HB 100-17
HC 1019-17
XREF HC 959-17
CRB GWERU 263-17

ELIZABETH SHAVA
versus
PRIMROSE MAGOMORE N.O
and
NATIONAL PROSECUTING AUTHORITY

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 20 APRIL 2017 AND 27 APRIL 2017

Urgent Chamber Application

B Dube with *C Makwara* for the applicant
1st respondent in default
Ms S Ndlovu for the 2nd respondent

MATHONSI J: It is becoming fashionable for accused persons appearing before a magistrate who have their applications made in terms of s198 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07] for a discharge at the close of the state case to approach this court on an urgent basis seeking an order interdicting the continuation of the trial while they pursue a review of the decision dismissing the application for a discharge at that stage. The net effect of such an approach is really to render in-effectual the jurisdiction of the magistrates court to try offenders and to sit in judgment over such matters.

There can be no doubt that while it is a necessary feature of every adversarial system of justice that there should be a higher court in the hierarchy of the courts to correct judicial errors, that procedure should not be abused. See *Mukwemu* v *Magistrate Sanyatwe N.O and Another* 2015 (2) ZLR 417 (H) 420 C-D. It does not detract from the time honoured principle of our law that this court will only exercise its discretion to interfere with unterminated criminal proceedings where there were gross irregularities in the proceedings or where it is apparent that

an injustice may occur if this court does not intervene. Otherwise this court is generally loathe of exercising its powers of review before the termination of a criminal case.

The applicant was arraigned before a magistrate in Gweru on an assault charge in contravention of s89 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It was alleged that on 13 February 2017 she had assaulted her 70 year old neighbour, Emely Moyo, at the gate of her plot, being Plot 10 Treetops, Gweru over a boundary dispute. She pleaded not guilty to the charge and stated in her defence outline that she had not assaulted the complainant as alleged. Instead it was the complainant, a woman 22 years her senior, who had assaulted her. She is only 48 years old.

The state led evidence from six witnesses including three eye witnesses and the complainant who testified as to how the applicant had caused the complainant to be summoned to the gate before dragging her out causing her to fall. While on the ground she allegedly punched the complainant in the face twice before onlookers came to her rescue. The medical doctor who attended to the complainant later that day but compiled a report two days later also testified. So did the attending police detail who received a report of assault and arrested the applicant.

At the close of the state case the applicant made an application for discharge on the basis that the state had failed to establish a *prima facie* case for her to answer. This was because the state witnesses had given "different versions on factual narrations". Simply put the basis of the application was that the witnesses were unreliable and had been discredited during cross examination to an extent that no reasonable court could act upon their evidence.

The trial court was unimpressed. In dismissing the application the trial magistrate kept her eyes on the ball. She stated:

> "It is common cause that there are discrepancies in the testimonies of the state witnesses. The question however is whether or not those discrepancies are material or fatal such that one can safely say the state did not manage to prove a *prima facie* case against the accused. The complainant stated that the accused spat saliva on her face, grabbed her by the collar, pushed her and she fell down. She also stated that the accused then assaulted

> her with clenched fists. That evidence was corroborated by the second state witness who stated the same. Not only that, the third and fourth state witnesses stated that the accused grabbed the complainant by the collar, pushed her and she fell down. They also stated that the accused assaulted the complainant with clenched fists. This is what is material (to) the charge of assault that the accused is facing. The court was convinced that the state has managed to prove a *prima facie* case against the accused and she has a case to answer."

The applicant would not accept that outcome. In HC 959/17 she made an application for the review of the magistrate's ruling on exactly ten grounds none of which are real grounds for review. For instance she would want the decision set aside on the ground that the magistrate "erred on both the law and facts in failing to discharge" her; the magistrate "erred both on law and facts and exercised (her) discretion incorrectly"; the court erred in ruling that the discrepancies in the state case were not fatal and that the court erred in ruling that the state had proved a *prima facie* case when it had not.

It occurs to me that the applicant simply does not agree with the decision of the magistrate and has sought to have it reviewed on what are essentially grounds of appeal as opposed to review. She is clearly entitled to approach this court on appeal but cannot be entitled, on that basis alone, to halt unterminated criminal proceedings which is what she seeks to do in the present application. Pending the review application the applicant has come before me on a certificate of urgency seeking interim relief, the stay of the criminal trial in case No GWP 263/17. This is to enable her to prosecute the review of the decision dismissing her application for discharge at the close of the state case.

The second respondent conceded the application. *Ms Ndlovu* who appeared for the second respondent submitted that the complainant was not a credible witness because she had admitted under cross examination that she had previously been convicted of assaulting the applicant in respect of the same fight. In addition, it was common cause that there was bad blood between the two of them arising out of their business competition. The other state witnesses are known to the complainant and therefore could not be relied upon.

Christmas having come quite early in the year for *Mr Dube* who appeared for the applicant, he submitted that the applicant has a reasonable apprehension that the trial magistrate is biased against her because firstly she decided the matter without regard to the submissions made in the written application for discharge. Secondly when an application for review was made to this court the magistrate refused to postpone the trial proceedings *sine die* to enable the applicant to prosecute the review application. She elected instead to postpone the matter to 21 April 2017 threatening to continue with the trial in the absence of a court order stopping it.

I have already commented on the reasoning of the trial magistrate in rejecting the application. To her there was sufficient evidence led by the state on the alleged assault to establish a *prima facie* case for the applicant to answer. The applicant wanted no other outcome of the application except a discharge because the witnesses were discredited. She simply did not agree with that finding and for that reason the trial should be stopped and the matter taken to be tried by this court. Regarding the alleged bias it is significant to note firstly that this is not relied upon as a ground for review in HC 959/17 but appears to be an afterthought. Secondly it is common cause that there has been no application made to the judicial officer for her recusal on the ground that she has exhibited traits of bias.

It means therefore that one can scarcely ignore the possibility that it is being thrown in here out of desperation by a person who cannot accept that in the duel obtaining in adversarial criminal proceedings a decision may be made for or against a party. You do not throw the judicial officer out through the window for arriving at a decision adverse to you. A judicial officer is not biased merely because he or she has made a decision against one party in favour of the other.

I did not accede to the concession made *Ms Ndlovu* for the prosecution because I was of the view that it was made without thorough and due consideration of the facts of the matter. As a superior court this court must be careful not to usurp the authority of the lower court to try criminal matters and conclude them one way or the other. Doing so will render nugatory the

criminal jurisdiction of that court as flood gates may be opened for accused persons to frustrate criminal prosecutions.

Let me reproduce herein for posterity, the dialogue between the complainant and defence counsel on the issue of her conviction which, in my view, demonstrates that the conviction in question is not an answer to the charge leveled against the applicant;

"Q: Is it your first time to be in court?
A: No, its my first time to be in court where the accused is represented.
Q: You appeared in court on Friday?
A: It was a case where accused alleged I spat saliva on her.
Q: What happened?
A: I was convicted.
Q: That related to the same day that you allege accused assaulted you?
A: Yes."

Q: You spat at the accused and you were convicted?
A: I did not (spit) saliva although I was convicted."

The complainant defended that issue without attempting to mislead. As far as she was concerned she was convicted for spitting at the applicant and *Mr Dube* admitted that is the nature of the assault for which the complainant was convicted. To my mind that conviction would not nullify the case against the applicant without more. If it does then it is incumbent in her to show the court in conducting her defence how that is so. I therefore disagree sharply with the prosecution's concession on that point. I also do not agree that a witness is disqualified from giving credible evidence merely by virtue of relationship to the complainant.

As already stated, this court will not interfere in unterminated proceedings except where there is gross irregularity resulting in a miscarriage of justice. It was said by MALABA JA (as he then was) in *Attorney General* v *Makamba* 2005 (2) ZLR 54 (S) at 64C-E that:

> "The general rule is that a superior court should intervene in uncompleted proceedings of the lower court only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by

any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant."

It has also been stated that a superior court should be slow to intervene in unterminated proceedings in a court below and should generally speaking confine the exercise of its power to rare cases where grave injustice must otherwise result or where justice might not be obtained by any other means. See *Ismail and Others* v *Additional Magistrate Wynberg and Another 1963(1) SA 1(A), Ndlovu v Regional Magistrate, Eastern Division and Anothe*r 1989 (1) ZLR 264 (H) at 269C, 270 G. *S* v *John* 2013 (2) ZLR 154 (H); *Achinulo* v *Moyo N.O and Another* HB 226/16; *Khumalo* v *The Presiding Magistrate N.O and Another* HB 345/16.

I have said that the applicant seeks to review the decision of the magistrate on what are clearly appeal grounds. In my view attacking a judgment on the ground that it is not supported by evidence would be a matter of appeal as opposed to review. It has been said in the past that the essential question in review proceedings is not the correctness of the decision under review but its validity. See Herbstein and van Winsen, *Civil Practice of the Supreme Court of South Africa* 4th ed. at p932 An applicant like the present applicant who seeks to have an interlocutory decision set aside in unterminated proceedings on the grounds that the court has made a wrong decision in the proper discharge of its adjudicating function, adopts the wrong procedure. The correct one should be to appeal. Therefore to the extent that generally an appeal is entertained only after conviction, such a premature approach to a superior court will not succeed.

All the magistrate said in her ruling is that the evidence presented on behalf of the state raises a case that the applicant assaulted the complainant. She tried hard to discredit the evidence but the court was persuaded that the core of the case was established. Accordingly the applicant must defend herself. It cannot be said that that there is anything wrong with that decision. Much less, that there is gross irregularity resulting in a miscarriage of justice.

On the aspect of gross irregularity entitling this court to intervene in the middle of the trial, the words of STEYN CJ in *Ismail and Others* v *Additional Magistrate, Wynberg and Another, supra* at page 4 are apposite;

> "It is not every failure of justice which would amount to a gross irregularity justifying intervention before completion ---. A superior court should be slow to intervene in unterminated proceedings in a court below and should generally speaking confine the exercise of its powers to 'rare cases where grave injustice must otherwise result or where justice might not by other means be obtained.'"

I am not satisfied that this is one such case or that justice might not be obtained by the applicant even after the dismissal of the application for discharge at the close of the state case. I am therefore unable to exercise my discretion to intervene in the unterminated criminal proceedings in favour of the applicant.

In the result, the application is hereby dismissed with costs.

Gundu and Dube, C/o Dube-Tachiona & Tsvangirai, applicant's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners