**REPORTABLE ZLR(16)**

**(1) KISIMUSI EMMANUEL DHLAMINI (2) GANDI MUDZINGWA (3) CHINOTO M. ZULU (4) ANDRISON MANYERE (5) ZACHARIAH NKOMO (6) REGIS MUJEYE (7) MAPFUMO GARUTSA**

**v**

**THE STATE**

**SUPREME COURT OF ZIMBABWE**
**CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA,**
**GARWE JA & CHEDA AJA**
**HARARE,** SEPTEMBER 15, 2011 & MARCH 17, 2014

*T Bhatasara with him A M Muchadehama*, for the applicants

*C Mutangadura with him M Dube*, for the respondent

**MALABA DCJ:** This is a referral by the High Court for determination under s 24(2) of the Constitution of Zimbabwe of questions of alleged violations of the fundamental rights of the applicants guaranteed under ss 13(1) (right to personal liberty); 15(1) (right not to be subjected to torture or to inhuman or degrading treatment) and 18(1) (right to the protection of the law).

The applicants seek the following relief:

1. A declaration that their rights, in terms of ss 13(1), 15(1) and 18(1) of the Constitution have been violated

2. An order for a permanent stay of the criminal proceedings before the High Court
3. An order for *mandamus* directing the Attorney General to act in terms of s 76 (4a) of the Constitution of Zimbabwe and investigate the alleged offences committed against the applicants
4. A special order as to costs.

At the inception of the hearing before this Court, Mr *Mutangadura*, who appeared for the respondent, raised four points *in limine*. The most important point the determination of which disposes of the matter is that the referral to the Supreme Court by the High Court, of the questions of the alleged violations of the rights of the applicants at the stage of the proceedings in which it was done is prohibited by s 24(3) of the Constitution. The point *in limine* is properly taken as the referral was incompetent.

The facts are as follows. It was alleged by the applicants at their initial remand hearing before the Magistrates Court that they were abducted from various places in Harare, Norton and Masvingo, between 25 November 2008 and 13 December 2008 by members of the State security agency.

The applicants alleged that they were taken to a secret detention centre which they later found out to be Goromonzi Prison, where they were kept incommunicado until 22 December 2008. They were allegedly denied access to families, legal counsel and medical treatment for injuries sustained as a result of torture inflicted by the abductors.

For the purposes of this judgment the following are the facts which appear from the affidavits of all the applicants:

1. The *modus operandi* used in the alleged abductions is that each applicant had hands handcuffed behind his back, blindfolded and driven around to disorientate. They were all detained at Goromonzi Prison.
2. The applicants were released from illegal detention on 22 December 2008 into the custody of the police and detained at various police stations.
3. The alleged abductors tried to conceal the location of their detention centre.
4. Statements were recorded from the applicants on 22 and 23 December 2008 in the absence of their legal representatives.
5. All the applicants were blindfolded when handed over to police stations on 22 December 2008 and when taken to record statements on 22 and 23 December 2008, in a bid to prevent them from seeing their abductors.

On 29 December 2008 the applicants were taken to Rotten Row Magistrates' Court for initial remand. They were each charged with insurgency, banditry, sabotage or terrorism in contravention of s 23(1)(a)(i) and (ii) of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] ("the Criminal Code") alternatively malicious damage to property in contravention of s 140 of the Criminal Code. Medical affidavits from two doctors who examined the applicants while in custody were produced to the court *a quo*. The reports were to the effect that the applicants had evidence of healed bodily injuries consistent with torture. They also exhibited clinical symptoms of psychological trauma.

The magistrate ordered an investigation into the allegations of abduction and torture. Senior Assistant Commissioner Nyathi tendered his report to the court on 21 January 2009. On the same day, the then Minister of State Security in the President's office, deposed to an affidavit in terms of s 296 of the Criminal Procedure and Evidence Act [*Cap. 9:07*]. He declined to disclose the places where the applicants had been detained and identities of State security agents involved in the investigation of the allegations against the applicants. The Minister denied that State security agents were involved in the alleged abduction, torture or illegal detention of the applicants admitting only that they were involved in investigating them for the alleged commission of the offences with which they were charged.

It is common cause that the applicants challenged the application by the State to have them placed on remand. They raised at that stage the question of their detention as a violation of their fundamental right to personal liberty. They did not request the magistrate to refer any such question to the Supreme Court for determination. The magistrate granted the application by the State and placed the applicants on remand on the ground that there was a reasonable suspicion that they had committed the offences with which they were charged. If the applicants were of the view that the decision to place them on remand was a violation of their fundamental right to the protection of the law they could as an exceptional remedy have made that allegation in an application to the Supreme Court for redress in terms of s 24(1) of the Constitution had they requested before the decision to remand them was made that the question of violation of their right to personal liberty be referred to the Supreme Court for determination and that request had been refused on the ground that the raising of the question was frivolous and vexatious. The Supreme Court would then have decided whether the decision to place the

applicants on remand was a violation of their right to the protection of the law under s 18(1) of the Constitution. They did not invoke the provisions of s 24(2) of the Constitution at the time they ought to have done. The applicants accepted the legality of the decision to place them on remand on the basis of which they were arraigned before the High Court in July 2009.

*Prima facie*, in finding that there was reasonable suspicion that the applicants committed the offences with which they were charged, the magistrate did not violate the applicants' right to personal liberty. On 25 February 2009 the High Court held in cases HC 42/09 and HC 147/09 on review that the decision of the magistrate to place the applicants on remand was based on a proper application of the principle and finding on the facts that there was a reasonable suspicion that the applicants had committed the offences of which they were charged.

It is clear that s 24(2)of the Constitution was designed to enable the Supreme Court to adjudicate and consider the question whether there has been or there is likely to be a contravention of the Declaration of Rights, as a court of first instance exercising original jurisdiction.

Section 24(2) provides that:

> *"(*2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

Mr *Mutangadura* argued that what was required of the applicants was the raising of a question of a contravention of the Declaration of Rights and a request that the presiding magistrate refer the question to the Supreme Court for determination. In this case, the question was raised before the magistrate at the initial remand without a request that it be referred to the Supreme Court for determination.

Once the decision to remand the applicants was made on the ground that there was a reasonable suspicion of their having committed the offences with which they were charged, and that position still prevailed at the time they appeared in the High Court for trial, the prosecution could not be stopped on the basis that they had been tortured or subjected to inhuman or degrading treatment.

There was no legal basis on which the trial judge could refer the questions of contraventions of ss 13(1), 15(1) and 18(1) of the Constitution to the Supreme Court for determination under s 24(2) because the question of the existence of a reasonable suspicion of the applicants having committed the offences with which they were charged had already been determined justifying their arraignment before the High Court. The High Court could not turn the proceedings before it into an inquiry into the correctness or otherwise of the decision of the Magistrates Court to place the applicants on remand. It could not seek to have the correctness of that decision impugned through the procedure under s 24(2) of the Constitution because the Supreme Court would no longer be exercising original jurisdiction in the circumstances. The court would not be determining the question of violation of the right to personal liberty but reviewing the decision of the Magistrates Court.

Section 24(3) provides that:

> *"(3)* Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1)."

The procedure adopted by the High Court in this case had the effect of interrupting the criminal proceedings before determination which in a criminal case is when the accused is convicted and the final sentence delivered. The decision on the question whether there was a reasonable suspicion of the applicants having committed the offences they were charged with to justify placing them on remand had been made by a court of competent jurisdiction and, in the absence of a request that the question whether placing them on remand was likely to violate their right to personal liberty be referred to it for determination, the Supreme Court could not be prevailed upon to exercise its original jurisdiction on the question of the contravention of ss 13(1) and 15(1) of the Constitution.

The case of *Muchero & Anor v Attorney General* 2000 (2) ZLR 286 (SC) is apposite. The facts were that the applicants, who were on bail on allegations of fraud and corruption, challenged the right of the State to continue to remand them for trial and applied for their removal from remand on the grounds that no reasonable suspicion existed that they had committed an offence, as required by s 13(2) (e) of the Constitution. Having heard evidence, the magistrate refused the application. The applicants' counsel requested that the question of whether s 13(2) (e) of the Constitution had been contravened be referred to the Supreme Court under s 24(2) of the Constitution. The matter was referred to the Supreme Court.

The headnote reads:

> "The referral was incompetent. It should have been requested before the magistrate rendered a decision. Once he had made a decision, the matter could only be dealt with by way of appeal or review"**.** (emphasis added)

In this case there was no request for a referral of the question that placing the applicants on remand was likely to violate their right to personal liberty protected by s 13(1) of the Constitution before the decision was made by the magistrate to remand them on the ground that there was a reasonable suspicion of their having committed the offences with which they were charged. The magistrate made the decision to remand the applicants for trial notwithstanding the question of the alleged violation of their right to personal liberty having been raised because there was no request for a referral. The question was therefore not referred and the decision of the magistrate on review was found to have been consistent with the factors the court was required to consider under s 13(2)(e) of the Constitution. Section 24(3) of the Constitution applied to the proceedings.

In *Jestina Mungarewa Mukoko v Commissioner General of Police & 4 Ors* SC 3/09, **CHIDYAUSIKU** CJ at p 2 of the cyclostyled judgment said:

> *"Section 24 of the Constitution is peremptory. This court has no discretion to condone a departure from compliance with s 24 of the Constitution. Consequently failure to comply with the procedure set out in s 24 of the Constitution is fatal to any Court application made in terms thereof."*

The learned CHIEF JUSTICE went on to say at p 3:

> "Thus, when a matter is before the High Court or any court subordinate to the High Court, such as the magistrates court in this case, the question of the contravention of the

guaranteed right should be referred to the Supreme Court by the court *mero motu* or at the instance of any one of the parties to the proceedings."

Section 24(2) of the Constitution clearly precludes a situation where the question is referred to the Supreme Court in respect of a matter which is no longer necessary for resolution by the lower court in the determination of the dispute before it. If that were to be permitted it would mean that the Supreme Court would not be rendering a decision on the question as a court of first instance in the exercise of original jurisdiction. It was no longer necessary for the High Court to place the applicants on remand and *ipso facto* to consider whether or not placing them on remand was likely to violate their right to personal liberty, the decision to place the applicants on remand having already been made by the Magistrates Court. The applicants were before the High Court for trial on the basis of the decision that there was a reasonable suspicion of their having committed the offences with which they were charged.

Accordingly, the matter is struck off the roll with no order as to costs.

**CHIDYAUSIKU CJ**: I agree

**ZIYAMBI JA**: I agree

**GARWE JA**: I agree

**CHEDA AJA**: I agree

***Mbidzo, Muchadehama & Makoni***, appellant's legal practitioners

***The Attorney-General's Office***, respondent's legal practitioner