KISIMUSI E DHLAMINI	1ST APPLICANT
and	
GANDHI MUDZINGWA	2ND APPLICANT
and	
CHINOTO M ZULU	3RD APPLICANT
and	
ANDRISON MANYERE	4TH APPLICANT
and	
ZACHARIAH NKOMO	5TH APPLICANT
and	
REGIS MUJEYE	6TH APPLICANT
and	
MAPFUMO GARUTSA	7TH APPLICANT
and	
THE STATE	1ST RESPONDENT
and	
OLIVIA MARIGA N.O.	2ND RESPONDENT

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE 25 February 2009

CRINIMAL REVIEW APPLICATION

Muchadehama, for the applicants
Ziyambi, for the respondents

HLATSHWAYO J: The applicants have approached the High Court for a review of the procedures followed, and the decision arrived at, by the trial magistrate in placing them on remand. The brief grounds of review are outlined in the application as follows:

> "1. The learned magistrate in the court a quo erred in dismissing the applications for refusal to have the applicants (accused persons in the court a quo) placed on remand.
>
> 1.1 The court a quo failed to apply its mind to the first application for refusal of remand.

1.2 The court a quo also erred in holding that there was a reasonable suspicion that the applicants had committed the offences with which they were being charged.

2. The learned magistrate also erred in not giving proper and adequate reasons for her decision.

2.1 The magistrate's reasoning was so outrageous in its defiance of logic and acceptable standards that no sensible person who applied his mind to the matter would have arrived at the same decision.

2.2 There were gross irregularities in the proceedings or the decision.

2.3 The learned magistrate failed to see that no evidence had been placed before her by the state warranting the applicants to be placed on remand.

3. The learned magistrate also erred in ignoring the evidence of the applicants that had been placed on record.

4. The magistrate also erred in disallowing applicants' legal practitioners the right to reply on points of law thereby allowing the misleading submissions by the state to stand uncontroverted.

4.1 It is submitted that the magistrate was in a hurry to make a wrong and injudicious decision.

5. It is therefore submitted that the magistrate's order to have the applicants placed on remand be set aside."

At the first hearing of this matter on 5 February 2009, the court drew to the applicants' legal practitioners' attention that the grounds for review that they had set out above had more to do with the substantive correctness rather than the procedural impropriety of the decision complained of; that the "grounds for review" when examined closely tended more towards "grounds of appeal"; that practically, and as an example only, it was easier to prove that a decision was incorrect (appeal) than that it was so incorrect that no reasonable person who applied his mind to the matter would have arrived at the same decision (review); that strictly speaking in terms of the rules of court there are no provisions for urgent reviews or urgent appeals, but that in appropriate cases nothing would prevent an appeal being heard urgently and

that, at any rate, an application for bail pending appeal or review can always be made.

The legal practitioners then undertook to reconsider the application and revert to the court, which they duly did but with the insistence that the matter should proceed as a review matter and as currently formulated. After the state filed its opposing papers on 18 February 2009, the applicants were advised to file their answering affidavit, if they so wished. The applicants' legal practitioners were also informed that the matter had been set down on motion court for handing down of judgment on 25 February 2009. No answering affidavit had been filed by end of business on 24 February as promised, nor by 0930hrs on the following day. I have thus concluded that the applicants no longer intend to file an answering affidavit and consequently proceed to hand out judgment.

The background to this case appears at page 82 of the Record and the Request for Remand forms. According to counsel for the applicants the applicants were kidnapped by State agents from places in and around Harare and Norton from November 2008 to December 2008 and hidden in secret detention centres around Harare, Goromonzi and other places. They were allegedly subjected to torture, inhuman and degrading treatment while so detained, which allegations of ill-treatment the court a quo ordered to be investigated. They were subsequently surrendered to the regular police and charged with three counts of bombing police stations in Harare and two counts of bombing a road and a rail bridge just outside Harare. All the applicants (accused persons) are members, employees, activists or sympathizers of the Movement for Democratic Change – Tsvangirai (MDC-T) political party.

Section 27 of the High Court Act, Chapter 7:06 sets out specific grounds upon which an application for review may be made. Among other things, the applicant must show that the inferior court, tribunal or administrative authority lacked the requisite jurisdiction or that there was gross irregularity in the conduct of the proceedings.

In the application before me, the grounds for review, as already noted, were crafted in very general and sometimes vague terms. There was no allegation of lack of jurisdiction on the part of the court *a quo*. Therefore, the only substantive ground for review can be taken as that of "gross irregularity". There is a vague reference to perceived bias, though, pertaining to the alleged refusal by the magistrate to allow applicants' lawyers the right to reply on points of law. However, this appears to be a misunderstanding by the respondent's lawyers of the nature of the application they were involved in at the court *a quo*, which properly understood was as follows: the prosecution applied for the placement of the applicants on remand and the various applications the defence lawyers placed before the court were essentially points in opposition to the initial application and not fresh applications in themselves. The initial application for remand is always invariably brought by the prosecution and then opposed by the defence. Only subsequent applications for refusal of further remand are initiated by the defence. The trial magistrate was therefore correct in not allowing the defence an opportunity for a further reply to the prosecution's application. It would be stretching matters rather far to hold that the ruling by the magistrate demonstrated bias in favour of the state.

According to the applicant's counsel, basically two arguments were placed before the magistrate:

1. that the applicants were themselves victims of criminality (abductions, torture, forced disappearances, etc.); that their right to protection of the law had been violated and that therefore they could not be placed on remand.
2. that there was no reasonable suspicion that the applicants had committed an offence.

Concerning the first argument, the applicants submitted that the court *a quo* did not pay due regard to it at all. According to the record of proceedings the prosecutor and the court dealt with the matter as follows:

"By Mrs Ziyambi (prosecutor, to Court):

> "Your worship, we proceed to respond to the first issue raised by my learned colleague which is where they indicated that they are making an application for refusal for placing them on remand on the grounds that the accused persons were victims of a crime. Your worship, you will note that this Court made an order directing the Attorney General's office to direct the police to investigate the allegations of torture, abduction and kidnapping. It, therefore, follows that the alleged torture, kidnapping and abduction which form the basis of the argument that they are victims of a crime are now subject of an investigation ordered by this Court." (At page 155 to p.156 of Record).
>
> "By the Court:
>
> "The issue of torture, kidnapping and abduction of the accused persons is still under investigations by the Attorney General which has been ordered by the Court to file a report at a given date." (See page 2, lines 1-3 of Ruling).

It is difficult to conceive how the above complaint can be sustained as a ground for review. Surely, once the court *a quo* had ordered an investigation into the alleged abductions, torture and forced disappearances, giving a specific date by which a report had to be filed, it could not then proceed simultaneously to make a finding on the same allegations ahead of the report, notwithstanding that the applicants had filed affidavits and submitted medical reports on the point. Such a procedure would have rendered nugatory the court-ordered investigation. In my view, therefore, the court *a quo* was perfectly correct in refusing to make findings on matters which were still pending in terms of an investigation it had just ordered itself and, ironically, at the instance of the applicants. The question remains though as to what purpose, if any, the findings of the investigation were expected to have in the remand proceedings. It appears from the magistrate's ruling that those findings would not have any impact on the remand proceedings. If the defence counsel had intended to rely on the findings of the investigation to oppose the placement of the applicants on remand, then he should have requested the postponement of the matter until such a report was available or insisted on an earlier production of the report or a different way of proving the alleged abductions, torture and forced disappearances.

Nothing more would have needed to be said on the issue of abductions, torture and disappearances in this regard, were it not that the applicants' legal practitioner has sought to rely on some case authority whose *ratio decidendi* he appeared not to fully appreciate.

In his submissions *Mr. Muchadehama* posited that where an accused person has been abducted, tortured or otherwise brought to court in a manner tainted with violation of human rights, the court should refuse to place such an accused on remand. He sought to rely on the case of *S v Ibrahim 1991 (2) SA 553* for that proposition.

Now, in *S v Ibrahim*, the issue involved the abduction of an accused person from a foreign state by agents of what one might call, for want of a better word, the 'apprehending' state and the subsequent surrender of the accused to the police and courts of the 'apprehending' state. That situation is distinguishable from the present one in which the alleged abductions, torture and forced disappearances occur internally. This must not be read to mean that internal violations of human rights are to be condoned, but merely to point out that the case law relied upon to support the remedy sought does not uphold such a proposition. On the contrary it clearly distinguishes between cases involving breaches of international law and those which do not, thus:

> "The main cases relied on in the foreign authorities to preclude an accused person from objecting to the jurisdiction of a criminal court to try him on the grounds that he has unlawfully been abducted from abroad are simply cases where there was no breach of international law, where the State in which the unlawfully apprehended person was being tried did not authorize or connive in such unlawful apprehension or where the unlawful apprehension was not affected (effected?) by an official of the State in which such a person was to be tried." P.556

And the conclusion is then made thus:

> "To compel an accused person to undergo trial in circumstances where his appearance itself has been facilitated by a criminal act of kidnapping authorized or connived at by the State or an official of the State would be to sanctify international delinquency by judicial condonation. There is an inherent objection to such a cause,

> both on grounds of public policy pertaining to international ethical norms and on the ground that it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations." Page 556.

Once the proper appreciation of the reasoning in *S v Ibrahim* has been made, as has been done above, one may then proceed to examine whether the sentiments expressed therein are not applicable, even with greater force, to situations of internal abductions, torture and forced disappearances. If the courts frown upon situations where the state has resorted to cross-border abductions presumably because of non-existence or difficulties in the implementation of extradition agreements or because of the exigencies of apprehending criminals operating from across borders, the courts should be even more wary of the state resorting to such extreme measures of bringing accused persons before the courts within its own jurisdiction where it holds sway and has limitless and perfectly legal and humane ways in which it can secure their attendance to court. It may thus be argued that if it is proved that internal abduction, torture or forced disappearance carried out or authorized by or connived in by the state or its officials has preceded the handing over to the police and the courts of an accused person, then, as in the case of foreign abductions the judiciary should not condone such delinquent acts. Whether the proper way of exercising judicial censure of such conduct is through the courts declining to exercise their jurisdiction as in the foreign abduction cases, I hesitate to hazard an opinion and so leave the issue completely open as I have not been addressed on the matter.

In respect of the second argument, it was submitted that the magistrate failed to give proper and adequate reasons for her decision to have the applicants placed on remand; that her reasoning was so outrageous in its defiance of logic and acceptable standards that no sensible person who applied her mind to the matter could have arrived at such a decision. The impugned reasoning went as follow:

> "On the issue of reasonable suspicion, it was held in the case of Martin v Attorney-General & Anor 1993 (1) ZLR 153 that:

"The test to be applied is the same as that for arrest without a warrant. It does not require the same resolution of conflicting evidence that guilty beyond reasonable doubt demands, nor even a preponderance of probability. Certainty as to the truth is not involved or otherwise it ceases to become suspicion and becomes fact. Suspicion by definition is a state of conjecture or surmise whereof proof is lacking."

The court is, therefore, of the view that the facts alleged by the State ground a reasonable suspicion that accused persons committed the offences. The other issues raised by the defence are triable issues to be canvassed at trial. Application by the State is therefore granted. Accused persons are to be placed on remand." (P.2 of Ruling).

Elaborating on the perceived shortcomings of the magistrate's reasoning, counsel for the applicants submitted that the magistrate did not refer to the evidence of 1st, 2nd and 3rd applicants and to the affidavits of the applicants, did not comment on the request for remand Forms 242 relative to their adequacies or deficiencies and did not make a finding as to whether the state had provided sufficient details linking each of the applicants to the offence and to each other.

The above criticism of the magistrate's reasoning by the defence counsel seems to be more focused on the substantive correctness rather than the procedural regularity of the decision. Admittedly, the two inquiries do overlap. However, for the decision to be set aside for unreasonableness it must be shown that the decision is so grossly unreasonable that it can only be explained on the grounds that the decision was made in bad faith or because of some ulterior motive or that the decision maker failed to apply her mind to the decision. This is the so-called 'symptomatic unreasonableness'. See G Feltoe, *A Guide to Zimbabwean Adminitrative Law*, 3rd ed. Page 46. All that can be said here about the reasoning of the court *a quo* is that it was rather niggardly with the facts upon which it based its decision. It cannot be said that it was not alive to the legal parameters under which it was enjoined to make its decision, the facts and allegations on the basis of which the state sought to have the applicants remanded and the evidence placed before it by the defence. In the case of *Attorney-General v Blumears & Anor 1991 (1) ZLR 118,* the magistrate gave "brief and not so clearly expressed" reasons for remanding respondents in custody

but this lapse was not found to be sufficient to justify the setting aside of his decision. Indeed, whereas at the High Court the magistrate's order was set aside, on appeal to the Supreme Court, the High Court decision was reversed and the application dismissed.

Consequently, this application for review is dismissed.

Mbidzo, Muchadehama & Makoni, legal practitioners for the applicants.
The Attorney-General's Office, legal practitioners for the respondents.