

AURTHUR BOSHA
and
TAURAYI MANUWERE N.O.
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA & MANYANGADZE JJ
HARARE, 19 & 23 October 2022 & 23 November 2023

Application for Criminal Review

T L Mapuranga, for the applicants
C Muchemwa, for the State

KWENDA J: The applicant is on trial before the regional magistrate sitting at Harare who is cited herein, as the first respondent. The second respondent is the State. It is our view that the second respondent ought to have been the Prosecutor General who is mandated and empowered, in terms of s 12 (a) and (b) of the National Prosecuting Authority Act [*Chapter 7:20*], to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting and conducting such criminal proceedings.

The applicant is on trial before the first respondent, charged with criminal abuse of duty as a public officer as defined in s 174(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The definition of the crime was recently amended. The amendments have no bearing on the issues raised by this review since the crime was allegedly committed before the amendments.

The allegation against the applicant arose when he was assigned as the public prosecutor to deal with a bail application by one Musafare Mupamhanga, who was facing a charge of robbery, committed in aggravating circumstances, as defined in s 126 (3) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The applicant allegedly consented to the accused person's admission to bail in a manner allegedly contrary to or inconsistent with Attorney General's Office (Criminal Division) Standard Operating Procedure (SOP) in that he did not seek the approval of his superior, one Edmore Makoto. The State alleged that the SOP which

became operational before the severance of the prosecuting arm of the State from the Attorney General's Office continued in force and was binding on the applicant. The SOP and the 2013 Constitution. The applicant was also alleged to have, at the same time, disregarded a memorandum dated 16th November 2020 addressed to all public prosecutors by Chief Law Officer, Michael Mugabe, another superior of the applicant, to whom the applicant was also allegedly answerable. The memorandum was concerned with bail matters and with regards to consenting to bail, and it was by and large similar to the SOP. The applicant is, therefore, being alleged to have committed the crime by omitting to do something which was his duty as a public officer to do.

The crime with which Mupamhanga was charged, is stated as 'armed robbery' in the state outline. This is a common error often overlooked even by judicial officers. It occurs and is overlooked because, in most cases persons in the practice of law, prefer to rely more on experience and observation and not the wording in the source of law, whether statute or common law, before putting pen on paper. This is the point made by CHITAPI J in the case of *PG v Abdul & Ors* HH 90/21.

The applicant excepted to the charge, before the respondent, in terms of s 171 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and at the same time, entering a plea of not guilty in terms of s 180 (4) of the Act. His defence counsel argued, on the applicant's behalf, in the proceedings *a quo*, that the High Court proceedings wherein the applicant had consented to bail had not been nullified. The High Court proceedings remained extant and thus no criminal charge could arise from them. The argument was, therefore, that the charge does not disclose an offence. The other ground for exception was that the applicant was independent as a public prosecutor and subject only to the law. Any violation of the SOP would only yield disciplinary proceedings and never give rise to a criminal charge. The argument was that the applicant did not require authority from anyone before consenting to bail. The third objection was that the charge did not disclose all the essential elements of the crime. He cited the case of *S v Munawa* HH 573/15 where this court observed that there is no law which requires a prosecutor to seek authority before consenting to bail. I will not discuss this matter in detail for two reasons. Firstly, in light of the basis upon which we intend to dispose of this review which is informed by the case of *Machipisa & Ors v S* SC89/23 discussed below. Secondly, the *Munawa* case, *supra*,

was concerned with an application by the Prosecutor General, for revocation of bail. The issue was whether the court was required to rescind a bail order previously issued by it simply because the public prosecutor consented to bail without the authority of his superior. I will traverse this issue in my discussion of the case of *PG v Abdul & Ors* HH 90/21 below. The applicant's counsel also cited *Saviour Kasukuwere v Hosea Mujaya & Ors* HH 562/19 as authority for the necessary averments to be made in a charge of criminal abuse of duty as a public officer as defined in s 174(1) of the Criminal Law (Codification and Reform) Act.

The applicant prayed, before the first respondent, that his exception be upheld and he be found not guilty and acquitted in terms in terms of s 180(6) of the Criminal Procedure and Evidence Act.

The exception was successfully opposed by the State. The public prosecutor argued that although the applicant was authorised to represent the State or the Prosecutor General in the bail application of Mupamhanga, he did not have unfettered discretion in dealing with the matter.

The first respondent, agreed with the State and dismissed the exception. Relying on the case of *S v Chogugudza* 1996(1) ZLR 28 (H), the first respondent ruled that there was no need for the High Court proceedings to be nullified. The first respondent also ruled that the applicant had the duty to obey the Prosecutor General's SOP. Once again, he relied on the *Chogugudza* case, *supra*, on this point. On the third point, the first respondent ruled that when the charge is read together with the State outline, it disclosed all the essential elements of the crime.

The Supreme Court recently clarified the law on the popular procedure of excepting to a charge and pleading not guilty in the same breath. In the case of *Machipisa & Ors v S* SC 89/23, the Supreme Court clarified that such a procedure was unavailable in the Magistrates Court. Once the accused person has excepted to the charge in terms of s 180(1) of the Criminal Procedure and Evidence Act, he or she may not competently plead to the charge at the same time. That is what the applicant did at his trial. We note that the applicant's prayer in the exception was that his exception be upheld and he be found not guilty and acquitted in terms in terms of s 180(6) of the Criminal Procedure and Evidence Act. The prayer was based on the fact that the applicant had validly pleaded not guilty and thus entitled to a verdict. There was no other prayer by him before the first respondent. The same prayer has been persisted with on review. Against the background of an invalid plea of not guilty such a prayer could not be granted. There

could be no relief based on an invalid process. The prayer remains invalid on review and, therefore, cannot succeed.

I would not do justice to this case if I did not deal with a point of law raised and argued strenuously by applicant's counsel. It is that, the exception ought to have succeeded because both the SOP and the memorandum by Chief Law Officer, Michael Mugabe which the applicant is alleged to have disobeyed had no force of law. Neither of them had been promulgated into law. Both the SOP and the memorandum, not being part of public law, were not binding on the applicant, and his disobedience of one or the other or both of them could not properly be a basis for a charge of criminal abuse of duty as a public officer. The applicant had no duty to obey a policy or directive which was not legally binding. Applicant's counsel argued that in terms of s 260(2) of the Constitution, the Prosecutor-General must formulate and publicly disclose the general principles by which he or she decides whether and how to institute and conduct criminal proceedings. He argued that the constitutional provision requires the Prosecutor General to gazette the general principles. He said in an individual case the Prosecutor General may give instructions or directions specific to the particular case without publicising them. However, general principles should be gazetted into a public law because the import of s 260 (2) of the Constitution is to make the Prosecutor General accountable to the people with respect to principles by which he or she decides whether and how to institute and conduct criminal proceedings. For that reason, the SOP and Mugabe's impugned memorandum were invalid. He cited, as his authority, the case of *PG v Abdul & Ors* HH 90/21. He argued, further, that although the SOP predates the 2013 constitution and may have been binding prior to the 2013 constitution, it ceased to be binding when the 2013 constitution took effect. There was no need, as from the date when the 2013 constitution took effect, to make the SOP to be part of public law because the applicant was, as a public prosecutor, subject to the control and direction of the Prosecutor General who has the constitutional prerogative to institute and conduct prosecution on behalf of the State. Applicant's counsel argued that the first respondent should not have followed the *Chogugudza* case *supra*, because it was decided before the 2013 constitution.

The argument was opposed by the State counsel who argued that the applicant was answerable to the Prosecutor General and his superiors. The State also argued that the charge

and the State outline sufficiently disclosed the criminal conduct constituting the crime of criminal abuse of office.

The argument that the SOP predates the 2013 constitution and may have been binding prior to the 2013 constitution, and that it ceased to be binding when the 2013 constitution took effect, should not detain us. The constitution does not apply retrospectively unless it specifically provides for it. A law is valid until a declarator of invalidity is issued.

The decision in *PG v Abdul & Ors* HH 90/21 may have been misunderstood by the applicant. At p 9 of the cyclostyled judgment CHITAPI J states as follows:

“The applicant has averred firstly that the issue of the prosecutor having to first obtain consent of his superiors is an administrative act which is part of internal operations within the applicants’ led establishment, viz, the National Prosecuting Authority. Section 260 (1) (a) of the Constitution provides that the applicant is independent and is not subject to the direction or control; of anyone. Therefore, unless the administrative arrangements in that office become public law, the court will not pry into them. It is noted that the applicant does not allege that the prosecutor in question lacked title to prosecute. Had this been so, then the bail proceedings would be a nullity.”

All the learned judge meant was that corruption by a public prosecutor does not necessarily vitiate the prosecution or the proceedings or the judgment of the court in the matter. The point is better understood if one has regard to the earlier remarks by the learned judge by at p 5 of the same cyclostyled judgment.

“It is important for purposes of this application that I comment that the above order was granted after the learned judge had read the documents filed of record and hearing counsel’s submissions meaning that both the applicant’s counsel submissions meaning that both the applicant’s counsel Mr *Kasema* and the respondent’s counsel Ms *Maheya* addressed the learned judge on the parties’ positions in the matter. The learned judge must therefore be taken as having granted an informed decision based on the facts placed before him as contained in documents comprising the application and additional oral submissions made by the applicant’s legal counsel. The order has not been appealed against and the order therefore stands.”

The ratio in the *Abudul* matter, *supra*, is that as long as the public prosecutor who appears in court is duly authorised by a certificate issued to him by the Prosecutor General, the court does not and has no obligation to be satisfied that the decisions he or she makes in proceedings are in compliance with internal directives issued by the Prosecutor General. The court would not be privy to any alleged failure by the public prosecutor to comply with the Prosecutor General’s SOPs because that is an internal matter. Accordingly, the proceedings are not vitiated. The

proceedings would only be vitiated if the SOP became part of public law. The court is not subject to the Prosecutor General's SOPs. In the *Abudul* matter, *supra*, the court was therefore seized with the issue of whether there was any legal basis to revoke bail. The High Court was not moved and did not express any opinion on whether the Prosecutor General's SOPs must be gazetted before they become binding on public prosecutors.

The charge could not be clearer than the one which the applicant has to answer in the Magistrates Court. The applicant would be guilty of criminal abuse of duty as a public officer if he, at the time of the alleged crime –

1. he was a public officer, who
2. in the exercise of his or her functions as such, intentionally—
3. did anything that was contrary to or inconsistent with his duty as a public officer; or
4. omitted to do anything which it was his duty as a public officer to do;
5. for the purpose of showing favour or disfavour to any person.

The applicant is, through his exception, simply denying the State allegation that he omitted to do anything which it was his duty as a public officer to do. It stands to reason that the issue of whether the applicant, as the public prosecutor authorised to represent the State or the Prosecutor General in the bail application of Musafare Mupamhanga, had unfettered discretion in dealing with the bail application is a factual dispute which can only be resolved at a trial.

Whether or not he had any duty to do anything or that he omitted such duty are disputes of fact to be resolved by the trial. The State must prove every essential element of the offence. Applicant's counsel argued that the charge does not disclose an offence because the SOP and memorandum do not constitute public law and so no charge can arise from disobedience thereof. The applicant's counsel must have lost sight of the fact that the offence is created, not by the SOP but by s 174(1) of the Criminal Law Codification and Reform Act. The SOP will be used by the State as evidence of the applicant's duty to be accountable. Applicant's counsel argued that a public prosecutor has no duty to obey a general principle which was not gazetted and the charge does not disclose an offence on that basis alone. Essentially, the appellant put forward what would have been his defence on the merits disguised as an exception.

My reading of [*Chapter 9*] of the Constitution is that, like any other public officer, a public prosecutor must exercise his authority as a public trust and in terms of the Constitution

avoiding conflict of interest. He has a general duty to be transparent, impartial, honest and sincere. Whether or not disobeying the SOP or the memorandum issued by Michael Mugabe constitutes that duty is a matter to be resolved by his trial. See *S v Gomba & Ors* HH 391-23.

The applicant could not validly except to the charge in terms of s 180(1) of the Criminal Procedure and Evidence Act while, at the same time, pleading, in terms s 180(2)(b) of the Act, that he was not guilty of the crime. The exception and plea of not guilty were therefore invalid. The first respondent's ruling is therefore a nullity because it cannot stand on nothing.

In the result, we order as follows:

1. The application is dismissed.
2. The plea and exception are set aside.
3. The matter is remitted to the trial court for the charge to be put to the applicant afresh.

KWENDA J:

MANYANGADZE J: AGREES

Rubaya & Chatambudza, applicant's legal practitioners
National Prosecuting Authority, second respondent's legal practitioners