(1)	**SIKHONZILE NGWENYA**	**APPLICANT**
	AND	
	ABEDINEGO NDEBELE N.O	**1ST RESPONDENT**
	AND	
	THE STATE	**2ND RESPONDENT**
	AND	
(2)	**TWHALA MOYO**	**APPLICANT**
	AND	
	THE STATE	**1ST RESPONDENT**
	AND	
	ABEDINEGO NDEBELE N.O	**2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 12 OCTOBER 2010 AND 21 OCTOBER 2010

Mr. R. Ndlovu for applicant
Mr. T. Makoni for respondent

Opposed Application

MATHONSI J: These are two applications in which the applicants, who are husband and wife, seek review of the criminal proceedings at the Magistrates' Court of Tsholotsho.

The applicants were jointly charged with two other people, namely Cowboy Moyo and Mkhululi Moyo of armed robbery in contravention of section 126 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] (the Criminal Law Code). On 15 April 2010 the

Magistrate delivered judgment in which he convicted the four of them. The applicants were convicted as accessories after the fact.

He was of the view that considering the seriousness of the offence it may be necessary to sentence them to imprisonment beyond his 5 year jurisdiction as a provincial magistrate. The Magistrate then referred the matter to the Attorney General in terms of section 54(2) of the Magistrates Court Act, [Chapter 7:10] as read with sections 225 and 228 of the Criminal Procedure and Evidence Act, [Chapter 9:07].

On 4 May 2010, the Attorney General directed that the matter be transferred to the High Court for sentence and the trial magistrate duly complied with that directive. As it is the matter is pending in this Court awaiting sentence.

The Applicants did not wait for sentence by this court but instead on 18 May 2010, they separately filed applications for review of the criminal proceedings which applications are identical. The grounds upon which the Applicants seek to have the proceedings reviewed are set out as follows:

> "1. The Respondent have (sic) failed to properly afford the Applicant a fair hearing in terms of section 18 of the Constitution of Zimbabwe in that they did not apply the concept of separation of trial in terms (of) section 190 of the Criminal Procedure and Evidence Act [Chapter 9:07].
> 2. Effectively, this resulted in Applicant being convicted for armed robbery by common purpose, which is wrong."

The relief sought by both Applicants is that the proceedings be quashed and the matter remitted for a trial de novo before a different Magistrate. The Applicants argue that by failing to separate the trials of the two of them from those of their co-accused, they lost the opportunity to cross-examine their co-accused who implicated them in the commission of the

offence. This therefore prejudiced them as a result of which they are entitled to have the proceedings set aside.

At the trial, it was common cause that after robbing the complainant, Cowboy and Mkhululi Moyo, who are brothers, carried the stolen property to the Applicant's home where they surrendered the property to the Applicants in the early hours of the morning of 29 January 2010. In fact both Applicants admitted having received the property and hiding it in their granary from where it was recovered by the police after they had conducted a search. It was also common cause that Cowboy and Mkhululi Moyo had given the Applicants the firearm they had used in the commission of the offence, which the Applicants hid in a trunk from where it was later recovered by the police after a search.

Although Cowboy had testified that himself and Mkhululi had been sent by the Applicants to go and commit the robbery, the Magistrate does not appear to have believed that story. In fact, he convicted the Applicants on the basis of their own admissions and not on the testimony of their co-accused. In his judgment the Magistrate made the following observations which are telling indeed:

> "Accused 2 was not telling the truth as to his whereabouts at the time of the robbery. The state has proved that he was with accused 1. That is why he was to 'assist' in carrying the property to accused 4's homestead. The accused 1 committed the offence of armed robbery with his brother accused 2. They used a firearm, knife and a whip to induce submission to the taking of the property and cash. Accused 3 and 4 were not there. Accused 3 and 4 only assisted after the commission of the offence. They both knew that the property had been stolen or was the subject of the robbery. They received the property at night and hid it in the granary. The 'tool' they hid in a trunk. ---. It is nonsensical for accused 3 and 4 to say that they put the property in the granary out of fear that a 7 year old brat could burn it. What of the gun that they put in the kitchen. They knew it was a gun---. The accused 3 and 4 actually concealed evidence of

the commission of the offence by hiding it in a granary and not telling the police where the property and the gun were."

It was for these findings that the Magistrate convicted both Applicants "as accessories after the commission of the crime of the armed robbery."

Section 206 of the Criminal Law Code provides:

"Any person, other than an actual perpetrator of a crime, who –
(a) knowing that an actual perpetrator has committed a crime; or
(b) realising that there is a real risk or possibility that an actual perpetrator has committed a crime; renders to the actual perpetrator any assistance which enables the actual perpetrator to conceal the crime or to evade justice or which in any other way associates the person rendering the assistance with the crime after it has been committed; shall be guilty of being an accessory to the crime concerned."

This is the provision under which the Applicants were convicted and on the evidence available the decision of the trial magistrate cannot be faulted.

Section 158 of the Criminal Procedure and Evidence Act, [Chapter 9:07] allows for a joint trial of accused persons implicated in the same offence as was done in this case. In terms of section 190 of that Act:

"When 2 or more persons are charged in the same indictment, summons or charge, whether with the same offence or with different offences, the court may, at any time during the trial, on the application of the prosecutor or of any of the accused, direct that the trial of the accused or any of them shall be held separately from the trial of the other or others of them, and may abstain from giving a judgment as to any of the accused." (The underlining is mine.)

Clearly therefore that section gives a judicial officer the discretion, at anytime during the trial, to separate the trials of two or more accused persons. However that discretion, while it has to be exercised judicially, can only be so exercised at the instance of the prosecution or the accused person. The court cannot mero motu separate trials.

A fortiori, a judicial officer certainly does not fall into error by not mero motu separating trials of jointly charged accused persons. The exercise of the discretion of the Magistrate in terms of section 190 can only be interfered with where it can be shown that it has led to a miscarriage of justice. Can it be said in this matter that the failure by the Magistrate to order a separation of trials, where he did not even have a right to do so without an application being made, has led to a miscarriage of justice? I do not agree with *Mr Ndlovu* for Applicants that it does. See *S v Ismail* 1994 (1) ZLR 377(S) at 379 G-H and 380A where KORSAH JA stated:

> "The trial court does not fall into error if, without invocation, it did not mero motu separate the trials of accused persons jointly charged. There is no rule of law that separate trials should be ordered where an essential part of one accused person's defence amounts to an attack on a co-accused, but the matter is one which the judge should take into account in the determination, of an application, whether to order separate trials or not."

At 381 C-D the learned appeal judge went on to say:

> "There reposes in the judicial officer a discretion to separate the trials of the co-accused. This discretion is sometimes exercised in favour of an applicant where evidence admissible against one of the accused would not be admissible against the others or where the separate trial would enable the state to call an accomplice as a witness. But it remains a discretion."

In the case before me none such situation obtained and, more importantly, there was no application for such separation. It would not have achieved anything. Applicants seem to suggest that where co-accused persons incriminate each other, even where there is no desire to use the evidence of any of them against the other, a separation of trials should be ordered. That is not correct.

In any event, can it be said that there are grounds of review in this matter? Section 27 of the High Court Act, [Chapter 7:06] sets out the grounds upon which a matter can be brought on review before this court as being;

(a) absence of jurisdiction;

(b) interest in the cause, bias, malice or corruption on the part of the presiding person;

(c) gross irregularity in the proceedings or the decision

(d) common law grounds like unreasonableness.

I have already stated that the Magistrate did not fall into error by not mero motu separating the trials when no application for that was made. I have also stated that the Magistrate did not believe, the story of the Applicants' co-accused but merely convicted them as accessories after the commission of the robbery on the strength of their admission to assisting the main perpetrators to conceal the stolen property and the weapon. Therefore no amount of flummery with the evidence of Cowboy and Mkhululi will change the roles played by the two Applicants in the crime. There are simply no grounds of review in this matter.

In addition to that, it is undesirable for accused persons to halt criminal proceedings by making frivolous review applications before proceedings have been concluded. The best option is to await the finalisation of proceedings and then pursue the challenge whether by appeal or review. In this case, the application is without merit and may have been undertaken to delay the conclusion of the matter.

In the result, I make the following order, that:

The applications in matters number HC 98/2010 and HC 99/2010 be and are hereby dismissed with costs.

Messrs R. Ndlovu and Company applicant's legal practitioners
Criminal Division, *Attorney General's Office* respondents' legal practitioners