ISAURA MASINGA
versus
MS SANDE N.O.
and
THE ACTING PROSECUTOR GENERAL

THE HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 22 May 2019 & 29 May 2019

Opposed Application

T Muzana, for the applicant
F.I Nyahunzvi, for the 2nd respondent

MATHONSI J: Just what was the magistrate in this matter thinking? Was she even thinking at all because there is nothing in her ruling on an application for discharge at the close of the state's case made by the applicant to suggest that she applied her mind to the evidence and the task at hand? As a result the magistrate's decision to put the applicant to her defence when the prosecution did not even attempt to establish a *prima facie* case against her threatens a grave injustice and clearly justice can never be obtained by any other means except the early intervention of this court in what are unterminated proceedings of a lower court.

This is a classic case where the prosecution preferred a certain charge against the applicant for which she was called upon to answer and went on to prove a different charge altogether. The elements of that charge were that the applicant had defeated or obstructed the course of justice in breach of s 184 (1) (a) and (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] by not eating solid foods when she was being investigated on suspicion of having ingested cocaine and later secretly excreting the cocaine with the help of unknown state officials. At the trial of the applicant on that charge, the prosecution set about proving a completely different case, namely that of defeating or obstructing the course of justice by lying to investigators that she was pregnant when she was not, thereby preventing the performance of a CT scan which would have established the contents of her stomach. The prosecution could not be allowed to do that because not only does

it amount to an undesirable ambush where an accused person is hoodwinked into preparing for a different case from the one confronting her at the trial, it also means that essential elements of the charge pleaded to would not be proved.

As I have said, the applicant, who is a South African national, was charged with defeating or obstructing the course of justice as defined in s 184 (1) (a) and (e) of the Criminal Law Code:

> "In that on the date unknown but during the period ranging between 6th of May 2017 and 10th day of May 2017 and in Harare, Isaura Masinga knowing that a police officer, namely Isaac Taungwena of CID Drugs, Harare was investigating the commission of a crime, or realising that there is a real risk or possibility that a police officer may be investigating the commission or suspected commission of a crime caused such investigation to be defeated or obstructed intending to defeat or obstruct the investigations or realising that there is a real risk or possibility that the investigation may be defeated or obstructed. That is to say Isaura Masinga knowing that the police suspected her of having ingested cocaine as confirmed by an Ultra Sound Scan or upon excretion, Isaura Masinga spent three consecutive days without eating any solid food in order to conceal the excretion of the ingested body packs only to start eating solid foods on the fourth day after arrest and detention on 9 May 2017 knowing that she had secretively and in common purpose (with) unknown state officials under whose custody she was, excreted the suspected cocaine body packs thereby defeating or obstructing police investigations."

The same elements of the offence were set out in the state outline in which was also added the allegations that the applicant had come from Brazil abode a United Arab Emirates plane on 5 May 2017 and alighted at Harare International Airport where she was suspected to be in possession of cocaine in her luggage or person. When a search yielded nothing she was still arrested and on 6 May 2017 taken to Carestream Ultrasound Scan. A scan performed at that centre revealed the presence of "body packs" in her abdomen and the possibility of pregnancy. The doctor who performed the scan recommended further investigation by use of a CT Scan as the one that had been conducted was inclusive. That was not done because the applicant had said she was pregnant.

A second scan was carried out at Parirenyatwa Hospital on 10 May 2017 which showed that there were no ingested "body packs" and that the applicant was not pregnant. The absence of pregnancy was confirmed the following day by a pregnancy test conducted at Harare Hospital. Clearly therefore the obstruction of justice for which the applicant was prosecuted related to secretly excreting what was suspected to be cocaine with the help of unknown state officials and nothing else. That is what the prosecution was required to prove.

Four witnesses testified on behalf of the prosecution starting with Isaac Taungwena, the investigating officer in the case with 11 years experience in the business. The thrust of his evidence was that the police could not motivate the performance of a CT Scan as recommended by the doctor because the applicant had lied that she was pregnant. A CT Scan cannot be performed on a pregnant woman. He stated in his evidence in chief at p 30 of the record:

> "After 4 days we went for an ultra sound scan, it indicated that accused had no (pregnancy) and had no cocaine in her abdomen. We went for a (pregnancy) test at Harare (Hospital) and it showed that she had no pregnancy and indeed accused lied that she was pregnant so that CT Scan (could) not be performed thereby defeating course of justice."

Asked to explain how the cocaine could not be found in the applicant's abdomen, the investigating officer could only say:

> "We are still investigating where and when she induced the substance since she slept in several places."

This he said even though he was emphatic that the applicant was monitored throughout the time that she was in custody both at the police station and at remand prison. Any doubt that may have existed as to what the investigating officer regarded as obstruction of justice disappear upon consideration of his testimony under cross-examination. At p 33 of the record, the following dialogue is recorded:

> "Q: Clarify how did accused obstruct or defeat the course?
> A: Accused lied she was pregnant so that the actual procedure i.e. CT Scan (was) not performed on her. That scan cannot be performed to someone who is pregnant as a way that she cannot be ascertained that she swallowed cocaine at her own time (*sic*)."

The other police witnesses followed suit. Theresa Maunganidze, could only speculate that the applicant "connived with security and excreted substance in her stomach." She admitted that she did not know the state officials who connived with the applicant neither did she witness any of the connivance or excretion. The same quality of evidence was presented by A. O Chinyani who also alleged connivance either at the police station or at remand prison but frankly admitted she did not have any evidence to prove that.

The only other witness called by the State was Damen Murambatsvina, a completely unreliable witness who could not possibly advance the state case in any way. I say he was unreliable because this is the Ultra Sonographer who conducted the first ultra sound scan on the

applicant on 6 May 2017 and compiled a report produced in court as exh 1. Not only did that scan yield abnormal bowel related masses with shadowing seen in the left lumbar region which he concluded "may be ingested body packs." He also observed "a tiny intra uterine gestational sac of 5.7 mm" when he scanned the applicant's pelvis. He concluded that the applicant was pregnant.

All the findings made by Murambatsvina were trashed by Doctor T Sibanda, a senior radiologist at Parirenyatwa Hospital, who conducted the second scan on 10 May 2017. According to Dr Sibanda, there were no "body packs" and there was no pregnancy but only a "myometrial cyst." He recommended a pregnancy test which ruled out pregnancy. Murambatsvina obviously found himself in a state of bother to explain his 2 non-existent findings and did not fare well at all. He confirmed that before conducting the examination he had been instructed by the police "to check for ingested body packs," and that when he scanned the pelvis he had been told by the applicant that she was pregnant. For some reason he was then able to see "a small (cystic) structure in the womb," a sure sign of pregnancy.

This was an impressionable witness who easily saw that which he was told existed. When the police told him to look for "body packs"' he quickly saw them in the abdomen, even though he later admitted under cross examination that solid food could still pass as what he saw. When the applicant told him she was pregnant, he easily saw a sign of pregnancy as he had been told. All that he saw turned out not to exist but the police still acted on his findings to prefer the charge against the applicant, a charge they dismally failed to sustain.

Having been served with a jackpot, counsel for the applicant made an application for discharge at the close of the state case in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In detailed written submissions he argued that at the close of the case for the prosecution the state should have placed before the court *prima facie* proof of the commission of the offence which implicates the accused to such a degree as to call for an answer. It was further argued that there was no evidence upon which a reasonable court acting carefully might properly convict and that whatever evidence adduced by the state is so manifestly unreliable that no reasonable court could safely act upon it. The evidence in question is that which I have already outlined.

The state opposed the application. Other than reproducing verbatim s 184 (1) (e) of the Criminal Law Code nothing of substance was stated in the written opposing submissions. Counsel

for the state made the startling submission that because the second scan conducted by Dr T Sibanda did not detect any body packs, this was a clear indication that the applicant had secretly excreted the cocaine body packs. It was lost to state counsel that there was not even an iota of evidence that there was cocaine in the applicant's abdomen or that the applicant had excreted the substance. More importantly, it did not occur to the state that given that the first scan by Murambatsvina had been discredited, there was a reasonable possibility that at no time whatsoever did the applicant have cocaine inside her body.

Against that background, the first respondent still dismissed the application for discharge at the close of the state case. In doing so the first respondent did not assess the evidence in any meaningful way and does not appear to have addressed her mind to the issues for determination at that stage. The ruling itself is surprisingly very brief and the material part reads:

> "The last witness' testimony clarified what had become a bone of contention during trial. He explained that it was the accused who told him that she was pregnant. He felt that accused misled him. In his scan he had observed a cystic structure to which upon (being) told by accused that she was pregnant he concluded that she could be pregnant as the cysts are normally a sign of pregnancy. However he then commented that accused misled him into believing that she was pregnant yet she was not. This was corroborated by the second scan. However the last witness indicated that he observed some body packs by the shadowing of the abdomen. He explained that ultrasound scan could not detect the contents of the body packs hence he referred for a C T Scan. Then there comes the state officials saying that the mere act that accused lied to them and to the last witness that she was pregnant, that she very well knew that a C T Scan could not be performed on her. Hence the charge for obstruction. The court also learnt from witnesses that accused could not take solid foods the time she was in police ells. It is apparent that there was no pregnancy to talk of or even a sign of it.
>
> However in light of such an explanation the court would say that there is a case to which accused should answer. Hence the application is hereby dismissed."

I have said that the state was required to prove the charge that the applicant defeated or obstructed the course of justice by secretly excreting cocaine which she had swallowed with the assistance of state officials. The case that she faced was never that she lied that she was pregnant when she was not thereby defeating or obstructing the court of justice. So with the charge and the essential elements of it right in front of her, the trial magistrate went on to rule on a completely different case, the result of being blind folded and then being led down the garden path by a prosecution preferring one charge and proceeding to prove another.

It is that decision which the applicant has brought before this court on review on the grounds *inter alia* that the decision is grossly irrational in its defiance of logic an common sense that it can only be explained on the basis of bias or inadvertent disregard of the principles governing an application for discharge at the close of the State case. The second respondent opposed the application stating in the opposing affidavit of Peter Kachirika, the public prosecutor charged with the prosecution of the matter, that the applicant defeated the court of justice by secretly excreting the body packs observed by Murambatsvina without the knowledge of the police. According to Kachirika it is important that Murambatsvina observed the body packs in the applicant's abdomen during the first scan. As such the court was correct in putting the applicant to her defence for her "to explain the circumstances surrounding the disappearance of the body packs."

This court will ordinarily not sit in judgment over a matter that is before an inferior court except in very rare situations where a grave injustice would occur if it does not intervene. While it is true that this court has review jurisdiction over unterminated proceedings it is always slow to intervene in unterminated proceedings of an inferior court except in cases of gross irregularities in the proceedings or it is apparent that justice might not be attained by other means. See *Achinulo* v *Moyo N.O & Anor* 2016 (2) ZLR 416 (H) at 417 B-C.

The principle that a superior court will only interfere in unterminated proceedings of an inferior court in exceptional circumstances of gross irregularity vitiating the proceedings or in rare cases of grave injustice has been hallowed by repetition over a number of years in judicial pronouncements. See *Ndlovu* v *Regional Magistrate, Eastern Division & Anor* 1989 (1) ZLR 264 (H) at 269C-270G; *Masedza & Ors* v *Additional Magistrate Rusape & Anor 1998 (1) ZLR 36 (H) at 41C; Ismael v Additional Magistrate Winberg and Anor* 1963 (1) SA I (A) at p 4; *Attorney General* v *Makamba* 2005 (2) ZLR 54 (S) at 64 C-E where MALABA JA (as he then was) said:

> "The general rule is that a superior court should intervene 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."

There are policy considerations behind that approach. Magistrates have jurisdiction to try criminal offenders and to pronounce judgments on the guilt or otherwise of those that are arraigned

before them for criminal prosecution. While this court has jurisdiction to supervise magistrates court's in terms of s 171 (1) (b) of the Constitution, it is undesirable to disturb proceedings before they are completed because it upsets good order and the smooth operations of the courts. Apart from that, it is not like an accused person who is aggrieved by an adverse interlocutory decision does not have recourse. He or she can bid time and challenge the decision by way of appeal. Therefore in deciding whether to intervene in unterminated criminal proceedings it is fair to draw a distinction between an appeal and a review because an appeal comes at the end of the trial where one approaches this court because the lower court came to a wrong conclusion on the facts or the law. One however comes to this court by way of review if aggrieved by the method of the trial. See Herbstein & van Winsen, *Civil Practice of the Supreme Court of South Africa* 4 ed at p 932.

In my view this is a case which cries out for intervention even though the proceedings have not been terminated because it is clearly wrong and unconscionable to put an accused person to her defence where the prosecution has not attempted to prove the charge or an essential element of charge. In terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

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

Authorities in which that provision has been interpreted make it crystal clear that the trial court has no option but to discharge an accused person at the close of the case for the prosecution where there is no evidence to prove an essential element of the offence, there is no evidence on which a reasonable court, acting carefully, might properly convict or the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it. See *S* v *Tsvangirai & Ors* 2003 (2) ZLR 88 (H); *S* v *Kachipare* 1998 (2) ZLR 271 (S) at 276 D-E; *Attorney General* v *Mzizi* 1991 (2) ZLR 321 (S) at 323B; *Attorney General* v *Tarwirei* 1997 (1) ZLR 575 (S) at 576G.

It is significant that the word "shall" is used in s 198 (3) because its use, by its very nature, takes away judicious discretion. It has been stated that a trial court has no discretion but to acquit at the end of the State case if there is no evidence upon which a reasonable court would convict. It is not entitled to place an accused person on his or her defence in the face of inadequate evidence

in the hope that the accused person might incriminate himself or herself. See *S* v *Mpofu* 2012 (1) ZLR 384 (H) at 390 A. *S* v *John* 2013 (2) ZLR 154 (H) at 159G.

The essential elements of the offence for which the applicant was charged were that she had ingested cocaine, for which she was being investigated. In order to defeat or obstruct the course of justice she did not take solid food and thereafter secretly excreted the cocaine. That way she defeated or obstructed the course of justice. No attempt was made to prove that there was cocaine in her abdomen, or that failure to take solid prison food is an offence, or that she excreted cocaine secretly. In fact the State witnesses were clear they did not have the evidence of that offence. Instead they set about telling a story that the applicant had given a lie about a non-existent pregnancy which prevented a CT scan being conducted thereby obstructing justice. That was an exercise in futility and did not even begin to prove any essential element of the offence. In short there was nothing upon which the applicant could be convicted.

The position of the law is very clear that this court will only exercise its review power to intervene in unterminated proceedings where the irregularity is gross or where an injustice might occur or where justice might not be attained by any other means. See *Achinulo* v *Moyo N O & Anor supra,* at p 420 E. I am of the view that this is such a case. The proper conduct of a criminal trial has been heavily compromised by requiring an accused person to defend herself on 2 different cases – one for which she is charged but for which no evidence was led and one which the State witnesses testified on. I totally agree that the decision under review is extremely irrational. In fact it defies logic and therefore reviewable.

In the result, it ordered that:

1. The ruling or judgment of the 1st respondent dismissing the application for discharge at the close of the state case is hereby set aside.
2. The applicant is hereby found not guilty and acquitted.
3. Each party shall bear the own costs.

MUNANGATI-MANONGWA J agrees ……

Mushangwe and Company, applicant's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners