VIMBAI CHIDAVAENZI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU JP and BERE J
HARARE 28 October 2008

CRIMINAL APPEAL

Advocate L Uriri for appellant
Mr R Chikosha for respondent.

MAKARAU JP: On 11 July 2008, Vimbai Chidavaenzi, ("Vimbai"), appeared before the magistrates' court, to answer to a charge of contravening section 4 of the Shop Licences Act [Chapter 14.17]. It was alleged in the charge sheet that from January 2008, the accused unlawfully conducted the business of selling goods at number 18 Lyton Road, Harare without a valid shop licence. It is not clear on the record in what capacity Vimbai appeared before the trial court. I say so because while her name was typed on the charge sheet as the accused person, the trial magistrate endorsed the name "Karima Investments" above Vimbai's name. A similar endorsement was made on the outline of the state case.

The record is silent as to the import or purport of both endorsements.

A plea of guilty was entered on behalf of the accused person who was duly convicted and sentenced to payment of a fine in the sum of $30 billion or in default of payment, 30 days imprisonment. In addition, all the items listed in the state outline as the subject matter of the offence were declared forfeited to the State. From the nature of the sentence imposed by the lower court, it would appear that the court was sentencing Vimbai in her personal capacity and not as representing Karima Investments as a company cannot be imprisoned in the event that it defaults on paying a fine.

Aggrieved by the sentence, the appellant noted an appeal to this court.

On the turn, we set aside the conviction and the sentence imposed on the appellant and indicated that our reasons would follow. These they are.

Two issues arise from the facts of this appeal.

Firstly, magistrates' courts are courts of record. This is specifically provided for in section 5(1) of the Magistrates' Court [Chapter 7.10]. The section proceeds to provide that the record shall be accessible to the public through the office of the clerk of court. There is thus a legal and professional duty on the part of magistrates to always keep full and comprehensive records of the proceedings before them. The record must *ex facie*, be able to inform the reader of what transpired in court without the aid of verbal explanations from the pressing officer. The rationale behind keeping a full and accurate record of the proceedings in a court of law was aptly summarized by MUCHECHETERE J (as he then was) in *S v Ndebele* 1988 (2) ZLR 249 (HC) at 254 C-G in the following words:

"All courts are courts of record and are required to keep full and comprehensive records of all proceedings. The proposition is self evidence and accords with reason and justice. In *Sv Besser* 1968 (1) SA 377 (SWA), the court held that a failure to keep a proper record of any proceedings or any part thereof amounted to gross irregularity cognizable under the court's power of review as envisaged in provisions such as s27 of the High Court Act No 29 of 1981. In addition s163 (4), 190 and 255 (3) of the Code compel him to record those matters mentioned in them."

After referring to other cases where the same legal position was adverted to, the learned judge proceeded to remark:

"The need to do so is quite obvious. In the absence of such a record how is a review or appellate tribunal to assess the correctness and the validity of an y proceedings placed before it for adjudication?"

In addition to the reasons given by the learned judge above, I would venture to suggest that the need to keep a full and comprehensive record also reduces arbitrariness on the part of the presiding officer as all questions by the court to the accused and the responses elicited by such questions are reduced to writing. It would take a criminal minded judicial officer to falsely record the questions he put to the accused and the answers elicited by such questions.

As was held by MUCHECHETERE J "as he was" in the matter that was before him, the appeal before us is also an eloquent expression of the importance of the need to keep full and comprehensive records of court proceedings.

Firstly, it is not clear from the record who the accused person before the court was. The charge sheet as stated above started off with the name of Vimbai. This was the name typed in when the charge sheet was prepared. Without canceling the name of Vimbai, the trial magistrate simply endorsed the name Karima Investments above that of Vimbai. Clearly, without an oral explanation from the trial magistrate, one cannot tell who the accused was and if it was Vimbai, why the name of Karima Investments was endorsed above hers.

It would appear from the sentence imposed in the matter that the trial court viewed Vimbai in her personal capacity as the accused person before it. This is so because in default of payment of the fine, the accused was sentenced to 30 days imprisonment, a sentence incompetent for corporate bodies. Assuming that the accused person before the court remained as in the typed charge sheet, one then wonders why the trade name Karima Investments was imposed above the name of the accused. But again, without an explanation from the trial magistrate, these questions will remain unanswered.

The trial court clearly failed to keep a full and comprehensive record of the proceedings before it. This amounts to a misdirection vitiating the entire proceedings. It is on this basis that although the appellant noted an appeal against sentence only, we set aside the conviction of the appellant and ordered that the goods that had been forfeited to the state be returned to her.

Further, assuming that the accused person before the trial court was Vimbai in her personal capacity, the record indicates that she did not at any stage tender a plea to the charges. The proceedings start off with a statement that the facts and essential elements had been explained and were understood by the accused. The defence counsel then advised the court that at the time the charges allegedly arose, the accused was not operating the shop as it was closed. Then follows an exchange between the prosecutor and defence counsel about the matter going to trial with the accused pleading to the charges. Immediately thereafter, the court records that the accused was guilty as pleaded (*sic).* The matter then proceeds to mitigation and sentence. The record does not indicate that at any stage during the proceedings, the charge was put to the accused and she pleaded to it as alleged.

Quite apart from the remarks made above about the need to keep a full and comprehensive record of the proceedings he was presiding over, the trial magistrate erred in a fundamental procedural regard by not recording a plea from the accused. While the Criminal Procedure and Evidence Act [9.07] does not specifically provide for how a plea to charge should be taken, as a matter of procedure, the accused person should personally plead to the charge. (See *R v Chinowaita and Others* 1967 RLR 54 (AD) and *S v Nyandoro* 1987 (2) ZLR 66 (SC)). In R v Chinowaita and Others (supra), the Appellate Division (as it was then called), felt constrained to bring it to the attention of all trial judges the need to observe the practice of specifically asking the accused person to personally plead to each count in the indictment. In

that matter, the legal practitioner had tendered a plea of not guilty on behalf of the accused persons.

In *casu*, no plea was recorded from either the appellant or from her legal practitioner. It is not clear on the record whether this important procedural step was taken by the court. it further cannot be assumed that the accused pleaded guilty to the charges where the record is silent. The rest of the proceedings that followed cannot be valid in the absence of a plea by the appellant.

In response to the notice of appeal, the trial magistrate indicated that the accused person pleaded guilty and was legally represented. However, the taking of the plea is not on record, again a failing on the part of the trial magistrate to keep an accurate and comprehensive record of the proceedings before him.

Thus, apart from the misdirection cited above, we were of the view that the failure by the trial court to record a plea from the accused person personally was such a gross irregularity as to vitiate the entire proceedings.

In our view, it is safer to set one possibly guilty person free than to condone a departure from practice that may set the precedent for the conviction of many innocent people.

For the above reasons, we quashed the conviction of the appellant and set aside the sentence and forfeiture order issued by the trial court.

Bere J agrees