

**THE STATE****Versus****CLEMENCE TSATSA AND ANOR**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 29 MARCH 2007

Criminal Review

**NDOU J:** The matter was referred for review by the learned Beitbridge Magistrate who dealt with the remand proceedings. This is a novel referral presumably inviting this court to exercise its inherent powers. The background facts are the following. The accused persons appeared before the magistrate on 30 January 2007 on initial remand. They were both represented by a legal practitioner. At those proceedings the record reflects:

“PP – The state applies for an initial remand. The matter was brought to court yesterday. I read the docket. I was of the view police needed to investigate further. I feel there was need for more evidence to link the accused to the offence. I referred the matter back to the police. There was then apparently a complaint by the victim’s parents to the Acting Director of Public Prosecution Mrs Ziyambi. May it be on record that I was given instructions by the same although she had no relevant papers. She believed I was in error and that I needed to recall accused persons to place them on remand. Her opinion binds me. She is senior to me. May I have it noted that the defence does not contest. We agreed that the two be placed on remand on the following conditions. That they be admitted to bail by consent of Mrs Ziyambi in the sum of \$100 000 each ... Those are the agreed conditions.”

Defence Counsel

I concur with those arrangements. My friend’s hands are tied. If I am to oppose I will put him in a fix. We would have opposed the remand. That is all. We are not opposed to the remand.

By Court

This sort of application baffles me. It seems against the principles of justice as I understand them ... I maintain my silence. I hope my silence is golden. Accused persons will be placed on remand “as per agreement” of state counsel on instructions and defence counsel.”  
(emphasis added)

Thereafter, the learned magistrate referred the matter for review with a memorandum couched in the following terms:

Judgment No. HB 38/07

Case No. HC 384/07

CRB B205-6/07

“I have decided *mero motu*, to have these proceedings reviewed. I would have simply let the matter rest as it is but I am of the view that it raises lots of issues that must be addressed. I will not pre-empt these issues.”

Once the accused persons’ and the state counsel agreed that the accused persons be placed on remand the issue raised by the learned magistrate ceased to exist. The role of the court is to adjudicate on real issues and ignore technical and wholly academic points. The criminal courts exist to do justice and not to provide a forum in which technical and wholly academic points are argued – *Le Grand v Carmelu (Pvt) Ltd* 1979 RLR 402 AD at 405. The accused persons’ legal practitioner agreed (he was not obliged to do so) to the arrangement suggested by the Acting Director of Public Prosecutions. The fact that the magistrate seized with the remand proceedings is suspicious of such arrangement does not make it reviewable. The Acting Director of Public prosecutions is a delegate of the Attorney General. The public prosecutor, like the one in Beitbridge Magistrates’ Court, is a representative of the Attorney General but not necessarily his delegate – see section 11 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The decision as to whether to prosecute or not rests with the Attorney General or his delegate and is not subject to interference from any other person. He is the servant of no-one save of the law itself. He is answerable to the law and to the law alone – *R v Metropolitan Police Commissioner ex parte Blackburn* (1) [1968] 2 QB 118 and *Central African Examiner (Pvt) Ltd v Howman & Ors NNO* 1966 RLR 75(G).

From the facts of this case, the Acting Director of Public Prosecutions overruled the local public prosecutor. The public prosecutor, whatever his/her reservation about the suggestion by the Acting Public prosecutor was, nevertheless made the application to place the accused persons on remand. The accused persons did not oppose the application. They were represented by a legal practitioner as alluded above. There was consensual placing of the accused persons on remand. There is no discernable irregularity in the proceedings. The

Judgment No. HB 38/07

Case No. HC 384/07

CRB B205-6/07

magistrate himself, notwithstanding his reservations, placed the accused persons on remand.

[It seems he did so under protest] In my respectful view review proceedings are not for investigative purposes when there is discord in the prosecution camp. Review should be used where there is gross irregularity in the proceedings being reviewed. Once the parties themselves agreed, there was no issue left for determination as far as the placing of the accused persons on remand is concerned.

Accordingly I find nothing irregular with the remand proceedings carried out by the Beitbridge Magistrate on 30 January 2007.

Cheda J agrees .....