TATENDA KUFANDIRORI

versus

THE TRIAL PROSECUTOR (REGIONAL) N O

and

THE REGIONAL MAGISTRATE

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE 21 February 2012

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**Criminal Review**

HUNGWE J: In this matter the applicant seeks an order quashing his conviction on a charge of rape and a further order setting aside the sentence of 10 years imprisonment imposed upon him following the said conviction in the court of the Regional Magistrate, sitting at Bindura on 4 June 2008.

He sets out his grounds of review as follows:

“It shall be contended on review that the conviction and sentence of the court *a quo* be set aside and that the matter must be tried *de novo* for the reasons which come hereunder:

1. The plea of guilty on the strength of which was induced by undue influence (*sic*). The applicant relied on the wrong advice of the first respondent to his detriment.
2. The resultant plea of guilty was not a genuine and advised admission of the charge and the essential elements.
3. Wherefore the conviction and sentence of the court *a quo* must be set aside and the matter must be heard afresh before a different court.”

This “application for review” was served on the office of the Attorney-General who declined to respond on the basis that the office of the Attorney General was not cited as one of the respondents.

It is not clear whether or not the Regional Magistrate Court concerned i.e the second respondent was served with the papers. She has not filed any papers.

The record of proceedings attached to the application shows that the learned regional magistrate used A4 diary pages beginning from a page which reflects “Monday 8 January 2007” and ended on a page titled “Saturday 13 January 2007.” She correctly proceeded to record the accused’s plea in terms of s 271 (2)(b) of the Criminal Procedure and Evidence Act, [*Cap* *9*:*07*] on the front page.

The second page which is titled “Wednesday 10 January 2007” begins thus:

“ … proceed to trial. You should not be forced to admit by anyone, do you understand?

A: I do. I am admitting.

Q: I will put again the essential elements to you. Do you admit that on 2 March 2008 and at Kufandirori Village, Chief Makoni, Rushinga, you unlawfully and knowingly had sexual intercourse with Shiela Hoko as alleged?

A: Yes I admit.

Q: Do you admit that you inserted your penis into her vagina?

A: Yes I admit.

Q: Do you admit that the complainant had not consented to the sexual intercourse?

A: Yes she did not consent.

Q: Did you have any lawful right to do so?

A: No.

Q: Any defence to offer?

A: None.”

There is attached to the papers as exh 1 a medical affidavit which was produced and marked exh 1 by a medical doctor.

The doctor states therein that examination was painful to the complainant and the conclusion was that penetration was effected.

In his founding affidavit the applicant states that he was unduly influenced by the prosecutor to admit to sexual intercourse when no such thing occurred. He claimed he was in love with the complainant and had only “caressed the complainant’s body.” He was induced to plead guilty by a promise of a lenient sentence approximating a fine coupled with time to pay he says. This occurred after the presiding magistrate had altered his plea to “not guilty” and ordered the matter to be stood down. In that interim period he was taken to the office of the prosecutor who assured that should he save the court’s time by admitting to the rape charge the court would leniently sentence him and give him time to pay.

He was then taken back to court and in the resumed hearing he dropped his claim to only having caressed the complainant’s body and decided.to admit to raping the complainant.

On this basis he claims that his plea was not a genuine plea and should be altered to one of “not guilty.”

There has been a disturbing stream of “applications for review” by convicted persons who had undergone a trial without benefit of legal representation. Despite improved legal representation these courts are still flooded with “applications for review” which do not comply with r 257 of the Rules of Court. It is necessary to again restate the review procedure open to the accused person who is aggrieved by a lower court’s decision.

There are three ways in which a criminal trial before the magistrate may be brought on review at the instance of the accused.

First, where the accused was represented by a legal practitioner in the court below or was a company as defined in the Companies Act [*Cap 24:03*]. Usually such cases do not go on review unless within three days after the determination of the case the legal practitioner or the person who was cited as, and appeared as, the representative of the company, requests the Clerk of Court to forward the case on review. Such a request must be made in writing and accompanied by a brief statement of the reasons for the request.

The magistrate must comment on the reasons for the request before the record is forwarded on review (See s 7 (2) of the Magistrate Court Act [*Cap 7*:*10*].

The second instance is where the court has imposed a sentence which is not usually subject to review in the ordinary course. The accused person (other than one who has been legally represented or is a company) may, if he considers that the sentence imposed is not in accordance with real and substantial justice, within three days of the sentence request the Clerk of Court, in writing, to forward the record on review. In this case there is no requirement for the accused to give reasons for his request. This does not preclude him from submitting his reasons why he believes the sentence is not in accordance with real and substantial justice. Similarly there is no specific requirement from the magistrate to comment. (Section 57 (3) of the Magistrates’ Court Act).

This procedure is not available of the accused who wishes to challenge his conviction; if he wishes to challenge his conviction he should appeal.

See *S* v *Stokie* 1980 ZLR 280.

The third way is to bring the matter for review before the High Court under the courts’ general powers of review. The grounds on which any proceedings may be brought on review are:

1. Absence of jurisdiction on the part of the lower court;
2. Interest is the case, bias, or corruption on the part of the lower court;
3. Gross irregularity in the proceedings or decision.

(Section 27 of the High Court Act) [*Cap 7:06*].

An irregularity must be of so gross a nature as to viciate the proceedings. Where this occurs, the court may set aside the proceedings on review without reference to the merits. The accused can be charged again.

See *S* v *Naidoo*  1962 (2) SA 348, *S* v *Nyamayevhu* 1978 RLR 140, *S* v *Mozi* 1956 R & N 357 and High Court Act s 29 (3).

Such a review must be brought by way of notice of motion.

See High Court (Miscellaneous Appeals and Reviews) Rules RGN 450 of 1975 r 2 (2) as read with High Court Rules ( r 256).

The notice of motion procedure is set out in Order 33 of the High Court of Zimbabwe Rules, 1971.

As this procedure is somewhat undeniably complex to many a legal practitioner it may, in many, cases be simpler to follow one of the other courses described above.

Clearly the applicant’s counsel failed to appreciate the above.

There was an attempt to proceed in terms of the High Court Rules Order 33 r 256. But the failure to comply is far too obvious for the court to ignore.

Firstly the applicant failed to cite properly the respondents as noted by the office of the Attorney General.

Secondly, and most importantly, the applicant failed to set out clearly and concisely the grounds for review which he relied upon. If it was a gross procedural irregularity, which he sought to rely on he ought to have set out that procedural irregularity on the face of the application as is required by the Rules.

There is noting *ex facie* the record which points to any irregularity in the procedure adopted by the lower court. As pointed out above the irregularity must be so gross as to viciate the proceedings.

Assuming in the accused’s favour that the prosecutor unduly influenced him to plead guilty, this would have necessitated an appeal rather than a review as this raises a question of law.

In any event the applicant is challenging his conviction. He is not challenging the propriety of the procedure used by the magistrate in determining his guilt.

In the result therefore his application for review was misconceived.

It is therefore dismissed.

*Manyurureni & Company*, applicant’s legal practitioners