REPORTABLE ZLR (10)

Judgment No. S.C. 15/99
Criminal Application 98/98

DAVID ISRAEL BEN JESSE vs THE ATTORNEY-GENERAL

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA, EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, FEBRUARY 18 & 25, 1999

The applicant in person

P Muziri, for the respondent

GUBBAY CJ: The applicant was charged in the Regional Court, Eastern Division, with: (i) the offence of kidnapping; (ii) a contravention of s 7(1) of the Children's Protection and Adoption Act [*Chapter 5:06*] (the ill-treatment or neglect of children or young persons); and (iii) a contravention of s 4(4)(a) of the Firearms Act [*Chapter 10:09*] (the purchase, acquisition or possession of ammunition without the holding of a firearms certificate in respect thereof). He pleaded not guilty to all counts.

On 19 March 1998, and at the stage when the trial before the regional magistrate had reached the closure of the prosecution case, there was lodged with this Court an application purportedly brought pursuant to s 24(1) of the Constitution of Zimbabwe. It was founded upon the allegation that the provisions of both s 7(1) of *Chapter 5:06* and s 4(4)(a) of *Chapter 10:09* fell foul of the presumption of innocence

guaranteed by s 18(3)(a) of the Declaration of Rights in the Constitution and, therefore, should be declared invalid.

The application was opposed by the respondent solely on the ground that neither impugned provision places an evidential burden on an accused person to prove his innocence rather than on the State to prove guilt beyond a reasonable doubt.

At the inception of this hearing, a preliminary procedural point was raised by the Court. It was whether the applicant was entitled to have recourse to s 24(1) of the Constitution since he had omitted to request the regional magistrate to refer the alleged constitutional questions to the Supreme Court in terms of s 24(2). Put differently, whether an applicant may, during the course of proceedings in the High Court or in any court subordinate to it, simply ignore the provisions of s 24(2) and utilise the procedure laid down in s 24(1).

I entertain not the slightest doubt that the resort by the applicant to s 24(1) of the Constitution was impermissible.

The right to apply directly to the Supreme Court under subs (1) of s 24 is made "subject to the provisions of subs (3)", which in turn reads:-

> "Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1)". (Emphasis added).

The effect of s 24(3) of the Constitution was considered in *S v Mbire* 1997 (1) ZLR 579 (S) in relation to the refusal by a regional magistrate to accede to the request for a referral under s 24(2). I pointed out at 581H-582B that:-

> "It is clear from the wording of this provision that where a referral has been refused by the High Court or by any court subordinate to it, albeit the opinion that the raising of the constitutional question was merely frivolous or vexatious was manifestly erroneous, there is to be no interruption in the proceedings. They are to continue to the stage of determination, which in a criminal case is when the accused is convicted and the final sentence delivered. … Thereafter, the right to raise the constitutional question as a ground of appeal against such determination becomes permissible."

These remarks apply with even more cogency to the present matter. For without even seeking to obtain a referral under s 24(2), the applicant is claiming an entitlement to bring questions, which ought to have been raised before the regional magistrate, directly before this Court. That is precisely what is prohibited by the closing words of s 24(1), as read with s 24(3).

Counsel for the respondent sought an order for costs, notwithstanding that he had failed to oppose the application on the ground of its procedural defect. He declined the suggestion by the Court that the Attorney-General should consent to an order that each party bear its own costs. In the event, it seems to me that in a situation like this a court is bound by the approach to costs laid down in *Jesse v Chioza* 1996 (1) ZLR 341 (S). In that case I said at 347F that where a point is successfully raised by the court itself on appeal, the usual order is that the loser pays the costs; the reason being that it is for the party seeking relief to satisfy himself that the matter is properly before the court.

It is true that the applicant is not a qualified legal practitioner, but neither is he without any knowledge of the law, as is evident from the frequent extent to which he has represented himself in litigation in all courts over the past few years. In the circumstances, I do not consider that a relaxation of the rule in his favour is warranted.

It follows that the application must be dismissed with costs. This order is, however, without prejudice to the applicant's right to raise the constitutional questions on any appeal from the determination of the regional magistrate in the current criminal proceedings.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.