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THE LAW - IMPORTANCE AND CORRECT PROCEDURE FOR PROCESSING CRIMINAL REVIEWS

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MASVINGO — ZIMBABWE

by

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INTRODUCTION

Criminal review is a mechanism that is primarily designed to safeguard the rights of accused persons in criminal proceedings. Breaking down the component parts of the defining term "**review**" also highlights its purpose. "**Re**" is a word-forming element that conveys the meaning of "back to the original place" or "anew, once more". This introspective quality is buttressed by the definition of the word "**view**" in the present context. "**View**" contains connotations that reference a sense of "inspection or examination". Attendant in its undertone is a "sense of regard in a certain way". When fused together, the essence of the procedure is clearly illuminated. It seeks to trace the procedural steps that were taken in criminal proceedings with an objective transfixed on curing evident anomalies.

The principal underlying consideration in regard to criminal law is that, in most instances, the liberty of persons is at stake and the stigma that is attached to a conviction has to be justly endowed upon deserving

persons. It forms a vital component of the mantra of expeditious delivery of justice.

The procedure is also aimed at ensuring that the penal authority of the State is not abused at the sentencing stage in situations where litigants have been rightly convicted. The remedy is central in appreciating the role and protection of fundamental rights contained in the supreme law of the land. In all, it is a holistic measure that is objectively focused on maintaining the legality of the entire processes that are relevant in criminal proceedings.

The significance of the procedure is highlighted by its constitutional protection. **Section 70(5)** of the Constitution stipulates the following:

> "**5.** Any person who has been tried and convicted of an offence has the right, subject to reasonable restrictions that may be prescribed by law, to -
>
> **a.** have the case reviewed by a higher court; or
>
> **b.** appeal to a higher court against the conviction and sentence."

The aforesaid section is relevant for two distinct reasons. To begin with, it highlights that the mechanism of review is a sacrosanct procedure in criminal proceedings that cannot be abridged, as it forms part of the fundamental rights that are afforded to accused and convicted persons in this jurisdiction. However, this right, like any other fundamental right and freedom enshrined in the Declaration of Rights under ***Chapter 4***, is subject to reasonable limitations as championed by **section 86** of the Constitution.

The second fundamental aspect that is highlighted by **section 70(5**) of the Constitution relates to the difference between review and appellate proceedings. It is axiomatic that the provision recognises the distinction between an appeal and a review. It also serves to inform of the integral characteristic of criminal review - that it cannot be undertaken by a court of similar jurisdiction. The responsibility is permanently imposed upon a higher judicial forum. In this regard, appeals and reviews share similar machinery relating to their implementation. However,

it is their distinct qualities that inform of the unique qualities of review proceedings.

Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed p 932 provide the ultimate distinction between the remedy of appeal and that of review as follows:

> "**The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside.** Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not a review upon this test. **The essential question in review proceedings is not the correctness of the decision under review but its validity.**"

Tying this apposite definition to the question of criminal review proceedings, it is apparent that the

process aims to maintain the legality of proceedings. The proceedings in the lower court ought to be procedurally and substantively in accordance with real and substantial justice. This relates to an investigation into the manner in which the decision of the inferior court or tribunal has been arrived at.

Therefore, the difference between criminal reviews and appeals is highlighted by the restriction of appeal proceedings to the record before the court. In general, the courts are not enjoined to allow extrinsic issues to influence their determination. An appeal seeks to attack the correctness of the decision of the inferior court or tribunal. In review proceedings, it is competent for parties to bring extrinsic evidence to prove the irregularity.

This point was canvassed by HUNGWE J (as he then was) in the case of *Maphosa* v *The State* HH 323/13. He astutely observed at p 2 of the judgment that:

> "An election to appeal confines the legal practitioner to matters reflected in the record of proceedings. On the other hand, were he to proceed by way of notice of motion seeking a review of the

proceedings then counsel would have brought under review other matters which do not appear *ex facie* the record by way of affidavit."

In *S* v *Machona and Ors* 1982 (1) ZLR 87 at 90 it was held that where issues are raised challenging the propriety of the proceedings of an inferior tribunal, and the facts which have to be proved to support these issues do not appear as established on the face of the record, proceedings should be by way of review.

In addition, the key differences were summarised in a previous discussion in the presentation I delivered on 23 March 2018 at the Workshop for the Orientation of New High Court Judges. The distinction of appeals and reviews was depicted in the following manner:

Appeals	**Reviews**
Request to change or modify the decision	Inquest into the legality of the decision
Confined to the facts or law	Confined to the method of trial

Concerned with the correctness of the decision itself	Concerned with the validity of the legal matters of a decision
Grounds of appeal are unlimited and cannot be prescribed	Grounds of review are limited by law and have to be laid out in the application for review
Confined on the four corners of the record	Permissible to prove a ground of review through affidavit. (Except on automatic review)
An appeal is final and conclusive unless a statute gives a further right	A review is not final, it may be reviewed again.

THE LAW ON CRIMINAL REVIEW PROCEEDINGS

Although the procedure of criminal review is afforded constitutional protection, it finds expression in legislation that has been promulgated to give effect to the operation of the courts. The principal statutory

Acts that deal with criminal review proceedings are the Magistrates Court Act [*Chapter 7:10*] (hereinafter referred to as "the Magistrates Court Act") and the High Court Act [*Chapter 7:06*] (hereinafter referred to as "the High Court Act"). The two statutes complement each other, as they provide for the competencies of the judicial officers involved in criminal review proceedings.

Section 57(1) of the Magistrates Court Act provides for the implementation of criminal review proceedings. It is worded as follows:

> "**57 Review**
>
> (1) When any court sentences any person —
>
> (a) to be imprisoned for any period exceeding twelve months; or
>
> (b) to pay a fine exceeding level six;
>
> the clerk of the court shall forward to the registrar, not later than one week next after the determination of the case, the record of the proceedings in the case, together with such remarks, if any, as the magistrate may desire to append:
>
> Provided that —

(i) where any of the evidence in the case has been taken down in shorthand writing or recorded by mechanical means, it shall, unless the magistrate otherwise directs, be a sufficient compliance with this subsection if the clerk of the court forwards to the registrar the manuscript notes of such evidence made by the magistrate in accordance with (the) rules;

(ii) this subsection shall not apply in relation to any person —

(a) who is represented by a legal practitioner;

(b) which is a company as defined in the Companies Act [*Chapter 24:03*];

unless within three days after the determination of the case the legal practitioner of the accused or the person representing the company in terms of subsection (2) of section 385 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], as the case may be, in terms of subsection (2) requests the clerk of the court to forward the case on review."

In instances where the sentence handed down is between three to twelve months, **section 58** of the Magistrates Court Act becomes applicable. In terms of **section 58,** the criminal proceedings are sent to a Regional Magistrate for scrutiny before confirmation. Scrutiny proceedings before the Regional Magistrate act as a filtering mechanism. They safeguard the rights of convicted persons, whilst also ensuring that the courts are not inundated with frivolous matters whose proceedings were in accordance with real and substantial justice. The provision is also an embodiment of the faith reposed in the competency of judicial officers manning the magistrates courts.

Section 58(3) of the Magistrates Court Act provides for the exception where the Regional Magistrate is uncertain as to the legitimacy of the proceedings. He or she is empowered to forward the record to the High Court Registrar, whose mandate is to place the record for review before a Judge. Of note is the point that the Regional Magistrate does not have to be satisfied that there is an apparent discrepancy in the proceedings. Once an aspect of mere doubt clouds his

or her certainty, the matter has to be forwarded to the High Court. *Reid-Rowland* remarks that the procedure of scrutiny provides a useful method of ensuring that the proceedings in the magistrates' courts are suitably conducted.[1] Providing this checkpoint serves the dual function of sieving meritorious cases and ensuring that the review jurisdiction of the High Court is not unduly burdened.

The general authority of the High Court to carry out review proceedings is provided for in terms of **Part V** of the High Court Act, in particular **section 26**. It is from this provision that the High Court's authority to review all proceedings and decisions of all inferior courts of justice is established.

There are a myriad of reasons which are contained in **section 27(b)** of the High Court Act that constitute credible grounds for review. The grounds of review include the absence of jurisdiction, bias, and gross irregularity in the proceedings or decision. This is consonant with the holistic aim of criminal review

[1] 26-2 *Criminal Procedure in Zimbabwe* 1997, John Reid-Rowland

proceedings. They are aimed at maintaining the legality of the proceedings, hence a robust approach is adopted to ensure that there was adherence to real and substantial justice.

The powers of the High Court in review proceedings are set out in **section 29(1)** of the High Court Act, which provides:

> "**29 Powers on review of criminal proceedings**
>
> (1) For the purpose of reviewing any criminal proceedings of an inferior court or tribunal, the High Court may exercise any one or more of the following powers —
>
> (a) direct that any part of the evidence which was taken down in shorthand or recorded by mechanical means be transcribed and that the transcription be forwarded to the registrar of the High Court;
>
> (b) hear any evidence in connection with the proceedings, and for that purpose may cause any person to be summoned to appear and give evidence or produce any document or article;
>
> (c) where the proceedings are not being reviewed at the instance of the convicted person, direct that any question of law

> or fact arising from the proceedings be argued before the High Court by the Attorney-General or his deputy and a legal practitioner appointed by the High Court."

It is evident that the High Court's authority in review proceedings is extensive. This is designed to safeguard and protect the rights of convicted persons. It is important to note that review proceedings in certain instances may represent the final shot at acquittal for convicted persons. This is due to the fact alluded to earlier that the subject matter for review may not be applicable in appeal proceedings. The need to treat the liberty of persons with utmost care is in line with the constitutional mandate of the Judiciary.

The Supreme Court is also endowed with the authority to review the propriety of criminal proceedings. This is provided for under **section 25** of the Supreme Court Act [*Chapter 7:13*]. The case of *Streamsleagh Investments (Pvt) Ltd* v *Autoband Investments (Pvt) Ltd* SC 72/14 highlighted the position in the following manner at pp 7-8 of the judgment:

"Section 25(2) in particular empowers the Supreme Court to exercise review powers at any stage whenever it comes to its attention that an irregularity has occurred in any proceedings, including proceedings that are not the subject of an appeal or application before it."

Therefore, the Supreme Court is endowed with the judicial authority to review criminal proceedings on its own accord.

Section 19 of the Constitutional Court Act [*Chapter 7:22*] provides as follows:

"**19 Review Powers**

(1) Subject to this section, the Court and every Judge shall have, in constitutional matters, the power to review the proceedings and decisions of the Supreme Court, the High Court and all other subordinate courts, tribunals and administrative authorities.

(2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Court or a Judge that an irregularity has occurred in any proceedings or in the making of any decision, notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Court.

(3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Court or a Judge, and provision may be made in rules of Court, and a Judge may give directions, specifying that any class of review or any particular review shall be instituted before, or shall be referred or remitted to the Supreme Court, the High Court or the Labour Court, as the case may be, for determination."

The Constitutional Court is endowed with review authority over the proceedings of subordinate courts, including the Supreme Court, in constitutional matters. The review jurisdiction cannot be invoked at the instance of the parties. The Court is mandated to elect to utilise its review authority when an irregularity comes to its attention *mero motu*.

TYPES OF CRIMINAL REVIEWS

AUTOMATIC REVIEW FROM THE MAGISTRATES COURT

There exists a variation in the manner in which criminal reviews can be instituted. The most prominent one relates to automatic reviews by the High Court in instances where the accused persons have been sentenced

to terms of imprisonment above twelve months or to fines above Level 6 as prescribed by **section 57(1)** of the Magistrates Court Act. Once the jurisdictional facts are satisfied, the review procedures apply.

The required adherence to the prescribed timeline of one week for forwarding the record of proceedings to the High Court is meant to prevent infringement of the rights of convicted persons. If the process is not carried out expeditiously, the injured party cannot be adequately compensated for the period during which he or she is adversely affected by the decision rendered by the lower court. As such, **section 57** of the Magistrates Court Act is crafted in a manner that places the emphasis on the need for an urgent resolution of the review process.

The rationale for this state of affairs is accurately stated by Professor G Feltoe in the *Magistrates' Handbook 2021*. He asserts that every accused person who obtains a sentence of some severity is automatically entitled to an independent investigation of his conviction and sentence by a senior judicial officer

who is enjoined to satisfy himself or herself that the proceedings meet the requirement of being in accordance with real and substantial justice.

The law does not exist in a vacuum but rather is alive to the society that it caters for. This point is illustrated by the full import of **section 57(1)** of the Magistrates Court Act in that unrepresented persons enjoy an automatic right to review once their sentence meets the threshold of twelve months. This ensures that there is a scheme in place to curtail the excessive infringement of fundamental rights of all members of society in criminal proceedings. In this regard, the automatic procedure of review seeks to circumvent the inherent difficulties that are posed by the economic standing of the accused persons.

REVIEW AT THE INSTANCE OF THE ACCUSED OR CONVICTED PERSONS

There are exceptions to the automatic criminal review process. **Section 57(1)(b)(ii)** of the High Court Act provides that the automatic process of criminal review is not triggered when the person is represented by a

legal practitioner or if the person is a juristic entity such as a company.

However, the aforementioned section contains a provision which enables the legal practitioner or company representative within three days to request the clerk of court to forward the record for review. In addition, **section 57(3)** of the Magistrates Court Act provides for an election by the accused person to pursue a review of the criminal proceedings.

Section 57(3) of the Magistrates Court Act is worded in the following terms:

> "(3) The accused person in any criminal case in which the court has imposed a sentence which is not subject to review in the ordinary course in terms of subsection (1) may, if he considers that such sentence is not in accordance with real and substantial justice, within three days after the date of such sentence, in writing, request the clerk of the court to forward the record of the proceedings in terms of subsection (1) and the clerk of the court shall thereupon deal with the matter in terms of subsection (1) as if the case were subject to review in the ordinary course."

The emphasis on real and substantial justice is meant to afford the accused an opportunity to have his or her rights vindicated. It empowers litigants to timeously seek the oversight of the High Court through review of the proceedings in the lower court. The emphasis of the time limit of three days in both instances highlights the need for urgency when dealing with criminal reviews. The accused must be allowed to exercise his or her basic right of review, without unduly detaining the processes of the court.

The need to afford the accused an opportunity to exercise the right of review was canvassed in the case of *S* v *Curle* 2001 (2) ZLR 323 (H). In that matter, the accused had invoked the review jurisdiction of the High Court based on the material deficiency of the record. The High Court reaffirmed the right of an accused to review criminal proceedings in the following terms at p 325:

> "The effect of a material deficiency in the record is that the proceedings must be set aside. The accused is seriously prejudiced through no fault of his own. He is entitled to have his case

considered on appeal or review and for that purpose he is entitled to a copy of the record certified as correct. If he does not receive that, he is frustrated in his basic right of appeal or review."

REVIEW AT THE INSTANCE OF THE HIGH COURT

This is a recognition of the need to prevent valid cases from being precluded from accessing the supervision of the High Court. The High Court, as the primary custodian of the review authority of superior courts, is empowered to undertake a review of criminal proceedings in the lower courts *mero motu.*

Section 29(4) of the High Court Act provides that:

> "(4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

In *S* v *Kalenga* HH 416-18 CHITAKUNYE J (as he then was) highlighted the importance of **section 29(4)** of the High Court Act. He said at p 1 of the judgment:

> "The above case came to my attention through a newspaper article headlined 'Student Nurse jailed for using forged papers'. The article informed everyone who cared to read (it) that a woman who used false documents to secure admission as a trainee nurse was jailed for 15 months.
>
> My concern was with the effective jail term of 10 months for the nature of the offence alleged. I requested for the record of proceedings in terms of s 29(4) of the High Court Act [*Chapter 7:06*]. …
>
> When the record of proceedings was placed before me for review, my view of the sentence was confirmed."

The above excerpt highlights that the manner in which the matter comes to the Judge pales into insignificance once an irregularity is established. It also highlights the importance of having vigilant judicial officers that are alive to the clarion call for justice.

In the *S* v *Kalenga* case *supra* the invocation of the procedure provided for under **section 29(4)** of the High Court Act enabled the court to address the issue of the

procedural irregularity in the failure by the lower court to apply the correct sentencing principles. The learned Judge said at pp 2-3 of the judgment:

> "*In casu*, I am of the view that the sentence in this matter was disturbingly inappropriate considering the developments in approaches to sentencing. This court has on numerous occasions pointed out that effective imprisonment must only be used as a last resort, where (the) court is satisfied that there is no other non-custodial sentence that would be suitable.
>
> In *S* v *Zulu* 2003(1) ZLR 529 (H) (the) court held, *inter alia*, that:
>
> > 'Over the years the courts have emphasised that imprisonment is a severe and rigorous form of punishment, to be imposed as a last resort and when no other form of punishment will do. There has also been a shift from the more traditional methods of dealing with crime and the offender towards a more restorative form of justice, which takes into account the interests of society and the victim. This is a holistic approach to sentencing, in that it punishes the offender, causes him to pay reparation and integrates him into society.'"

The court proceeded to set aside the custodial sentence and substituted it with the option of a fine. Had there been no review procedure provided for under **section 29(4)** of the High Court Act, an injustice would have remained unremedied.

The case of *Rose* v *The State* HH-71/12 related to the power of the High Court over criminal proceedings before the lower courts. HUNGWE J (as he then was) said at p 3 of the judgment:

> "It is clear from the foregoing that the statutory powers of review under the High Court of Zimbabwe Act, 1981, can be exercised at any stage of criminal proceedings before an inferior court.
>
> Further, the authorities indicate that this court has an inherent power of review. In *Rascher* v *Minister of Justice* 1930 TPD 810 at 820 KRAUSE J said:
>
> > '… a wrong decision of a magistrate in circumstances which would seriously prejudice the rights of a litigant would justify the Court at any time during the course of the proceedings in interfering by way of review ….

> The above principles were laid down in a civil case, and they would apply with greater force where the proceedings are of a criminal nature and a miscarriage of justice might result in the circumstances from a wrong decision of the magistrate or where the rights of an accused person are seriously affected thereby.'"

There are numerous authorities to the effect that the power ought to be exercised sparingly and only in appropriate circumstances where the interests of real and substantial justice cannot be ignored. The danger in the wanton application and enforcement of **section 29(4)** of the High Court Act is that the role of the lower courts may be undermined. See *Attorney-General* v *Makamba* 2005 (2) ZLR 54 (S).

The dynamics that underpin the application of **section 29(4)** of the High Court Act are succinctly captured by John Reid-Rowland in his book titled "*Criminal Procedure in Zimbabwe*". He states the following:

"(4) **Incomplete Proceedings**

The High Court's statutory powers of review can be exercised at any stage of criminal proceedings before an inferior court. However, in uncompleted cases this power should be sparingly exercised. It would only be appropriate to do so in those rare cases where otherwise grave injustice might result or justice might not be obtained. For example, if grave irregularity or impropriety occurred in the proceedings, it would be appropriate for the High Court to consider the matter. Generally, however, it is preferable to allow the proceedings to run to their normal completion and seek redress by means of appeal or review."

THE TEST OF REAL AND SUBSTANTIAL JUSTICE

A common thread in the methods through which criminal review proceedings are instituted is the concept of real and substantial justice. This is not an abstract concept but represents a guided or scientific tool through which criminal proceedings in the lower courts can be confirmed or overturned.

The availability of such a device is critical. This is because of the often emotive nature of criminal proceedings. Judicial officers, in as much as they are

impartial officers, cannot divest themselves of their human qualities. Consequently, their judgment in certain instances may be clouded by their perception of the alleged conduct. It is at this juncture that a review becomes an important feature of the justice delivery function.

The proceedings in the lower court are reviewed using the real and substantial justice test to examine their substantial compliance with the prescribed procedures. The concept of real and substantial justice is subsumed in **section 58(3)** of the Magistrates Court Act and **section 29(2)** of the High Court Act. It has been defined by Professor G Feltoe as the considered judicious exercise of judicial authority by the trial court, which satisfies in the main the essential requirements of the law and procedure. Therefore, it follows that when there is real and substantial compliance with the requirements of the law and procedure, the relevant criminal proceedings clear the justice benchmark.

The High Court has made several pronouncements on the characteristics of real and substantial justice. In the

case of *The State* v *Chizanga* HH 72-15, MAFUSIRE J said at p 4 of the judgment:

> "Commendably, the legislature (has) refrained from defining what 'real and substantial justice' means. But case law has. What is 'real and substantial justice' is left entirely to the scrutinising magistrate or reviewing judge. He makes a value judgment and exercises his judicial discretion, of course, guided by certain principles. In the case of *S* v *Chidodo and Anor* 1988 (1) ZLR 299 (H) GREENLAND J said:
>
> > 'The power of certifying proceedings as being in accordance with real and substantial justice is an additional power more particularly viewed as a prerogative. It seems clear from the words employed, i.e. "in accordance with real substantial justice", that a judge (and regional magistrate) is required to make a value judgment on the question. He must be satisfied that everything that transpired at the criminal trial conforms with the notions of justice that these words imply'.
>
> The test of what is real and substantial justice is an objective one. What is considered to be just depends on the norms and sense of values generally prevailing in society."

In addition, the authoritative case of *S* v *Kawareware* 2011 (2) ZLR 281 (H) placed the following caveat on the test. UCHENA J (as he then was) pertinently observed at p 287 that:

> "The failure to comply with minor requirements, minor mistakes and immaterial irregularities should not result in the scrutinising or reviewing judicial officer refusing to certify the proceedings as being in accordance with 'real and substantial justice'."

It is important to understand what is meant by the word "**proceedings**" in the context of the meaning of the concept of "**real and substantial justice**".

When used in the context of the delivery of justice process, "proceedings" refers to the actual steps taken in their singular and collective nature in accordance with legally prescribed procedures for the purposes of achieving specific objectives.

So the review of criminal proceedings of a lower court involves the looking at or study of the steps taken as required by the law of the applicable procedure. It means that the reviewing Judge must have a full knowledge and understanding of the law of the applicable procedure as well as the applicable substantive law so as to be able to say that the steps which were required to be taken were or were not taken.

Criminal proceedings would be in accordance with real and substantial justice if, upon review of the lower court's actions, the High Court is satisfied that what is revealed by the record of what transpired in the lower court is real evidence of the acts constituting the steps the lower court was required to take by the prescribed procedures.

The evidence of the acts constituting the necessary steps prescribed by the procedures would include acts relating to the essential elements of the charge, their explanation, and the responses by the accused. In respect of a plea of guilt, the record of proceedings must show that what happened in the interaction between the magistrate and the accused reflects the voluntariness and genuineness of the confession of guilt by the accused at the time of the proceedings.

It is important for a reviewing Judge to understand that the record of the proceedings in the lower court is a "real time" record. It is not supposed to be a measure of what an accused person says some time after the criminal proceedings have been completed when he or she may be under external influence and has a change of mind.

The criminal proceedings would therefore be in accordance with real and substantial justice if what happened, as evidenced by the record of the proceedings in the lower court, reflects not just what actually happened as a matter of fact but also that what happened

is in its nature, quality and extent what is required by the applicable law as testimony to a delivery of justice in the circumstances of the case.

Thus, the test, as highlighted above, is not concerned with irrelevant defects that are minor and have no bearing on the rights of the accused.

EFFECTS OF THE REAL AND SUBSTANTIAL JUSTICE TEST

The real and substantial justice test is applicable in both scrutiny and review proceedings. In terms of **section 58(3)** of the Magistrates Court Act, the attendant Regional Magistrate is mandated to endorse his or her certificate upon the proceedings, which are then returned to the court of origin once he or she is satisfied that the proceedings are in accordance with real and substantial justice. Conversely, he or she is obliged to forward the record to the Registrar of the High Court for review in a higher forum if he or she considers the proceedings not to be in accordance with real and substantial justice.

WHAT ARE THE POWERS OF A JUDGE IN CRIMINAL REVIEW PROCEEDINGS?

After reviewing any proceedings from the Magistrates Court, the High Court must exercise one or more of the powers conferred on it by the High Court Act. Whichever power a Judge exercises in any criminal review case it must be aimed at ensuring that the proceedings in the lower court are exposed to a process of examination that is capable of showing that they were in accordance with real and substantial justice or they were in violation of this fundamental principle of the criminal justice system.

Where proceedings are in terms of **section 57** of the Magistrates Court Act, the powers set out below may only be exercised after the proceedings in the related criminal trial have been completed by the passing of sentence by the magistrate.

In the case of *S* v *Hutchings* 1970 (1) RLR 176 (GD) the High Court made instructive comments on the point at which the power of review may be exercised. GREENLAND J stated at 176F-177B that:

> "The powers conferred on the General Division of the High Court by the Magistrate's Court Act, [*Chap. 15*], ss. 55 and 56, seem to permit of a

> review only after the proceedings in a criminal trial have been completed by the magistrate. The opening words of subs. (1) of s. 55 are 'When the court sentences any person' and the machinery for review only begins to operate after sentence. But the High Court Act, 22 of 1964, in s. 31, gives a more general power of review. It enables the High Court to review 'all proceedings of all inferior courts'.
>
> With the approval of the CHIEF JUSTICE I invoked this power and quashed the conviction before the resumption by the magistrate of the proceedings for sentencing the accused. I did so because of the obvious undesirability of going through a needless formality which could only result in prejudice to the accused."[2]

The above citation makes the point clear that the exercise of review powers must be done after the accused person has been sentenced in an automatic review. However, where a review is carried out in terms of different provisions of the High Court Act similarly bestowing review jurisdiction on the High Court, the rules applicable to the point at which review powers are exercised may change. For example, where review is

[2] See also, Gardiner and Lansdown, *South African Criminal Law and Procedure* 6 ed, Vol. 1 (Cape Town: Juta & Co; 1957) at p. 731.

sought by motion prior to sentence, some of the review powers below may be exercised subject to the rules governing the interference in unterminated proceedings by superior courts.

The decision in *Hutchings supra* was affirmed in the case of *S* v *Rose* 2012 (1) ZLR 238 (H). In that case, the applicant filed an ordinary application seeking an order declaring her not guilty and acquitting her prior to the completion of the proceedings in the magistrates court. The High Court held at p 241A-B that:

> "What is permitted is intervention by this court in a ruling that is so gross that it is incapable of correction by way of ordinary review or appeal; or where it is unconscionable to await the conclusion of the proceedings before seeking redress in the normal way."

Review powers of superior courts must not be exercised without due regard to the relevant principles governing interference in unterminated proceedings before lower courts. In *Masedza and Ors* v *Magistrate Rusape and Anor* 1998 ZLR 36 (H) the relevant part of the headnote reads as follows:

> "… the power of the High Court to review the proceedings in the magistrates courts is exercisable even where the proceedings in question have not yet terminated. However, it is only in exceptional circumstances that the Court will review a decision in an interlocutory decision before the termination of the proceedings. It will do so only if the irregularity is gross and if the wrong decision will seriously prejudice the rights of the litigant, or the irregularity is such that justice might not by other means be attained."

The imperative to restrain the exercise of review powers pending criminal proceedings is one of the most hallowed principles of criminal reviews. *Gardiner and Lansdown* restate and summarise it in the following terms:

> "While a superior court having review jurisdiction in review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained. See *Welles* v *General Court Martial and Anor* 1954 (1) SA 220 (E), and p 4. In general, however, it will hesitate to intervene, especially having regard to the effect

of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available."[3]

The principle restraining interference by superior courts in unterminated criminal proceedings is undergirded by not only the need to ensure an orderly criminal process but also by the very dictates of the rule of law. Processes in any criminal justice system must be allowed to run their full course and any conclusions about their outcomes not prematurely made.

The case of *Dombodzuku and Anor* v *Sithole NO and Anor* 2004 (2) ZLR 242 (H) is illustrative of the rationale. In that case, it was stated at 245C-E that:

"While the statute granting the review power does not place any limitations on the exercise of that power, this court has in practice rarely exercised the power in relation to proceedings pending before the lower court. In practice, the court will withhold its jurisdiction pending completion of the lower court's proceedings to make for an orderly conduct of court proceedings in the lower court. It would create a chaotic situation

[3] See Gardiner and Lansdown, *South African Criminal Law and Procedure 6 Ed*, Vol. 1 (Cape Town: Juta & Co 1957) at p. 750.

if any alleged irregularity or unfavourable ruling on an interlocutory matter were to be brought on review before completion of the proceedings in the lower court. The court's aversion to disrupting the general continuity of proceedings in the lower court assumes ascending importance especially in cases where no actual and permanent prejudice will be occasioned the applicants. The power is, however, exercised in all matters where, not to do so, may result in a miscarriage of justice."

TO CONFIRM THE PROCEEDINGS

The power to confirm the proceedings is perhaps one of the commonly relied on powers in criminal reviews. It is set out in **section 29(2)(a)** of the High Court Act. The section reads:

"(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings —

(a) are in accordance with real and substantial justice, it shall confirm the proceedings."

The fact that the proceedings of a lower court have been confirmed on review does not affect any right that the convicted person may have to appeal.[4]

REMITTING THE CASE FOR TRIAL *DE NOVO* AND FOR OTHER REASONS

The power to remit a case for trial *de novo* is set out in **section 29(2)(b)(v)** of the High Court Act. The provision reads:

> "(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings — …
>
> (b) are not in accordance with real and substantial justice, it may, subject to this section — …
>
> (v) remit the case to the inferior court or tribunal with such instructions relative to the further proceedings to be had in the case as the High Court thinks fit."

[4] See J Reid-Rowland, *Criminal Procedure in Zimbabwe,* (Harare: Legal Resources Foundation, 1997) at 26 – 6.

The learned authors *Gardner and Lansdown* submit that the power to remit a matter to enable the State to adduce further evidence is exercised sparingly.[5]

J Reid-Rowland recognises three separate instances in which the power to remit a case may be exercised. These include remittal for trial *de novo*, remittal for further evidence, and remittal for sentence. In situations where the High Court exercises the power of remittal for the purpose of sentence only, *J. Reid-Rowland* states that:

> "There is no other specific situation in which a reviewing court may remit a case to the trial court for sentence, but it is submitted that the court's wide powers to remit the case to the trial court, with instructions about the further proceedings to be had in the case, would entitle it, in appropriate circumstances, to confirm the conviction entered by the magistrate but send the case back for sentence to be passed afresh, in the light, for example, of further evidence which the magistrate is instructed to hear."[6]

[5] See also, Gardiner and Lansdown, *South African Criminal Law and Procedure 6 ed*, Vol. 1 (Cape Town: Juta & Co; 1957) at p. 737.
[6] See J Reid-Rowland, *Criminal Procedure in Zimbabwe,* (Harare: Legal Resources Foundation, 1997) at 26 – 10.

See also *S* v *Mhona; S* v *Moyo* 2005 (1) ZLR 472 (H), being a case in which the High Court relied on its power of remittal to return a matter for resentencing. Although the High Court upheld the conviction, it took the view that there was no enquiry carried out by the learned trial magistrate on the existence of special circumstances. Thus, *G Feltoe* states that it would be appropriate to remit a matter to the trial court if it did not consider mandatory issues that it should have had regard to.[7]

THE POWER TO REDUCE OR SET ASIDE THE SENTENCE

A commonly relied on power that is accorded to review Judges is the power to reduce or set aside the sentence. This power is set out in **section 29(2)(b)** of the High Court Act. The section reads:

> "(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings —
>
> (*a*) …

[7] See G. Feltoe, *Magistrates' Handbook 2021*, (Harare: UNDP and JSC; 2021) at p. 467.

(*b*) are not in accordance with real and substantial justice, it may, subject to this section —

(i) …

(ii) reduce or set aside the sentence or any order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal:

Provided that —

(i) a sentence of imprisonment shall not be substituted for a fine unless the enactment under which the convicted person was convicted does not permit the imposition of a fine;

(ii) the substituted sentence shall not be more severe than that imposed by the inferior court or tribunal unless the convicted person —

(*a*) is a company; or

(*b*) was represented by a legal practitioner at the proceedings in the inferior court or tribunal concerned;

and requested that the proceedings be forwarded on review or otherwise instituted the review."

The import of the power to alter a sentence was aptly summed up by J Reid-Rowland *supra*. The learned author stated that:

> "On review, the High Court may reduce or set aside the sentence or any order of the lower court. It may also substitute a different sentence. However, a sentence of imprisonment may not be substituted for a fine unless the enactment under which the person was convicted does not provide for a fine. The substituted sentence may not be more severe than that imposed by the lower court unless the convicted person either is a company or was represented at the trial by a legal practitioner. In either of those cases, it is also necessary, before a sentence may be increased on review, that the convicted person should have requested that the proceedings be sent on review or otherwise instituted the review. It would not be permissible to increase the sentence on automatic review.
>
> If there has been an improper splitting of charges and verdicts on several charges are set aside on review and a verdict of guilty on one count is substituted, an increased sentence may be imposed for that one count, provided that it does not exceed the previous total sentence or the magistrate's sentencing jurisdiction."

In terms of **section 29(5)(b)** of the High Court Act, the power to alter a sentence may only be exercised with the agreement of another Judge of the High Court.

THE POWER TO CORRECT OR SET ASIDE THE PROCEEDINGS OF THE MAGISTRATE

The power to correct or set aside the proceedings of a magistrate is also accorded to a review Judge. **Section 29(2)(b)(iii)** of the High Court Act provides for these powers:

> "(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings — …
>
> (b) are not in accordance with real and substantial justice, it may, subject to this section — …
>
> (iii) set aside or correct the proceedings of the inferior court or tribunal or any part thereof or generally give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made on any matter which was

before it in the proceedings in question."

When examined closely, the powers bestowed upon a Judge of the High Court in terms of **section 29(2)(b)(iii)** of the High Court Act interconnect with other powers that are already bestowed on the High Court in other provisions of **section 29**. These include the power to alter a conviction, the power to quash a conviction, and the power to reduce or set aside a sentence. For this reason, *J Reid-Rowland* incisively comments that:

> "It is not clear to what extent this general provision adds to the court's specific powers to alter or correct the verdict and to alter the sentence. The provision appeared in the MCA, before the enactment of the HCA, and was re-enacted in the latter Act. But there was no provision of the MCA which gave the review court the specific powers referred to. In *R* v *Kaseke and Ors* 1968 (2) SA 805 (RA), for example, it was held that the court on appeal (the powers on appeal being identical, in this respect, to those on review) was not authorised to set aside a specific acquittal and find the accused guilty on a charge on which he was acquitted, simply because the trial court wrongly found him guilty on some completely

unrelated charge. It is clear that the court now does have such powers on review."

Be that as it may, the exercise of the powers to correct or set aside criminal proceedings of the lower court require the concurrence of another Judge before they can be exercised.

THE POWER TO ALTER THE CONVICTION

A Judge has the power to alter a conviction on review. This power is set out in **section 29(2)(b)(i)** of the High Court Act as follows:

> "(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings — …
>
> (b) are not in accordance with real and substantial justice, it may, subject to this section —
>
> (i) alter or quash the conviction."

An alteration of a conviction can only be made when the trial magistrate should have returned the verdict found to be have been the correct verdict in light of "the charge that was actually brought and the evidence that

was, or should have been, accepted".[8] *J Reid-Rowland* cautions that:

> "… where the accused was *charged with* and convicted of an attempt to commit an offence but the evidence shows that he committed the substantive offence, it would not be competent to alter the conviction to one of committing the substantive offence, because that was not a verdict which the magistrate could have reached."

Under normal circumstances the reviewing Judge must only alter a conviction on the basis of those facts that the trial magistrate found to have been proved. The reason is that a superior court is loathe to disturb findings of fact of a trial court, especially when they depend on the credibility of witnesses. See *Gumbura* v *The State* SC 78/14 at p 7. Thus, in the case of *R* v *Musarurwa* 1964 RLR 270 (A) at 273, QUÈNET JP stated that:

> "Counsel for the Crown submitted the magistrate should have found that the words: 'Many women and children were injured. One boy was killed', appearing in the first telegram, were false and that the appellant knew that to be so. He asked

[8] See J Reid-Rowland, *Criminal Procedure in Zimbabwe,* (Harare: Legal Resources Foundation, 1997) at 26 – 7.

this Court to make such a finding, and he relied upon sec. 56(2)*(c)*, as read with sec. 59(3) of the Magistrate's Court Act, *Chap. 15*. If we acceded to this request it could have no other result than add to the gravity of the conviction on count 2. Indeed, counsel for the Crown said that if the Court did not correct the magistrate's finding, he could not submit the sentence on counts 2 and 3 was not excessive. In essence, the Crown is asking the Court to reverse an adverse finding on a question of fact. Neither in *R v Scott-Rodger,* 1956 R & N 421 nor in *R* v *Labuschagne,* 1961 R & N 305, relied upon by counsel for the Crown, did the Court do what we are now being asked to do. All that was done in those cases was to substitute the correct verdict on the facts which the magistrate found to be proved."

In terms of **section 29(5)(b)** of the High Court Act, the power to alter a conviction must not be exercised unless another Judge of the High Court has agreed with the exercise of that power in the particular case.

THE POWER TO QUASH A CONVICTION

The power to quash a conviction is, like the power to alter a conviction, provided for in terms of **section 29(2)(b)(i)** of the High Court Act. The power

to quash the conviction is to be exercised within the limitations of **section 29(3)** of the High Court Act. The section reads as follows:

> "(3) No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record or proceedings unless the High Court or a Judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred."

Convictions are not to be quashed on trifling grounds. Only an irregularity that negates real and substantial justice suffices as a ground for invoking the power to quash proceedings. According to *J Reid-Rowland*:

> "The object of this section is, it is submitted, to prevent proceedings being set aside on technical grounds. The test is whether there has been substantial prejudice to the accused. If there is any doubt on the point, he is entitled to the benefit of that doubt. Lack of jurisdiction is not a technical point. If the court had no jurisdiction to try the case, the proceedings would have to be set aside, even if there had been no prejudice to the accused. If the conviction and sentence are set aside on the ground of an irregularity, the

proper course is to remit the case to the lower court for trial before another magistrate."

OTHER PROCEDURAL POWERS

There are other powers given to Judges of the High Court for the purpose of ensuring that they are well equipped to properly carry out criminal reviews. Without such powers, the effective review of criminal proceedings would, in some circumstances, be impeded by the practical challenges that a Judge may face.

Section 176 of the Constitution provides that:

> "**176 Inherent powers of Constitutional Court, Supreme Court and High Court**
>
> The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution."

In *Chunguete* v *Minister of Home Affairs and Ors* 1990 (2) SA 836 (W) FLEMMING J appositely stated at 848F-G:

> "What is appropriately called the 'inherent jurisdiction' is related to the Court's

functioning towards securing a just and respected process of coming to a decision ….”

The need to ensure a just and respected review process is the reason why **section 29(1)** of the High Court Act provides for additional powers that a Judge may invoke.

The first form of procedural power that is accorded to the High Court is that a reviewing Judge may direct that any part of the evidence which was recorded in shorthand or by means of a recording machine be transcribed.[9] The power to call for a transcribed record of proceedings may be relied on as soon as a reviewing Judge realises that the manuscript notes are incomprehensible and impede an accurate review of the record of proceedings. See for example *S* v *Zhanota* HH-681-18 and *S* v *Mashumba and Ors* HH-248-18. Requesting transcribed records of proceedings has aided Judges to examine whether real and substantial justice was meted out in several cases. In *S* v *Gezani* HH-381-18, the High Court stated at p 1 of the judgment as follows:

[9] See J Reid-Rowland, *Criminal Procedure in Zimbabwe,* (Harare: Legal Resources Foundation, 1997) at 26 – 5.

> "I initially sought the trial magistrate's comments regarding the first person to whom the complainant reported the offence. In the process, I directed that the entire proceedings be transcribed, and in light of my subsequent scepticism on the verdict this turned out to be a wise decision."

The exercise of this power must be viewed in the light of the fact that magistrates have an obligation to record the proceedings meaningfully and comprehensively. Glaring deficiencies in the trial magistrate's record of proceedings may provide a ground of review. In the case of *S* v *Davy* 1988 (1) ZLR 386 (S) at 393 GUBBAY JA (as he then was) stated the following:

> "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."

Therefore, the power to request a transcribed record of proceedings is necessary for the purpose of ensuring that the reviewing Judge obtains a meaningful account of what transpired and determining whether real and substantial justice was done.[10]

Under **section 29(1)(b)** of the High Court Act, the High Court is accorded the power to hear any evidence in connection with the proceedings and it may cause any person to be summoned to appear and give evidence or produce any document or article. The scope of this power was clearly set out by the learned author *J Reid-Rowland* as follows:

[10] See also *Mlambo* v *State* HH–570–17.

> "On review, the High Court may hear any evidence in connection with the proceedings. For that purpose, it may have witnesses subpoenaed to give evidence or to produce any document or article. In view of the High Court's power to remit the case to the magistrates court with such instructions as the High Court thinks fit (which would presumably include an instruction to hear further evidence), it is submitted that the power to call evidence on review should be exercised sparingly. The criteria on which an appeal court would hear evidence would appear to be appropriate."

Gardner and Lansdown also state that the power to direct that further information or evidence be supplied or taken is not intended to call for evidence to supply deficiencies in the State's case but it is aimed at elucidating matters which on the record are obscure.[11] It, therefore, means that the power to call for further evidence ought to be relied on in exceptional circumstances. As *J Reid-Rowland* submits, where a Judge forms the opinion that there may be a need for the adduction of further evidence, it would be better to

[11] See Gardiner and Lansdown, *South African Criminal Law and Procedure 6 ed*, Vol. 1 (Cape Town: Juta & Co; 1957) at p. 736.

remit the matter to the trial court with directions on how further evidence will be led.

Another critical point to note in respect of the use of this power is that the power to summon witnesses and hear evidence may not be exercised by a single Judge on automatic review in terms of **section 29(5)(b)** of the High Court Act. Where a Judge intends to invoke such a power, he or she must always remember to seek the concurrence of another Judge.

Finally, I will consider the power of a Judge to seek clarification on any matter that arises in criminal reviews. *G Feltoe* states that:

> "The reviewing Judge may seek clarification or comment on aspects of judgments from the magistrates who tried the cases. These queries are contained in what are known as 'white letters'."[12]

ABUSE OF CIVIL PROCEDURES FOR PURPORTED REVIEWS OF CRIMINAL PROCEEDINGS

There is need to speak about a concerning trend that has developed in the High Court. This relates to the

[12] See G Feltoe, *Magistrates' Handbook*, (Harare: UNDP and JSC; 2021) at p. 468.

application of procedures designated to regulate civil proceedings to criminal review proceedings. This has arisen due to the ingenuity of certain legal practitioners who challenge rulings of the magistrates through applications to the High Court under procedures intended for civil applications.

The relevant procedure is now captured under **rule 59** of the High Court Rules, 2021. The effect of utilising the procedure set out therein effectively turns the purported criminal review proceedings into civil proceedings that deal with issues raised in the lower court. The reason for this conversion is that the procedure of setting matters on the unopposed roll is meant for civil proceedings. Criminal review proceedings cannot competently be set down as an unopposed matter due to their very nature as *sui generis* proceedings.

Judicial officers ought to refrain from adopting the common misconception regarding criminal reviews. The procedure is not solely intended for the protection of the rights of accused persons. It is intended to also

vindicate the interests of the public in the matter. This is particularly evident in cases that involve corrupt malpractices. Criminal reviews are an objective standard that has to be satisfied in relation to the conformity of the proceedings to a set standard.

Therefore, the attendant Judge cannot grant an order in default because public interest cannot be divested in criminal review proceedings. The State, regardless of whether the matter is unopposed, cannot waive public interest in the matter. The basis for this position is that the only interest that can be waived at law relates to a private individual interest that attaches to an individual. When dealing with matters that fall into the public arena, there can be no waiver of public interest. The State cannot appropriate public interest and claim to waive such in matters set on the unopposed roll. This amounts to an abuse of civil procedure where matters are disposed of in default without the Judge exercising his judicial function on the merits of the case.

I refer to the compelling approach advanced by KWENDA J in *Munobvanei & Anor* v *The Presiding Magistrate and Ors* HH-280-19. Before setting out his reasons for setting aside his initial order, the learned Judge canvassed the question of the impropriety of setting down criminal reviews before a single judge in motion court. I quote the *dicta* by the learned Judge appearing at pp. 2-3 of the judgement in *extenso*:

> "I am of the firm view that the practice and procedure of setting down applications for criminal review to be dealt with by a single judge in the Motion Court is undesirable for various reasons. Firstly, whichever way the Court decides it must necessarily prepare judgment giving reasons for the decision. Invariably, a judge prepares either a review minute or judgment when setting aside a conviction or sentence on review. There seems to be a grey area in our law but I think that the same should apply when this Court overturns a lower court's decision to dismiss an application for discharge at the close of the State case, substituting (the) same with an acquittal.

The absence of a response or concession by the State does not preclude the Court from determining the application on the merits. In other words, the applicant is not justified in believing that an acquittal will of necessity ensue simply because the State has not filed a response. The judge is required to review the whole criminal proceedings in the court *a quo* and prepare reasons for judgment. Clearly that is not the procedure contemplated in the 'Motion Court' where one judge presides over numerous cases in one sitting.

Secondly, I believe that a judge needs (the) concurrence of another (judge) before setting aside the lower court's decision and substituting it with another decision which the lower court ought to have made at law, particularly if the decision substituted is an acquittal. Once again, this is not a procedure contemplated in the Motion Court where orders are granted instantly by the presiding judge without reference to another judge."

The approach espoused by KWENDA J in the *Munobvanei* case *supra* was also adopted by MAWADZE J in *Matanhire and Anor* v *The Magistrate Mukumba N.O. and Anor* HMA-20-21. In that case, the learned Judge wrote a judgment in an unopposed application for criminal review filed in terms of **section 26** of the High Court Act, as read with **Order 33** of the repealed High Court Rules, 1971.

The trial prosecutor did not oppose the application as he inexplicably agreed to a postponement of the matter *sine die*. MAWADZE J rightly questioned whether the procedure that was followed by the applicants in that case amounted to a conflation of both criminal and civil procedure. Following the approach proposed in the *Munobvanei* case *supra*, the learned Judge held at p 7 of the judgment that:

> "Indeed in terms of s 29(2)(b)(iii), this court is vested with powers to set aside any criminal proceedings on review. However, the question is how such powers should be exercised. Can such powers be competently exercised by a single judge presiding in the Motion Court (where a matter has

been set as per Order 33 of the High Court Rules 1971)?

To my mind, the answer lies in the proviso to s 29 of the High Court Rules 1971 ….

The practical problem in this matter is that if I am to accede to the request made by both applicants and quash these criminal proceedings (and order a trial *de novo*) I can only competently do so with the concurrence of another judge, and not as a lone ranger High Court Judge sitting in the Motion Court …. This on its own shows the impropriety of setting down criminal reviews on the unopposed roll purportedly in terms of Order 33 of the High Court Rules 1971."

STANDARD STEP BY STEP APPROACH TO CRIMINAL REVIEWS

The following is a guideline tool that may be utilised by a Judge in assessing the procedural aspects of a criminal review.

1. Charge Sheet

The charge sheet ought to be the first port of call in review proceedings. This is because it contains the particulars of the conduct alleged to be an offence. More often than not the charge sheet reflects the reality of the conduct in question. It is important that the requirements of a proper charge must be met.

Thus, it is of importance that the Judge is aware of what an acceptable charge sheet entails. All the essential elements of the alleged crime must be apparent from the document. It ought not to be excipiable otherwise it fails to disclose the relevant offence. In certain instances, the prejudice occasioned by an excipiable charge sheet is so grave that the accused's fundamental rights are infringed.

2. The State Outline

The primary purpose of the State Outline is to inform the accused of the allegations against him or her. Therefore, a question that permeates the perusal of a State Outline is whether or not it informs the accused of what he or she has done. The accused ought to be in a position to appreciate the basis of the allegation.

It is important that the *mens rea* is adequately set out. In the case of a plea of guilt, it is necessary to look at the agreed facts. The presiding Judge ought to be able to appreciate the basis of the accusation.

3. Plea of Guilt

This calls for the Judge to look at the agreed statement of facts. The facts ought to be balanced and fair, thus there is a need to ascertain that the accused has really agreed to them. An appropriate set of facts in this regard ought to reflect a state of mind that highlights that the accused accepts guilt.

The magistrate has a duty to show that the facts and the essential elements of the offence relate to each other. He or she must endeavour by way of questioning to extract the relevant responses from the accused. The judicial officer must satisfy himself or herself that the accused has understood the elements of the crime.

Where an accused person tendered a plea of guilty, the reviewing Judge is mandated to ensure that the peremptory procedure that is set out in **section 271(2)(b)** of the Criminal Procedure and

Evidence [*Chapter 9:07*] was followed. In particular, the Judge must ensure that the trial magistrate explained the charge and the essential elements of the offence to the accused. He or she must also ensure that the magistrate enquired from the accused whether or not he or she understood the charge and the essential elements of the offence and whether his or her plea of guilty was an admission of the elements of the offence.

4. Sentence

A reviewing Judge must be satisfied that there were sufficient facts for the sentence imposed. This also covers the evidence that was advanced in mitigation. Some indicators that suggest that real and substantial justice was not met during sentencing include the splitting of sentences that were imposed on the accused.

5. Evidence

Where a plea of not guilty was tendered, the reviewing Judge will still have to start by considering the charge sheet, the State Outline, the plea, and the Defence Outline. By so doing, the Judge will be able

to highlight the common cause facts. From this exercise, the issues that were before the trial magistrate will emerge. The Judge must be alive to the issues that were in dispute. He or she may even note them down.

It is helpful to start with the documentary evidence. For example, the contents of any medical reports must be ascertained first.

6. Judgment

Suffice to mention that if a judgment is well-written, it may immediately demonstrate that a conviction was made properly. For this reason, Judges must approach the judgment of the trial magistrate from the position that magistrates are honourable and that they would not set out any false information. If, after reading the judgment, a Judge still maintains doubts as to the verdict, he or she may go back to the evidence that was adduced.

WHAT IS THE ROLE OF A JUDGE IN CRIMINAL REVIEWS?

Criminal reviews are a means to an end. They were put in place to safeguard the integrity of the criminal

justice system, in which all people place their trust for the protection against the most egregious evils in society. The High Court is bestowed with supervisory jurisdiction over magistrates and this includes the power to review their decisions. See **section 171(1)(b)** of the Constitution of Zimbabwe, 2013. This spells out the supervisory function and role of a Judge carrying out criminal reviews. I hasten to state that the word "supervise", as it is used in the Constitution, must be construed within its constitutional and legal context. In the case of *State* v *Manning* 220 Iowa 525, 259 N.W. 213, the Supreme Court of Iowa set out the meaning of the word "supervise". It stated that:

> "To 'supervise' is to have general oversight over — to superintend or to inspect."

Review Judges also play the role of guardians of the criminal justice system's integrity. The role of Judges in protecting the criminal justice system is evident in the imperative to confirm all proceedings that are in accordance with real and substantial justice. This is why **section 29(3)** of the High Court Act only

countenances a substantial miscarriage of justice as a basis for setting aside criminal proceedings on review.

COMMON PROBLEMS BEING ENCOUNTERED IN CRIMINAL REVIEWS

For the sake of completeness it is necessary to address the aspects relating to some common problems that are encountered in criminal reviews. There are accepted solutions and shared wisdom to addressing some of the difficulties faced in criminal reviews.

PILING REVIEW RECORDS

One perennial problem that is encountered in the process of criminal reviews is the fact of delays by particular Judges in finalising criminal reviews.

A Judge before whom a record has been placed for review must act timeously and with the due diligence that is expected of judicial officers. The duty to act timeously is codified in **section 20(2)** of the Judicial Service (Code of Ethics) Regulations, 2012. *G Feltoe* emphasises that **section 57(4)** of the Magistrates Court Act requires the Registrar to lay the review records

before a Judge in Chambers "with all convenient speed".[13]

LACK OF KNOWLEDGE

The lack of knowledge and appreciation of the salient principles of criminal law and procedure remains a perennial problem affecting the judicious conduct of criminal review. The public places its trust in the Judiciary on account of its knowledge. It, therefore, means that a Judge who lacks knowledge is unable to discharge the collective obligation of the High Court or any other superior court of ensuring that criminal processes conform to the dictates of real and substantial justice.

BIASED ATTITUDES TOWARDS MAGISTRATES

In the course of exercising their supervisory jurisdiction, some Judges tend to form predispositions about magistrates. These may include predispositions that magistrates are ignorant or, worse still, incompetent. A Judge must be conscious that the review system is a recognition of the inevitable failures of

[13] See G Feltoe, *Magistrates' Handbook 2021*, (Harare: UNDP and JSC; 2021) at p. 460.

men and women presiding over magistrates courts. If they are fallible, there is no justification whatsoever in holding any prejudicial view against a magistrate. It is for this reason that, in an address to the Magistrates Forum by CHIEF JUSTICE GUBBAY, cited by *Feltoe*, it was observed that:

> "[the magistrate] … should not live in fear of the reviewing judge and constantly be looking over his or her shoulder, but should rather regard the reviewing judge as the second member of a two-man team. The reviewing judge is not there to criticise, to nit-pick or to show off his or her knowledge and experience; he or she is there to assist as far as he or she is able in the administration of justice; and to ensure that the accused person receives fair treatment."

A Judge must embrace the design behind the review system that is targeted towards uprooting failings that undermine the attainment of real and substantial justice within the criminal justice system.

Where criminal proceedings from a magistrate's court have been reviewed and confirmed by a Judge of the High Court in terms of the law, there should be no subsequent review of the same proceedings by another Judge. The

reason is that there is no provision for one Judge to review another Judge's decision.

NIT-PICKING

Criminal reviews are not intended to give Judges room to nit-pick all sorts of errors made by magistrates in criminal trials. A review is not an appeal. For this reason, technicalities that may be significant on appeal may not be similarly significant in automatic review processes. As already mentioned, the underlying consideration is real and substantial justice. If a Judge really considers real and substantial justice as the compass of his or her review activity, he or she will eschew the entanglements of nit-picking and petty fault-finding. *Gardiner and Lansdown* recite helpful *dicta* by INNES CJ on the reliance on real and substantial justice as the torchlight of criminal reviews. The *dicta* reads:

> "If we were to quash review proceedings for informalities to which the accused took no objection and in respect of which he raised no appeal, it is difficult to say we could stop. The result would be that many proceedings would be

quashed on mere technical informalities, and the Crown put to expense, and the prisoner the worry of fresh proceedings, with possibly the same result as to his guilt."[14]

In the same vein, SMITH J in the case of *R* v *Harmer* 1906 TS 50 stated that:

"I think the rule ought be that where although the charge is defective in some particular, yet it is clear that the prisoner has in fact committed the offence intended to be charged, the court will not on review set aside a conviction unless it is clear that the prisoner has been prejudiced by the form the charge took. I quite admit that in some cases there may be a difficulty in deciding whether prejudice is caused to the prisoner or not; and in those cases where it is doubtful I think the prisoner should have the benefit of doubt, and that the conviction should be quashed; but where it is clear that no prejudice has been occasioned to the prisoner, then I think it is not the duty of the court on review to quash the conviction in considering whether real and substantial justice has been done."

Notwithstanding the admonition against nit-picking and combing through the proceedings in the lower court, a

[14] See Gardiner and Lansdown, *South African Criminal Law and Procedure 6 ed*, Vol. 1 (Cape Town: Juta & Co; 1957) at pp. 745 – 746.

Judge must remain open to the possibility of novel errors that undermine real and substantial justice. *J Reid-Rowland* states that:

> "Where lesser irregularities occur, an appeal or review court can separate the good from the bad, and consider the merits of the case, including any findings as to the credibility of the witnesses. Unless the court comes to the conclusion that a substantial miscarriage of justice has actually occurred as a result of the irregularity, the court will not set aside the proceedings on the grounds of the irregularity only."[15]

A Judge must always be mindful of the basis upon which he or she elects to exercise any powers on review. Where a Judge bases his or her decision to review on grounds other than those set out in law or by judicial precedent, that Judge runs the risk of falling into the pitfall of nit-picking.

POOR TIME MANAGEMENT

It is not uncommon to hear a Judge saying that reviews are "time-consuming" or that he or she is "short of time" to carry out a review. Although the workload of

[15] See J Reid-Rowland, *Criminal Procedure in Zimbabwe,* (Harare: Legal Resources Foundation, 1997) at 16 – 41.

any Judge is usually heavy, criminal reviews ought not to be cited as a cause of delays in the delivery of justice. The standard step-by-step approach that I have set out serves as an effective tool of curtailing delays in carrying out criminal reviews and concentrating on trivialities that are inevitably time-consuming.

ILLEGIBLE RECORDS OF PROCEEDINGS

Reviews are usually done using the magistrate's manuscript notes. Due to the demanding conditions under which those notes are recorded, they are invariably difficult to read. The record of proceedings is the basis upon which a Judge of the High Court will reach a conclusion on whether real and substantial justice was meted out. This difficulty should not detain a Judge. The problem of illegible records of proceedings is dealt with in more detail under the procedural powers that are accorded to review Judges.

SUMMATION

In conclusion, the highlighted procedures all form part of the machinery that propels the remedy of criminal

review proceedings. The measure is unique in the sense that it requires an interplay of the lower courts and the superior courts with a particular emphasis on the High Court. It imparts a responsibility to judicial officers to be alive to the need to act in a manner that is consistent with real and substantive justice. Moreover, the need to protect the constitutional freedoms afforded to citizens, in particular the right to liberty, is inherent in the purpose and ideal of the remedy.
