ALBERT MUGOVE MATAPO
and
NYASHA ZIVUKU
and
ONCEMORE MUDZURAHONA
and
EMMANUEL MARARA
and
PATSON MUPFURE
and
SHINGIRAI WEBSTER MUTEMACHANI
versus
THE STATE

HIGH COURT OF ZIMBABWE
OMERJEE & MUSAKWA JJ
HARARE, 19 &24 MAY 2011

Criminal Appeal

C. Warara, for appellants
C. Mutangadura, for respondent

MUSAKWA J: This is an appeal against the decision of the magistrate's court wherein it ordered the committal of the appellants for trial before the High Court despite their case having been previously dismissed in terms of s 160 (2) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

This court, in judgment number HH 142-10 ordered the dismissal of the case against the appellants in terms of s 160 (2) of the Criminal Procedure and Evidence Act. This was premised on the fact that the court came to the conclusion that the appellants had not been brought to trial within six months of their committal. The judgment was handed down on 9 July 2010. Subsequently the State brought the appellants before the magistrate's court where it sought their committal for trial before the High Court on the same charges.

The appellants' contention is that in light of the dismissal of the charges against them, the court a *quo* erred in ordering their re-indictment. They therefore seek an order declaring their re-indictment null and void and that they be released forthwith.

In its heads of argument the State raised a preliminary point in respect of the procedure adopted by the appellants. The contention was that this is not an appealable matter and should have been contested by way of review. At the initial hearing when the matter was postponed, Mr. *Mutangadura* abandoned the point in *limine* in favour of the matter being heard on the merits.

Despite Mr. *Mutangadura*'s concession, a closer look at this matter reveals that there is no provision for appealing against a magistrate's decision to re-commit the appellants. Criminal appeals from decisions of Magistrates' courts are noted in terms of s 60 of the Magistrates Courts Act [*Cap 7:10*] which provides that-

"1) Subject to this section and any other enactment, any person who is convicted of any offence by a court may appeal to the High Court against the conviction and additionally, or alternatively, any sentence or order of the court following upon the conviction.

(2)….

(3) A person who is convicted of any offence by a court and who is discharged after conviction in terms of any provision of the Criminal Procedure and Evidence Act [*Cap 9:07*] may appeal against such conviction to the High Court.

(4) Any person who has been convicted by a court but sentenced by a judge of the High Court in terms of Part IX of the Criminal Procedure and Evidence Act [*Cap 9:07*] may appeal to the Supreme Court against such conviction or any sentence imposed upon him or any order of court following upon such sentence as though he had been both convicted and sentenced in the High Court."

As can be noted from the above provision, the decision appealed against does not relate to a conviction. In addition, there was no submission that the appeal was noted in terms of any other enactment. In essence, there is no appeal before us.

However, in the course of determining this matter, it has come to our attention that there is an apparent injustice that merits the attention of this court.

In terms of s 65 of the Criminal Procedure and Evidence Act, the committal procedure is the only legally permissible way to bring an accused person for trial before the High Court. The provision in question states that-

"No person shall be tried in the High Court for any offence unless he or she has been previously committed for trial by a magistrate for or in respect of the offence charged in the indictment:
Provided that—
(i) in any case in which the Attorney-General has declined to prosecute, the High Court or any judge thereof may, upon the application of any such private party as is described in sections 13 and 14, order any person to be committed for trial;
(ii) an accused person, other than an accused person committed for trial under section 66, shall be deemed to have been committed for trial for or in respect of the offence charged in the indictment if the evidence taken before the committing magistrate contains an allegation of any fact or facts upon which the accused might have been committed upon the charge named in the indictment, although the committing magistrate may, when committing the accused upon such evidence, have committed him or her for some offence other than that charged in the indictment or for some other offence not known to the law;
(iii) an accused person who is in actual custody when brought to trial, or who appears to take his or her trial in pursuance of any recognizance entered into before any magistrate, shall be deemed to have been duly committed for trial upon the charge stated in the indictment unless he or she proves the contrary;
(iv) nothing in this section shall be construed as affecting the power of a judge to sentence a person whose case has been transferred to that court on the direction of the Attorney-General in terms of section 225;
(v) no irregularity or defect in—
(*a*) any proceedings referred to in section 66; or
(*b*) any other matter relating to the bringing of an accused person before the High Court;
shall affect the validity of the trial, but the court may, on the application of the prosecutor or the accused, adjourn the trial to some future day."

The summary committal procedure is provided for by s 66 of the Act. There is no provision for a re-committal of an accused whose case has been dismissed. Since the appellants were previously committed for trial they were liable to be brought to trial in terms of s 322 as read with s 65.

The real issue for determination is what is the consequence of the dismissal of a charge in terms of s 160 (2)? In this respect s 321 provides that-

"Any person who is acquitted on any indictment, summons or charge or whose case has been dismissed for want of prosecution shall forthwith be discharged from custody."

Although the dismissal of a matter for want of prosecution is no bar to further proceedings, the legal ramification of such dismissal is that upon being served with a notice of trial an accused person shall not be required to pay further bail or to be committed to custody. In this respect s 322 provides that-

"(1) A person who—

(*a*) has been discharged in terms of section *three hundred and twenty-one* for want of prosecution; or

(*b*) has been admitted to bail but not duly brought to trial;

may be brought to trial in any competent court for any offence for which he was formerly committed to prison or admitted to bail at any time before the period of prescription for the offence has run out:

Provided that, subject to subsection (2), a person referred to in—

(*a*) paragraph (*a*) or (*b*) of this subsection shall not be liable to be committed to custody; or

(*b*) paragraph (*b*) of this subsection shall not be liable to find further bail;

in respect of proceedings for an offence referred to in this subsection.

(2) A person referred to in subsection (1) who was committed for trial for an offence referred to in that subsection may be prosecuted by the Attorney-General before the High Court for that offence, and if that person, having been duly served with an indictment and notice of trial, fails to appear at the time mentioned in such notice, the court may, on the application of the Attorney-General, issue a warrant for his arrest and detention in prison until he can be brought to trial or until he finds bail for his appearance to stand his trial on the said indictment."

John Reid Rowland in Criminal Procedure in Zimbabwe at 16-13 comments in respect of the consequences of discharge for want of prosecution as follows-

"Where a person has been discharged for want of prosecution or admitted to bail but not brought to trial, he may be brought for any offence for which he was previously charged and in custody or on bail at any time before the period of prescription for the offence has run out. He may not, however, if he was previously in custody and discharged, be committed to custody. If he was on bail, he is not liable to find further bail. The Attorney-General may prosecute

him before the high Court. If the accused fails to appear at the time mentioned in the notice of trial, he may be arrested and detained in custody or released on bail."

Mr. *Mutangadura* submitted that the consequences of a discharge arising from s 321 of the Criminal Procedure and Evidence Act do not apply to a dismissal of a case in terms of s 160 (2). In support of this submission, he pointed out that this is because s 321 and s 322 fall under part XV of the Act that is headed 'Discharge of Accused Persons' and that the appellants were not discharged in terms of this part, but had their case dismissed. Mr. *Mutangadura* is not correct in this submission because in interpreting statutes, headings and other references are inserted for convenience. In this respect s 7 of the Interpretation Act provides that-

"In an enactment—
(*a*) headings and marginal notes and other marginal references therein to other enactments; and
(*b*) notes, tables, indexes and explanatory references inserted therein as part of any compilation or revision in terms of the Statute Law Compilation and Revision Act [*Chapter 1:03*];
shall form no part of the enactment and shall be deemed to have been inserted for convenience of reference only."

In any event s 160 (2) on its own does not provide for what happens to an accused whose matter has been dismissed. The answer to that lies in s 321.

Although Mr. *Mutangadura* eventually conceded that the appellants should have been released following the dismissal of their case in terms of s 160 (2) of the Criminal Procedure and Evidence Act he further submitted that this is no longer possible as their trial has commenced. His contention was that upon pleading to an indictment an accused person's bail is terminated in terms of s 169.

Section 169 of the Criminal Procedure and Evidence Act provides that-

"If the accused is indicted in the High Court after having been admitted to bail, his plea to the indictment shall, unless the court otherwise directs, have the effect of terminating his bail, and he shall thereupon be detained in custody until the conclusion of the trial in the same manner in every respect as if he had not been admitted to bail."

It is clear from a plain reading of the above provision that it does not apply to a situation where an accused person is brought to trial in the High Court subsequent to his case having been dismissed.

Both counsels were not clear on how an accused person whose case has been dismissed is served with notice of trial in terms of s 322. Mr. *Mutangadura* suggested that this can only be done upon being re-indicted before a magistrate in terms of s 66 which then enjoins the magistrate to commit the accused to custody. A closer look at s 66 shows that it provides for summary committal of an accused where the Attorney-General is of the opinion that any person is under reasonable suspicion of having committed an offence for which the person may be tried in the High Court. It does not follow that after committal for trial and a case is dismissed in terms of s 160 (2) then the Attorney-General revisits the process of committal. It is inconceivable that the Attorney-General can formulate a second opinion over a matter that he previously caused an accused to be committed for trial on the basis that there is again reasonable suspicion that the person committed an offence that warrants trial before the High Court.

Any doubt on the above view is removed by a reading of s 137 of the Act which states that-

> “As soon as the indictment in any criminal case brought in the High Court has been duly lodged with the registrar of that court, such case shall be deemed to be pending in that court.”

No meaningful research was conducted by both counsels concerning how an accused person can be served with notice of trial in terms of s 322. In terms of Rule 5 of the High Court (Criminal Procedure) Rules SRGN 452/1964 a notice of trial and indictment shall be served on an accused person by the deputy sheriff. In passing, it is noted that these rules were last amended in 1977. They definitely need to be amended as they contain some archaic provisions relating to an accused’s race.

In terms of s 41 of the High Court Act [*Cap 7:06*], in determining appeals the High Court may exercise its review powers conferred upon it by s 29 of the Act. This is done where it is necessary or expedient in the interests of justice.

It is apparent that despite this not being a valid appeal, the appellants should not have been committed to custody. A declaratory order will be issued to that effect.

In the result it is ordered as follows-

a) The appeal is struck off.

b) The appellants were not liable to be committed to custody upon being re-indicted.

Omerjee J agrees……………………………………..

Warara & Associates, appellants' legal practitioners
Attorney-General's Office, respondent's legal practitioners