taken into account in passing sentence.

BHUNU J, agrees:.....