MICHAEL KAWANZARUWA
versus
ESQUIRE MATOVA N.O
and
THE STATE

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 27 October 2021 & 12 January 2022

Review

M D Hungwe, for the applicant
S Maunganidze, for the respondents

MAXWELL J: The applicant seeks an order in the following terms:

"1. The decision of the first respondent dismissing the applicant's application for discharge at the close of the State case under case number CRB 9311/19 be and is hereby set aside.
2. The applicant be and is hereby discharged and acquitted at the close of State case under CRB 9311/19.
3. Each party to bear its own costs."

The applicant was arraigned before the first respondent facing allegations of contravening s 136 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. The allegations were that on 28 June 2019 and at Sengwe Law Chambers, Number 99 Selous Avenue, Harare, the applicant and three others, acting in common purpose unlawfully misrepresented to Kudakwashe Gapara that the second accused, William Bertram Gibbons was Jason David Maple, the legitimate owner of Stand Number 103 Colray Township of Stand Number 37 Colray in the District of Salisbury (Harare) which was for sale for US$120 000. The misrepresentation caused Gapara to pay US$55 000. Cash deposit at Sengwe Law Chambers. The applicant pleaded not guilty and the matter went to trial. Five witness gave evidence on behalf of the State. The State thereafter closed its case and the applicant in terms of s 198 (3) of The Criminal Procedure and Evidence Act [*Chapter 9:07*] (CP & E Act) applied for discharge and acquittal which application was dismissed by the first respondent. Section 198 (3) of the CP&E Act reads:

> "If at the close of the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge or other offence of which he might be convicted therein, it shall return a verdict of not guilty."

The first respondent sued in his official capacity did not file any opposition papers, an indication that he will be bound by the court's decision. The second respondent opposed the application

In *The State* v *Tsvangirai and Others* 2003 (1) ZLR 88, it is spelt out that a discharge at the close of the State case will be in order were:

> "a. There is no evidence to prove an essential element of the offence or
> b. There is no evidence on which a reasonable court acting carefully might properly convict or
> c. The evidence is so manifesting unreliable that no proper court could safely act on it."

The trial court was appreciative of what falls for consideration in deciding whether or not a *prima facie* case has been established and it concluded that there was indeed evidence linking the applicant with the commission of the offence. The question to be considered is whether or not at the close of the state case there is evidence upon which a reasonable court acting carefully might convict. If the answer to this question is in the affirmative then the accused person ought to be placed on his defence. The establishment of a *prima facie* case is a condition precedent to placement of an accused to his defence. The trial court is obliged in its discretion to assess whether or not there is evidence amounting to a *prima facie* case warranting the placement of the accused to his defence. In the case of *S* v *Petronella Nyarugwe* HH 42/16, it is stated that; -

> "A *prima facie* case is a case where one can say there has been shown, on the evidence led, a probable cause to put the accused on his defence. Generally, probable cause or a *prima facie* case is made where all the essential elements of the offence charged or any other offence on which the accused may be convicted have been proved on a balance of probability. At this stage the test is not whether there is proof beyond reasonable doubt but whether on a balance of probabilities it can be argued that the essential elements constituting the offence charged or any other offence have been proved."

The court *a quo* held that the applicant was portrayed as the driving force behind the fraudulent transaction. It stated:

> "He is the one who connected Kudakwashe Gapara to the second accused who masqueraded as Jason David Marple yet in real life the second accused is William Bertram Gibbons. He is also the one who connected the Gapara's (*sic*) to the third accused. Most importantly he is the one who came with Natasha Jones on the day the Gapara's (*sic*) were duped. Evidence was led to the effect that when payment was made after Natasha Jones introduced herself as a para legal in the employ

> of Sengwe Law Chambers, it was the first accused who ran around to collect the trust account receipt book for Sengwe Law Chambers."

The court went on to comment that the pplicant was said to have been involved in the counting of the money and remained at Sengwe Law Chambers after the Gaparas left the premises upon payment of the deposit. It is also on record that the Gaparas were shocked to learn that Sengwe Law Chambers indicated that it had not received any money which had been paid in the third accused's office. The court *a quo* cannot be faulted for concluding that the applicant together with the second accused and Natasha Jones are the only persons who can tell the court what happened to the money. It also held that as the applicant had asserted that he was given his commission after the Gaparas left, he must explain how he ended up receiving the commission in the light of an express provision in the agreement that all the money was to be held in Sengwe Law Chambers' trust account until the payment of the full purchase price. Finally, the court *a quo* also observed that throughout the course of the transaction, the applicant dealt with the Gaparas as Michael Chimanikire instead of his actual name, Michael Kawanzaruwa.

Clearly, the court *a quo's* conclusion that a *prima facie* case was established cannot be faulted.

In any event, second respondent's heads of arguments addressed the settled position on interference with unterminated cases. In *Ndlovu* v *Regional Magistrate Eastern Division and Another* 1989 (1) ZLR 264 (H), the court held that:

> "On the authorities, it is clear that a superior court will not ordinarily interfere by way of review before the conclusion of the proceedings in the inferior court, but this court in the exercise of its inherent jurisdiction will in rare cases in unterminated proceedings before an inferior court, interfere where a grave injustice might otherwise result or where justice might not by other means be obtained."

CHIDYAUSIKU J (as he then was) in *S* v *Sibanda* 1994 (2) ZLR 19 reiterated the position thus:

> "An accused who wishes to have his case reviewed before trial is completed has to proceed by way of court application in terms of order 33 of the High Court Rules. That relief is not readily available. It is only in exceptional cases that this court will review criminal proceedings before they are completed. See *Ndlovu* v *Regional Magistrate & Anor* 1989 (1) ZLR 264…."

Nothing exceptional has been pointed out to warrant this court's interference in the unterminated proceedings.

The draft order shows that the applicant is seeking to have the judgment of the trial court dismissing an application for discharge at the close of the state case set aside. The basis being that the court came to a wrong conclusion on facts and law. The applicant argued that the evidence of the witnesses did not establish his guilt. Clearly, the applicant is attacking the court's conclusion as a wrong conclusion on facts and law. It is trite that only procedural challenges call for review. A challenge to the substantive correctness of the decision made requires redress by way of appeal and not review. In *Rose* v *S* HH 71-12, HUNGWE J opined that the essential question in review proceedings is not the correctness of the decision under review but its validity. See also *Masedza and Others* v *Magistrate Rusape and Another* 1998 (1) ZLR 36 which was quoted with approval in remarks by MATHONSI J (as he then was) in *Archinulo* v *Moyo and Another* 2016 (2) ZLR 417. The common thread in all these cases is that the superior courts should be wary of the difference between a review and an appeal. The reviewing court should only interfere in unterminated proceedings in the lower court in exceptional circumstances of gross irregularities which would occasion injustice. In the present case the applicant seems aggrieved by the decision of the court *a quo* and argues primarily that the decision is not justified by evidence. This clearly does not call for redress by way of review but appeal. The applicant simply does not agree with the court's finding that a *prima facie* case has been established at the close of the state case. The challenge to the propriety of that finding is not a ground for review as it does not speak to any procedural irregularity. The application is further premised on a misinterpretation of the court's ruling that placement of the accused to his defence to give his version would amount to shifting the onus to the applicant. The record of proceedings from the trial court shows that the court's finding that there is a *prima facie* case was reached after an assessment of evidence. Applicant expressed disagreement with the court's finding and sought to unprocedurally question the correctness or otherwise of the decision by way of review. I find nothing untoward, unprocedural and injudicious displayed to warrant interference with the proceedings in the court *a quo*. The application for review is baseless and must fail.

Accordingly it is ordered that:

1. The application for review be and is hereby dismissed.
2. The matter is remitted to the Magistrate Court for continuation of trial before the same magistrate.

3. The matter is to proceed to the defence case as directed by the first respondent.

Kadzere, Hungwe and Mandevere, applicant's legal practitioners
National Prosecuting Authority, second respondent's legal practitioners