JANE LINDA ROSE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 17 June 2008 & 22 February 2012

Application for review of un-terminated proceedings

G C Chikumbirike, for the applicant
No Appearance for the respondent

HUNGWE J: This is an application for an order declaring the applicant not guilty and acquitting her after a review of the proceedings leading to her conviction. The matter was placed before me as an ordinary court application although the proceedings in the magistrate's court are not yet concluded in that she has not yet been sentenced. There are certain deficiencies to which I shall later return. The question raised in this application is whether this court has power to intervene in unterminated criminal proceedings in the exercise of its inherent powers of review. In order to answer this question it is important to draw a distinction between an appeal and a review.

Herbstein & van Winsen Civil Practice of the Supreme Court of South Africa 4 ed p 932 explain the distinction:

> ``The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory

> as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not a review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity."

It will be useful for purposes of this decision for me to summarise the law that is applicable. The power of a superior court to review the proceedings of an inferior court covers various stages in a criminal proceeding before an inferior court, that is, prior to conviction, after conviction but before sentence, and after sentence has been passed by an inferior court.

Part IV of the High Court of Zimbabwe Act, 1981 enumerates the High Court's statutory powers of review. Section 26 provides that, subject to the provisions of the Act and any other law, the High Court has review powers over all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities. Section 27(1) provides that subject to the provisions of that Act and any law, the grounds of review are absence of jurisdiction, bias and gross irregularity in the proceedings or decision. Section 27(2) provides that nothing in that particular section shall affect the provisions of any other law relating to review of inferior courts, tribunals or authorities. Section 29(1)(b) provides that for purposes of reviewing any criminal proceedings the High Court may hear any evidence in connection with the proceedings. Section 29(2) states that if on review of any criminal proceedings the High Court considers that the proceedings are not in accordance with real and substantial justice it has the power to do various things, including the power to alter and quash the conviction or to set aside or correct the proceedings or "generally give such judgment or make such order as the inferior court or tribunal ought, in terms of any law, to have given, imposed or made on any matter which was before it in the proceedings in question." Section 29(3) specifically provides that no conviction or sentence shall be quashed or set aside in terms of s 29 by reason of any irregularity or defect on the record of proceedings unless the High Court considers that a substantial miscarriage of justice has actually occurred. Section 29(4) states that, subject to the rules of court, the powers under s 29(1) and (2) may be exercised whenever it comes to the notice of the High Court that any criminal proceedings are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court or have not been submitted to the High Court for review.

It is clear from the foregoing that the statutory powers of review under the High Court of Zimbabwe Act, 1981, can be exercised at any stage of criminal proceedings before an inferior court.

Further, the authorities indicate that this court has an inherent power of review. In *Rascher* v *Minister of Justice 1930 TPD* 810 at 820 KRAUSE J said:

> "... a wrong decision of a magistrate in circumstances which would seriously prejudice the rights of a litigant would justify the Court at any time during the course of the proceedings in interfering by way of review ...
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> The above principles were laid down in a civil case, and they would apply with greater force where the proceedings are of a criminal nature and a miscarriage of justice might result in the circumstances from a wrong decision of the magistrate or where the rights of an accused person are seriously affected thereby."

In *Ginsberg* v *Additional Magistrate of Cape Town* 1933 CPD 357 at 360 GARDINER JP observed:

> "Now, as a rule, the Court's power of review is exercised, only after termination of the criminal case, but I am not prepared to say that the Court would not exercise that power ... before a termination of a case, if there were gross irregularity in the proceedings."

In Wahlhaus v *Additional Magistrate, Johannesburg & Anor* 1959 (3) SA 113 (A) at 119-120 OGILVIE THOMPSON JA (as he then was) said:

> "It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict or mandamus - against the decision of a magistrate's court given before conviction ...
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> This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of Gardiner and Lansdowne (6 ed Vol 1 p 750) state:
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> > 'While a superior court having jurisdiction on review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where

> justice might not by other means be attained ...In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.'
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> In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts. I would merely add two observations. The first is that, while the attitude of the Attorney-General is obviously a material element, his consent does not relieve the Superior Court from the necessity of deciding whether or not the particular case is an appropriate one for intervention. Secondly, the prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction."

In *Ellis* v *Visser & Anor* 1956 (2) SA **117** (W) at 120-122 MURRAY J (as he then was) considered Ginsberg v Additional Magistrate of Cape Town (supra) and observed that the learned JUDGE-PRESIDENT in that case dealt with a case in which the trial magistrate tried the accused in his absence in circumstances where such trial was not permitted. The learned JUDGE-PRESIDENT said this was one of the exceptional and unusual cases where the trial magistrate had acted with gross irregularity and had not discharged the functions entrusted to him. GARDINER JP's view was that where a trial magistrate performs his functions in a proper and regular manner the Superior Court would not interfere. Referring to Rascher *v* Minister of Justice (*supra*), MURRAY J indicated that as far as what KRAUSE J had said was concerned, if that meant that any wrong decision by a trial magistrate on a point of law was given in the course of a criminal trial was subject to immediate interference by the superior Court he would hold that he did not agree with that. MURRAY J went on to state at 123-124:

> "Even assuming that I have the discretion to interfere in exceptional cases I see no reason whatsoever for using that discretion in the applicant's favour, and see considerable reason against exercising my discretion in the applicant's favour ...
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> The grounds counsel asked me to consider were really this: That the title to prosecute is a sine qua non and the applicant would be subject to hardship if the case was allowed to proceed further, and that there would be repetition of matters which would cause him to

> be involved in publicity of an extremely undesirable character from his point of view. It was also pointed out that he would be put to costs and that he was not certain that he would be able to recover from the prosecutor if acquitted. It was also pointed out that the case would be a protracted one and that there would be claims on the applicant's time as a result of this.
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> I cannot see that, in regard to these matters, the applicant is in any worse position or suffers any greater hardship than any person who is prosecuted and eventually acquitted.
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> ...There are a number of objections which may be taken apart from embarrassment in a case against an accused person; there are special pleas ….and there are matters of exception or objections to the plea and the indictment presented. All of these matters can be decided and are decided by the magistrate. If the applicant's contention in this case is correct, then in every one of these cases where a decision is taken by a magistrate there would be just as much reason as in the present case for the accused person to claim that this matter must be decided *in limine* without awaiting the results of the merits of the case. The result would, I think, create chaos - one envisages a succession of appeals….whereas it is desirable that the actual merits should be speedily disposed of; and any decisions which are wrong in law should be corrected in the ordinary way by way of appeal, as there can be no miscarriage of justice, no abuse of process of the Court if the ordinary procedure is followed."

Mr *Chikumbirike*, for the applicant, submitted that by virtue of s 26 of the High Court of Zimbabwe Act 1981, this court has power of review to quash a conviction before the resumption of the proceedings for sentencing and that s 29(4) enables this court to intervene at any stage of the proceedings of an inferior court to correct injustice which is brought to its notice. But the power of this court under s 26 is specifically made subject to the provisions of that Act and, as already mentioned, s 27 provides the grounds of review are an absence of jurisdiction, bias and gross irregularity in the proceedings or the decision. None of the foregoing grounds are alleged by the applicant as the basis for this Court's review. The applicant urged this court to hold that the decision arrived at in the interpretation of the Gold Trade Act is “irregular” so as to make that decision liable to be set aside on review. Mr *Chikumbirike* was at pains to convince this court that the proceedings are indeed liable to be reviewed before sentence is passed because to allow the sentencing of the applicant would result in an injustice.

The test as to when a superior court could intervene in unterminated proceedings has already been discussed above. A superior court having jurisdiction on review or appeal will be slow to exercise any such power, whether by mandamus or otherwise, and will only do so in rare cases where "grave injustice might otherwise result or where justice might not by other means be attained."

On the other hand s 29(2) and (4) provides that when any criminal proceedings are not in accordance with real and substantial justice this court may alter or quash the conviction or set aside the proceedings. However, s 29(3) states that no conviction shall be quashed or set aside by reason of any irregularity or defect in the record of proceedings unless substantial miscarriage of justice has actually occurred.

What is permitted is intervention by this court that is so gross that it is incapable of correction by way of ordinary review or appeal; or where it is unconscionable to wait the conclusion of the proceedings before seeking redress in the normal way. It seems to me that such instances will be rare. In *S v Hutchings* supra this court interfered prior to sentencing for the purpose of quashing an erroneous conviction brought to its attention by the trial magistrate. While in *S v Sibanda* HB-139-88 this court, after the proceedings had, as far as conviction and sentence were concerned, been confirmed, decided to set aside the proceedings on the basis of an irregularity that had occurred in a guilty plea having been recorded as a result of undue influence.

McComb v *Assistant Resident Magistrate & Attorney-General* 1917 TPD 717 was a case where the magistrate had refused to allow certain questions to be put to a State witness. The matter was postponed in order to allow an application to be made for a mandamus that the magistrate allows the questions. This is what the court said at 718:

> ``Moreover, as pointed out by my brother GRWGOROWSKI, if the court is called upon to intervene whenever a magistrate disallows a question in cross-examination, it might protract the hearing of the case indefinitely. After having got the court's ruling on the question, when the matter comes up before the magistrate again, the attorney may wish to put other questions which the magistrate deems wholly irrelevant and the magistrate may disallow them, and an application may again be made to this court for a mandamus to

> compel the magistrate to allow the questions. That only shows how undesirable it is for the court, in the absence of good reasons, to intervene in the middle of (or rather, as in this case, at the beginning) of criminal proceedings upon an application of this nature."

In the present matter, the record shows that when an application was made by the trial magistrate for the adjournment of the proceedings pending a review of his decision convicting the accused, the trial magistrate quite rightly refused to stop the proceedings until after sentence. For some reasons which do not appear on record the matter did not proceed to sentence. Later these review proceedings were initiated. It was now represented on the applicant's papers that the trial court had stopped the proceedings in order for the review process to get under way. This is incorrect. The fact is that all the authorities confirm that the reason why a review of unterminated proceedings is not countenanced is to avoid creating situation such as here where proceedings are unnecessarily interrupted. In light of the above, the "decision" which it is sought to bring on review can properly be brought on appeal or review after the proceedings are fully concluded. In any event I see no basis to think that the magistrate's interpretation was wrongly arrived at, if that is the basis of bringing a review of the decision.

It has come to my attention that in all probability the presiding magistrate may not be available to sentence the accused. In terms of the Magistrate Court Act [*Cap 7:06*] this matter may be placed before another magistrate for sentence. In the result therefore I dismiss the application for review and order that the matter be placed before another magistrate for sentencing of the applicant.

Chikumbirike & Associates, applicant's legal practitioners