

THE STATE

Versus

MICHAEL NDLOVU

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 13 April 2023

**Review judgment**

**DUBE-BANDA J:**

[1] This review is at the instance of the scrutinising Regional Magistrate. The accused was arraigned before the magistrates' court sitting at Gweru, in the Midlands Province. He was charged with the crime of sexual intercourse or performing indecent acts with a young person as defined in section 70(1)(c) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 15 January 2022 the accused solicited or enticed the complainant, a female juvenile aged 15 years to have extra marital sexual intercourse with him. He pleaded not guilty, and after a contested trial he was convicted and sentenced to ten (10) months imprisonment of which four (4) months were suspended on condition of good behaviour.

[2] This record was referred to this court for review by the Regional Magistrate. In the covering letter accompanying the request for a review, the Regional Magistrate made the following pertinent comments and observations:

- i. The accused person was convicted after a full trial by a magistrate sitting at Gweru. After the conviction the proceedings were then taken over by another magistrate who then recorded mitigation and sentenced the accused person in terms of s 334(7) of the Criminal Procedure and Evidence Act [Chapter 7:09].
- ii. That the sentencing magistrate did not note on record the absence of the trial magistrate and the reason for such absence. The second magistrate just recorded mitigation and sentenced the accused.
- iii. The record of proceedings is incomplete. The case consists of a blank space and then there is cross examination of the accused. The magistrate's explanation of s 198 and 199 of the Criminal Procedure and Evidence Act and accused's evidence-in-chief are missing from the record.

[3] The first issue taken by the Regional Magistrate is that the record of proceedings is incomplete. I have perused the record of proceedings; it is indeed incomplete. The accused's

evidence in chief is missing. In terms of s 5(1) of the Magistrates Court Act [Chapter 7:10] the magistrates' court is a court of record. See: *S v Chidavaenzi* HH 113/08. It is trite that the trial magistrate must make full, clear and accurate written notes of everything that is said and everything that happens during the hearing of a case. See: Prof. G. Feltoe *Magistrates' Handbook* 446. Everything that happens during the trial must be recorded. Again, recording machines should not be switched off during proceedings because this can create the impression that something has been done that should be kept away from the eyes of the reviewing judge. See: *S v Mashaba* 2004 (1) SACR 214 (T) 215 g-j; Du Toit *at al Commentary on the Criminal Procedure Act* 30-8.

[4] A complete record of the proceedings is necessary for a proper review of the proceedings. Magistrates should not allow incomplete records to be sent on review or scrutiny. In a case of an incomplete record, the magistrate should attempt to reconstruct it before the matter is sent on review or scrutiny. If this is not possible the fact of the missing part should be mentioned when the matter is sent on review or scrutiny. See: *S v Three* 1997 (2) SACR 534 E. Where there is a substantial and material deficiency in the record such constitute a gross irregularity necessitating the quashing of the conviction. See: *S v Curle* HH 183/2001; *S v Marais* 1966 (2) SA 514 (T) at pages 516 G-H and 517 A-B; *S v Manera* 1989 (3) ZLR 92 (SC) at page 93.

[5] In a criminal trial evidence in chief of the accused is material. It is essential. It is missing in the record of proceedings in this matter. One wonders how the trial court reasoned its judgment with the missing evidence in chief. This court is in the dark about what the accused said in his evidence in chief defending himself. The reviewing court must know what the accused testified in his evidence in chief, as most criminal cases turn on the facts and the inferences to be drawn from those facts. With missing evidence in chief, the record is incomplete and there would be nothing for this court to review. This constitutes a gross irregularity necessitating the setting aside of these proceedings.

[6] The second issue taken by the Regional Magistrate relates to the non-compliance with s 334(7) of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP &E ACT). In this case the accused was convicted after a contested trial by a magistrate. Thereafter the trial was taken over by another magistrate who then recorded mitigation and proceeded to sentence the accused. Section 334(7) of the CP &E Act provides that in the absence of the magistrate who convicted the offender, any other magistrate of the court may impose sentence. It was held in *S v Manga* 2006 (2) ZLR 304 that in order to use this provision, the sentencing magistrate must, firstly, note on the record the absence of the trial magistrate and the reasons for the

absence. Secondly, the accused must be given the opportunity of addressing in mitigation. Finally, it is incumbent on the second magistrate to consider the evidence recorded and upon which the verdict of guilty returned.

[7] In *casu* the sentencing magistrate did not note on the record the absence of the trial magistrate and the reasons for such absence. Without the reasons for the absence the reviewing court is in the dark whether the absence is the one contemplated by the empowering provision, this is important because only the absence that is contemplated by the provision permits the sentence to be imposed any other magistrate, other than the trial magistrate. In *R v Karonga* 1960 (4) SA 64 (SR) the court quashed the sentence that was imposed by another magistrate on the basis that the trial magistrate was not absent as contemplated s 334(7) of the Act. In *S v Manga* 2006(2) ZLR 304 @ 308 the court said:

“I am, therefore, not satisfied that the unavailability of the trial magistrate from Mbare, regard being had to both time, space and circumstance, was such as is contemplated by the lawmaker which permits the sentencing magistrate to intervene. I therefore hold that the sentencing magistrate improperly stepped into the shoes of the trial magistrate.”

[8] In *S v Manga (supra)* the court set aside the sentence and remitted the matter for sentence by the trial magistrate.

[9] In this case the reasons for the absence of the trial magistrate are not known. It is not known whether the absence was occasioned by death, serious illness, retirement or resignation from service or a length absence for whatever reason. In the circumstances and even if this was the only irregularity it would still not possible to remit the matter to the trial magistrate for sentence.

[10] In the circumstances the effect of a material deficiency in the record, coupled with the failure of the sentencing magistrate to note in the record the absence of the trial magistrate and the reasons for the absence is that the entire proceedings were afflicted by a gross irregularity. I take the view that the proceedings at the magistrates' court were not in accordance with real and substantial justice, as a result, a substantial miscarriage of justice has actually occurred. The conviction must be quashed and the sentence set aside.

In the result, I make the following order:

- i. The conviction is quashed and the sentence is set aside.

- ii. The Prosecutor-General may in his discretion commence proceedings against the accused afresh before a different magistrate, provided however that should the accused be convicted, the period of sentence already served must be taken into account as a portion of any new sentence which may be imposed.

TAKUVA J ..... AGREES