

THE STATE  
versus  
CLEOPAS CHIZHANJE.

HIGH COURT OF ZIMBABWE  
UCHENA and CHITAKUNYE JJ  
HARARE, 28 December 2012

### **Criminal Review**

UCHENA J: The record of the proceedings in which Cleopas Chizhanje (the convicted person) was convicted and sentenced on his own plea was place before me for review. It is not reviewable. Most of the documents and the record of proceedings which should be in it are missing.

According to the review cover the convicted person was charged with four counts of contravening s(s) 131 and 113 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The back of the charge sheet on count 4 where the Magistrate recorded the pleas indicates that he pleaded guilty to all four counts. It is however not possible to ascertain what charge was preferred under count three as the charge sheet and state outline, for that count are missing from the record. While the charge sheets for counts one and two are also missing the charges preferred under them are revealed by the outlines of the state's case. The outlines of the State's case for counts three and four are also missing from the record.

The magistrate's hand written record of proceedings is also missing except for a sheet of paper on which the accused's mitigation is recorded. I caused my clerk to write to the trial magistrate seeking clarification on the state of the record. In her response the trial magistrate said;

“Indeed the accused person pleaded guilty to all four counts preferred against him. All the essential elements of the offences in respect of the four counts were put to the accused person and recorded.

The trial magistrate has also noted that the charge sheet in respect of counts 1 to 3 is missing as well as facts for count 3 to 4. A full record of all the proceedings was brought to me for signature before it was forwarded for review.

Half a page was left blank as the court canvassed the essential elements in respect of all the counts on different pages since there were four counts. The trial magistrate also recorded the reasons for sentence on a separate page. All these are missing in the record of proceedings.

The trial magistrate is not aware of what could have happened to part of the proceedings in the record after it left her office for review.”

This case is not reviewable because reviews are based on the documents in the review cover and the record of proceedings. Where the record or part of it goes missing and it becomes impossible to review the proceedings the convicted person’s conviction and sentence must be set aside. That however must only be if the record of proceedings if it was mechanically recorded can not be transcribed, or if it was hand written can not be reconstructed.

Many magistrates now simply throw their hands in the air when faced with such a situation. They as did the trial magistrate in this case simply say “I don’t know what happened to the record of proceedings or part of it and leave every thing to the reviewing judge. Reviewing judges do not create records of proceedings, but merely review them. It remains the duty of trial courts to take remedial action to ensure that a record of proceedings is placed before a judge for review. It is only when the record has been irretrievably lost and can not be transcribed or reconstructed, when a magistrate can throw his/her hands in the air and leave everything to the reviewing judge.

My experience, with incomplete review records indicates that many magistrates, do not know what to do with such situations. They believe if a record or part of it is lost that is the end of the matter. It is not. The following should be done.

1. The clerk of court who is the custodian of court records must be administratively required to search for the record or missing part of the record.
  
2. If it can not be found after a diligent search, he must either cause the mechanical record to be transcribed or the missing record of proceedings to be reconstructed.

If a document generated by the state is missing a copy can be obtained from the prosecutor.

3. If the mechanically recorded proceedings are transcribed and the transcribed record is certified by the transcriber and signed by the magistrate it can be forwarded for review.

4. If the record is to be reconstructed the procedure laid down in the cases of *S v (A; Juvenile)* 1991 (1) ZLR 237 (HC), *R v Nortje* 1950 (4) SA 725 (E) and *R v Wolmarans & Anor* 1942 TPD 279, should be followed.

In the case of *S v (A JUVENILE)* (*supra*) ADAM J at p 242 C to D said;

“It is clear from the foregoing that the practice has been for some considerable time well regulated in that the duty of the clerk of the court was to submit the best secondary evidence that he could obtain.

To summarise, where the accused has pleaded guilty, found guilty and sentenced or has pleaded not guilty, been found guilty and sentenced and the record is irretrievably lost prior to review by this court, since the trial court is *functus officio*, the clerk of the court must by affidavit indicate that the record is irretrievably lost and should obtain from the presiding magistrate, witnesses and others present at the trial affidavits as to the contents of the record and thereafter he must give both parties an opportunity to peruse this so they may give their version as well. This reconstructed record from the best available secondary evidence must be sent for review.”

While I fully agree with the observations of ADAM J, I must add that while a magistrate becomes *functus officio* on sentencing the convicted person, he retains an administrative duty to ensure that the record is sent for scrutiny or review. That is why he has to sign the scrutiny or review cover. The *functus officio* principle only applies to his judicial role. It does not extend to his administrative duties. If the clerk of court does not know what to do when a record or part of it is lost the magistrate must guide and supervise him on the procedure to be followed, to ensure that the provisions of the law on sending proceedings for scrutiny and review are complied with.

Having dealt with how to ensure that a transcribed or reconstructed record is placed before a reviewing judge I find it imperative to comment on the standard of record keeping. Many records are now being forwarded for review in a disorderly manner, with papers loosely placed in a review cover in any order. It is the duty of the clerk and the trial magistrate to ensure that the documents and record of proceedings are properly

arranged and securely stapled or bound together. It is not difficult to imagine how some documents end up slipping out of the review cover, if they are simply loosely placed in it. A magistrate should not sign a review cover with loose papers in it. He should administratively instruct the clerk of court to staple or bind them together before signing the review cover. In the case of *S v Manera* 1989 (3) ZLR 92 (SC) GUBBAY CJ @ 94 H to G said;

“It is, I think, necessary to impress **upon all judicial officers and clerks of court that records of proceedings must be preserved with meticulous care.** Rule 24(2) of the Supreme Court (Magistrates Court) (Criminal Appeal) Rules, 1979, published in SI 504 of 1979, places upon the clerk of the court the administrative responsibility of lodging the original record with the Registrar of the Supreme Court. It is his obligation to ensure that the complete record of the proceedings is so lodged. Consequently, if there is anything remiss with the record, the fault must be visited upon the State and not upon the appellant” (emphasis added)

A securely bound review record, can not, arrive on the reviewing judge’s desk, with missing parts. In the present case the magistrate says the record was in order when she signed the review cover. She however omits to state whether or not the record had been properly secured.

In view of what I said above this case can not be reviewed until an inquiry is conducted as to whether or not the proceedings can be transcribed or reconstructed.

It is therefore remitted back to the magistrate’s court for such an inquiry after which it should be resubmitted for review.

In view of the administrative issues raised in this judgment a copy, should be send to the Chief Magistrate’s office for his information.

CHITAKUNYE J agree -----