

(1) PETROS MAKAZA (2) GOLDEN NHIKA
v
THE STATE

AND

(1) KHUMBUZO GUMBO (2) SYDNEY NDACHENGEDZWA
v
THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JCC, GWAUNZA JCC,
GARWE JCC, GOWORA JCC, HLATSHWAYO JCC,
MAVANGIRA AJCC, CHIWESHE AJCC, MAKONI AJCC
HARARE, JULY 2, 2014 & JULY 19, 2017

T Mpofu, for the applicants

I Muchini, for the respondents

Judgment No. CCZ16/17
Const. Application No. CCZ 5/13
Const. Application No. CCZ 102/13

1

CHIDYAUSIKU CJ: These matters were referred to this court by a magistrate’s court in terms of s 24(2) of the former Constitution of Zimbabwe (“the former Constitution”). The applicants allege a breach of ss 15(1) and 18 of the former Constitution. The relief sought is a permanent stay of criminal proceedings.

The facts of the matter are as follows.

PETROS MAKAZA & GOLDEN NYIKA

The applicants were charged with contravening s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (“the Act”), namely robbery and theft. It is

alleged that on 10 August 2012 at Munyuki Shopping Centre in Epworth the applicants unlawfully, intentionally and violently took from William Mukurumidze (hereinafter referred to as “the complainant”) his beret and his cell phone. The applicants deny the charges. They contend that the complainant, a soldier attached to the Presidential Guard, together with three of his colleagues, assaulted the applicants on the night the alleged offences were committed for wearing “MDC” T-shirts. After assaulting the applicants, the complainant took them to the police and accused them of the robbery and theft.

Thereafter the arresting officer, together with the complainant and seven other individuals, handcuffed the applicants and proceeded to assault them with clenched fists and booted feet for allegedly stealing the complainant’s beret and cell phone and sought to extract a confession from the applicants. After these assaults, the applicants were made to wear MDC T-shirts and taken to Mbare where they were surrendered to members of Chipangano, a vigilante brigade, who further assaulted and tortured them severely. In short, the applicants’ case is that they were tortured by both the police and members of the vigilante brigade who did so at the instance, and with the connivance, of the police.

It is these assaults by the police and the vigilante brigade that the applicants allege constitute torture and violated their constitutional rights. They contend that because of this torture their prosecution should be permanently stayed. In this connection they caused the following questions to be referred to this court for determination, namely:-

- (i) Whether a constitutionally legitimate prosecution can be conducted where the State violates a fundamental right;
- (ii) Whether the violation of rights in this matter warrants a permanent stay of prosecution;

(iii) The remedy available to the applicants under the *ubi jus ibi remedium* principle.

The respondent did not challenge the allegations of the applicants. Consequently, the Court proceeds on the basis that they were admitted. It is also not disputed that while the torture was intended to extract from the applicants a confession to the commission of the crime, it did not succeed in securing such a confession.

Article 1 of the *United Nations Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment* defines torture as follows:

“... torture means any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third party has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not indicate pain or suffering arising only from, inherent in or incidental to lawful sanction.”

Judgment No. GCZ16/17
Const. Application No. CCZ 15/13
Const. Application No. CCZ 102/13

3

I have no doubt in my mind that the assault on the applicants constitutes torture and is a violation of Art. 1 of the *United Nations Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment* and also a violation of s 15(1) of the former Constitution.

The respondent’s case is that the ill-treatment of the applicants in breach of s 15(1) of the former Constitution in this particular case does not taint the decision by the public prosecutor to institute criminal proceedings against them. The respondent further argues that the requirement for remand, as enshrined in s 13(2)(e) of the former Constitution,

had been complied with, despite the fact that the assault by the police and the vigilante brigade was to gather evidence to sustain the prosecution.

The respondent admits that the assault was perpetrated so as to gather further evidence to sustain the prosecution. However, it is accepted that no evidence was gathered as a consequence of the torture as the applicants, despite the torture, denied committing the offence in question.

KHUMBUZO GUMBO & SYDNEY NDACHENGEDZWA

They were both employed by EASYLINK (PVT) LTD, BULAWAYO, the latter as a teller and the former, a security guard. They were charged with contravening s 113 of the Act namely, "THEFT". It was alleged that on 29 April 2012 the two applicants, together with two other tellers not yet arrested, having intimate knowledge that a large sum of money had been deposited in their employer's bank vault on 28 April 2012, had conspired to steal, and had thereafter stolen, the said cash, amounting to US\$107 774.00, from their employer.

It was alleged that the four employees, ("the accomplices") had taken advantage of the fact that they were the only ones on duty that day and had access to the keys to the vault. They had, at closure of business at about 4.20pm on 29 April, deliberately left the security door unlocked and the alarm system unarmed in preparation for their return later that night to effect the theft. It was further alleged that in order to feign a break-in, the accomplices had cut the burglar bars of the toilet window, which they left open, and destroyed the mother board of the CPU digital video recorder (the CCTV) with a view to destroying the video evidence but unknowingly left the hard drive which contained all the footage linking the accomplices to the commission of the offence.

The State alleges that after their arrest the applicants had indicated their desire to make indications as to the place where they had hidden the money. They led the Police, who were accompanied by 3 details from Dog Section, to a bushy place beyond the Hillside area where their handcuffs were removed. They were allowed to alight from the vehicle for the purpose of making indications when suddenly they ran off in opposite directions and the dogs were released after them. The dogs caught up with them and were eventually called off by their handlers but not before severe injuries had been inflicted on the applicants.

The charge is denied by the applicants. They allege that upon their arrest on the 30 April 2012 they were taken to the offices of the CID where they were interrogated. GUMBO was assaulted with batons on the legs and under the feet. It is common cause that when he appeared in the magistrates' court injuries were visible on both his knees and feet and his leg was swollen. Thereafter, on the following day, they were taken by homicide police for indications and further interrogation. As they passed Hillside Police Station, they were joined by a van from the Dog Section. They arrived at a certain spot and were made to alight from the vehicle. They were interrogated and in the process dogs were set on them, as a result of which each applicant sustained severe injuries from dog bites and had to be hospitalised. The factual disputes which arise from the two conflicting accounts as to how the injuries were sustained by the applicants cannot be resolved by this court.

The applicants allege that they were tortured in order to obtain evidence to be used at the trial. Both the torture and the motive therefor are denied. The respondents, while accepting that the applicants were bitten by the dogs, deny that the applicants were tortured.

In any event, the respondents deny that any evidence was obtained as a result of the assault, or, that it was intended to use any such evidence in the prosecution of the applicants.

DISPOSITION

The questions referred for determination have, to a large extent, been answered by this Court in *Mukoko v The Attorney-General* 2012 (1) ZLR 321 (S). They are:

- (i) Whether any trial can be based on evidence extracted through a violation of the right enshrined in s 15(1) of the former Constitution;
- (ii) Whether or not the use at the trial of information obtained as a result of torture will violate the right of the applicants to a fair hearing enshrined in s18(2) of the former Constitution;
- (iii) Whether the applicants' right to protection against torture was violated.

Judgment No. CCZ16/17
Const. Application No. CCZ 5/13
Const. Application No. CCZ 102/13

6

In *Mukoko's* case, this Court had this to say at 339A B on the effect of evidence extracted through torture on a prosecution:

“The decision of the Court on this point is that ill-treatment *per se* has no effect on the validity of the decisions (decision) to charge the victim with a criminal offence and institute prosecution proceedings against him or her. It is the use of the fruits of ill-treatment which may affect the validity of the decisions (decision) depending on compliance or non-compliance by the public prosecutor with the requirements of permissible deprivation of personal liberty under s 13(2)(e) of the Constitution.”

The prosecutors, in the present matters, are not relying on the ill-gotten fruits of the ill-treatment of the applicants to institute the prosecution. On the authority of *Mukoko's* case *supra*, the fact that the applicants (in the MAKAZA case) were tortured in violation of s 15(1) of the former Constitution, cannot form the basis of a permanent stay of prosecution where such torture does not yield the evidence the State seeks to rely on.

Furthermore, the requirements of remand, as envisaged in s 13(2) (e) of the former Constitution, had been complied with, despite the torture by the police.

The same must apply to GUMBO'S case. In view of the disputes of fact concerning the purpose and intent of the assault perpetrated on the applicants, it has not been established that the treatment meted out to the applicants constitutes torture as defined above. However, that notwithstanding, the applicants argue that the ill-treatment by the Police was such as to warrant a stay of prosecution.

The instant cases are distinguishable from the *Mukoko* case. In *Mukoko's* case, Mukoko was tortured before she was charged. The State sought to rely on the confession obtained as a result of the torture to sustain the charges.

Judgment No. CCZ16/17
Const. Application No. CCZ 5/13
Const. Application No. CCZ 102/13

A prosecution predicated on a confession extracted through torture is unlawful and unconstitutional. In the *MAKAZA* case, the applicants did not confess despite the torture. On their own evidence, they, as it were, resisted the torture. The prosecution is based on the evidence of the complainant and other witnesses. Similarly, in the GUMBO'S case, no evidence was obtained from the alleged assault or ill-treatment.

In both matters, there is no direct connection or nexus between the fruits of the alleged torture or inhuman or degrading treatment to which they were subjected and the institution of the criminal proceedings. In these circumstances, an order of the permanent stay of the criminal proceedings is not the appropriate remedy.

This conclusion is regrettable in the extreme. It is, however, an inevitable consequence of the proper interpretation of the law. This Court abhors the torture of an accused person. Torture is wholly unacceptable to this Court but it cannot be a bar to prosecution where the prosecution is based on evidence not extracted by such torture. The appropriate remedy for the applicants lies in a claim for damages and not a stay of prosecution.

In this regard, the applicants also submitted that the *ubi jus ibi remedium* principle entails that for every right violated there should be a corresponding remedy. I accept this submission. I, however, do not accept on the facts of the instant cases that the stay of prosecution is the appropriate remedy. The torture is not in any way linked to the prosecutions at hand in the Magistrate's Court. The applicants have not shown that there was any evidence procured as a result of their torture which the respondent intends to use for the purpose of their prosecution. The applicants' remedy, as I have already stated, may lie in a civil claim for damages or in a prosecution of the perpetrators of the assault or torture.

Judgment No. CCZ 16/17
Const. Application No. CCZ 5/13
Const. Application No. CCZ 102/13

8

We were urged by Mr *Mpofu*, who appeared for all the applicants, to grant a permanent stay of prosecution on the basis that this court cannot countenance the illegality of the pre-trial torture and assaults inflicted by the Police or their agents on the applicants.

The question was raised in Mukoko's case¹ and determined thus²:

“As a matter of law and fact it is clear that where reasonable suspicion of the accused person having committed a criminal offence existed at the time the public prosecutor charged him or her with the offence in question and commenced criminal prosecution proceedings, the prosecution must be taken to have been properly instituted regardless of the fact that the accused person was subjected to torture, or inhuman or degrading treatment prior to the charge being brought against him or her. The charge and

¹ At p 329B-D

² At pp 342H-343D

prosecution would be a product of the consideration by the public prosecutor of evidence on the conduct of alleged wrong doing by the accused person.

There is nothing in the Constitution which requires the Court to permit an accused person, reasonably suspected of a criminal offence and properly charged, to escape prosecution because he or she was subjected to torture or inhuman or degrading treatment prior to the charge being brought against him or her. The Constitution does not guarantee protection against prosecution to an accused person reasonably suspected of having committed a criminal offence on account of having been subjected to torture, or inhuman or degrading treatment before the charge was laid on him or her. Giving effect to the proposition advanced on behalf of the applicant would violate the constitutional principle of proportionality. The principle requires that a fair balance be struck between the interests of the individual in the protection of his or her fundamental rights and freedoms and the interests of the public in having those reasonably suspected of having committed criminal offences tried and if convicted, punished according to law.”

That is not to say that in an appropriate case the Court may not feel constrained to order a permanent stay of proceedings where there has been pre-trial violation of the fundamental rights of an accused person. But this remedy will only be granted in extremely rare circumstances³ and each case must be decided on its own merits.

Judgment No. CCZ16/17
Const. Application No. CCZ 5/13
Const. Application No. CCZ 102/13

9

For the reasons outlined above, the applications for permanent stay of prosecution cannot succeed.

In the result, the applications are dismissed with no order as to costs.

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

³ See *Mutsinze v Attorney General* CCZ13/2015 at para [40] on p 14- p 15.

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

MAVANGIRA AJCC: I agree

CHIWESHE AJCC: I agree

MAKONI AJCC: I agree

GARWE JCC:

[1] I have gone through the judgment of the late former Chief Justice and agree with the general proposition he makes that ill-treatment of an accused person ^{Judgment No. CCZ16/17} ^{Const. Application No. CCZ 5/13} ^{Const. Application No. CCZ 102/13} per se has no effect on the validity of the decision by the authorities to prosecute such person on a criminal allegation. Indeed, this view was expatiated in the case of *Mukoko v The Attorney-General*, cited in the main judgment

[2] The view is further expressed by the late Chief Justice that where there is no direct correlation between the fruits of the alleged torture or inhuman or degrading treatment to which an accused person is subjected and the institution of the criminal proceedings, an order of permanent stay of the criminal proceedings is not the appropriate remedy. It is further opined that the appropriate remedy may lie in a claim for damages and not a stay of prosecution. Implicit in this remark is the suggestion that, however serious or reprehensible the violation might be, as long as there is reasonable suspicion upon

which an arrest is effected, the court is powerless to intervene and order a permanent stay of the criminal proceedings.

[3] I consider the above remarks too wide and, further, that they do not correctly reflect the law in terms of the current constitutional dispensation. In terms of s 53 of the Constitution, no person may be subjected to torture, or cruel, inhuman or degrading treatment or punishment. In terms of s 176 of the Constitution, the Constitutional Court, Supreme Court and High Court have inherent power to protect and regulate their own process and to develop the common law. In terms of s 85 of the Constitution, the Constitutional Court can grant appropriate relief including a declaration of rights and an award of compensation.

[4] In my view, in a case where the violation of an accused person's rights is serious, this court may well determine that, depending on other considerations, such as the seriousness of the offence the accused is facing, a permanent stay is warranted. It is correct that the grant of a permanent stay is exercised in the most exceptional of circumstances. The corollary to this is that where such exceptional circumstances exist, the court may well feel inclined to grant a permanent stay.

[5] In *Jonathan Mutsinze v The Attorney General, Zimbabwe* CCZ 13/15, I cited with approval remarks in paras 30-31, of the judgment of the International Criminal Court in ICC 01/04-01/06-772 Appeals Decision, *The Prosecutor v Thomas Lubanga Dy-70*, that the power to stay proceedings permanently may be exercised: -

“Where either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course.”

[6] I further quoted with approval remarks in *Police v Sherlock* 2009 SASC, 64, a decision of the Supreme Court of South Australia, that: -

“The justification for staying a prosecution is that the court is obliged to take that extreme step in order to protect its own processes from being used for purposes alien to the administration of justice”

[7] In my view therefore this court can, in an appropriate case, order a permanent stay of prosecution even where there is enough evidence on which a prosecution can be sustained. What constitutes an appropriate case is an issue I prefer to leave for another day.

[8] Indeed, the late former Chief Justice, notwithstanding the clear position adopted earlier in his judgment, appears to accept, towards the end of the judgment, the principle that such a remedy may well be available to an accused person. In this regard, he states:-

“This is not to say that in an appropriate case, the court may feel constrained to order a permanent stay of proceedings where there has been pre-trial violation of the fundamental rights of an accused person. But this remedy will only be granted in extremely rare circumstances.”

Judgment No. CCZ 16/17
Const. Application No. CCZ 5/13
Const. Application No. CCZ 102/13

12

[9] With the above remarks, which contradict the earlier part of the judgment, I would certainly agree. Where an accused person is subjected at the pre-trial stage to the most serious violations of his fundamental rights and he approaches this court for relief, this court must surely have the jurisdiction to grant the ultimate order of a permanent stay of criminal proceedings.

[10] That said, I am of the further view that the matter involving Khumbuzo Gumbo and Sydney Ndachengedzwa was not properly referred. The State was alleging that, during indications, the applicants suddenly bolted in different directions, forcing the police to unleash police dogs on them. The applicants dispute this version. They said they were being interrogated when dogs were set upon them, causing serious injuries

for which they had to be hospitalised. The factual dispute was never resolved before the matter was referred to this court.

[11] I consider the failure to resolve the dispute a fatal irregularity. The need for the magistrate to resolve such a dispute goes without saying. If indeed the applicants were trying to run away as alleged by the State and dogs were unleashed upon them in order to subdue them, then, in the absence of a suggestion that excessive force was used, no question of torture would arise. If on the other hand, the applicants' version was found to be the more probable one, then clearly that would have been a relevant factor to be taken into account in determining whether or not a permanent stay was, on the facts of the case, warranted.

[12] The need for a court referring a matter to the Constitutional Court to resolve disputes of fact before making a referral has been emphasised in a long line of cases. It is on the basis of the findings of fact made that the court referring the matter formulates an opinion whether or not the question raised is frivolous or vexatious. It is also on the basis of those findings of fact that this court hears argument in order to determine whether a fundamental right has been infringed. See *Douglas Togarasei Mwonzora & 31 Ors v The State* CCZ 9/15

[13] In the result, I would qualify the main judgment by adding the rider that torture or degrading or cruel punishment inflicted on an accused person may well justify a permanent stay of criminal proceedings, but this will be in very exceptional circumstances where the court feels that on the facts, it cannot preside over a matter involving a serious violation of an accused person's rights. The *ubi ius ibi remedium* principle would apply.

[14] In respect of Khumbuzo Gumbo and Sydney Machengedza, I would make the following order: -

“The application, not having been properly referred to this court, is struck off the roll.”

Zimbabwe Lawyers for Human Rights, applicants’ legal practitioners

Civil Division of the Attorney-General’s Office, respondent’s legal practitioners

Judgment No. CCZ16/17
Const. Application No. CCZ 5/13
Const. Application No. CCZ 102/13