Judgment No. HB 90/2003
Case No. CRB B171/2002

THE STATE

Versus

TOBIAS NYATHI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 AUGUST 2003

S S Mlaudzi for the accused

Criminal Review

NDOU J: The accused was convicted of one count of assault with intent to do grievous bodily harm and another of housebreaking with intent to steal and theft by a Beitbridge Magistrate. He was sentenced to 12 months and 10 months imprisonment respectively with 3 months thereof suspended on condition of good behaviour. The matter was submitted for automatic review to this court. The proceedings were confirmed as being in accordance with real and substantial justice.

The record was re-submitted for review to this court but this time around with an embodiment of written submissions from the accused's legal practitioners. It seems to me that the intention is to seek my indulgence to exercise my wide powers bestowed by section 29 of the High Court Act [Chapter 7:06]. This is my assumption as the accused's legal practitioner did not bother to state the legal basis of the application, moreso after the proceedings have been confirmed. Be that as it may, this court has very wide powers on review – *R* v *Chidongo* 1939 SR 210. In the exercise of such powers, I am there to assist, as far as I am able, in the administration of justice and to ensure that the accused person receives fair treatment. On review, I must be satisfied that the proceedings in the lower court were substantially just – *R* v *Leggate*

1941 SR 2; *Fikilini* v *Attorney-General* 1990 (1) ZLR 105 (S); GUBBAY CJ remarks in his paper –

> *"What a Reviewing Judge expects of a Magistrate"* as reported in Legal Forum (1992) Vol 2 No. 4 p 6 and *Criminal Procedure in Zimbabwe* by John Reid Rowland at 26-5. The latter learned author aptly described the purpose of review as follows – "… it is imperative to ensure that the review system, which is aimed at providing a curb on any misdirected or arbitrary exercise of power, is administered efficiently and speedily. A magistrate should not live in fear of reviewing judges, constantly looking over his shoulder, but should regard the reviewing judge as the second member of a two men team. The reviewing judge is not there to criticise or nit-pick or show off his knowledge; he is there to assist, as far as he is able, in the administration of justice and to ensure that accused persons receive fair treatment."

As these proceedings have already been reviewed and confirmed, the accused in essence, seeks the withdrawal of the certificate of confirmation. Such a withdrawal is merited where it is shown, first, that there has been an irregularity in the proceedings or mistake. Second, where facts are discovered which, if known at the time of the initial review, would have resulted in the original certificate being withheld – *S* v *Moyo* (1) 1978 RLR 316 (G) and *Criminal Procedure in Zimbabwe (supra)* at 26-6. Using this approach I proceed to consider the merits of the second application for review. The basis for the latter review is firstly, the attack of the conviction; secondly, refusal of an adjournment or postponement to give the accused a chance to obtain alternative representation.

Use Of Review Procedure To Attack The Conviction

Mr Mlaudzi, for the accused, in his papers filed the accused person's affidavit attacking the propriety of the conviction. Generally, the accused is not allowed to use the review procedure to attack the conviction. He should appeal against the conviction. In very exceptional cases, this court, may, however, be prepared to deal

with propriety of the conviction on review. In *S* v *Runganga* 1995 (2) ZLR 303 (H) MALABA J (as he then was) remarked at 306G-307E –

> "The legal practitioner did not have to use the review procedure to attack the conviction. In *R* v *Pia & Anor* 1967 (1) RLR (G) DAVIES J said at 107H-
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> "In terms of subsections 55 and 58 of the Magistrates" Act [now section 57 (1) (ii) (b) and 57(2)] a person who has been convicted before a magistrates' court is entitled only to submit a written statement, on review, setting out the grounds or reasons upon which he considers the sentence imposed upon him not to be in accordance with real and substantial justice. He is not entitled to submit written representation attacking the conviction. The proper course if he wishes to attack the conviction is to note an appeal … Appeal procedure is entirely different from review procedure and it is wholly inappropriate for an accused person to attempt to attack his conviction by way of review."

In 307D-E the learned judge went on to deal with the exception –

> "Section 29(4) of the High Court Act [Chapter 7:06] is worded in terms that are identical to those of section 64(4) of the Magistrates' Court Act which was repealed by section 59 of Act 29 of 1981. The section confers upon a judge of the High Court the power to review proceedings of an inferior court which come to his notice 'not withstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review.'' The judge can only exercise his review powers in terms of section 29(2) of the High Court Act if he is satisfied that the proceedings brought to his notice in the circumstances set out in section 29(4) are not in accordance with real and substantial justice" – *S* v *Hulley* HB-60-95.

In the circumstances, it is wrong for *Mr Mlaudzi* to have used the review procedure to attack the conviction of the accused. The appeal procedure should have been used.

REFUSAL OF ADJOURNMENT OR POSTPONEMENT TO AFFORD THE ACCUSED AN OPPORTUNITY TO SECURE ALTERNATIVE LEGAL REPRESENTATIONAND/OR CALL DEFENCE WITNESSES

This is an allegation of irregularity in the proceedings. This court may in exceptional cases, where it is satisfied that the allegations of irregularity in the

proceedings are not without foundation, exercise its indulgence of reviewing the proceedings – *R* v *Pia (supra)*; *S* v *Stockie* 1980 ZLR 280 (G) and *S* v *Runganga (supra)*. This indulgence is, however, not readily granted. In this regard the remarks of GUBBAY J (as he then was) in *S* v *Stockie (supra)* are instructive. At 282F-H the learned judge warned –

> 'I have no hesitation in remarking that it is wrong to use section 64(4) (of the Magistrates' Court Act) as a cover to get the benefit of an appeal in the proceedings not subject to automatic review. The ordinary procedure of appeal must be followed. If the attitude of this court were otherwise, it would be inundated with complaints in the most trifling of cases. As it is the time of a reviewing judge is sufficiently occupied with matters that properly come before him. In the light of the above, I was solely tempted to refuse to consider the merits of this particular conviction … I emphasise however, that my decision to exercise my power under section 64(4) of the Act in this instance must not be taken by practitioners as a precedent for obtaining for a client thought to be aggrieved a cheap form of redress not provided by the legislature by slipping in by the back door.'

MALABA J in *S* v *Runganga (supra)* at 307H also emphasised –

> "It is important to point out to legal practitioners that procedures should be used for the purposes for which they were created. The indulgence of reviewing the proceedings where the propriety of the conviction is attacked under section 29(4) will not be readily granted."

The first issue relates to the court ordering the trial without the accused person's legal representative. It is trite that every person who is charged with a criminal offence is permitted to defend himself at his own expense, by a legal practitioner of his own choice – section 18(3)(d) of the Constitution of Zimbabwe, 1980. This constitutional right is reiterated in section 191(a) of the Criminal Procedure and Evidence Act [Chapter 9:07]; section 65 of the Magistrates' Court Act [Chapter 7:10] and section 51 of the High Court Act *(supra)*. The trial court however, has a discretion, in appropriate cases, to order that the trial should proceed but this discretion must be exercised judicially. Before exercising this discretion, the trial

court must clarify whether the absence of the accused person's legal practitioner is the fault of the accused or of the legal representative. The accused should not be penalised for the fault of his legal practitioner in such cases – *S* v *Nqula* 1974(1) SA 801 (E) and *Criminal Procedure in Zimbabwe (supra)* 15-5.

The right to legal representation as enshrined in section 18(3)(d) of the Constitution (*supra*) and other pieces of legislation that I have referred to above imposes an obligation to permit, not to ensure, legal representation – *Constitutional Law of Zimbabwe* by G Linington at 421-2 and *Wheeler and Ors* v *Attorney-General* 1998 (2) ZLR 305 (S). In other words, this right is limited, it is not absolute. In the above case GUBBAY CJ at 311 said –

> "… it is only in exceptional circumstances that a court would be justified in refusing a postponement of the trial to an accused who wanted to engage a legal practitioner at his own expense; or whose chosen legal representative was absent for good reason. But where the application for the postponement is obviously vexatious or frivolous or where the accused is guilty of gross negligence in failing timeously to engage the services of a legal representative of his choice or of a deliberate tactic to unreasonably delay the trial, he cannot complain that his constitutional rights are infringed if the trial is ordered to commence. In addition, there is no right to seek to secure the services of a legal practitioner who is disabled from representing a client, for instance, by not being permitted to enter the country; or who because of heavy commitment, is unavailable to appear for an excessively long period. If the state is unable to prove any such reason, the trial should be postponed until the chosen legal representative is available. In this way, an accused will enjoy the full protection of the Constitution."

In *S* v *Paweni and Ano* 1984(2) ZLR 16(H) EBRAHIM J (as he then was) held that this right must be interpreted in a way that conforms with the principle that justice should be done. This means that there is a need to consider not only the interests of accused persons but also the interests of all parties concerned. When determining the application and extent of the right in particular cases, courts must

consider how much notice of the trial has been given the complexity of the cases, and, where applicable the availability of other competent lawyers. The above decision was upheld by the Supreme Court in *Paweni and Anor* v *Attorney-General* 1984 ZLR 39 (S) where GUBBAY JA (as he then was) at 43 stated –

> "[An accused] is entitled to choose whom he wishes to represent him, but if his prime choice is unavailable then he is obliged to look further afield and engage someone else. In other words the right of choice is subject always to the practitioner's availability on the trial date."

In *Nhari* v *Public Service Commission* 1999(1) ZLR 513 (S) GUBBAY CJ further amplified he protection of section 18(3)(d) of the constitution at pages 517 – 519 in the following terms –

> "The appellant … had an absolute right to procure legal representation. It was not a question of the … magistrate having a discretion whether to permit is. His discretion turned on the grant or refusal of the postponement sought. However a refusal arising from an injudicious exercise of that discretion would constitute a denial of the right to legal representation. It is … a matter of considerable importance, both in the interests and administration of justice, that every person who enjoys the fundamental right to be represented by a legal practitioner before a court or after adjudicating authority established by law should be accorded every opportunity of putting his or her case clearly and succinctly to such body. Almost invariably that function can only be performed properly when it is presented by a person trained and experienced in law… if the absolute right to procure legal representation is to have any meaning and significance, it must embrace the right to be afforded a reasonable opportunity to secure it. A refusal of that opportunity, where requested, constituted a denial of the right to a fair hearing guaranteed under subsection (2) and (9) of section 18. … Notwithstanding the inconvenience which would have been suffered by all save the appellant, I have not the slightest doubt that the refusal of the postponement constituted sufficiently improper exercise by the … magistrate of his discretion to warrant interference."

The basis of the accused person's attack is captured in paragraph 3 of his affidavit which I propose to quote in entirety –

> "3. I had engaged the services of Mr Nikisi to represent me at my trial but he died before trial. I was still preparing to get an alternative legal

> practitioner but I was waiting to be refunded the funds I had paid him however the court decided to try without defence lawyer."

The trial magistrate's comment is that this intention was not communicated to him. In any event, the trial took place over a period of four months. The accused had sufficient time to secure services of another legal practitioner or request a postponement to secure one. The accused has been dilatory in securing legal representation. He should have requested for a postponement in order to secure legal representation. He has not even bothered to explain such failure on his part. Even with the benefit of legal representation there is no attempt to explain why the accused person had been dilatory in securing legal representation and, more importantly, why he failed to request a postponement for that purpose. The accused has not established a factual basis for this failure.

Coming to the question of the alleged refusal to grant postponement for the accused to call defence witnesses the accused has not been candid in his affidavit. The record reveals that accused requested postponement and was granted the same on two occasions. This occurred between 18 July 2002 and 26 August 2002. When he failed to secure his witnesses he decided on his own, to close his case and dispense with the calling of defence witnesses. In the circumstances there is no irregularity committed according to the record of the proceedings. In any event it is trite that not every refusal of an adjournment or postponement of a trial to give the defence time to call a witness who is not available at court constitutes a gross irregularity. The decision on whether or not to grant an adjournment of a trial in terms of subsection 165 and 166 of the Criminal Procedure and Evidence Act *(supra)* is a matter within the discretion of the trial court. However, the decision to refuse an adjournment or

postponement will be interfered with if the decision in the circumstances amounted to a gross regularity because material facts were not taken into consideration – *S* v *Runganga (supra)*. In other words, were the trial court has taken into account all the material facts bearing upon the decision, the review tribunal will not interfere with the decision, even if on the same facts it would have reached a different decision – *R* v *Zackey* 1945 AD 505 and *R* v *Crocser* 1947 (2) SA 483 (C). The question is not whether the review tribunal would have exercised the discretion differently, but whether in refusing the adjournment all the material facts were taken into consideration. In the circumstances, not every refusal of an adjournment of a trial to give the defence time to call its witness who is not available at court constitutes a gross irregularity necessitating interference with the proceedings. In all cases where there are grounds for a postponement even if he has a doubt because the presumption should be that the application is bona fide. The magistrate has a duty to enquire into the reasons for the request for a postponement. Once he has enquired fully into the reasons he should then make up his mind whether to grant the postponement or not – *R* v *Kistah* (1908) 29 NLR 580; *R* v *Steyn* 1918 TPD 152 and *R* v *Levin & Ors* 1928 TPD 357.

As alluded to above, the accused abandoned his intention to call the defence after two postponements failed to secure the attendance of his witness. The accused person's application is devoid of articulation on the factual basis of the alleged gross irregularity. He did not show that he requested and was refused the postponement either to secure the services of legal representation and/or attendance of his defence witness . He was content with brief and bland allegations of irregularity. Whilst I agree that in such instances we have to prefer the use of the criteria that emphasise the

paramount important of the right to legal representation, there is *in casu* no factual basis for a finding that a gross irregularity was committed by the trial court in exercise of is discretion.

In the circumstances, even considering the accused person's submissions there is no case made out of the withdrawal of the judge's certificate of 17 October 2002. I, accordingly, decline to withdraw the certificate of confirmation and the proceedings I still consider to be in accordance with true and substantial justice.

Samp Mlaudzi & Partners accused's legal practitioners