FLETCHER DULINI NCUBE

and

SONY NICHOLAS MASARA

and

ARMY ZULU

versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 31 JULY and 1 AUGUST 2002

Adv. Anderson for the applicants
Mrs M Moya-Matshanga for the respondent

Judgment

CHIWESHE J: On 16 July 2002 applicants sought and obtained a provisional order calling upon the respondent to show cause why a final order should not be made as follows:

"1. The indictment in the above matter be struck off;
2. The applicants be removed from remand."

By way of interim relief the following order was granted:

"Pending determination of this matter the applicant is granted the following relief:

(a) the indictment of the applicants be postponed until this court has made a determination with regard the present matter.
(b) respondent be and is hereby ordered to show cause why applicants should not be removed from remand.
(c) respondent be and is hereby ordered to file its answering papers on or before 12 noon of 17 July 2002 and applicants are granted leave to set the matter down within 48 hours thereafter."

The background facts to this application are as follows. Applicant and co-accused persons face charges of murder. They were arrested in November 2001. They are all on bail pending trial in the High Court. They have been on remand since the time of their arrest.

According to the respondents (and this has not been challenged) their Bulawayo office received instructions from the Attorney-General's office in Harare that the applicants be indicted to the High Court in Harare. A letter was then written to the Clerk of Court (Criminal) requesting him to issue summons against the applicants in terms of section 110 (3)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The letter was copied to applicant's legal practitioners. In terms of the summons issued, the applicants were required to be in court 2, Tredgold Magistrates' Court at 8.30a.m on 12 July 2002. The summons were not served as the police were unable to locate applicants. Warrants were then issued in terms of section 110 (3)(b) of the Criminal Procedure and Evidence Act. When the police sought to uplift the warrants they were informed that the magistrate had cancelled the warrants in chambers. It was then agreed between the respondent and applicants' legal practitioners that the applicants be brought (by their legal practitioners) on 15 July 2002 for indictment. Applicants' legal practitioners duly brought the applicants late in the afternoon of that date. They served respondents with a chamber application seeking to bar respondent from indicting the applicants. A provisional order was granted on the basis of those papers on 16 July 2002. It was granted "*ex parte*". The reasons for that decision were given under the hand of my brother KAMOCHA J in judgment number HB-80-2002 and are stated as follows:

"The legal practitioners indicated that they had discussed the issue of making an application in court to have the applicants removed from the remand with the Attorney-General's Office but it (the Attorney-General's Office) did not seem to want to have an application brought to court. They then ended up deciding to make this application for a provisional order to compel the state to come and argue the matter in court. They went on to say they had already served the papers on the Attorney-General's Office. It was on that basis that the provisional order was granted."

With respect, the correctness of that decision is doubtful moreso because it is not based on the merits of the case before the court but on the assumption that the Attorney-General's Office would not attend court unless the provisional order was granted. In my view the issues canvassed in the application are neither new nor urgent. I do not consider therefore this matter to be an appropriate case in which an *ex parte* judgment (even on a provisional basis) should have been granted. In terms of the merits of the matter no assistance is derived from that judgment regarding confirmation or otherwise of the provisional order.

In their heads of argument applicants contend that the state has not disclosed any admissible evidence to link them with the offence. "The sole basis on which it is alleged that they were implicated consists of alleged confessions by other persons sought to be indicted with them as co-accused in which they are alleged to have been implicated."

It is further argued that whilst the Attorney-General has the power to prosecute he is only entitled to exercise that power in accordance with sections 18 and 13 of the Constitution (that is where admissible evidence is disclosed on which the court may objectively find the existence of a reasonable suspicion that the offence charged has been committed and that the accused should stand trial).

According to applicants the indictment papers which are before this court do

not allege any evidence against the applicants save for the alleged confessions by their co-accused after their arrest - these are not admissible against applicants.

On their part respondents argue that the application should be dismissed because it has no basis in law. They aver that the application is frivolous and vexatious and goes against the provisions of section 76 subsection 4(a) of the Constitution as well as section 110 of the Criminal Procedure and Evidence Act. They argue that the application seeks to usurp the powers of the Attorney-General.

Subsection 4(a) of section 76 of the Constitution of Zimbabwe reads:

> "(4) The Attorney-General shall have power in any case, in which he considers it desirable so to do -
>
> (a) to institute and undertake criminal proceedings before any court ... and to prosecute or defend an appeal from any determination in such proceedings."

And subsection (7) of that section provides:

> "(7) In the exercise of his powers under subsection (4) or (4)(a) the Attorney-General shall not be subject to the direction or control of any person or authority."

The applicants rely on section 13 of the constitution of Zimbabwe for the proposition that the Attorney-General can only exercise the powers bestowed upon him subject to the limitations imposed by that section, and in this case, in particular subsection (2)(e) of that section.

Section 13(1) and (2) reads:

> "13 Protection of right to personal liberty
>
> (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2).
>
> (2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorised by law -

> (a) ...
> (b) ...

(c) ...
(d) ...
(e) upon reasonable suspicion of his having committed or being about to commit a criminal offence.
(f) ...
(g) ...
(h) ...
(i) ..."

Section 18(1) of the constitution of Zimbabwe upon which the applicants rely states:

"18 Provisions to secure protection of the law
(1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

Whilst I agree with the respondents that the prerogative in deciding to prosecute any criminal matter rests with the Attorney-General (subject to the provisions relating to private prosecution) I would also agree with the applicants that in exercising his discretion in that regard the Attorney -General must do so judiciously and in accordance with the law. That power cannot be exercised outside the parameters of the law nor in an arbitrary manner.

The main thrust of this application is the contention by applicants that there are no grounds giving rise to a reasonable suspicion that they committed the offence in regard to which they have been in remand and in respect of which they stand to be indicted.

In the case of *Martin* v *A-G and Another* 1993(1) ZLR 153 at 159 it was held thus:

"It is the entitlement of every individual to challenge the power and right of the state to place him on remand. This he does upon a submission that insufficient facts have been alleged to enable the court to objectively find the existence of a reasonable suspicion of his having committed or being about to

commit a criminal offence, thereby justifying the deprivation of his personal liberty under section 13(2)(e) of the constitution. He may adduce evidence, as the applicant did, designed to demolish, clarify or weaken the facts alleged by the state. The test

to be applied is the same as that for arrest without warrant. It does not require the firm resolution of conflicting evidence that guilt beyond a reasonable doubt demands, nor even a preponderance of probability. Certainty as to the truth is not involved, for otherwise it ceases to become suspicion and becomes fact. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking."

In so holding GUBBAY CJ reiterated the point made in the case of *Attorney-General* v *Blumears and Another* 1991(1) ZLR 118 (S) at 123 A-B. (See also *Bull* v *Attorney-General and Another* 1986(1) ZLR 117 (S)).

That the requirements and test for the existence of a reasonable suspicion that an accused person has committed or is about to commit an offence is as enunciated in the above cases admits of no doubt. Whilst there is ample authority in this regard concerning arrests without warrant, detention, remand and bail applications, I am unable to find, nor are the parties able to refer me to any authority in which an indictment was stopped on the grounds that no reasonable suspicion exists that an offence has been committed.

Applicants argue that the same considerations would nonetheless apply in relation to an indictment - in fact the same considerations apply throughout the pre-trial stage, including indictment. I tend to agree with *Adv. Anderson's* submissions in that regard. It appears to me that the reason why there is a dearth of authorities at the indictment stage is probably due to ignorance on the part of unrepresented accused persons or where the accused person is legally represented, such issues would have been canvassed at an earlier stage, particularly at the remand stage. Assuming that an indictment can be challenged on the same basis and that the

test for the existence of a reasonable suspicion would be the same as laid down in the above cited cases, then this application cannot succeed. The state is not required to prove its case at this stage, not even on a balance of probabilities. All it needs do at

this stage is demonstrate that on the facts alleged a reasonable suspicion arises that an offence has been committed. The test is the same as that for arrest without warrant. Suspicion has been described in the *Martin* case *supra* as "a state of conjecture or surmise whereof proof is lacking" The admissibility or otherwise of any facts or evidence that the state may seek to establish or adduce is not a factor for consideration at this stage. Applicants seek a ruling on the basis that whatever evidence the state may have in the form of confessions by co-accused in which applicants are implicated would ordinarily be inadmissible as against applicants and therefore no reasonable suspicion could be held to exist that the applicants committed an offence. With respect, that would amount to an unjustifiable extension of the test to be applied.

In my view such issues stand for determination by the trial court. Suffice it to say that where an accused person implicates another in circumstances such as the present, that would be sufficient grounds for holding that a reasonable suspicion exists that an offence has been committed by such other. On that basis an arrest is justifiable. The accused person may be placed on remand on the same basis and indicted if needs be.

Reliance has been placed by applicants on the following cases:
Attorney-General v *Moyo* SC 33-02
Spooner v *The State* HB-51-01
Moyo and Another v *The State* HB 26-02

In these cases what was under consideration was the question of admission to bail. The admissibility or otherwise of co-accused's extra curial statements was considered for purposes of bail. I do not consider those cases relevant to the present

applicant. My attention has also been drawn to the provisions of sections 178 and 179 of the Criminal Procedure and Evidence Act. Again those provisions in my view have no direct bearing on the present applicant.

Applicants have been on remand for close to nine months now. At no stage during that period did they apply to be removed from remand even though they knew or ought to have known the facts upon which the state relied for placing them on remand. Those facts do not appear to have changed. It was only after the state indicated its intention to indict them that the present application was made (on an urgent basis). I can only conclude that the application is made solely for purposes of defeating the process of indictment. In any event I have already concluded that on the merits the application cannot succeed.

It is ordered that the provisional order be and is hereby discharged with costs.

Webb, Low & Barry applicants' legal practitioners
Attorney-General's Office respondent's legal practitioners