FELIX MUNYARADZI
versus
MRS VONGAI GUWURIRO
and
THE PROSECUTOR GENERAL

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 14 October 2021 and 30 May 2022

Opposed

C Warara, for the, for the applicant
A Muzivi, for the respondent

MANGOTA J: I heard this opposed matter on 14 October, 2021. Following the concession which the second respondent who stood for, and on behalf of, the Prosecutor-General properly made, I entered judgment for the applicant with no order as to costs.

On 12 May, 2022 the applicant wrote to the registrar of this court requesting written reasons for my decision. He referred to a letter which he claimed he wrote on the same subject-matter on 5 May, 2022. He alleged that the Prosecutor-General refused to drop case CRB P 1893/21 stating that there was just a removal from remand by the court and not a quashing of the charge(s). He claimed that he would be placed on remand in the same manner that he challenged in HC 1694/21, if the judgment is not availed to him.

My reasons for decision, as gleaned from the facts which the court *a quo* dealt with are these:

The applicant was arrested and taken to court where he was released on bail on condition that he should not interfere with state witnesses. On a date which was not known to the prosecutor but in January 2021, the allegations went, the applicant sent one Shadreck Homera to influence the complainant to withdraw the charge(s) of fraud which had been levelled against him and have an out of court settlement.

The circumstances which emerge from the above mentioned allegation is that the applicant interfered with the complainant who was/is a state witness and he therefore breached the condition of bail which the court *a quo* extended to him.

It was/is the position of the second respondent that the applicant's alleged interference with the complainant-a state witness-amounted to the crime of defeating or obstructing the course of justice. He, accordingly, was arraigned him before the court on the charge of contravening section 184 (1)(a) of the Criminal Law (Codification and Reform) Act *[Chapter 9:23*] in terms of which he moved for the placement of the applicant on remand.

The applicant challenged his placement on remand. He protested the procedure which the second respondent employed. He insisted that the latter should have proceeded in terms of section 127 or section 133 of the Criminal Procedure and Evidence Act *[Chapter 9:07]* which refers to an inquiry into the circumstances of the alleged breach of the condition(s) of bail as opposed to preferring a charge against him and placing him on remand as occurred *in casu.*

The magistrate before whom the applicant was arraigned disagreed with the applicant. She agreed with the second respondent as a result of which the applicant moved to review her decision. I therefore had the occasion to deal with the application for review.

Section 26 of the High Court Act [Chapter 7:06] as read with Rule 62 of the High Court Rules, 2021 confers power upon me to review proceedings and/or decisions of such inferior courts as that of the magistrate, among other inferior courts, tribunals and administrative authorities. I also have the authority to review unterminated proceedings which take place in courts which are lower than the High Court but only in circumstances of proven gross irregularity which vitiates the proceedings and give rise to a miscarriage of justice which cannot be redressed by other means or where the interlocutory decision in clearly so wrong as to seriously prejudice the rights of the applicant: *Attorney-General* v *Makamba*, 2005 (2) ZLR 54 (S).

In stating as it did in the above-cited case, the Supreme Court was not re-inventing the wheel. It was only laying emphasis to the correct law which STEYN CJ was pleased to enunciate in *Isman & Ors* v *Additional Magistarate*, 1963 (1) SA 1(A) wherein the learned Chief Justice remarked that:

> "It is not every failure in justice which amounts to gross irregularity justifying intervention before in completion. 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 obtained".

The guidelines which the superior courts laid down are relevant. They cannot be wished away. If these were not in place, many accused persons who are arraigned before inferior courts would

easily escape the arm of justice by simply abusing the power of the court to interfere with uncompleted proceedings which are before those courts. As was aptly stated *Ndhlovu* v *Regional Magistrate, Eastern Division & Another*, 1989(1) ZLR 264(H) at pages 269-270 G, the reviewing courts would be inundated with applications for review of uncompleted proceedings in the magistrates' courts. This is *a fortiori* the case because the filing of such applicants is viewed in some quarters as a ploy to delay trials or finalization of ongoing and /or pending trials. There are a *plethora* of cases in this, and other, jurisdictions which provide that the court will not intervene in uncompleted proceedings save in the exceptional circumstances where an injustice which cannot be redressed by other means in due course may otherwise result.

It is in the context of the above-observed set of circumstances that this application should be considered. The question which begs the answer is whether or not the case of the applicant falls into the area of those rare cases where an injustice which cannot be corrected after the proceedings have run their course exists. His statement is to equal effect. He complains of a serious injustice having been visited upon him by both the court *a quo* and the second respondent. He alleges that the decision of the court in placing him on remand on a complaint by one Erasmus Makodza that he sought to influence him to withdraw charges against him through a third party, one Shadreck Homera, should have been inquired into. The court, be insists, furthered the injustice which the police did when they arrested, and lodged, him in police cells and bringing him before it without complying with due process as required by sections 49((1)(b) and 50 (1)(e) of the constitution of Zimbabwe.

I mention, at this stage of the judgment, that an accused who breaches his conditions of bail does not have a charge which arises from the alleged breach preferred against him. Practice and procedure do not allow that to occur to him. Such an accused is subjected to an inquiry which the court before whom he appears mounts in terms of section 127 or section 133 of the Criminal Procedure and Evidence Act and, where the breach is established on a balance of probabilities, the court which is inquiring into the circumstance of the breach of the conditions that commits him to prison until his trial.

Preferring a fresh set of charges which were based on the applicant's alleged breach of his bail conditions was a serious travesty of justice which cannot be condoned let alone countenances. The procedure which the magistrate adopted was akin to the act of putting the cart before the horse.

The magistrate misdirected herself in an unconscionable manner vis-a- vis the applicant's alleged breach of his conditions of bail. If she had taken the trouble to read and digest the contents of section 127 or section 133 of the Criminal Procedure and Evidence Act, as she should have done, she would have been properly guided as to the correct course of action for her to take. Section 127 of the Act which is more appropriate to the case of the applicant than any other, for instance, provides that:

> "(1) If a peace officer believes on reasonable grounds that a person to whom bail has been granted in terms of this part is about to… interfere with evidence against him, he may arrest the person… and shall, as soon as possible, take him before a magistrate who may, upon being satisfied that the ends of justice would otherwise be defeated, commit the person to prison".
> Section 133 of the Act is to an equal effect.

It is only through the inquiry procedure that the magistrate is able to satisfy himself that the ends of justice would otherwise be defeated. Once he is so satisfied of the stated matter, the course which remains open to him is to commit the person who has breached his bail conditions to prison. It is through the same inquiry that the police and the second respondent are enabled to assess whether or not the accused, in the process of breaching his bail conditions, committed another offence for which they may prefer another charge against him. Before that stage is reached, neither the police nor the second respondent have the capacity to prefer another charge on the accused person is doing so would be to unjustifiably visit the accused with double jeopardy.

The short-cut manner in terms of which the court *a quo* dealt with the present case leaves a lot to be desired. It is pertinent for the magistrate before whom a person appears to acquaint himself with the law which is relevant to the case which has been place before him. Where he fails to do so, as appears to be the case *in casu*, he is more likely than not to fall into pitfalls which the magistrate fell into with the result that he dispenses injustice instead of dispensing real and substantial justice which constitutes the hallmark of his work as a judicial officer.

As counsel for the applicant correctly submits, the current case relates to rights which, once they are taken away, redress can be difficult because the applicant would have been prejudiced already. His continued placement on remand cannot be cured once the trial court finds that the accused had no case to answer on the charge. Even where he was to be convicted, the issue for which redress is sought will not be dealt with in an appeal because it would be interlocutory which leads to a grave injustice and a violation of the rights of the applicant.

The representative of the second respondent who appeared before me on the day that the application was heard and determined remained alive to the impropriety of the procedure which obtained before the court *a quo.* He became aware of the fact that the procedure which had been employed was misplaced It was for the mentioned reason, if for no other, that he conceded, properly so, that the procedure which had been adopted was incorrect. His concession was informed on his reading of the law which should have been applied in the circumstances of the case.

The order which ensued from the determination of the application was/is as clear as night follows day. It set aside the decision which the magistrate made on 20 March, 2021 under case number CRB HRE P1893/21. It also revoked the applicant's continued placement on remand. The decision, as it stands, amounts to a squashing of the proceedings of the magistrate. It is, for the avoidance of doubt, ordered that:

a) The proceedings and the decision of the court of the magistrate of 20 March, 2021 be and are hereby quashed.
b) Each party shall pay its own costs.

Warara and Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners