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Judgment No. S.C. 204/98
Crim. Application No. 844/96

GEORGE BURT v THE STATE

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & KORSAH AJA
HARARE, MAY 19, 1998 & FEBRUARY 11, 1999

E W W Morris, for the applicant

J Matimbe, for the respondent

KORSAH AJA: This is an application for a permanent stay of proceedings referred to this Court, in terms of s 24(2) of the Constitution of Zimbabwe, by the presiding magistrate at the request of counsel for the applicant.

Although this matter properly falls for determination by this Court only on a referral of the constitutional issue as to whether proceedings should be permanently stayed because of alleged unexplained and inexplicable delays on the part of the State in affording the applicant a fair hearing within a reasonable time, another issue canvassed in the court below, and raised in argument before us, is: Whether the applicant was entitled to a verdict of *autrefois acquit*. It was submitted that the learned trial magistrate fell into error when he declined to rule on the plea of *autrefois acquit* and favoured a referral of that issue, as well, for determination by this Court.

In *Bickle and Ors v Minister of Home Affairs* 1983 (2) ZLR 400 at 432 D-E this Court expressed the salutary rule that if a case can be determined by any other court on common law principles or on some other legislative basis then a resolution of the issue or issues on those principles must be considered and applied. Recourse to constitutional remedies must be a last resort. It is for that reason that I turn first to the plea of *autrefois acquit* which the learned trial magistrate swept aside and opted for a referral of the constitutional issue.

The events leading up to this application make interesting and instructive reading regarding both the plea of *autrefois acquit* and the constitutional issue.

The alleged offence of culpable homicide resulting from the driving of a motor vehicle and related offences occurred on 12 September 1993. On 20 September 1993 the applicant was arrested on a charge of culpable homicide. On 27 September 1993 the applicant's extra-curial statement was recorded by the police. He had legal representation from the day of his arrest.

In or about February 1995, some seventeen months after his arrest, a summons was issued, calling upon the applicant to appear in court in April 1995, to answer the charges preferred against him. On that occasion he pleaded "not guilty" to all the charges and was remanded until 4 July 1995. On that remand date neither the State nor the defence were ready to proceed, so the matter was remanded, by consent, until 19 October 1995.

It seems rather strange that, having acquiesced in a remand of the matter to 19 October 1995, the applicant's counsel should, on 6 September 1995, address a letter to the Public Prosecutor seeking an explanation for the delay in bringing the matter to finality and at the same time advising that difficulty was being experienced in locating a defence witness and that failure to locate that witness would severely prejudice the applicant. Firstly, the applicant knew the reason for the delay and that he was partly responsible for it. Secondly, the delay might well enure to the benefit of the applicant as it would afford him greater opportunity of locating his missing witness.

Surprisingly, on 19 October 1995, when the applicant appeared in court and the State was not ready to proceed because none of its witnesses had turned up and therefore sought a further remand, the applicant's counsel, without mention of the defence's inability to locate the witness whose absence would cause the applicant severe prejudice in the conduct of his defence, opposed the application for a further remand and demanded a verdict. The magistrate, however, simply refused to remand the matter further and also refused to return a verdict. He indicated that it was open to the applicant to argue later, if the charges against the applicant were ever resuscitated in court, that the refusal to remand amounted to an acquittal or that an application for a permanent stay of proceedings on the grounds of inordinate delay in bringing the matter to finality be lodged. We are not here concerned with what may be regarded as perfidy on the part of the applicant, but rather with the question whether the refusal to remand may, in law, be regarded as an acquittal.

Generally speaking, if a man has been tried and been found to be not guilty of an offence by a court of competent jurisdiction to try him, the acquittal is a bar to a second indictment for the same offence. The rule applies to any offence of which he could have been properly convicted at the trial of the first indictment.

It was common cause that the applicant's plea of not guilty was entered by a magistrate other than the one who refused a further remand of the matter and also refused to return a verdict. It was yet another magistrate who refused to adjudicate on the issue of *autrefois acquit* and referred the matter to this Court. There has been much debate by counsel for the parties as to whether any other magistrate, other than the one before whom an accused pleaded, is competent to enter a verdict if further remand is refused. Both counsel in their opposing arguments place reliance on s 180(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which reads:-

> "(6) Any person who has been called upon to plead to any indictment, summons or charge shall, except as is otherwise provided in this Act or in any other enactment, be entitled to demand that he be either acquitted or found guilty by the judge or magistrate before whom he pleaded:
>
> Provided that -
>
> (i) where a plea of not guilty has been recorded, whether in terms of section *two hundred and seventy-two* or otherwise, the trial may be continued before another judge or magistrate if no evidence has been adduced; …". (Emphasis added).

Counsel for the State, seizing upon the words "by the judge or magistrate before whom he pleaded", contends, erroneously in my view, that no magistrate, other than the one before whom an accused would have pleaded, can enter a verdict. This argument fails to take cognizance of the intent of the first proviso to the subsection under consideration, which clearly is to place any other magistrate,

where a plea has been taken but no evidence has been led, in the cloak of the magistrate who took the plea, with all the powers of that magistrate who took the plea to pronounce, in accordance with the law, the verdict he deems fit. The second magistrate thus had jurisdiction to make an order refusing a further remand. Whether that order refusing remand amounts to an acquittal is another matter. And whether if it was intended as an acquittal it was valid to avail the applicant of a plea of *autrefois acquit* is yet another matter.

It seems to me that every trial must proceed with an investigation of the charge or charges levelled at the accused. If a charge does not constitute an offence under any law the court is at liberty to quash it and discharge the accused. A person so discharged is under no compunction, legal or otherwise, to appear again in court to face the charge against him in the form in which it was framed. Such a discharge is not an acquittal; for there has been no trial ending in a verdict. So also is a discharge for want of prosecution. It does not amount to an acquittal. A refusal to remand a matter has the effect of liberating an accused from his legal duty to attend court, and no more, because there is no date fixed for him to do so. It is not a pronouncement of his innocence and does not amount to an acquittal. If the intention of the court is to return a verdict of not guilty it should record such a verdict as testimony for the guidance of posterity and not leave it to be inferred. And even where the verdict is recorded, there may be grounds for declaring the trial a nullity.

In *R v Heyes* [1951] 1 KB 29 the appellant pleaded not guilty to charges of stealing and receiving stolen property but, during the opening of the case for the prosecution he altered his plea to one of guilty of receiving. The jury were not

asked to return a verdict and he was convicted by the Recorder on his own plea. On an appeal against verdict, LORD GODDARD CJ had this to say:-

> "Once the jury had heard the appellant say that he wished to withdraw his plea and admit his guilt, the proper proceeding was for the court to ask them to return a verdict. It appears that counsel did suggest to the learned Recorder that this was the proper course; but the Recorder thought that it did not matter. It does matter because, once a prisoner is in charge of a jury, he can only be either convicted or discharged by the verdict of the jury.
>
> As there was no verdict of the jury here, the trial was a nullity to such an extent that the Court could set aside the proceedings and order a retrial or *venire de novo*."

In the instant case the trial magistrate was both judge and jury. If his order bringing the trial to an end was a nullity the remedy is to set aside the proceedings and order a new trial.

In *Marcaruka v S* S-87-96, this Court acceded to a submission by the State, represented by Mr Chitapi, that:-

> "Once the accused has tendered a plea of not guilty, the issue of a further remand ceases to arise. The accused will have joined issue with the prosecution. The way forward if the trial does not proceed after the tendering of the plea or the trial is not completed there and then is to be found in sections 165 and 166 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].
>
> It follows that in a situation where a plea of <u>not guilty</u> has been entered, there is no provision for the magistrate to refuse a further remand. The accused is not on remand but on trial. A trial and remand procedure are two different things. Simply put, a trial is adjourned or postponed where expedient. It can be postponed for various reasons and this includes at the request of either of the parties. <u>Remand procedure connotes a situation where the State is not ready to proceed to trial and requests the court to remand the accused either in custody or on bail until he is tried</u>. Therefore a 'refusal to remand' is in essence a discharge for want of prosecution and the State can proceed by way of summons. Thus, where a plea has been entered, the trial has commenced and there is no provision for a discharge for want of prosecution, hence the existence of s 180(6) which is open to the accused to utilize."

It seems to me that Mr Chitapi put too restrictive a meaning on the word "remand", which has been a legal term of art for a considerable period, and was not given any special meaning in s 2, which is the interpretation section of the Act, other than that commonly accorded to it by Courts and members of the profession. "A remand in the first instance is for the sake of allowing further evidence to be collected and adduced at a further hearing" - see *Wharton's Law Lexicon* 12 ed (my emphasis). A further hearing may occur after a plea has been entered and part of the evidence has been led. In the Concise English Dictionary, remand includes "to recommit in custody after a partial hearing". There appears to be no warrant to limit the use of the word "remand" to appearance in court before plea.

Mr Chitapi summed up his argument in the M*arcaruka* case *supra* thus:-

> "The course open to the magistrate was to postpone the matter but since he did not do so, he ought to have answered the applicant's prayer under s 180(6) aforesaid and entered a verdict of not guilty and discharged the applicant."

Even if I am wrong and Mr Chitapi is right that a trial magistrate, after a not guilty plea, has no power to refuse a remand, if a magistrate makes an order which he has no jurisdiction to make, it is no more than a misdirection in law which renders the proceedings a nullity, because it is an order made without jurisdiction. The appropriate remedy then would be to remit the matter for trial *de novo* and not to enter a verdict of not guilty because a trial must end with a verdict; and since a refusal to remand is not a verdict, this Court cannot substitute a verdict for a non-verdict or where none has been returned by the trial court.

There is, finally, another important aspect of the plea of *autrefois acquit*. Unlike the defence of alibi, the disproof of which rests on the prosecution, the proof of issues in the defence of *autrefois acquit* lies on the accused - see *Archbold* 38 ed para 448, and see also *Criminal Procedure in Zimbabwe* by John Reid-Rowland 1997 pp 16-20 - for it is the accused who knows the offences of which he was charged at the trial which pronounced such verdict. Therefore, in accordance with the general rule that the party who avers the existence of a document bears the *onus* of producing it, the burden rests on the accused to produce a record of the acquittal or a certified copy thereof.

In the instant case, no such certified copy of the acquittal was produced because none was extant. There was only an inference of an acquittal from an order which the State says the magistrate made in error or had no jurisdiction to make. Where then was the acquittal by the trial court?

From the foregoing it is patent that I am of the view that a plea of *autrefois acquit* would not have availed the applicant. That leaves this Court with the constitutional issue.

The applicant was arrested and charged with the offences the subject of this application in September 1993. That is when the time for his expeditious trial was triggered.

On 23 May 1996 Mr Chitapi appeared in the Supreme Court to argue the matter of *Marcaruka supra*. Present in the Court on another matter was

Mr *Morris*. Judgment was given in the *Marcaruka* matter *supra* with reasons to be handed down later. Due to the similarities in the procedure adopted by the trial courts in both cases a discussion took place between Mr Chitapi and Mr *Morris* which resulted in the exchange of the following communications between the attorneys for the applicant and the Office of the Attorney-General, on 23 May 1996 and 13 June 1996 respectively:-

> "ATTENTION: MR T CHITAPI
>
> Dear Sir
>
> Re: THE STATE vs GEORGE BURT: C.R.B. 4221/95: CR HRE TRAFFIC 4-9/11/93
>
> We understand that as a result of a verbal communication between Advocate Morris and yourself you have undertaken to withdraw any thought of prosecution in the above matter as a result of the Supreme Court decision in *Marcaruka v The State*.
>
> Please may we have this undertaking in writing.
>
> Yours faithfully,
>
> COGHLAN, WELSH & GUEST".

To which Mr Chitapi responded on 13 June 1996 as follows:-

> "Thank you for your letter dated 23 May 1996. I only undertook to recommend to the Director that depending on how the Supreme Court will word the judgment in *Marcaruka's* case, the prosecution of George Burt should be discontinued. The judgment is not yet circulated but I will keep my promise."

Of course, Mr Chitapi could do no more than recommend the discontinuance of any further prosecution in the Burt case, but whether or not the prosecution of Burt would proceed rested in the lap of the Director for Public Prosecutions.

Thus it was that on 15 July 1996 the applicant was served with a summons to appear in court on 22 July 1996 to answer the identical charges as before preferred. On the same day the applicant's attorneys wrote to Mr Chitapi to query the position, and in a telephonic conversation with Mr Chitapi the applicant's attorney was assured that the State would not proceed with the prosecution of the applicant, because of the decision in *Marcaruka supra*. However, on 22 July 1996 the State, represented by counsel other than Mr Chitapi, proceeded with the summons although no evidence was led as the docket was not available.

On the following day, 23 July 1996, Coghlan, Welsh & Guest wrote again to Mr Chitapi querying the position and protesting that:-

> "As previously arranged the writer attended court with (our) client yesterday and discussed matters with (the) Public Prosecutor, Mr Phiri, who indicated you had uplifted the docket last week. As you did not appear in court we confirm the writer attended your offices to establish the present position. We record with respect that we were astounded to learn that the State is now suggesting that because (our) client at the hearing in the matter did not appear before the magistrate before whom he pleaded not guilty the principles and legal position as stated in *State v Marcaruka* is distinguishable. You are therefore suggesting that the State is going to proceed."

It is, of course, now appreciated that in terms of the provisions of s 180(6) of the Criminal Procedure and Evidence Act the identity of the magistrate who entered the applicant's plea is of no consequence and that any magistrate may proceed with the matter provided no evidence had been led before any other magistrate.

No further steps were taken in the matter until 16 June 1997, when a summons, out of the blue, was served on the applicant notifying him that the matter

had been set down for trial on 30 June 1997. Immediately a letter was written, warning the State of the applicant's intention of asking for a permanent stay of proceedings on account of the State's tardiness.

Mr *Matimbe*, for the State, submitted, rightly in my view, that, as regards the constitutional issue, time begins to run once an accused person has been charged with an offence. He conceded that up to 30 June 1997, when the application for referral was made, that the applicant's prosecution had been pending for forty-six months and that such a delay is long enough to trigger an enquiry into its cause.

Mr *Matimbe* contended that from the time a further remand was refused on 19 October 1995 the applicant contributed significantly to the delay by raising the defence of *autrefois acquit*. This argument, in the face of the submissions made by the State in the *Marcaruka* case *supra* is untenable. The same alleged procedural error had been committed by the magistrate in both cases - refusing a further remand without making consequential orders. It was the State's confusion about how to proceed thereafter that was responsible for the delay. Here, the delay after 19 October 1995 was due solely to the State's tardiness in arriving at a decision whether to proceed to trial, having regard to the concessions made in the *Marcaruka* case *supra*.

The applicant testified at the referral proceedings that the delay had caused him emotional prejudice. One can understand the emotional stress a person may experience if one moment he is told that he will no longer be prosecuted and at

the next he is hauled before a court to answer the very charges he was made to understand had been dropped. This happened not once but twice.

The applicant alleged in his heads of argument, though not at the referral proceedings, that he could no longer, as a result of the delay, trace a key witness for the defence. This allegation Mr *Matimbe* rightly contends should have been made at the referral proceedings where the right to subject him to cross-examination by the State on that issue could have been exercised.

The applicant has from the issue of the summons on the first occasion protested against the delays and sought to have an explanation from the State for such delays. At no stage was the State ever taken by surprise and even at this late stage the only explanation the State can proffer for its tardiness is that the defence raised by the applicant so baffled it that it could not proceed expeditiously. Well, that is not good enough.

In my view, if, in any straightforward matter, such as a running-down case, there is inordinate delay, which the accused has not contributed to, in bringing the matter to trial, and the prosecution can proffer no reasonable excuse for its tardiness, then where the accused has asserted his right to be tried within a reasonable time, he is entitled to a permanent stay of prosecution.

Nowhere in this matter has the State been able to justify the delay in proceeding expeditiously against the applicant.

In the result the applicant is granted a permanent stay of prosecution. There will be no order as to costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Coghlan, Welsh & Guest, applicant's legal practitioners