BRIAN WHANDE
versus
MS CHIGODORA N. O.
and
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 23 May 2019

**Urgent Chamber Application**

*N. Chikono,* for the applicant
*T. Mapfuwa,* for the 2nd respondent

MATHONSI J: The applicant is a serving prisoner at Chikumbi Prison in Harare after his conviction for contravening s 67 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] on 26 April 2019 by the Magistrates Court sitting at Harare. He stands convicted of indecently assaulting a male child. Upon his conviction on his own plea of guilty, he was sentenced to 24 months imprisonment of which 6 months imprisonment was suspended on condition of future good behaviour.

The applicant has brought an urgent application riding on the founding affidavit of his father Edson Mugove Whande, which is not even supported by any medical evidence, seeking the following relief:

> "TERMS OF FINAL ORDER SOUGHT
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> That the respondent show cause to this Honourable Court on the return date why a final order should not be granted in the following terms:
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> 1. That the trial of the applicant be done *de novo* after procedures in terms of the Mental Health Act [*Chapter 15:12*] have been complied with.
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> TERMS OF THE INTERIM ORDER GRANTED
>
> (a) That the conviction and sentence imposed by the 1st respondent on the applicant on 26th April 2019 be and are hereby set aside and quashed respectively.
> (b) That the applicant should be released immediately from Harare Central Prison into the custody of his father Elson Mugove Whande."

*Nicholas Chikono,* a legal practitioner at the law firm representing the applicant has certified the matter urgent because he says he personally visited the applicant at Chikurubi Maximum Prison where he interviewed the applicant and formulated the impression that the applicant is of "unstable mind" as he told the lawyer that he was convicted of raping a 15 year old girl he does not know when he was not. His demeanour and answers convinced the legal practitioner, who does not profess to have any medical or psychiatric expertise, that indeed the applicant did not appreciate the criminal proceedings and that his guilty plea was not a genuine one. *Chikono* fears that the applicant might be taken advantage of by other prison inmates hence the need to treat the matter as urgent.

It is needless to say that *Chikono*'s observation is of no value to the court and cannot possibly motivate the court to act upon it, he not being qualified to make any medical or psychiatric evaluation of a person. For his part, the applicant's father deposed to the fact that upon the applicants' arrest he had visited him at Mabvuku Police Station where he was being detained and discovered he had been arrested by members of the public who had suspected that he had attempted to sexually abuse the complainant. In effecting a citizens' arrest, they had assaulted the applicant before taking him to the police.

Edson Mugove Whande stated that he had informed the police that his son was born with "a mental challenge." He later learnt from the police that the applicant would be taken to court on 26 April 2019 and did attend the court proceedings. He expected the state to inform the court about the applicant's "mental challenge" and when this did not happen he raised his hand to do so but was prevented from informing the court by prison officers in attendance. The applicant accepted the allegations and having pleaded guilty he was duly convicted. Like any other father in his position, Whande petitions this court to review the decision of the trial court and order his son's immediate release from prison. But then life cannot be that easy.

Mr *Chikono,* who appeared for the applicant conceded that he was unable to advert to any misdirection on the part of the trial court in the manner in which it conducted the proceedings. He submitted that the trial magistrate was innocent as she was unaware of the mental incapacity of the applicant. It must follow that the applicant did not exhibit any signs of mental disorder. If he had, the magistrate would have directed that he should be examined by a medical doctor. Mr *Mapfuwa* for the second respondent weighed in on that aspect by submitting that the applicant should have proceeded in terms of s 30 of the Mental Health Act and sought an examination by an expert. As that was not done, the application is misplaced and

without merit. I agree. Everything that can be wrong with an application is wrong in this matter. For a start the applicant was convicted and sentenced by a court of competent jurisdiction following compliance with due process. Currently there exists a valid conviction and sentence which therefore requires the applicant to serve his sentence unless and until the decision of the trial court has been set aside following a proper challenge or the applicant is admitted to bail pending a lawful challenge of the outcome of the criminal trial. A convicted felon cannot just be released from lawful custody on the paternalistic "say so" of his father.

There is absolutely no evidence upon which a court of law might come to a conclusion that the applicant was not fit to stand trial, or that he did not appreciate the proceedings. Certainly such evidence cannot be the self-serving opinion of the applicant's legal practitioner. Pretty much less can it be the word of a grieving father who cannot wait to see his son safely back at home, never mind what it is he stands accused of. The closest the applicant's father has come to submitting evidence for consideration by the court is a letter and an attendance register elicited from the "Senior Woman" at Churchill School which is dated 2 May 2019, days after the applicant's conviction and sentence. Said the senior woman:

> "TO WHOM IT MAY CONCERN
>
> This letter serves to confirm that Brian Hwande was a special class student at this School from 1992 to 1993. For any further information you can contact officials at the above mentioned institution. Find attached a copy of the school register. Your assistance in this regard is greatly appreciated."

It is not confirmation that the applicant was in a special class at Churchill School 26 years ago that breaks the record for the irrelevant, but that such piece of evidence could be submitted and relied upon in an attempt to overturn a criminal conviction and sentence by both a parent and his legal practitioner, that is disarming. It is neither proof of mental incapacity nor anything to suggest the applicant did not commit the offence or did not appreciate the proceedings when he pleaded guilty.

More importantly, a wrong application has been made without even a single ground for review. A review application can simply not be made by urgent application. This is because the rules of the High Court do not allow it. There is a procedure set out in Order 33 of the High Court of Zimbabwe Rules, 1971 through which proceedings and decisions of inferior tribunals may be brought to this court for review. Not even a single provision of that Order has been complied with suggesting that no attempt whatsoever was made by counsel to familiarise himself with the rules governing reviews.

In terms of r 256:

> "Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, *quasi-judicial* or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other persons affected."

The requirement for the proceedings to be brought by court application is peremptory by virtue of the use of the word "shall" in the rules. The applicant has chosen to seek review by urgent chamber application which offends the provisions of r 256. I am aware that in terms of r 229C of this court's rules the fact that an applicant has instituted a chamber application when he or she should have proceeded by way of a court application shall not in itself, be a ground for dismissing the application unless the other party is prejudiced which prejudice cannot be remedied by directions for service with or without any appropriate order for costs. Unfortunately for the applicant, the failure to proceed by court application is not the only defect in this application.

The application also offends r 257 and r 260 of the rules. Rule 257 requires the court application to state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. The applicant having elected to set out what he regards as grounds for review, did not bother to relate to review grounds set out in s 27 of the High Court Act [*Chapter 7:06*] or any of the known common law review grounds. These grounds are absence of jurisdiction, interest in the cause, bias, malice or corruption on the part of the tribunal, gross irregularity in the proceedings or the decision and any common law grounds. This court's power to review criminal proceedings provided for in s 29 does not relate to the present application and has not be resorted to.

The applicant has set out the claim that the applicant is a mental patient and that his guilty plea was not genuine as well as that the applicant may be victimized in prison and that he is impotent as grounds for review. I have said there is no evidence of mental incapacity the same way as there is no the evidence of impotence, if at all it would be relevant for a charge in terms of s 67 of the Criminal Law Code [*Chapter 9:23*]. These are not review grounds provided for in the law. What the applicant is doing is to seek reconsideration of his case or raising a defence which was not raised before the trial court. For the reason that there are no valid grounds for review the application is defective and therefore cannot succeed.

That is not all. There has been no compliance with r 260 requiring the preparation and lodgment of the record of proceedings. The rule requires that the record be lodged within 12 days of the date of service of the application for review, a clear indication that such an application cannot be made by urgent application. This is application that cannot be saved.

In the result the application is hereby dismissed with costs.

*Ngarava Moyo & Chikono,* applicant's legal practitioners
*The Prosecutor General,* 2nd respondent's legal practitioners