

THE STATE

Versus

SANELISIWE MOYO

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 21 & 24 NOVEMBER 2016

Review Judgment

BERE J: This record was brought to me on automatic review.

On perusing the record I raised a query with the trial magistrate through my minute which read as follows:

“A reading of the state summary suggests that in all the four counts the various sums of money stolen were not recovered.

However, when the sentence of the accused was pronounced the learned Magistrate alluded to a substantial amount of the stolen money having been recovered and proceeded to suspend 6 months imprisonment on condition the accused restitutes the complainant to the tune of US\$1 469,00.

This would not make sense in the light of what the state summary and the canvassing of the elements of the offence project.

Let me hear from the trial Magistrate.”

Indeed, the trial magistrate provided a swift response to my concerns and stated as follows:

“... Complainant submitted an affidavit that he had been reimbursed part of the money after the conviction of the accused but before sentence. I omitted to attach the complainant’s affidavit before proceedings were sent for review. I apologise. Find attached affidavit”

Therein lies the problem with the casual approach adopted by the trial magistrate.

It has been emphasised for times without number that the Magistrates' Court is a court of record as dictated by statute. See section 5 (1) of the Magistrates' Court Act¹. This means the whole court proceedings must be properly recorded. It is not enough in this case for the trial magistrate to make a belated reference to the complainant's affidavit whose production in court is not supported by his own notes in the court record. Doing so may be regarded as a desperate attempt to doctor the record after the proceedings have been completed and that approach is certainly not accepted. It is a serious dereliction of duty.

The learned Judge, Patel (now JA) had occasion to deal with an almost similar challenge and he put the correct position of the law as follows;

“Although the trial magistrate admits his blatant error he does not proffer any explanation as to what actually happened at the hearing of the matter. It is highly probable that he did not record the proceedings as they actually took place and later attempted to recreate them from his evidently faulty recollection.

As is succinctly spelt out in section 5 of the Magistrates' Court Act [Chapter 7:10], a Magistrates' Court is a court of record with the attendant obligation to ensure that every relevant detail is duly recorded. The obligation is unquestionably critical, not only so that justice is seen to be done but also so that it is completely and effectively done.”²

I could not have agreed more with the learned Judge's dissection of the law in this regard.

It is for these reasons that I withdraw my certificate, thus declining to certify the proceedings as being in accordance with real and substantial justice.

1. [Chapter 7:10]

2. *The State vs Shepherd Guzha & Another* HH-368-12