JOANA MAMOMBE
and
CECILIA REVAI CHIMBIRI
versus
CHIEF MAGISTRATE F. MUSHURE NO
and
THE STATE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE; 12 January & 7 February & 4 July 2023

Criminal Review

Mr *A Muchadehama,* for the applicants
Mr *M Reza & Mr T Mafuwa,* for the 2nd respondent

MUNANGATI MANONGWA J: This is an application for review made in terms of r 62 of the High Court Rules, 2021 as read with ss 26,27, 28 and 29 of the High Court Act, [*Chapter7:06*]. The applicants are challenging the decision of the court a *quo* to have the criminal matter involving them proceed to defence case on the basis that no *prima facie* case was established against them. The applicants raise a number of review grounds which are outlined later in this judgment.

The applicants herein were arraigned before the first respondent facing the following charges:

1. "Publishing or communicating false statements prejudicial to the state as defined in Section 31(a)(i) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]

In that on the 13th day of May 2020 and in Harare Joana Mamombe and Cecillia Revai Chimbiri one or both of them unlawfully and intentionally communicated to their relatives friends and legal practitioners a statement which was wholly or materially false to the effect that they had

been abducted by the police with the intention or realizing that there is a real risk or possibility of inciting or promoting public disorder or public violence or endangering public safety.

Alternatively

"Publishing or communicating false statements prejudicial to the state as defined in Section 31(a)(iii) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]

In that on the 13th day of May 2020 and in Harare Joana Mamombe and Cecillia Revai Chimbiri one or both of them unlawfully and intentionally communicated to their relatives' friends and legal practitioners a statement which was wholly or materially false to the effect that they had been abducted by the police with the intention or realizing that there is a real risk or possibility of undermining public confidence in a law enforcement agency, the Prison service or the defence forces of Zimbabwe

2. Alternatively

"Defeating or obstructing the course of justice as defined in s184(1)(f) of the Criminal Law [Codification and Reform] Act, [*Chapter 9:23*]"

In that on the 13th day of May 2020 and in Harare Joana Mamombe and Cecillia Revai Chimbiri and Netsai Marova one or both of them unlawfully and intentionally made statements to Detective Inspector Chafa, a police officer falsely alleging that a crime of kidnapping had been committed or may have been committed, knowing that the allegations were false or realizing that there is a real risk or possibility that it may be false.

The applicants pleaded "**Not Guilty**" to the charges. At the close of the state case the applicants applied for discharge in terms of S 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The application was dismissed. Aggrieved by the refusal of discharge the applicants approached this court on review seeking the following relief:

1. That the application succeeds.
2. That the first respondent's decision in CRB 45-46/20 handed down on 12 September 2022 wherein she dismissed Applicants' application for discharge at the close of the state case be and is hereby set aside and substituted with the following:

> "The accused persons Joana Mamombe and Cecilia Revai Chimbiri be and are hereby found not guilty, discharged and acquitted at the close of the state case"

3. There is no order as to costs.

The application is opposed. This criminal review application has been made easier by the concession by the State that the main and first alternative charges faced by the applicants of publishing or communicating false statements prejudicial to the state as defined in Section 31(1)(i) alternatively publishing or communicating false statements prejudicial to the state as defined in s 31(a)(iii) herein were not sustainable given the evidence led in the Magistrates court which failed to establish a *prima facie* case to which the applicants could answer to. Thus this court is left with the task of reviewing the court *a quo's* ruling wherein it refused to discharge the applicants on the second alternative charge of defeating or obstructing the course of justice as defined in s 184 (1)(f) of the code.

It is imperative for the better understanding of this matter for the state outline to be reproduced so as to understand the facts of this matter as presented by the State. The outline is as follows:

State Outline

1. The complainant in this case is the State.
2. The accused persons and their particulars are as indicated above.
3. On 13 May 2020, at about 1230 hours, accused persons and other members of the Movement for Democratic Change Alliance (MDC-A) youths gathered at Choppies Supermarket, Warren Park 1, Harare where they demonstrated against the recalling of MDC-A members of Parliament and alleged misuse of COVID-19 funds by the Government.
4. On the same date (13/05/20), social media platforms and local newspapers circulated stories purporting that the accused persons had been arrested for having participated in the Warren Park demonstration.
5. On 15 May 2020 at around 0100 hours, the accused persons' lawyer Jeremiah Bamu contacted the police and advised that the accused persons were at Muchapondwa Business Centre Bindura.

6. The Police and the accused persons' legal practitioners went to Muchapondwa Business Centre, Bindura where they collected the accused persons and took them to Parktown Hospital, Waterfalls, Harare for medical examination since they alleged that they had been tortured.
7. On 19 May 2020, accused [1] was interviewed and made a statement to Detective Inspector Chafa of CID Law and Order Harare to the effect that she had been abducted by members of the police and a statement of complaint was recorded from her.
8. On 25 May 2020, accused [2] was interviewed and made a statement to Detective Inspector Chafa of CID Law Order Harare to the effect that she had been abducted by members of the police and statements of complaint were recorded from her.
9. Investigations conducted by the police established that the accused persons were never abducted but they created or lied, in that during the time of the alleged kidnapping the accused persons visited several leisure places in Harare.
10. On the same date [13/05/20], at around 1654 hours, accused persons were physically seen at Belgravia Shopping Centre, Harare while in a silver Mercedes Benz registration number AFE 9222 which was being driven by their colleague.
11. There are video footages showing the times and places where the accused persons visited at Belgravia Shopping Centre these were downloaded and can be produced as Exhibits.
12. The statements of the two accused persons which they supplied to the police in their alleged kidnapping with respect to degree of injuries are inconsistent with the results of the medical reports.
13. Their flow of travel as indicated in their statements is inconsistent with the triangulation of their mobile phones as given by the service providers.
14. The vehicle which the accused persons claim that they used to enter into Harare Central Station after the arrest (Toyota Noah /Minibus shaped) was not captured by the CCTV at the Police Station at the time being claimed
15. The accused acted unlawfully.

The applicants came up with numerous grounds of review which are presented a follows;

Grounds of Review

1. First respondent's decision was grossly irregular and violated the applicants' right to the protection and benefit of the law protected by section 69(3) of the Constitution by putting the Applicants to their defence on the main count and first alternative counts when the charges in these counts where ruled to be unconstitutional and therefore null and void.
2. First Respondent's decision was also grossly irregular in that she put the Applicants to their defence in order that per chance they may incriminate themselves and also to bolster a State case which could not stand in its own.

2.1 Further and in any event this approach was deprecated upon in cases such as *AG* v *Bvuma & Anor* 1998(2) (S) *S* v *Kachipare* 1998 (2) ZLR 271 (S).

3. First respondent's decision was also grossly irregular and unreasonable in that having identified the tests to be applied at the close of the State case did the opposite and put the Applicants to their defences when none of the requirements had been met.
4. First respondent's decision that Applicants had communicated with a Legal Practitioner and Moline Kademaunga was grossly irregular, unreasonable shocking and repulsing (see para 58 of the ruling) there being not a single State witness who testified to this. Further and in any event Applicants never communicated that they had been kidnapped, an element which was central to all the charges.
5. The first respondent's treatment of the evidence of Detective Chief Inspector Chafa was wrongful and irregular in that the court held that the witness had recorded statements from applicants when no such statements were produced. Furthermore, it was not clear from this witness' testimony as to who said what and when to him.
6. The first respondent's decision was grossly irregular in glossing over the 2nd alternative (See para 62-68 of the ruling) when earlier in the trial first respondent had dismissed applicant's request for further particulars to be supplied by the State.
7. The first respondent's decision was also grossly unreasonable in that she ignored the apparent contradictions in the evidence of the witnesses particularly that of Christopher Tapera Kazembe and Godfrey Mangezi. Further the court also ignored the evidence of the other witnesses for the State which exonerated the Applicants.

7.1 Further the court ignored the evidence of applicants having been tortured, injured, wounded and unable to walk or talk. The first respondent ought to have answered that critical question. What were the applicants doing at Muchapondwa and how did they get there?

8. The first respondent's decision was grossly irregular in that she was manufacturing evidence for the State in order to justify her premeditated decision.

9. First respondent's decision was further grossly unreasonable in putting the Applicants to their defence in order to rebut the evidence in record. Applicants have no such duty or *onus*. It is the State and the State alone to prove applicant's guilty beyond any reasonable doubt.

10. First respondent decision was grossly unreasonable and violated applicants' right to a fair trial before an independent and impartial tribunal. First respondent's decision can only be explained by reason of structural bias, malice and mala fides.

11. Furthermore, first respondent's decision was grossly unreasonable and irrational and based on a misapprehension of the law and what needed to be established in cases such as the one that was before her.

Applicants' Submissions

The applicants' counsel contended that the applicants never communicated that they had been kidnapped as alleged. In that regard, he argued that the State did not produce the statements in which the applicants allegedly communicated that they had been kidnapped. Further, Detective Chief Inspector Chafa (hereinafter referred to as "DCI Chafa") did not state which witness said what vis the kidnapping allegations. He contended that as there were three accused persons initially, whose statement did the State rely on to formulate the charge or find basis to charge the applicants regard being made that the doctrine of common purposes is no longer part of our law. Mr. Muchadehama contended that it is DCI Chafa who formulated that opinion. He further contended that when DCI Chafa embarked on the journey to Muchapondwa he was already investigating a case of kidnapping even before meeting the applicants, in that regard, it cannot be said the applicants made a report of kidnapping to the authorities. He stated that if it was DCI Chafa who formulated the opinion that the applicants had been kidnapped as he stated in his

evidence, that cannot translate to mean the applicants rendered a false statement. The applicants' counsel thus submitted that a finding that the applicants made such a statement not having a basis becomes an irrational conclusion.

The Applicants' counsel submitted that the evidence of Venencia Muchenje and Nashley Muyedzenga was mixed up with the witnesses at one time saying that the allegations that the applicants had been kidnapped came from the police CID Law and Order and not the Police (p180 lines 3-5 and p228 lines 1-16) before the interviewing of the applicants.

It was also contended on behalf of the applicants that the Police or DCI Chafa had recorded statements from the accused persons as complainants and applicants were not warned of the possibility that they could be used against them as accused persons. Mr. Muchadehama contended that it was unfair and unprocedural to record a statement from a witness without affording them the rights of a potential accused were the accused would be informed of the right to silence, the right to the services of a legal practitioner. To then turn and use the statements against the applicants would be improper and unprocedural.

Applicant's counsel submitted that the charges were specific that the statements had been made on 13 May 2020. No evidence was presented to court of the applicants speaking to the police or communicating to anyone on 13 May 2020 about being kidnapped. He submitted that the State failed to justify the date. He referred to evidence of DCI Chafa that an informant Mr. Bamu had called the Police that the applicants who had been missing had been found at Muchapondwa Business Centre. That DCI Chafa only saw the applicants on the night or early morning of 15 May 2020 and statements were recorded on the 17th and 18th of May 2020 for one applicant and on 20 May 2020 due to the applicants' inability to render statements due to ill health. He thus contended that in the absence of any evidence that applicants spoke to DCI Chafa on 13 May 2020 the charge could not hold against the applicants.

On the falsity of the statement, Mr *Muchadehama* submitted that even if it were to be assumed that the applicants made such a statement, no evidence showed that the statement was false as all instances show that the applicants may have been kidnapped. He submitted that it is common cause that the applicants were found at Muchapondwa Business Centre. He stated that Detective Chief Inspector Morgan Chafa admitted that the applicants were unable to walk and speak properly and were injured to such an extent that they required hospitalization. The applicants

were immediately taken to hospital as per DCI Chafa's evidence. He submitted that it is the police which requested medical affidavits and DCI Chafa accepted all the contents of the medical reports when put across to him during cross examination. Mr *Muchadehama* submitted that DCI Chafa could not challenge the injuries on, and status of 1st applicant which were reflected on the medical affidavit as emotional stress, bruises on both breasts, bruises on right lower leg, rectum soiled by feaces and anal tears. As for the 2nd applicant the doctor observed an anal tear, bruises on the back, injury on feet, injuries on nipples and that the injuries were due to a blunt object. The applicants referred to an admission by Chafa that the applicants had been assaulted. He stated that falsity being an essential element, the failure by the state to prove it on a *prima facie* basis entitled the applicants to an acquittal.

Mr. *Muchadehama* pointed to the contradictions in the evidence of Takura Kazembe of POTRAZ and Godfrey Mangezi of Econet who were both State witnesses. He pointed to the evidence of Mr Kazembe who sought to say the applicants were using their phones and were active on Facebook, the internet, WhatsApp up to 21.37 pm during the time of the alleged kidnapping. To the contrary, Mr Mangezi from Econet the service provider states that from the availed annexures it is not possible to tell whether the person/user was on social media or were browsing the internet. Mr. Muchadehama contended that whilst the court *a quo* noted the discrepancies it decided to ignore them. Mr. Muchadehama argued that by choosing to go by the evidence of Kazembe and ignoring that of Mangezi the court was being partial as it did not consider the evidence that was exculpatory to the applicants.

He submitted that none of the two witnesses could categorically say the applicants had the phones on them after 3.00pm on 13 May 2020. Reference was made to the evidence by Kazembe that the reflection of a cellphone call on a base station is no evidence that the cellphone is closest to that base station because when one base station is congested the service goes to the next base station. The applicants referred to Kazembe's evidence that a base station can serve a cellphone from as close as 100 metres to as far as 5 kilometres. (See p 68 and p70)

Mr *Muchadehama* submitted that by calling this witness the State intended to establish that on 13 May 2022 the applicants were in Harare and had their cellphones during the time that they were allegedly kidnapped. This was not achieved and hence the decision of the first respondent

was not reasonable and was irrational as no court given those circumstances could say a *prima facie* case had been established.

In his submission Mr *Muchadehama* stated that the State case also hinged on the fact that the applicants had been seen at Belgravia Shopping Centre, Arundel Shopping Centre and at Sam Levy Village yet no such evidence was established. Counsel referred to the evidence of Detective Chief Inspector Muvhuro the Officer in Charge CID Cyber Laboratory who produced videos in Court. The applicants submitted that the videos were of such poor quality such that the witness could not identify the motor vehicle which was supposedly that of the applicants, the make or type or colour of vehicle was not visible neither was the registration number. The people appearing on the video could not be identified as the applicants. It was submitted that the screenshots of the video which were produced in court were not visible and there was nothing connecting the applicants to the videos or screenshots. Mr *Muchadehama* submitted that nothing of interest was found at TV Sales & Home Arundel, TV Sales & Home Same Levy Village as per the state witness. He further submitted that Mr. Muvhuro admitted that nothing relating to the applicants appears from the digital video recorder video from Chicken Inn Belgravia, Zuva Service Station and the external drive from Bon Marche (see p701 of the record).

It was submitted that the disregard by the court *a quo* of the fact that the applicants alleged that they had left their phones in the car and no one saw them using the phones and the next persons in possession are the police who admit they got the phones from the applicant's car shows bias as the court wants the applicants to answer the question who was using the phones which is for the State to prove. It was argued that the doctrine of recent possession militates against the police who admitted breaking in to the applicants' motor vehicle to retrieve the phones.

Mr *Muchadehama* submitted that the onus was on the State to prove that what DCI Chafa was told was false if the court was to believe that he was told something and this did not emerge from the evidence led. He submitted that the court *a quo* ignored the evidence of the State in which the applicants were found injured and traumatized as confirmed by medical affidavits placed before the court, which affidavits were requested by the police. He argued that the evidence pointed towards interference with the applicants. Failure by the court to consider the evidence shows structural bias and is malicious conduct on the part of the first respondent.

In that regard the applicants cannot be put to their defence in the hope that they will incriminate themselves. He submitted that the dismissal of the application in the circumstances is intended to put applicants to their defence in order to prove their innocence such an approach is grossly irregular, unreasonable and activated by malice. Mr *Muchadehama* submitted that the decision is irrational given that the evidence led did not establish a *prima facie* case, there is nothing for the applicants to answer to.

He further submitted that the court *a quo* ignored evidence in the applicant's favor, pertaining to the fact that the videos taken at Chicken Inn Belgravia, Bon Mache, Arundel and Sam Levy Villages did not link the accused to those places. That, it was argued was grossly irregular unreasonable and malicious. He noted that DCI Chafa found no evidence that the applicants were in Harare after 15:30 on the 13th May 2020 as advocated for by the State.

The applicants' counsel argued that of the 10 (ten) witnesses called by the state the first respondent never related to any other witnesses thus she ignored the evidence of the other 8(eight) witnesses. That approach he submitted cannot be correct and is irregular and smacks of ulterior motives.

Mr *Muchadehama* pointed to court that the first respondent manufactured evidence and also considered what she extracted from the defence outline as evidence where no witness had led such evidence. He submitted that such conduct was unprocedural and an irregularity which impacted upon the court's decision. He referred to the findings by first respondent on para 58 of the ruling (p 235 of the record) wherein the first respondent stated as follows

> "*Prima facie* the first accused communicated to a friend and her legal practitioner whilst the second accused communicated to Molline Kademaunga and Agency Gumbo from her political party that they had been arrested by the police. *Prima facie* that statement was false".

Mr Muchadehama submitted that no such evidence had been led and further it had nothing to do with the second alternative charge. He equally attacked the finding which the first respondent made that the 1st applicant had the car keys yet no such evidence had been led by the State. He submitted that at Muchapondwa the 1st applicant had not been found with the keys. He submitted that in the absence of evidence led to that effect the conclusion by the first respondent is without basis and is driven by malice and a desire to convict outside evidence and a sign of operative prejudice.

Second respondent's Submissions

Mr Reza for the State submitted that the applicants had made a statement to DCI Chafa leading him to believe that the applicants had been abducted and that the statement was false. He submitted that a witness Yuvett Chizano stated that she served women in a silver Mercedes Benz. He referred to the evidence of Yuvett Chizano that one of the three occupants came out of the motor vehicle and when she saw a camera she ran back.

Mr. Reza stated that at around 2pm both applicants' phones on 13 May recorded the Warren Park base station and that both applicants were travelling together and call records confirm that. Mr. Kazembe and Mr. Mangezi stated that the phones were active on social media and exhibits showed that both phones were active at 5:00pm around Belgravia Shopping Centre. He stated that evidence had been presented to court that 1st applicant was on Facebook and twitter yet according to their rendition the applicants should have been far away from Harare. He argued that there is no evidence that the phones left Harare as the activity of the phones would show.

Mr. Reza argued that the discrepancies referred to by the applicants are minor and are not fatal. He argued that there are no discrepancies between the evidence of Mr. Mangezi and Mr. Kazembe if anything their evidence complement each other. The corroboration lies on the fact that they both stated that a base station captures a person using a device within that area. He further argued that the court a quo 's decision was not irrational given that the phones were found in that car and the 1st applicant had indicated in her defence outline that she had locked the car and she had taken the car keys with. As only the applicant had the car keys and the phones were on social media from 2pm to 11 pm it can only be the applicants using the phones. He argued that this is further confirmed by the fact that the police had to use a locksmith to open the vehicle.

Mr. Reza stated that there is evidence that the kidnapping was stage managed more so when the 2nd applicant has links to the area as her mother is from Chinyani Village, Musana which village is close to Muchapondwa Business Centre. He further submitted that when police officers went to Muchapondwa the applicants told them that they had been brought to that place against their will hence it was proper for the police to investigate and have the applicants examined by doctors. On the issue of falsity Mr. Reza argued that, the State does not deny that the applicants had injuries but the injuries do not speak to the force allegedly used. He referred to the fact that the 2nd applicant

had said she had a rifle inserted on her backside but the medical report indicated there were no injuries. This he argued further pointed to the falsity of the report.
Mr. Reza however admitted that the evidence of Mr Muvhuro did not support the State's case and created problems for the State's case when analyzed.

In response Mr *Muchadehama* maintained that the evidence led by the State did not prove a *prima facie* case. He maintained that apart from the decision being irregular, grossly unreasonable and injudicious the decision must have been actuated by bias and malice. He thus submitted that the applicants should not be put to their defence to bolster the State's case which cannot stand on its own.

ANALYSIS

It is imperative to state from the onset that the courts are reluctant to interfere with unterminated proceedings of a lower court. This is meant to allow the lower court to exercise its powers by hearing a matter and make a decision without hindrance. The general rule is as summed by the *Supreme Court in Attorney General v Makamba* 2005 (2) ZLR 54 (S) 64C-E

> "The general rule is that a superior court should intervene in uncompleted proceedings of the lower court only in exceptional circumstances of proven gross irregularity vitiating proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant."

Thus it is only in exceptional circumstances that the courts will interfere. In doing so, each case depends on its own facts as well as the strength of the grounds of review and what would have gone wrong in the decision making process of the lower court.

The exceptional circumstances have been identified to include but are not limited to the following

i) Where grave injustice would occur if the superior court does not intervene
ii) Where there is grave miscarriage of justice
iii) Where proceedings are likely to be declared a nullity
iv) Where the decision is clearly wrong as to seriously prejudice the rights of the litigant

(See *Gumbura & Ors* v *Mapfumo & Ors* [2022] ZWSC 10

It is this court's understanding that given the aforegoing exceptions, a reviewing court is thus obliged to assess the grounds of review and weigh them against the evidence before the court in order to assess whether it is imperative for the court to interfere with the unterminated proceedings. If the applicant is likely to experience grave injustice, serious prejudice to his/her rights or the decision results in miscarriage of justice, the court has to weigh in and interfere with the unterminated proceedings to serve the ends of justice. Equally where there are gross procedural irregularities and the decision is manifestly wrong it is not in the interests of justice to allow the proceedings in the lower court to continue.

The applicants herein contend that the decision to place them on their defence constitutes a gross irregularity giving rise to miscarriage of justice and prejudicing the applicants who are entitled to an acquittal.

It is now settled that a court is obliged to discharge an accused at the close of the State case where:

i) There is no evidence to prove an essential element of the offence. See *Attorney General v Bvuma & Anor* 1987 (2) ZLR 96(S) at p102

ii) There is no evidence on which a reasonable court, acting carefully, might properly convict see *Attorney General* v *Mzizi* 1991(2) ZLR 321 at p 323B, and

iii) The evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it- see *Attorney General* v *Tarwireyi* 1997(1) ZLR 575(S) at p 576

Thus where there is no evidence of the commission of an offence by the accused person the court has no discretion but to acquit the accused person. It follows as the accused person would not have a case to answer to.

The alternative charge that the applicants faced in terms of s 184(1)(f) of the Code for which they applied to be discharged at the close of the State case accused the applicants of unlawfully and intentionally making statements to Detective Inspector Chafa, a police officer falsely alleging that a crime of kidnapping had been committed or may have been committed, knowing that the allegations were false or realizing that there is a real risk or possibility that it may be false. It is this charge that the applicants contend they should not be made to answer to by being compelled to enter into the defence case as no *prima facie* case was established by the State at the close of its case.

As correctly noted by the court *a quo,* the essential elements of the alternative charge which pertains to a false report of kidnapping are that

a. The accused makes a statement to a police officer
b. The statement alleges that a crime has been committed or may have been committed;
c. The statement is false; and
d. The accused knows that the allegation is false or realizes there is a real risk or possibility that the allegation is false.

The applicants contend that no sufficient evidence to make them answer to the charges by being put to their defence has been placed before the court considering the essential elements of the charge. In its findings the court *a quo* dealt with the evidence on the alternative charge in three (3) paragraphs and same read as follows:

> "*Prima facie* there is evidence that the second accused made a statement to the police through detective Chief Inspector Chafa on 17 and 18th May 2020 and the first accused after five days to the effect that they had been forcibly taken from Harare and tortured until they were dumped by the roadside in Muchapondwa. To the Police Officer a crime of kidnapping had been committed. *Prima facie* going by the location and activities on their phones, that statement was false. *Prima facie* the accused knew that the statements were false, or at least realized the real risk or possibility that it was false. *Prima facie* there is evidence to prove the essential elements of the second alternative charge.
> The call data records show that contrary to the accused's claims that their phones were left in the car behind TM Supermarket opposite Harare Central Police Station, the numbers were active during the time the accused were allegedly under abduction, including uploads on social media sites. The first accused person had the car keys with her. If the accused persons were not using their phones, who was? How do you explain the significant uploads on their phones throughout the time they were allegedly being tortured in Muchapondwa?"

The applicants do not agree with these findings and they fielded eleven grounds of review. The first ground pertains to the main charge and the first alternative count. Given the concession by the State that those charges cannot be sustained the ground naturally falls away. The remaining ten grounds of review are repetitive and, some of the perceived grounds are not grounds of review *per se* but supportive evidence of a ground. Grounds of review like grounds of appeal must be clear, precise and concise. It is not for the court to scrounge around and try to decipher what it is that the applicant wants to state in a ground of review. A reading of the remaining grounds reveals that there are only four grounds which this court has to deal with and these can be summarized as follows

1. That the decision of the first respondent to put the applicants to their defence was grossly unreasonable and irregular given the evidence at hand.
2. That the first respondent's decision to dismiss applicants' request for further particulars was grossly irregular.
3. That the first respondent's decision was grossly unreasonable as it was characterized by bias, malice and mala fides.
4. That the first respondent's decision is irrational due to the misapplication of the law.

In deciding this application, this court needs to revisit the decision of the court *a quo* and determine given the evidence fielded whether substantively the State established a *prima facie* case justifying the putting of the accused to their defence and procedurally handled the matter lawfully given the grounds of review presented before the court. Where there is no evidence that an accused committed the offence or any offence of which he might be convicted the law demands that the accused be found not guilty and acquitted as provided in s 198(3) of the Criminal Procedure and Evidence Act.

In casu it was thus imperative for the State to lead evidence that the applicants had made a statement to DCI Chafa that they had been kidnapped. Evidence on record shows that the said Chafa received information on the night of 14-15 May 2020 that the applicants who had been reported missing had been found at Muchapondwa and he together with other officers decided to go to Muchapondwa area. As submitted by Mr. Muchadehama he went to Muchapondwa already knowing that he was going to investigate a kidnapping. By that time, he had not yet met the applicants. He further gave evidence that he had *mero motu* formulated the opinion that the applicants had been kidnapped. There is no evidence that the investigation of the kidnapping allegations was instigated at the instance of the applicants at that juncture.

Further, no statement of any one of the applicants was presented to the court despite a request by the applicants' legal representative to be furnished with further particulars. Whilst it is accepted that a statement to the police officer does not have to be in writing, the fact that there were three accused persons and as rightly submitted by Mr *Muchadehama*, in the absence of the doctrine of common purpose, it was essential for the State to lead evidence pertaining to the statement of each accused person which was not done. This is because the acts of one accused person cannot be

attributed to another. It was therefore necessary that the State presents evidence of the contents of the statement made to DCI Chafa by each of the accused person as it is the statement made which is assessed *vis* the falsity which is an essential element of the charge. The denial of further particulars was therefore fatal. This, coupled by the fact that the State did not particularly establish who stated what facts or who made what report makes the decision grossly irregular.

Even if it were to be taken that a report had been made that the applicants had been kidnapped, it had to be proven by the State that the statement was false. The falsity does not seem to come out from the evidence led. The evidence of DCI Chafa was to the effect that he received information that three applicants had been found *"dumped*" at a shopping centre called Muchapondwa. He stated that when he arrived at Muchapondwa he met with first and second applicants who were distressed, were crying and apparently in pain and they had difficulty in walking and appeared disoriented. The witness further confirmed that he had spoken to two persons David Mango and Obert Madzimbamuto who had confirmed that the applicants had arrived at their home at night on 15 May 2020 seeking help and they were injured and unable to walk. It is his evidence that together with the applicant's legal practitioners they accompanied the applicants straight to a medical facility and for a couple of days he could not get statements from them as they were unwell. In his evidence in chief DCI Chafa stated as follows; *"We came back and eventually we managed to record a statement. In those statements, that is the two accused person's statements I concluded that taking into consideration those circumstances, they had been kidnapped."* This conclusion arose out of the officer's assessment of the circumstances. Thus it can therefore not be said the applicants lied to the police officer. Under cross examination he admitted that the applicants had been assaulted although he came short of saying they were tortured. Medical affidavits before the court show the bodily injuries suffered by the applicants which the witness did not dispute.

Mr. Reza's submission that some of the injuries are not consistent with the alleged force used is without basis in the absence of any expert evidence from medical personnel. The police requested for the medical affidavits, which as Mr *Reza* conceded and indeed DCI Chafa, showed several injuries on applicants. Some injuries being on intimate parts of the body.That one of the applicants has a connection to the area as her mother is from Chimbiri Village which is close to Muchapondwa where the applicants were found adds no value to the State's cause. The state

witness DCI Chafa admitted that the applicants were dumped and were injured and disoriented, this is inconsistent with persons who were on a casual visit. That Cecilia Chimbiri's mother hails from a village close to Muchapondwa does not prove anything given the circumstances pertaining to this case which DCI Chafa bore testimony to. In any case DCI Chafa stated during cross examination that the applicants had sought assistance from David Mango and Obert Madzimbamuto as the applicants did not know their location when they arrived at Mango's homestead during the night of 15 May 2020.Thus the authenticity of the allegations of kidnapping was not destroyed by the evidence of State witnesses.

The court *a quo* made a finding that the applicants' mobile phones were active in the central business district on 13 May 2020, and there were uploads showing that the applicants were active on social media. Contradictory evidence came from the State witnesses Christopher Tapera Kazembe and Godfrey Mangezi the experts who came to give evidence particularly to prove that the applicants were using their phones during the period they were alleging to be kidnapped. Mr. Mangezi was categorical that the data activity on applicants' cellphones is no evidence that there was physical interaction with the phones. (Refer to pages 511-517). Mr. Mangezi went further to say he could not tell with certainty where the applicants were on 13 May 2020. Further no phone calls or messages were sent out or received by the applicants after 3:30pm on 13 May 2020. The evidence of the phones which the State sought to rely on is further dented by the fact that the State witness DCI Chafa confirmed that the applicants' phones were found by the police in the locked vehicle which was packed behind TM Supermarket opposite Harare Central Police Station and this was in the absence of the applicants. In fact, the applicants were in hospital at the time the phones were found. The applicants had indicated in their defence outline that they had been asked to leave their belongings in the vehicle they were in when certain people forced them into another vehicle.

The apparent misdirection by the court *a quo* pertaining to the issue of onus to prove a *prima facie* case clearly comes out when the 1st respondent in her judgment makes the following remarks; *"If the accused were not using their phones, who was?*

This question is misplaced and hence results in the irrational decision due to a misapplication of the law. It was for the State to present evidence that the applicants were using their phones during the alleged kidnapping. The State had the obligation to prove that the applicants were using their phones. Equally the question *"How do they explain the significant uploads on their phone*

throughout the time they were allegedly being tortured in Muchapondwa" is misplaced. The evidence given by Mr. Mangezi and Kazembe about the usage of phones was contradictory hence the State did not prove that the uploads on 13 May 2020 pointed towards human interaction or usage of the phones by the applicants. Where evidence led by the state on a crucial aspect is contradictory, the court cannot rely on it as it cannot choose to disregard evidence of one witness against the other as the State case has to be consistent to a great extent. The applicants could not be put to their defence or be asked to explain that which the State had failed to explain.

It is apparent that whilst the first respondent was able to identify the approach to be adopted in applications for a discharge at the close of the State case she failed or contradicted herself in so far as she disregarded the principle.

In discrediting the allegations of kidnapping the state sought to rely on evidence that the applicants had been seen at various outlets particularly at Belgravia, Chicken Inn, Arundel and Sam Levy Village. Mr. Muvhuro Officer in Charge CID Cyber Laboratory recovered Digital Video Recorders from Chicken Inn, Zuva Service Station and a network Video Recorder from Bon Marche Belgravia. The video footages were of such poor quality to the extent that the make, type, registration number and colour of the alleged applicant's vehicle could not be identified. The video does not show the occupants of the vehicle. Neither were the images of the persons appearing in the footage identifiable and the witness could not tell whether the object/image was male or female. (See p 686-687). Nothing of interest was found at TV Sales Arundel and TV Sale Sam Levy. Yuvert Chizano a former Manager at Chicken Inn Belgravia who was fielded as witness to state that she had served the applicants clearly said she was unable to identify the applicants as the persons she had served as she attended to a lot of people and this had occurred years back.(See p527 of the record). In essence there is no evidence to buttress the sighting of the applicants.

Most damning was the evidence of Mr. Muvhuro, and Mr *Reza* was professional enough to concede that such evidence damaged or set back the State case.

It is apparent from the foregoing that the evidence adduced on behalf of the State is so manifestly unreliable and certainly no reasonable court could safely act on it. It is trite that a gross misdirection can arise from the misapplication of the law to the facts and that is what obtains *in casu*.

The applicants further referred to a gross irregularity whereby the first respondent referred to and relied on certain facts which had not been presented in evidence by the state to arrive at her decision The applicants termed this "manufacturing of evidence." This arises from the finding by the court *a quo* that the first accused (first applicant) communicated to a friend and her legal practitioner whilst the second accused (second applicant) communicated to Molline Kademaunga and Agency Gumbo from her political party that they had been arrested by the police. This the applicants argued had nothing to do with the second alternative charge which referred to kidnapping allegations. A reading of the record does not point to such evidence having been led at all. Equally the statement in the judgment that the accused had the car keys did not come from the evidence led. No witness attested to that. In fact the services of the lock smith had to be sought by the police to gain access into the car. The first respondent seems to have picked this from the defence outline where the first applicant states that she initially had the keys.

Bringing in evidence which has not been led before the court is improper because at the close of the State case the court relies on the evidence led to decide on whether a *prima facie* case has been established. It is a gross irregularity to anticipate what the defence will state and use same as a basis to arrive at a decision. This is because the court is obliged to consider the evidence led and presented before it by the state and not speculate on what the defence is to say. What appears in a defence outline is not evidence. A defence outline remains an outline of the evidence to be presented to court by an accused. Its skeletal in nature. Its full body is attained upon the leading of evidence which gets tested in cross examination. The court thus finds the inclusion of facts not placed before the court in evidence but extracted from a defence outline to be grossly irregular more particularly when that happens at the close of the state case.

The applicants attack the decision of the court *a quo* on the basis that the decision was grossly unreasonable and characterized by bias malice and mala fides. This is premised upon the fact that the court *a quo* not only refused to have further particulars provided but ignored evidence that is in the applicants' favour. The evidence of Chief Inspector Muvhuro indicates that the applicants had not been seen at the places that the State alleges they were seen particularly Belgravia. No concrete evidence was presented to prove that the applicants were in Harare on 13 May 2020 after 3.30pm as the State alleged. In fact, the applicants are only located in the early hours of 15 May 2020. The court in making a decision is bound to consider evidence in its totality and the fact that

the court *a quo* only relied on evidence that in its view would support *a prima facie* case and not indicating why it did not consider evidence which dented the state case points towards bias. In fact, such an approach is grossly irregular.

The court a quo further underplayed the contradictions in the State case particularly the evidence of Kazembe and Mangezi. Given the contradictions it is puzzling how the first respondent reached a decision that "*prima facie going by the location of and activities on their phones"* the statement of kidnapping was false. Of the two witnesses who gave evidence on the issue of activities on the phone one had clearly denied that the uploads pertained to human interaction. He had also said he could not say the applicants were in Harare. Mr. Reza conceded the destructive effect of the evidence of Muvhuro to the State case yet the first respondent did not even refer to that evidence presumably because it did not support the State case. The finding can only be attributed to bias and *mala fides* or alternatively to gross misapplication of facts. That is irregular and points towards bias. The test for bias is objective and the possibility of bias and not actual bias suffices. A judicial officer has to be impartial and where the parties reasonably perceive that a judicial officer is not impartial that impacts upon the decision made. In reality such an officer must recuse himself or herself.

This court notes that the evidence of the State witnesses had been so discredited during cross examination and had become so manifestly unreliable such that no reasonable court could safely convict on such evidence. The evidence of the State witnesses is simply irreconcilable and the falsity of the alleged statement is simply absent.

As rightly put by the applicant's counsel in his submissions, the state's witnesses confirmed the following facts:

i) That the vehicle of the appellants was found locked behind TM Supermarket opposite Harare Police Station where the applicants alleged in their defence outline they had parked

ii) the applicants' phones were found by the police around the 17th May 2020 in the locked motor vehicle in the applicants' absence

iii) Applicants were found around Muchapondwa Business Centre disoriented

iv) Applicants were injured and medical reports requested by the state proved an array of injuries including injuries on the intimate parts of the applicants' bodies.

v) The applicants were not accounted for from 13 May 2020 to the early hours of 15 May 2020 (around 0100 hours as per state outline)

The falsity of the statements (which were not produced) was simply not established *prima facie*. In fact, evidence placed before the court by the State itself confirms that the applicants had been taken elsewhere. *In casu* it cannot be said reliable evidence has been presented by the State to prove the essential element of the alternative charge which is falsity. Where an essential element has not been proven *prima facie* the court has no discretion but to discharge the accused. See the *Bvuma* case cited supra. This court is convinced that given the foregoing analysis it cannot be said that the State had adduced reliable evidence favourable to it from its witnesses such that if evidence is uncontroverted by the defence the State can secure a conviction. In essence it is the finding of this court that even if the defense were to close their case without giving evidence the State cannot convict on the evidence led so far. This shows that the State has failed to prove a *prima facie* case against the applicants.

The first respondent states in her judgment that "*it is not for the accused to seal the holes in the state case during the defence case. Placing the accused to his defence in the hope of plugging holes in the state case not only offends the fair trial rights but is also a travesty of justice."* Surprisingly the Magistrate proceeded to do exactly that which she rightly cautioned against. Such a decision is a travesty of justice and is capricious and irrational. The test for irrationality was stated by Lord Diplock in *CCSU v Minister for the Civil Service* (1984)3 All ER 935 at 951 as follows:

> "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'… it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

This definition of irrationality was adopted in the decision of Secretary for *Transport & Another v Makwavarara cited* supra.

The misapplication of the law by the court *a quo* coupled by the failure to find that the evidence placed before the court did not suffice to put the applicants to their defence makes the decision irrational. Thus as stated in the foregoing paragraphs the decision of the first respondent

is found to be grossly unreasonable, irrational characterized by bias and malice and cannot be in accordance with real and substantial justice. The applicants cannot be pushed into a defence case to supplement the inadequacies of the State case and hope that in the process they incriminate themselves. To adopt such an approach would be unconstitutional and against the principles that place the burden on the State to prove its case and in this case on a *prima facie* basis at the close of the State case. The superior courts in the cases of *S v Kachipare, Attorney General* v *Bvuma & Anor and Attorney General v Mzizi* (all cited supra) have already set the parametres, and in essence established that it is injudicious to support a State case which is unable to stand on its own due to lack of evidence. Where such is the case an accused is entitled to an acquittal. It is not for the court to try and prop up a crumbling case, a court has to acquit in the absence of evidence to support an essential element of a charge, or where the evidence is manifestly unreliable that no reasonable court can act on it.

The application has merit and therefore succeeds. In that regard the applicants are entitled to a discharge at the close of the State case.

In the result it as ordered as follows:

1. That the application succeeds.
2. That the first respondent's decision in CRB 45-46/20 handed down on 12 September 2022 wherein she dismissed applicants' application for discharge at the close of the State case be and is hereby set aside and substituted with the following:

   "The accused persons Joana Mamombe and Cecilia Revai Chimbiri be and are hereby found not guilty, discharged and acquitted at the close of the State case"
3. There is no order as to costs.

Mbidzo Muchadehama & Makoni, applicant's legal practitioners
National Prosecute Authority, respondent's legal practitioners