NATHAN CHILUFYA
versus
COMMISSIONER GENERAL OF POLICE
and
CO MINISTERS OF HOME AFFAIRS
and
OFFICER IN CHARGE ZRP CHIKURUBI
DETENTION BARRACKS
and
CHIEF SUPRETENDENT MUTODZA

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 17, 18, and 21 May 2010

Urgent Chamber Application

E Koworera, for the applicant
Miss *K L Murefu*, for the respondents

UCHENA J: The applicant is a Detective Assistant Inspector in the Zimbabwe Republic Police. He was charged and convicted for bringing disrepute to the Zimbabwe Republic Police in contravention of s 35 of the Police Act [*Cap 11*:*10*], herein-after called the Police Act He was sentenced to twelve days imprisonment.

The first respondent is the Commissioner General of the Zimbabwe Republic Police, who is being sued in his official capacity as the Head of the Zimbabwe Republic Police.

The second respondents are the Co-Ministers of Home Affairs being sued in their capacity as the Ministers responsible for the Zimbabwe Republic Police.

The third respondent is the officer in charge of Chikurubi Detention Barracks, where the applicant will be lodged for twelve days if he is to serve the sentence imposed on him by the fourth respondent.

The fourth respondent is the officer who tried convicted and sentenced the applicant to twelve days imprisonment.

The applicant was convicted by the fourth respondent on allegations that he had sought and obtained a bribe of US$500-00, and stolen a plasma television from a suspect he had arrested and was about to lodge in police cells. He was charged under s 35 of the schedule to the Police Act, which provides as follows:

> "Acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police Force."

He was convicted and sentenced to twelve days imprisonment. The suspect, and another, wittiness gave evidence at the trial leading to the conviction of the applicant.

In this application the applicant alleges that the fourth respondent did not warn himself about the dangers of convicting on the evidence of accomplice wittiness's. He also alleged that the fourth respondent did not warn the accomplices before they testified. He further alleges that he is being exposed to double jeopardy as he is also being charged for the same acts under the Magistrate's court. He further complains that the sentence imposed by the fourth respondent induces a sense of shock.

Mr *Koworera* for the applicant submitted that s 35 (!) of the Police Act requires the trial under the Police Act to closely comply with the procedure followed in the courts of Zimbabwe. It provides as follows:

> "(1) The proceedings before or at any trial by a board of officers or an officer in terms of this Act, shall as near as may be, be the same as those prescribed for criminal cases in the courts of Zimbabwe."

The intention of the legislature is clear. The tribunal or trial officer must as nearly as is possible comply with the rules of evidence and procedure as is done in the courts of Zimbabwe. Where the tribunal or trial officer, significantly departs from the procedure set for criminal proceedings in the courts of Zimbabwe the proceedings may be set aside on review. The test applied on reviewing proceedings is whether or not the proceedings are in accordance with real and substantial justice. That may be satisfied if a record reveals statements made by the accused admitting having done what is alleged or other things tending to support the conviction. In other words errors, on the part of the prosecuting authority may if they do not go to the root of the proceedings, affect its being held to be in accordance with real and substantial justice. A stay of sentence must therefore only be granted if the record shows prospects of success, which can only be properly assessed from the totality of the proceedings. In this case the applicant has not placed the record of proceedings before the court. In fact the applicant said nothing about it in his founding affidavit. Mr *Koworera* tried to explain from the bar, but an application must stand or fall on the papers filed.

The applicant's failure to place the record before this court makes it impossible for this court to assess the applicant's prospects of success on review as the standard of assessment on review must comply with the proviso to s 34 (3) of the Police Act, which provides as follows:

> "Provided that no conviction or sentence shall be quashed or set aside by reason of any irregularity or defect in the record or proceedings unless the Commissioner considers that a miscarriage of justice has actually occurred".

The alleged irregularities can not therefore in the absence of information from the record showing that a miscarriage of justice actually occurred, persuade the court to stay the execution of sentence. The standard of review, set by the legislature for the Commissioner, must be applicable to the review of those proceedings by this court.

The applicant filed this urgent application seeking an order staying his imprisonment for twelve days as ordered by the fourth respondent. He seeks the stay of his imprisonment pending the review of his case. He says he is taking the proceedings on review before the High Court, and seeks the stay of the sentence pending review. He does not state that he has already filed a review, nor does he state the review case number. There is nothing on the record to show that the application for review has been filed. Mr *Koworera*'s complains that he is facing difficulties in obtaining the judgment and record of proceedings. If that is true he can initiate other forms of review.

The applicant can not however rely on an automatic review to this court because s 31 of the Police Act does not apply to the sentence imposed on him.

Section 31 of the Police Act provides for the review of the tribunal's proceedings by this court as follows.

> (1) Where a board of officers imposes on a member a sentence of a fine in excess of level three or a period of imprisonment in excess of one month, the record of the proceedings shall forthwith be forwarded to the registrar of the High Court together with—
> (*a*) any statement that the president of the board may wish to make; and
> (*b*) any statement relating to the sentence that the member may wish to make.
>
> (Subsection amended by s 4 of Act 22/2001)
>
> (2) On receipt of the record and statements referred to in subs (1), the registrar of the High Court shall forthwith place such record and statements before a judge of the High Court in chambers for review.
>
> (3) A judge before whom a record and statements are placed in terms of subs (2) may—

(*a*) if the proceedings appear to him to be in accordance with substantial justice, confirm the proceedings and endorse the record to that effect; or
(*b*) exercise the powers conferred upon a judge of the High Court by subs (5) of s 29 of the High Court Act [*Cap 7*:*06*] as if the proceedings were the proceedings of a magistrate's court".

In terms of s 31 (1) of the Act the proceedings in which the applicant was convicted and sentenced are not subject to an automatic review. Automatic review only applies to sentences, imposed by a Board, and exceeding level three or imprisonment exceeding one month.

The applicant was tried by one officer in terms of s 34 (I) of the Police Act. Section 34 (3) of the Act provides for a review of such proceedings, by the Commissioner. The section provides as follows:

"(3) Every officer who convicts and sentences a member under this section shall forthwith transmit the proceedings for review by the Commissioner, who may—

(*a*) confirm the conviction and sentence;
(*b*) alter or quash the conviction or reduce the sentence or substitute a different but not more severe sentence;
(*c*) quash the conviction and sentence and remit the matter for trial afresh before a different officer;
(*d*) remit the matter to the officer with instructions relative to the further proceedings to be held in the case as the Commissioner thinks fit:

Provided that no conviction or sentence shall be quashed or set aside by reason of any irregularity or defect in the record or proceedings unless the Commissioner considers that a miscarriage of justice has actually occurred."

Section 34 (3) therefore establishes that the Commissioner is the reviewing authority. The case can therefore only be reviewed by this court if an application for review, is filed, or in terms of s 29 (4) of the High Court Act [*Cap 7:06*], which provides as follows:

"(4) Subject to rules of court, the powers conferred by subss (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

Section 29 (4), of the High Court Act, gives this court or a judge of this court wide review powers. It allows a judge to call for and review any proceedings of an inferior court or tribunal it becomes aware of and forms the view that they are not in accordance with real and substantial justice. The judge is empowered to call for and review any proceedings even those he may hear about through the press, or a letter or any other source of complaint, or information.

This procedure can however not be used to review these proceedings because the applicant claims to have filed an application for review. His legal practitioners must be allowed to represent him and seek justice for him. The courts should not be seen to be championing the cause of a legally represented applicant. That is why trials in the magistrate's courts, in which the accused is represented by a legal practitioner, are not subject to an automatic review.

The applicant's case has actually been heard by the Commissioner as an appeal in terms of s 34 (7) of the Police Act. See the Commissioner's affidavit in which he said he has dismissed the appeal. The applicant did not respond to the Commissioner's opposing affidavit. This means the applicant is not being candid with the court. He clearly did not initially consider the reviewing of the proceedings necessary until his appeal was dismissed. This tends to show that the review is an afterthought, and an act of desperation aimed at avoiding imprisonment That must be why he does not even state that he has already applied for the review nor state the review case's number..

The record of proceedings has not been placed before the court. The sentence cannot be stayed without assessing the applicant's prospects of success on review.

There is no proof that the applicant is seriously pursuing a review of the proceedings. What would happen if the sentence is stayed but the application for review is not filed. I can not therefore grant a stay of the execution of a sentence when there is no proof that an application for the review of the proceedings has been filed.

Mr *Koworera* raised the issue of the appropriateness of the sentence of twelve days imprisonment. The charge under s 35 of the schedule is intended to protect the reputation of the Police force from being damaged by the conduct of its officers. There is no doubt that asking for bribes by police officers is like a cancerous disease which does not only seriously damage the image of the police, but poses a danger which can destroy the foundations on which the police force is founded. Therefore the sentence imposed can on its own not be a

basis for staying the execution as it does not in my view induce a sense of shock. The Police Force must act decisively against corrupt officers.

On the question of the accused person being exposed to double jeopardy as he is being tried in the magistrate's court for the same offence, I am satisfied that he can raise his conviction and sentence as a mitigating factor if he is convicted in the magistrate's court. A trial and conviction in terms of section 34 (1) is, in terms of s 34 (9) of the Police Act not regarded as a conviction in terms of any other law It is regarded as a disciplinary action. Section 34 (9) provides as follows:

> "(9) A member who is found guilty of a contravention of this Act by an officer shall not be regarded as having been convicted of an offence for the purpose of any other law."

This means the applicant is not exposed to double jeopardy as alleged. The trial in the magistrate's court does not therefore justify the staying of a sentence imposed for disciplinary purposes.

In the circumstances the applicant's application is dismissed.

The applicant shall pay the respondent's costs.

Nyikadzino, Koworera & Associates, applicant's legal practitioners
Attorney General*'s Civil Division*, respondents' legal practitioners.