LENON SHEUNESU MAPFUMO

Versus

PROVINCIAL MAGISTRATE FOR MIDLANDS PROVINCE SHOTGAME N.O

And

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 7 JUNE 2021& 11 JUNE 2021

Urgent Chamber application

S. Zingomo for the applicant
B. Gundani for the respondent

DUBE-BANDA J: After hearing argument in this matter I issued the following order: "That the application is dismissed."At the time I gave brief reasons and indicated that I would provide detailed reasons at a later stage. What follows are the detailed reasons for the order.

This is an urgent application. Applicant seeks an order to stop criminal proceedings in the magistrate's court pending the finalization of an application for review (case No. HC 695)/21) pending before this court. This application was placed before me after normal working hours on Friday 4th June 2021, and the trial in the magistrate's court was set to continue on Tuesday 8th June 2021. I then directed that the application be set down for a hearing on Monday 7 June 2021, at 2:30 in the afternoon. I further directed that a copy of the application and a notice of set-down be served on the respondents.

The applicant is facing two counts. In count 1, he is charged with the crime of disorderly conduct as defined in section 41(b) of the Criminal Law Codification and Reform Act [Chapter 9:2] (Criminal Law Code), it being alleged that on 25th April 2021, and at Kwekwe Criminal Court premises, Lenon Sheunesu Mapfumo (applicant) unlawfully and intentionally conducted himself in a disorderly manner by using threatening, abusive or insulting words or behaved in a threatening, abusive or insulting manner intending to provoke

a breach of peace or realising that there was a real risk or possibility that breach of peace may be provoked ,that is to say accused said "get away you stupid" to Constable Brighton Bvaure.

In count 2, he is charged with the crime of assaulting or resisting arrest from a peace officer as defined in Section 176 of the Criminal Law Code. The allegations are that on the 25th April 2019, and at Kwekwe Magistrates Court, Kwekwe Lenon Sheunesu Mapfumo (applicant) by means of violence resisted an arrest from peace officers acting in the course of their duty, that is to say accused resisted to be arrested and refused to proceed to Kwekwe Central Police Station. He also refused to be handcuffed by Constable Jasper Nechitima knowing that Constable Jasper Nechitima is a police officer or realising that there was a real risk or possibility that he is a peace officer.

At the trial the accused entered a plea of not guilty to both counts, and placed before court a copy of his defence outline. The trial commenced and the State led oral evidence from three witnesses. At the conclusion of the oral evidence of the witnesses, the prosecution closed its case. The applicant applied for a discharge in terms of section 198(3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. The application was in writing. The high watermark of the application for discharge was put as follows:

1. An analysis of the evidence led by the state in respect of the charge reveals the State failed to prove not only a *prima facie* case but that the accused had committed an offence at all. It is the submission of the defence that the conduct complained of by the complainants, and the evidence offered in support of the charges do not show the commission of any offence. In this regard there are glaring omissions with respect to the standard of evidence essential for the state to prove its case and sufficient enough to put the accused to his defence. In particular the following issues arise from the evidence led by the State.
    i. The evidence of the State does not show a breach of peace occurred or was likely to occur. The evidence of the complainants' only shows that accused was acting professionally to secure the release of his arrested client.

ii. It is clear the complainants were not amused because the accused called their conduct in refusing to assist him stupid. The complainants arrested the accused because of their emotional feelings not because an offence was committed.

iii. Accused could not have resisted arrest because the state outline and the complainants all state that accused complied with his arrest and agreed to go to the police station. At that point accused was under arrest and could not have resisted arrest at a later stage. The charge is therefore misplaced.

iv. There was no corroborative evidence from any witness stating the accused indeed shouted audible verbal abuse at the complainants. In fact, the third witness, one Mnangarwa stated that no such thing happened. This confirms the conversation the complainants and the accused had was private. It is clear therefore that the complainants' claims that the people at the court premises had witnessed accused's purported rogue conduct was patently false.

v. The third witness also stated that he did not see the accused resisting arrest. This is at odds with the conduct which the complainants tried to ascribe to the accused person.

2. In the circumstances it is submitted that the accused person be discharged at the close of the State's case as there is no evidence on which either accused should be put on his defence or the court may properly act upon in order to convict the accused. There is no *prima facie* evidence that he may have committed the offences let alone any offence.[1]

The trial court dismissed the application for a discharge, and the applicant was put to his defence. In dismissing the application, the trial court noted that there is evidence that applicant uttered the words complained of in count 1, i.e. "get away you stupid." The court then ruled that the words are insulting in their literal meaning. The accused has to be put to his defence to explain his utterances and to explain if not uttered in a public place. In respect of count 2, the court found that there is evidence that applicant refused to be cuffed on his right hand. He needs to explain why he refused to be cuffed on his right hand. The court ruled that the State has proved a *prima facie* case against the applicant and he has to be put to his defence.

[1]Paragraph's 2 – 3 of the application filed at the Magistrate's Court.

Applicant was aggrieved by the dismissal of his application and filed an application for review before this court. The purpose of this application is to stop the trial pending the finalisation of the application for review. In the certificate of urgency it is contended that:

1. The reasons for the dismissal of the applicant's application for a discharge in respect of the criminal proceedings are not proper in that:
    i. The 1st respondent failed to give proper and due regard to the fact that it is undisputed that applicant was interacting with the complainants as a legal practitioner seeking to secure the release of the client. The words he is alleged to have uttered even if proven cannot in any way constitute an offence more so when the context of professional exchange between a legal practitioner and police officers is considered. They would perhaps be an allegation of criminal insult but that has also been rendered obsolete in our jurisdiction.
    ii. 1st respondent also failed to take heed of the fact that the second charge was a convoluted mess as it alleged the applicant had resisted arrest when the state particulars and the two policemen stated in evidence that applicant had complied with their order for arrest. The applicant could not have done both acts that is, being arrested and resisting arrest. The charge was therefore incompetent as it is clear that this offence was not committed either. Applicant was also never warned and cautioned in respect of the second charge indicating this charge was an afterthought.
    iii. I observe that the above acts amount to irregularities as the applicant cannot be placed on his defence in respect of conduct which does not constitute an offence.
    iv. I further notice that the 1st respondent has already made findings of such a nature as to effectively pronounce the applicant's guilt in respect of both charges. The 1st respondent has already held that the words used by the applicant were insulting and amount to disorderly conduct and do not promote order. He has also held that State witnesses were telling the truth when they said applicant resisted arrest. This is a serious violation of the fairness which must be inherent in a trial. There is therefore nothing the accused can say in his defence because

he has already been convicted by the 1st respondent. His right to be presumed innocent before being found guilty has already been taken away.

v. I am of the view that the above issues were compounded by 1st respondent's acting in a grossly unreasonable way which is only demonstrated of bias against the accused in that

vi. He ignored evidence of the only independent State witness who stated that Applicant did not cause commotion at the court or shout anything at the two police witnesses who were the arresting details.

vii. He ignored the fact that the two policemen had been found guilty of assault against the Applicant in case number GKP236-237/20.

viii. He deliberately made up the fact the applicant uttered the words alleged by the State. Applicant did not do such a thing. One would notice also that there is a divergence of what the Applicant is alleged to have said to the two policemen as appears in the witness statements of the two policemen and in their testimony. The two policemen insisted the applicant had said, "get away stupid, *uchamama"* while the charge sheet and the state outline did not refer to the vernacular part of the statement. The 1st respondent chose also to ignore the vernacular part of the statement even though it was argued that it was indicative of a desire by the two policemen to lie against the Applicant. In the first instance, it was therefore not correct for 1st respondent to make the finding that applicant admitted to the words alleged by the two policemen. In the second instance, it was a grievous error on 1st respondent's part to fail to explain which statement in view of the diverging versions of the State case had the applicant admitted to.

2. In the circumstances therefore applicant has filed an application for review with this Honourable Court in respect of the 1st respondent's decision dismissing the application for discharge.
3. Applicant therefore seeks an order for the stay of the criminal proceedings pending the finalisation of the review proceedings filed in this Honourable Court.[2]

[2]Paragraphs 4 – 6 of the certificate of urgency.

In the main, the averments in the certificate of urgency are the same grounds that appear in the applicant's founding affidavit. In his oral submissions, Mr *Zingomo,* counsel for the applicant merely submitted that he stands by the papers filed of record. He then made very brief submissions when the court asked him to address certain issues. Mr *Gundani*, counsel for the 2nd respondent made the point that the State does not support the ruling of the trial court. In respect of count 1, counsel submitted that in terms of section 41 (b) of the Criminal Law Code, even if it is found that applicant uttered the words "get away you stupid," no offence would have been committed. In respect of count 2, counsel argued that the State Outline is contradictory, on one hand it alleges that applicant was arrested, and on one hand that he resisted arrest. Both counsel contended that the application for review has prospects of success, and therefore, this application must succeed.

For this application to succeed, the applicant must show that the pending application for review has prospects of success. In *Matapo & Ors v Bhila N.O. & Anor* 2010 (1) ZLR (H), the court held that this court does not encourage the bringing of uncompleted proceedings for review. There are, however, circumstances which may justify the reviewing of such proceedings. This means that the court will not lightly stay proceedings pending review. An application to stay proceedings pending review can only succeed if the application for review has prospects of success.

To ascertain whether the application for review has prospects of success, this court has to engage with the principles that have evolved in respect of the basis on which this court may interfere with unterminated proceedings in the lower courts, *vis-à-vis* the facts of this case. The legal principles that emerge from the jurisprudence in this jurisdiction is that the power of the High Court to review the proceedings in the magistrate's court is exercisable even where the proceedings in question have not yet been terminated. The general rule on when a superior court may interfere with the unterminatedproceedings of a lower court was settled in *Attorney-General v Makamba* 2005 (2) ZLR 54 (S)where MALABA JA (as he then was) had this to say at 64 C:

> The general rule is that a superior court should interfere in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross irregularity vitiating the 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.

In *Prosecutor General of Zimbabwe v (1) Intratek Zimbabwe (Private) Limited (2) Wicknell Munodaani Chivayo (3) L Ncube* SC 67/20 the Supreme Court said:

> Thus, put conversely, the general rule is that superior courts must wait for the completion of the proceedings in the lower court before interfering with any interlocutory decision made during the proceedings. The exception to the rule is that only in rare or exceptional circumstances where the gross irregularity complained of goes to the root of the proceedings, vitiating the proceedings irreparably, may superior courts interfere with on-going proceedings.

Further, the jurisprudence is that a superior court should be slow to intervene in unterminated proceedings in a court below and should, generally speaking, confine the exercise of its powers to `rare cases where grave injustice must otherwise result or where justice might not by other means be attained.'The rationale for the general rule may not be hard to find. If superior courts were to review and interfere with interlocutory rulings made during proceedings in lower courts, finality in litigation will be severely jeopardised and the efficacy of the entire court system seriously compromised. See: *Prosecutor General of Zimbabwe v (1) Intratek Zimbabwe (Private) Limited (2) Wicknell Munodaani Chivayo (3) L Ncube (supra).*

The critical issue in this application is whether the application for review has prospects of success. This inquiry is important because it provides the basis upon which this application turns. The application for discharge was anchored on section 198(3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], which says the court shall return a verdict of not guilty if at the close of the State case:- the court considers that there is <u>no evidence</u> that the accused committed the offence charged in the indictment, summons or charge or any other offence of which he might be convicted thereon. [My emphasis]. The words 'no evidence' have been interpreted by the courts to mean no evidence upon which a reasonable person might convict. See: *S v Khanyapa*1979 (1) SA 804 (A) at838F; *S v Heller* (2) 1964 (1) SA 524 (W) at 541G); *S v Kachipare*1998 (2) ZLR 271(S); S *v Tsvangirai* 2003 (2) ZLR 88.If there is evidence supporting the charge, an application for discharge can only be sustained if that evidence is of such a poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court. See: *S v Teek*2009 (1) NR 127 (SC) at 131A-B; *S v Mpetha and Others* 1983 (4) SA 262

(C) at 265; *Attorney-General v Mzizi*1991 (2) ZLR 321, 323 B; *Attorney-General v Tarwireyi*1997 (1) ZLR 575(S), 576.

Against this background and the legal principles enunciated above, I now consider the charges leveled against the applicant, *vis-a-vis* the evidence. I note though that the record of proceedings from the trial court was not placed before this court. Mr *Zingomo* said it will be made available to this court in the application for review. I checked in the application for review case HC 695/21, no record of proceedings is attached. The Magistrates' Court is a court of record. The record must contain all information relevant to the impugned proceedings, and must shed light on the decision-making process and the factors that were likely at play in the mind of the trial court. Without the record this court cannot properly perform its constitutionally entrenched function. Without the record this court is in the dark about the evidence presented in the trial, apart from what is contained in ruling of the trial court. This is not ideal.

Count 1.

Section 41 (b) of the Criminal Law Code says **"**Any person who, in a public place uses threatening, abusive or insulting words or behaves in a threatening, abusive or insulting manner,intending to provoke a breach of the peace or realising that there is a real risk or possibilitythat a breach of the peace may be provoked;shall be guilty of disorderly conduct in a public place and liable to a fine not exceeding level five or imprisonmentfor a period not exceeding six months or both."

Notwithstanding the absence of the record, what is clear is that there is evidence (whether is true or false cannot be resolved at the close of the State case) that applicant uttered the words anchoring the charge. The ruling says so. This explains the submission by Mr *Zingomo* that even if the words were uttered, no offence has been committed. In his heads of argument, counsel cited a number of cases, e.g. *Prosecutor General of Zimbabwe v Beatrice Mtetwa & Anor* HH 82/16, *Mwonzora* v *The State* CC17/2 and *Murray* v *Ndirowei and 2 Other* CCZ 2/17. In *Prosecutor General of Zimbabwe v Beatrice Mtetwa & Anor* (supra) this was an application for leave to appeal against respondent's acquittal at the close of the state case. The court upheld the points *in limine* raised by the respondent, and did not deal with the merits of

the matter. Therefore, it is distinguishable from this matter. The two other judgments relate to constitutional issues, which are not relevant to this case.

It is argued that the trial court ignored evidence of the only independent State witness who stated that applicant did not cause commotion at the court or shout anything at the two police witnesses who were the arresting details. It is further contended that the trial court ignored the fact that the two policemen had been found guilty of assault against the applicant in case number GKP236-237/20. It said there is a divergence of what the applicant is alleged to have said to the two policemen as appears in the witness statements of the two policemen and in their testimony. It is said the two policemen insisted that the applicant had said, "get away you stupid. *uchamama"*[3] while the charge sheet and the state outline did not refer to the vernacular part of the statement. It is said the trial court chose also to ignore the vernacular part of the statement even though it was argued that it was indicative of a desire by the two policemen to lie against the applicant. I am of the view that these arguments betray a misunderstanding about the principles applicable at the close of the state case.

In general, in an application for a discharge at the close of state case, the issues of corroboration, the reliability or otherwise of the state witnesses, the credibility or otherwise of state witness are of no concern to the trial court, unless the evidence is so poor that no reasonable court may convict on it. The court will not at this stage analyse the probative value of the evidence adduced by the State. A trial court cannot at this stage of proceedings even start to analyse the oral evidence *vis-a-vis* the witness statements. I take the view that as long as there is evidence supporting the charge, i.e. that applicant uttered the words anchoring the charge, he could not be discharged at the close of the state case.

Mr *Gundani* argued with force in support of the application. However, the power of this courtto interfere with on-going proceedings is not conferred upon the court by the consent of the parties. Even where the parties agree, the court still has to engage with the legal principles and the facts, and assess whether this is a proper case for it to interfere and not to allow the proceedings in the lower court to run their full course. See: *Prosecutor General of Zimbabwe*

[3]No English translation of this word was provided.

v (1) Intratek Zimbabwe (Private) Limited (2) Wicknell Munodaani Chivayo (3) L Ncube (supra). Mr *Gundani*, in support of the application argued that there is no evidence that applicant intended to provoke a breach of the peace or realised that there was a real risk or possibilitythat a breach of the peace may be provoked. The trial court noted that there is evidence that incriminates the applicant in the commission of the offence, and which calls for an answer. This is a factual finding made by the court hearing the matter, and on the facts of this case, there is no basis upon which this court can interfere with such a finding.

Count 2.

In respect of count 2, Mr *Zingomo* and *Gundani* argued that the charge is incompetent and the state outline is a mess, convoluted and contradictory. It is contended that the State alleges on one hand that applicant was arrested, and on the other hand that he resisted arrest. In support of this contention, both counsel quoted certain *paragraphs* of the state outline, being the following:

1. Constable Brighton Bvaure and Constable Nechitima tried to arrest the accused person for disorderly conduct after Constable Bvaure had informed the accused that he was under arrest and he complied to go with the police officers to Kwekwe Central.
2. After walking a few metres the accused person then refused to proceed to Kwekwe Central Police Station, resulting in Constable Nechitima handcuffing the accused on his left hand.
3. As Constable Nechitima was about to handcuff accused on his right hand, he became violent by refusing to be handcuffed leading to a tussle .In other words he resisted being handcuffed both hands and attempted to free himself from the police officers.

The argument is that if he was arrested, he could not have again resisted arrest. However, the trial court made a factual finding that there is evidence (whether that evidence is true or false cannot be resolved at the close of the State case) that applicant refused to be cuffed on his right hand. At the close of state case is not the time to analyse the State outline, and is

not even the stage to analyse the evidence, as long along as there is evidence on record that incriminates the accused, I take the view that it would be incorrect to grant a discharge.

Again, it is argued that the trial court has already made findings of such a nature as to effectively pronounce the applicant's guilt in respect of both charges. It is contended that there is therefore nothing the applicant can say in his defence because he has already been convicted by the trial court. It is said his right to be presumed innocent before being found guilty has already been taken away. I do not agree. However, I note that in some instances, the ruling might be just "inelegant but not blatantly wrong,"[4] as to amount to a gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means.

In conclusion, I am of the view that a case has not been made for this court to interfere with uncompleted proceedings of the trial court. No exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means has been shown. It has not been shown that the refusal of the trial court to discharge applicant at the close of state case is clearly wrong as to seriously prejudice the rights of the applicant. The decision to stop proceedings pending before another court cannot be taken lightly. It must be a decision well-grounded in law and the facts of the case. Otherwise finality in litigation will be severely jeopardised and the efficacy of the entire court system seriously compromised. This court cannot, just at every turn stop proceedings pending in the magistrate's court. Such a drastic relief cannot be just for the asking. This can surely bred chaos, anarchy and uncertainty in the lower courts. In the circumstances, I take the view that the application for review has no prospects of success. The trial of the applicant before the magistrate's court must proceed.

These then are the reasons for the order that I made.

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[4] As per KUDYA AJA (as he then was) in a different context though, in the case of *Cossam Chiangwa (2) Amon Chinyemba (3) Nathan Nhira (4) Shepherd Sebata (5) Apostolic Faith Mission In Zimbabwe (6) Donard Mdoni (7) Arthur Nhamburo (8) M. Mashumba v (1) Apostolic Faith Mission In Zimbabwe (2) Aspher Madziyire (3) Amon Dubie Madawo (4) Munyaradzi Shumba (5) Tawanda Nyambirai (6) Clever Mupakaidzwa (7) Briton Tembo (8) Christopher Chembere* SC 67/21.

Wilmot and Bennet, applicant's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners