ASSISTANT INSPECTOR MAHLEKA 044166 F

And

SERGEANT NDLOVU 052668 X

And

CONSTABLE HAMADZIRIPI 063261 L

Versus

THE TRIAL OFFICER
(SUPERINTENDENT DONALD ROBSON)

And

THE COMMISSIONER GENEREAL OF POLICE

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 19 JULY 2017 & 9 JANUARY 2020

Court Application

N. Mugiya for the applicants
L. Musika for the respondents

BERE J: On 10 November 2015 the applicants filed an application for a declaratur in this court seeking the following order:

> "1. That the respondents' trial proceedings in terms of the Police Act against the applicants be and are hereby set aside.
>
> 2. That the trial of the applicants in terms of the Police Act for the allegations for which they were charged with in terms of the ordinary law is declared wrongful and unlawful.
>
> 3. That the respondents are ordered to pay costs on a client – attorney scale."

The applicants' application was opposed by the respondents. The matter was therefore set down for hearing n this court on 15 June 2017.

On the date of hearing the parties reconsidered their respective positions and decided to deal with this matter as a stated case based on the following agreed facts;

Statement of agreed facts

"1. The applicants were charged for contravening section 35 of the Schedule of the Police Act by the 1st respondent who proceeded to convict them after a full trial and sentenced them to 14 days imprisonment at the detention barracks in terms of section 35 as read with section 29 of the Act. That is "acting in unbecoming or disorderly manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police Force."
2. Prior to the applicants being charged in terms of the Police Act, they had already been charged in terms of the Criminal Law Codification and Reform Act (Chapter 9:23) on the same allegation and circumstances and appeared at Harare Magistrates' Court where charges were withdrawn for want of prosecution and in particular for want of evidence.
3. The applicants have approached this honourable court challenging disciplinary proceedings in terms of the Police Act (Chapter 11:10) taken by the respondent under the Police Act.
4. It is the applicant's contention that they were not supposed to be subjected to a trial in terms of the Police Act as they had already been charged on the same allegations in terms of criminal law.
5. The applicant further allege that their trial in terms of the Police Act amounted to dual prosecution and a violation of their right as enshrined in the Bill of Rights in the Constitution in particular (Section 70 (1) (m) of the Constitution).
6. The respondents allege that the applicants can be disciplined in terms of the Police Act and also charged under the criminal law arising from the same conduct.
7. The respondent further allege that dual prosecution is permissible as it relates to the Police Act and the criminal law by virtue of section 35 (1) of the Police Act.
8. The parties have therefore agreed on the following issues of law which this honourable court should determine as follows:
    a) Whether or not a police officer can be charged in terms of the Criminal Law and in terms of the Police Act of the same conduct?
    b) Whether or not, para (a) above amounts to dual or double prosecution?
    c) Whether or not the provisions of section 278 (2) and (3) of the Code permits dual prosecution in so far as it relates to prosecution in terms of the Police Act?

d) Whether or not the provisions of section 278 (2) and (3) of the Code are consistent with the provisions of section 70 (1) (m) of the Constitution?
e) Whether or not the provisions of section 193 of the Constitution allow dual prosecution or bar dual prosecution especially read together with section 70 (l) (m) of the Constitution?
f) Whether or not matters in terms of the Police Act are civil in nature or criminal in nature especially read together with the provisions of section 193 (b) of the Constitution?
g) Whether or not the trial proceedings of the Police Act should be governed by the provisions of section 278 (2) and (3) of the Code and to what extent?
h) Whether or not the provisions of the Constitution in section in 193 and an Act of Parliament can be limited by the Police Standing Orders or any other subsidiary legislation.

Thus done and dated at Bulawayo this 26th day of June 2017."

To put this matter into its proper perspective it is necessary to provide a detailed background which has been formulated from the application for a declaratur which was originally filed in this court and which in my view cannot be wished away or supplanted by the statement of agreed facts.

Sometime in December of 2013 the applicants who were referred to as team 10 were assigned to manage a traffic road block at some place just after Manyame River along the Harare-Masvingo Highway.

Not far away from where the applicants were operating from, a ten year old girl from a nearby farm called Gilstone Farm, Beatrice picked up a plastic bag at a rubbish damp site. Upon opening it the girl's mother realised that the plastic bag was no ordinary one as it contained money in several denominations of various currencies wrapped up separately in a khaki and white paper and some edible fruits which the daughter had already started feasting on before the mother's intervention.

It turned out that this 'parcel' which was picked by the young girl had been placed by the applicants in this rubbish pit. All hell broke loose when the applicants discovered their hidden treasure had mysteriously disappeared. In a frantic effort to recover the lost parcel, the

applicants embarked on military style type of investigations against the suspects who included the ten year old girl, her mother and the adoptive young girl's father. There were serious allegations of impropriety raised against the applicants by the suspects during the ensuing investigations to recover the lost parcel. The allegations included pointing a fire arm against the suspect, handcuffing a woman suspect for no good cause and threats of serious assaults with a button stick in the event the money was no recovered. There were also serious suspicions behind the possible origins of this money and how some security items in the form of Z65J documents went missing at a road block.

The trial officer who presided over the charge of violating paragraphs 35 of the schedule of the Police Act referred to in the statement of agreed facts accepted holistically the evidence by the witnesses who included the young girl's mother who testified that in the process of recovering their loot, the applicants had also taken her money amounting to $132 which they later brought back under cover of darkness and cautioned her against revealing the whole saga to anyone.

After a carefully conducted disciplinary hearing, the applicants were found guilty and sentenced to 14 days (one officer) and 12 days (two officers) respectively.

The transcribed trial proceedings suggest that there was overwhelming evidence against the applicants. Indeed the evidence was beyond reproach. This might explain why there was no attempt to appeal against the outcome of that hearing.

It is in the light of this broad background that I must now deal with the application filed by the applicants and reduced to the statement of agreed facts earlier on referred to.

Mr Mugiya for the applicants has raised so many issues but as I understand it, his argument boils down to one critical consideration – should police officers be subjected to police disciplinary proceedings after being tried in a fully fledged criminal trial informed by the Criminal Law (Codification and Reform) Act Chapter 9:23. In other words does it amount to

double jeopardy or double prosecution to prefer disciplinary proceedings against officers who would have gone through criminal proceedings?

In raising his argument *Mr Mugiya* relied inter alia on section 70(1) (m) of the Constitution which is framed as follows:

> "Any person accused of an offence has the right not to be tried for an offence in respect of an act or omission for which they have previously been pardoned or either acquitted or convicted on the merits."

Counsel also argued that in terms of section 43.3 of the Standing Order Volume 1, part 2 a single officer, as happened in this case, has no jurisdiction to try a member who would have been charged in terms of the ordinary law on the same facts and allegations.

Further, buttressing his argument counsel suggested that in his own understanding once a member has been charged and convicted, the Commissioner General can rely on section 48 and 49 of the Police Act to deal with disciplinary proceedings against such a member. Taken to its logical conclusion, counsel's argument seems to be that once a member has been acquitted in a criminal court, the Commissioner General cannot initiate disciplinary proceedings, his hands remain tied up by the acquittal.

In this courts view this could not possibly have been the intention of the legislature. Such an absurdity could not possibly have been contemplated by the legislature. I will come back to deal with this in a more detailed manner later in this judgment.

Mr Musika for the respondents countered the arguments by *Mr Mugiya* by making a pointed reference to section 208 (1) of the Constitution of the Republic of Zimbabwe which enjoins members of the security services to act in accordance with the Constitution. It makes sense that if such members violate the Constitution they must be held accountable, they cannot rely on raise a technical arguments to avoid the scrutiny of their conduct, so the argument went.

Mr Musika further argued that section 193 (b) of the Constitution fully recognizes "a court or tribunal that deals with cases under disciplinary law, to the extent that the jurisdiction is necessary for the enforcement of discipline in the disciplined force concerned."

Counsel also sought to rely on section 278 (2) of the Criminal law (Codification and Reform) Act Chapter 9:23 which is worded as follows:

> "A conviction or acquittal in respect of any crime should not bar civil or disciplinary proceedings in relation to any conduct constituting the crime at the instance of any person who has suffered loss or injury in consequence of the conduct or at the instance of the relevant disciplinary authority, as the case may be."

This court takes the view that section 70 (1) of the Constitution of the Republic of Zimbabwe does not require a narrow and myopic interpretation as attributed to it by *Mr Mugiya*, for doing so would kill discipline in the police force especially if regard is had to the nature of the case that was preferred against the applicants in this case. In all civilized nations the world over, the emphasis is to keep and maintain a highly disciplined police force. Disciplinary proceedings like those initiated against the officers in this case and for which they did not appeal against are an effective guarantee to the ordinary citizen's rights in this country. Such action discourages police officers from riding rough shod on individual's rights especially during police operations or investigations like what happened in this case where serious undefendable allegations were raised against the applicants.

Section 70(1) of the Constitution must therefore not be read in isolation but in conjunction with other relevant sections like section 193(b); 208(1) (d) of the same Constitution whose unmistakable aim is to protect and cement the citizenr's rights. There is one other fundamental consideration which *Mr Mugiya* seems to miss in this case. The applicants were never acquitted in the Magistrates' Court but charges against them were merely withdrawn, meaning the case potentially remains alive in that court.

The view that I take of this case is that the conduct of the applicants in dealing with the suspects as they endeavoured to recover their soiled loot was quite deplorable. It was calculated to soil the reputation of the police, and indeed it did so.

In my view it cannot seriously be argued that the bringing of disciplinary proceedings against the applicants, given the wording of the charge that they faced amounted to double punishment or double jeopardy as argued by their counsel. Disciplinary proceedings under section 35 of the Police Schedule to the Police Act [Chapter 11:10] are an essential aspect of maintaining discipline in the force. In this regard, I feel more inclined to restate the words of my brother MATHONSI J (as he then was), in the case of *Magwala Nkululeko* vs *The Commissioner General of Police* where he remarked as follows:

> "I think police officers must now be reminded that they are like any other employee and are therefore subject to disciplinary action by their superiors. This court cannot be used as a shield against impending disciplinary action and will only step in where there had been a clear violation of a police officer's rights".[1]

In a subsequent judgment of *Felix Sengu* v *Commissioner of Police & 2 Others*[2] the same learned judge simply put it as follows:

> "It is trite that the same conduct can give rise to both criminal and civil sanction. Where an employee has allegedly stolen from an employer, the latter is entitled to prefer criminal charges against such employee to be pursued in the criminal court. That however does not oust the employer's jurisdiction to discipline such an employee under civil law, an exercise which may result in misconduct charges being preferred against the employee and disciplinary sanction eventuating. As an employee, the applicant remains subject to disciplinary law internally even where criminal prosecution has taken place. The acquittal by a criminal court cannot exonerate an employee from the consequences arising from disciplinary law. After all, the acquittal is merely the opinion of the criminal court under circumstances where the burden of proof, beyond a reasonable doubt, is more onerous than that obtaining under civil law being on a preponderance of probabilities."

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[1] HB-11-16 at page 5

[2] HB-110-16 at page 3

I might add and say that the conduct exhibited by the applicants in the case that was presented to the disciplinary hearing must be condemned by all fair minded people. Such conduct must continue to be exposed for shielding it will result in the creation of a rotten and corrupt police force which is a serious threat to the maintenance of law and order in this country.

My assessment of the evidence that was tendered at the disciplinary hearing now complained of suggests that that evidence sustains a criminal conviction against the applicants and there is no sound reason why the criminal prosecution has not been pursued to finality. I strongly recommend that the Prosecutor General revisits this case if it had been closed for lack of evidence. The evidence of criminal conduct is there in abundance.

In conclusion I make the following specific findings:

1. There is nothing wrong with a police officer being charged in terms of the Criminal law and being disciplined in terms of the Police Act flowing from the same conduct.
2. There is no double jeopardy or dual prosecution to talk about as the two processes are meant to achieve different results.
3. Section 70(1) (m) of in the Constitution of Zimbabwe is best understood not when read in isolation but in conjunction with other related sections such as sections 193(b); 208(1) of the Constitution as well as section 278 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Flowing from my findings, I make the following order:

The application is dismissed with costs.

Mugiya & Macharaga Law Chambers, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners