HOPEWELL CHIN'ONO
versus
MAGISTRATE MAREHWANAZVO GOFA
and
THE STATE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 10 and 12 May 2023

Opposed Application – Review

B Mtetwa and D Coltart, for the applicant
C Muchemwa, for the second respondent

MUSITHU J: This is an application for review in which the applicant is challenging the ruling of the first respondent which dismissed his exception to the criminal charges that he is facing for contravening s 184(1)(c) of the Criminal Law (Codification and Reform) Act[1] (the Code). The ruling was handed down on 21 November 2022. The applicant claims that the ruling was only made available to him on 12 December 2022. The applicant seeks the following relief:

"IT IS ORDERED THAT:

1. That the 1st Respondent's ruling dated 12th December, 2022 be reviewed and set aside and replaced with the following order:

   "That the Applicant's exception be upheld and that he be found not guilty and discharged".

2. That in the event of the matter being remitted back to the magistrates' court, the 1st Respondent be and is hereby disqualified from further participation in the criminal prosecution of the Applicant and that any further trial be conducted before a different magistrate.
3. That the Respondents jointly and severally, the one paying the other to be absolved, pay the Applicant's legal costs."

The record of proceedings in the court *a quo,* shows that the applicant appeared before the first respondent on 4 November 2022 and pleaded not guilty to the charge. He also informed the

[1] [*Chapter 9:23*]

court that he was excepting to both the charge and the outline of the State case in terms of s 171(2) of the Criminal Procedure and Evidence Act[2], (the Act). After hearing the parties, the first respondent dismissed the exception. It is her decision which is the subject of this review.

The matter was placed before me on 13 March 2023. On 20 March 2023, the applicant's legal practitioners wrote to the registrar requesting that the matter be set down on an urgent basis in terms of r 65(8) of the High Court Rules, 2021 (the Rules). The justification for the request was that the applicant's criminal trial pending before the first respondent was set to resume on 29 March 2023. The application for review would be rendered academic if the trial was to proceed before the review was heard. Heads of argument had already been filed on behalf of the applicant. The second respondent had filed its notice of opposition. What was outstanding were heads of argument. The first respondent did not oppose the application.

I invited the parties' legal practitioners for a case management meeting on 27 March 2023. At the meeting, the parties agreed to the following order by consent:

> **"IT IS ORDERED BY CONSENT THAT**
> **1.** The 2nd respondent shall file its heads of argument on or before 31st March 2023.
> **2.** Thereafter, the matter shall be set down for hearing on the 10th May 2023 at 10.00am/
> **3.** Judgment in this matter shall be handed down on or before 12th June 2023.
> **4.** The criminal trial under case number ACC 235/20 be and is hereby stayed pending the final determination of this matter."

The matter proceeded in the manner agreed by the parties.

FACTUAL BACKGROUND

The applicant was charged with the crime of *"defeating or obstructing the course of justice as defined in s (184)(1)(c) of the criminal law [codification and reform] act, [Chapter 9:23]."* The charge is framed as follows:

> 'In that on the 26th of October 2020 and in Zimbabwe, Hopewell Chin'ono, knowing that Henrietta Beatrice Rushwaya had a pending case of contravening section 182(1)(a) of the Customs and Excise Control Act Chapter 23:02 (Smuggling of gold) at the Harare Magistrates Court or realizing that there was a real risk or possibility that Henrietta Beatrice Rushwaya had a pending case of Contravening section 182(1)(a) of the Customs and Excise Control Act Chapter 23:02 (Smuggling of gold) at Harare Magistrates Court, Hopewell Chin'ono made a statement on his twitter handle ***HopewellChin'ono@daddyhope*** that "Henrietta Beatrice Rushwaya who is reported to be close to the National Prosecuting Authority boss is being brought to court tomorrow after being arrested with 6kgs of gold. My NPA sources tell me that the NPA's position is that bail is not opposed! The real criminals get bail always" intending by the statement to

[2] [*Chapter 9:07*]

prejudice the trial of the case or realizing that there is a real risk or possibility that the trial of the case may be prejudiced by the statement."

The State outline summarises the circumstances under which the offence was committed as follows:

" 01. Complainant in this case is the State.
02. Accused is a male adult residing at……..
03. On 26 October 2020, Henrietta Beatrice Rushwaya was arrested by detectives from the Minerals, Fauna and Flora Unit at Robert Gabriel Mugabe International Airport for smuggling about 6 kilogrammes of gold.
04. On the same date [26/10/20], accused heard about the arrest of Henrietta Beatrice Rushwaya and her subsequent appearance in court at Harare Magistrates Court from his alleged sources at the National Prosecuting Authority.
05. The accused then made a statement on his twitter handle HopewellChin'ono@daddyhope that "Henrietta Beatrice Rushwaya who is reported to be close to the National Prosecuting Authority boss is being brought to court tomorrow after being arrested with 6kgs of gold. My NPA sources tell me that the NPA's position is that bail is not opposed! The real criminals get bail always".
06. By making the statement, accused intended to prejudice the trial of Henrietta Beatrice Rushwaya's case or realized that there was a real risk or possibility that the trial of the case may be prejudiced by the statement.
07. Accused had no lawful excuse to make the statement."

The proceedings in the court *a quo*

After the tender of the plea of not guilty, the court *a quo* proceeded to deal with the applicant's exception first. The basis of the exception was that the allegations made against the applicant (the accused person in the court *a quo*) in the charge sheet, the State outline and the law under which he was charged did not disclose an offence. The allegations were also contradictory and did not support the section under which the accused person was charged. The applicant submitted that this was so for the following reasons. Firstly, it was submitted that the charge sheet stated that on 26 October 2020, Henrietta Beatrice Rushwaya (Rushwaya) had a pending case at the Magistrates Court yet this was not the position. That averment contradicted the tweet itself which stated that Rushwaya was to be brought to court on the following day.

The second reason was that the charge sheet alleged that the tweet was "*intended to prejudice the trial of the case"*. The applicant argued that this was false as there was no trial pending before any court on 26 October 2020. Rushwaya had not yet appeared before any court

on that date. The reference to "tomorrow" in the tweet served to confirm that there had not been any court hearing in connection with the matter as at 26 October 2020.

The third reason was that the mere arrest of a person suspected to have committed an offence did not always result in a court appearance. A matter is described as pending when the accused person has appeared in court on a matter that has been allocated a Criminal Record Book (CRB) number by the Clerk of Court. That had not happened herein. For there to be a pending case, the State had to allege and prove that Rushwaya was arrested and taken to court on the same date that the message complained of was tweeted. The tweet therefore made reference to a court appearance that was yet to take place.

The fourth reason was that even assuming that the alleged offensive tweet fell within the ambit of s 184(1)(c) of the Code, the tweet was of immense public interest as it sought to inform the public on a matter of public interest as required by ss 61 and 62 of the Constitution. The matter was also one of public interest as it related to the operations of the National Prosecuting Authority (NPA), an entity established under the Constitution, which is required to undertake prosecutions independently without fear or favour. There was no intention to prejudice any pending case as the tweet was intended to demonstrate the NPA's inconsistencies towards bail especially where a certain category offenders such as the applicant appeared before the courts. The applicant was entitled to express his views in terms of ss 60 and 61 of the Constitution. As a practicing journalist, the applicant was entitled to seek, receive and communicate information in terms of s 61 of the Constitution. Accordingly, no offence had been committed.

In its response to the exception, the second respondent denied that the charge was vague and embarrassing and that it did not disclose an offence as alleged by the applicant. The essential elements of the charge had been clearly spelt out. It was also submitted that the tweet of 26 October 2020 should not be considered in isolation. It had to be read together with another tweet that was posted soon after Rushwaya's court appearance. That subsequent tweet reads as follows:

> "As I told you last night after my NPA sources had briefed me, the NPA led by Prosecutor General Kumbirai Hodzi who is reported to be close to Henrietta Rushwaya did not oppose bail. This is someone who wanted to criminally smuggle gold worth US$370,000. What a banana republic."

The second respondent argued in the court *a quo* that the 26 October 2020 tweet was complemented by this second tweet made after Rushwaya's court appearance. The cumulative effect was that the two statements were made at a time when proceedings were pending before a court of law, and had the potential to defeat or obstruct the course of justice. The substance of the tweets could not be separated from Rushwaya's initial court appearance. In short, the applicant was aware of Rushwaya's impending court appearance. It was from these two statements that the allegations of obstructing or defeating the ends of justice were founded.

The ruling by the court *a quo*

In its ruling, the court *a quo* noted that the gravamen of the charge was the tweet of 26 October 2020. The court proceeded to analyse the law pertaining to the formulation of charges, as well as the constitutional rights of accused persons to a fair trial as enshrined under s 86(3) (e) of the Constitution. In determining whether the charge sheet disclosed an offence, and whether there were contradictions between the allegations and the offence creating section of the Code, the court said:

> "The charge sheet and state outline describes accused by forename and surname. The state outline describes the place of abode of accused. The charge sheet sets out shortly and distinctly the nature of the offence in such a manner and with such particularity as to place and time of the commission of the offence. It is at this juncture that court finds that the bone of contention is on whether the case was pending before court and this undoubtedly becomes a triable issue bearing in mind the literal meaning of pending which can attribute to an ongoing or a case which is imminent before the courts. Thus, the charge sheet and state outline clearly states what the accused allegedly did amounting to an offence, that is making a statement to a case pending before court which prejudice the trial of such a case……..
> From the foregoing, it is my considered view that the charge sheet and state outline are clearly worded, understandable and disclose a recognizable offence. Also, the offence creating provision under which accused is charged is proper. All these are not contradictory."

Having made these observations, the court determined that the tweet complained of satisfied the requirements of s 184(1)(c), and therefore the charge sheet and the State outline clearly disclosed an offence.

The application for review before the High Court

The application advanced ten grounds for review, which can be summarized as follows:

1. The first respondent committed a gross irregularity by reading into the charge sheet and the State outline what these did not say;

2. The first respondent acted irregularly when she *mero motu* interpreted s 184(1)(c), the charge sheet and the State outline in a manner designed to defeat the applicant's exception since the second respondent had not relied upon such interpretation;
3. Having accepted that the charge solely arose from the tweet of 26 October 2020, the first respondent committed a gross irregularity when she determined that the tweet must be read together with another tweet that was made after Rushwaya had appeared in court;
4. The first respondent committed an irregularity in dismissing the exception when it was common cause that both the charge sheet and the State outline specifically referred to the tweet of 26 October 2020, and never alleged that the tweet should be read together with the one made subsequent to the court appearance;
5. The first respondent also committed an irregularity when she wrongly stated that the charge sheet "sets out shortly and distinctly the nature of the offence with particularity as to place and time of the commission of the offence when in fact both the charge sheet and the State outline did not set out such details;
6. That the first respondent committed an irregularity and contradicted herself when she determined that the literal meaning of "pending" meant an ongoing case or a case which was imminent before the courts, when the second respondent never relied on such an interpretation in the charge sheet and the State outline;
7. The first respondent committed an irregularity in failing to determine the part of the exception that referred to the applicant's right to disseminate information to the public, in his capacity as a journalist;
8. The first respondent committed a further irregularity by finding that the tweet complained of disclosed an offence without providing reasons for such a finding;
9. The first respondent wrongly incorporated a tweet not relied upon by the second respondent, when such tweet arose from proceedings at a public hearing where the applicant was entitled to report on such public court proceedings;
10. The first respondent demonstrated gross bias, malice, prejudice and a desire to massage the facts in a manner that favoured the second respondent in complete disregard of what a charge sheet and State outline must tell an accused.

In its opposing affidavit, the second respondent admitted that first tweet of 26 October 2020 was made before Rushwaya appeared in court. It averred that the original tweet could not be divorced from the subsequent tweet made after the court appearance. The second tweet therefore confirmed the substance of the first tweet. The second respondent further averred that the two statements were closely linked and constituted a continuous transaction justifying the manner in which the charge was then couched. It was further contended that the failure to mention the second tweet in the charge sheet and the State outline could be cured through an amendment to both the charge sheet and the State outline. In short, the second respondent

submitted that the applicant had failed to make a case for review of the dismissal of his exception by the first respondent.

The brief submissions by counsel

In her oral submissions Mrs *Mtetwa* for the applicant whittled the grounds for review down to three, which are that: there was an irregularity arising from the interpretation of what was meant by the words 'pending before a court'; there were deficiencies arising from the court's finding that the charge sheet and the State outline fully set out the particulars of the offence, when in fact they did not and that the court *a quo's* failure to deal with the question of the applicant's right to disseminate information constituted an irregularity. Her address was by and large confined to the submissions made in the applicant's heads of argument and the contentions of law that were placed before the court *a quo*.

In his response, Mr *Muchemwa* for the second respondent conceded that when the applicant made the first tweet on 26 October 2010, there was no case pending before any court. He further conceded that the attempt by the second respondent to rope into the charges, the second tweet that was made after Rushwaya's court appearance, was an ill-advised decision, because the charge sheet and the State outline never alluded to that second tweet. Even the statement of the investigating officer, a Detective Inspector Naison Chirape, never made reference to the second tweet. The investigating officer confined himself to the tweet of 26 October 2020, as the basis upon which the charge was preferred.

Mr *Muchemwa* submitted that in light of the conspicuous defects in the charge sheet and the State outline, the second respondent was no longer opposed to the relief sought being granted. The second respondent's only concern was with respect to the part of the draft order in which the applicant petitioned the court to uphold the exception and find that he was not guilty and therefore entitled to be acquitted. Mr *Muchemwa* further submitted that there was no evidence on record to show that the applicant had tendered a plea of not guilty when he appeared in the court *a quo*.

I adjourned proceedings to enable the parties to verify the correct position with the record of proceedings at the Magistrates Court. At the resumption of the hearing, Mr *Muchemwa*

informed the court that he had confirmed that the applicant indeed tendered a plea of not guilty when he appeared in the court *a quo*. The court thereafter proceeded to hear arguments on the exception after the applicant had pleaded not guilty to the charge. In the circumstances, this court was therefore at large to grant the relief sought herein.

The analysis

The position of the law in this jurisdiction is now settled that superior courts should be slow to interfere in unterminated proceedings of lower courts, except in those exceptional cases where grave injustice would be occasioned by such non-interference. In *Gumbura & 6 Ors* v *Mapfumo N.O.*[3], MAKONI JA restated the position of the law when she held as follows:

> "It is settled law that a superior court will not readily interfere with unterminated criminal proceedings of a lower court except in exceptional circumstances. These include instances where grave injustice would occur if the superior court does not intervene and where there is gross irregularity resulting in a miscarriage of justice. One such instance is where there is a probability of the proceedings being a nullity. "It would be prejudicial to the accused, and a waste of time and resources, for the trial court to carry on with a trial likely to be declared a nullity." See *Matapo & Ors v Bhila NO 7* Anor 2010 (1) ZLR 321 (H) at 325 F. The task of assessing whether or not unterminated criminal proceedings ought to be stayed involves the exercise of discretion….."[4]

The sentiments of the court in the above authority are apposite to this matter. The circumstances of this matter show that grave injustice would occur were this court not to interfere in the unterminated proceedings before the court *a quo*. The circumstances clearly reflect an apathetic attitude on the part of the drafter of the charge and whoever placed those charges against the applicant in court. An accused person should only be brought before the court when the NPA has satisfied itself that the charge is not only properly crafted, but that it *inter-alia* discloses an offence which an accused person is expected to answer to.

The objective of a prosecution is to secure a conviction if the court is satisfied that on the evidence placed before it, the guilt of the accused has been proved beyond reasonable doubt. The conviction of an accused person is not just dependent on the weight of the evidence placed before the court. It starts with the formulation of the charge itself. In the instant case, it is disheartening to note that the same NPA that successfully opposed the exception in the court *a*

[3] SC 10/22 at p 8 of the judgment

[4] See also *AG v Makamba* 2005 (2) ZLR 54 (S) at p 64 and *Masedza & Ors v Magistrate, Rusape & Ano* 1998 (1) ZLR 36 (H) at p 41

quo, is the same NPA that readily conceded to the deficiencies in the charge sheet and the State outline, despite having earlier opposed the relief sought herein. Such prevarication does not bode well for the proper administration of justice as it erodes public confidence in the operations of that office.

The right to a fair trial is hallowed. It is engraved in s 86 (3)(e) of the Constitution as one of the fundamental and inviolable rights that may not be limited by operation of any law. Implied in that right is a legitimate expectation by an accused person that the charge he is required to answer to must be set out with sufficient exactitude and clarity so as not to leave him uncertain about the offence he is alleged to have committed.[5] Meticulousness is central to the formulation of a proper charge. Section 146 (1) of the Act speaks to the essentials of a charge. It states as follows:

> **"146 Essentials of indictment, summons or charge**
> (1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge."

It is no doubt that the charge in *casu*, as amplified by the State outline does not meet the threshold as set out by s 146(1) above. The charge as phrased made specific reference to the applicant's tweet of 26 October 2020. The wording of the offence creating section itself makes it clear that the statement which constitutes an offence must have been made *"in connection with a case which is pending before a court…."*[6]. At the time the tweet of 26 October 2020 was made, Rushwaya had not yet appeared before any court. There was no case pending before any court and consequently that tweet did not constitute an offence. How the second respondent then

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[5] See the sentiments of CHITAPI J in *Kasukuwere v Mujaya & 3 Ors* HH 562/19

[6] Section 186 (1)(c) states as follows:
184 Defeating or obstructing the course of justice
(1) Any person who—
(*a*) ……..; or
(*b*) ……..; or
(*c*) makes any statement, whether written or oral, in connection with any case which is pending before a court, intending the statement to prejudice the trial of the case, or realising that there is a real risk or possibility that the trial of the case may be prejudiced by the statement…"

sought to rope in the second tweet which was only made after her court appearance is bewildering in the circumstances.

The first respondent committed a gross irregularity when she determined that the applicant made a statement in connection with a case that was pending before the court, when no case was pending before any court at the material time. There was no triable issue to be determined through a trial. The question to be answered was simply whether there was a pending case or not at the time that the tweet was made. Further, the court also made a grave error in determining that the literal meaning of the word pending could be interpreted to incorporate *"a case which is imminent before the court"*. As already noted, a criminal case is only pending before the criminal court when it has been allocated a CRB number by the Clerk of Court and the accused person has appeared before the court for his initial remand. There is no halfway position so to speak. It is either a case is pending or it is not pending.

The concession by Mr *Muchemwa*, though belatedly made after an unnecessary waste of time and resources was nevertheless properly made in the circumstances. The anomaly would have been picked at the vetting stage had the second respondent's officials been more diligent in their appraisal of the charge sheet and the State outline. As properly conceded by Mr *Muchemwa*, the applicant is entitled to a verdict following his tendering of a not guilty plea.

In terms of s 180(6) of the Act, the applicant is entitled to demand for a verdict, having pleaded not guilty. Further, and again as properly conceded by Mr *Muchemwa*, the accused is entitled to his acquittal on the ground that he is not guilty on the charge. I considered remitting the case to the court *a quo* to enter the verdict which it should have entered. However, as there was no contention in relation thereto, I considered it a waste of time and resources to have the court *a quo* reconvene to record an obvious and agreed result.

As regards the question of costs, Mr *Muchemwa* appeared content with the court granting the order in the manner proposed by the applicant's counsel. He did not address the court on the question of costs, perhaps out of a realization that the second respondent's position was ill-conceived right from the onset.

Resultantly it is ordered that:

1. That the first respondent's ruling dated 12th December, 2022, in which she dismissed the applicant's exception be reviewed and set aside and replaced with the following order:

   "That the applicant's exception be upheld and that he be found not guilty and acquitted".
2. The second respondent shall pay the applicant's costs of suit.

Mtetwa & Nyambirai, applicant's legal practitioners
National Prosecuting Authority, second respondent's legal practitioners