

JOSEPH MATANHIRE
and
PETER BENJAMINI
versus
THE MAGISTRATE, ESQUIRE, P. MUKUMBA N.O.
and
THE NATIONAL PROSECUTING AUTHORITY N.O.

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 1ST April, 2021

Criminal Review

T. Mbwachena, for 1st and 2nd applicants
No appearance, for 1st and 2nd respondents

MAWADZE J: I decided to write this judgment despite that this is an unopposed matter. The reason for this rather unusual course of action will become more apparent later in this judgment. Suffice to say that this was mainly because of the procedural frailties inherent in this review application and the order being sought in the matter set on the unopposed motion roll. I also invited *Mr Mbwachena* to address me on legal problems apparent in this matter and unfortunately he appeared unprepared and unhelpful.

I also wish to mention in passing that the 2nd respondent should have been properly cited as;

“*The Prosecutor General N.O.*” and not as “*National Prosecution Authority N.O.*”

This is an application for criminal review ostensibly in terms of s 26 of the High Court Act [*Cap 7:06*] as read with Order 33 of the High Court Rules, 1971.

The Order sought is couched as follows;

“It is ordered that

- 1. The application for review be and is hereby granted.*
- 2. The proceedings in case number CRB Chivi 330/19 be and are hereby quashed*
- 3. The matter is remitted back for a trial de novo before a different Magistrate (sic)*
- 4. There be no order as to costs.”*

The grounds for review are outlined as follows;

- “1. The proceedings a quo were invalid in that the trial Magistrate grossly erred in not upholding the applicants’ constitutional rights to legal representation. Applicants expressly stated that they had a legal practitioner yet the court a quo ignored this and ordered the trial to start to the detriment of the applicants.*
- 2. The court a quo erred in violating applicants’ constitutional right to a fair trial by the decision of the trial Magistrate to proceed with the trial when the applicants’ legal practitioner was not available and had informed the prosecution of same.*
- 3. The Magistrate erred in initiating trial proceedings which were irregular and unprocedural in that the applicants and their legal practitioner had not been served with the State papers in order to craft a defence.”*

Despite the three rounds for review raised by the applicants, my view is that they all amount to one reviewable ground as per s 27(1) (c) of the High Court Act [*Cap 7:06*] which relates to gross irregularity in the proceedings or decision.

Background Facts

The two applicants were arraigned before the trial Magistrate (the 1st respondent) sitting at Chivi for contravening section 89(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] relating to assault.

The 1st applicant is aged 28 years and the 2nd applicant is aged 32 years. The complainant’s age is not stated but is a male adult. They are all neighbours in Diso Compound in Mashava.

The allegations against both applicants are that on 16 June, 2019 they were at Magwizi Bottle Store, Balmain, Mashava when each of the applicants or both of them assaulted the complainant Lameck Shumba with an iron bar and stabbed him with a knife on the head. The facts alleged are not clear as to the cause of this altercation. However it is said the 1st applicant followed the complainant into the toilet where he struck the complainant four times on the mouth with an iron bar and stabbed him once on the head with a knife.

It is alleged the complainant fled to his residence but was later followed by both applicants who allegedly further assaulted him all over the body with clenched fists.

As a result of the attack the complainant lost one teeth and two others are loose. He is said to have sustained a laceration and a deep cut on the head. There are two medical reports in the record produced during the trial. Exhibit 1 which shows that complainant was examined on 18 June, 2019 and the following injuries noted;

“lost one tooth, two mobile teeth, and lip laceration.”

These injuries are attributed to blunt object used with severe force and are described as very serious as there is permanent disability due to loss one upper tooth.

On 27 June, 2019 the complainant was also examined by a medical doctor at Masvingo Provincial Hospital as per Exhibit 2 and the following injuries were noted;

“a deep laceration ± 5 cm on occiput, sutured with 4 stitches”

The founding affidavit by the 1st applicant purports to give background facts. However a reading of the record of the proceedings shows that both applicants are not truthful on what transpired in the matter.

As per founding affidavit the applicants were arrested on 26 June, 2019 and were granted bail pending trial on 11 July, 2019. They alleged that the trial was to commence on 25 July, 2019 but could not proceed as the complainant failed to attend court. The matter was then postponed to 10 September, 2019. The applicants said on 10 September, 2019 they advised the court that they had engaged a legal practitioner *Mr Maboke* and unsuccessfully sought a postponement to 26 September, 2019. They also alleged that their legal practitioner had not been served with the State papers.

As per the founding affidavit both applicants aver that the trial prosecutor was agreeable to the postponement sought but that it is the trial Magistrate who, without good cause ordered the trial to proceed. The trial thus proceeded as ordered with the applicants conducting their own defences.

The contention by the applicants is that this decision by the trial Magistrate violated the applicants’ right to legal representation as is provided for in s 70(1) (d) of the Constitution. The applicants allege that they were forced to cross examine the complainant without the expertise of their counsel of choice which according to them is irregular. Both applicants contend therefore

that they were denied the right to a fair trial enshrined in s 69(4) of the Constitution as none of them was favoured with the State papers. This is the basis upon which they both seek the quashing of the proceedings and a trial *de novo* before a different Magistrate.

There are however factual inaccuracies when one juxtaposes the record of proceedings and the averments made by the applicants in the founding affidavit.

Indeed the trial commenced on 10 September, 2019. The complainant is the only witness who testified as the trial commenced at 14.15 hrs. The complainant was indeed cross examined in a material way by both applicants until 16.45 hrs when the matter was adjourned to 17 September, 2019 and one other State witness Nomsa Mate who was present duly warned.

On 17 September when the trial resumed both applicants were in default and warrants for their arrest were properly issued. However later that same day both applicants pitched up now in the company of their legal practitioner *Mr Maboke* who successfully made an application for the cancellation of the warrants of arrest citing transport problems. Thereafter *Mr Maboke* was not done as he had another application.

Mr Maboke made an application which he coined as “*an application to stay the proceedings pending an application for review at the High Court*” in which he said he would seek to have the proceedings in the Magistrates Court quashed.

In my view this was the genesis of the legal minefield so apparent in this matter.

Mr Maboke, from the bar submitted that the trial prosecutor had agreed that the trial would commence 26 September, 2019 and not 10 September, 2019 since no State papers had been furnished. *Mr Maboke* said contrary to assertions by the State, his fellow colleague in his law firm *Mr Mbwachena* had not been served with the State papers as promised. He further submitted that when the trial was ordered to proceed on 10 September, 2019 both applicants were thus denied their right to legal representation and a fair trial. In the result he wanted the proceedings stayed pending that review application. *Mr Maboke's* view was that there was no prejudice to the State if his request was granted, but that irreparable harm would be occasioned to his clients if the trial proceeded. The nature and extent of such irreparable harm was however not explained.

The trial prosecutor found favour with this application. It was not opposed. Further the trial prosecutor strangely agreed that the matter be postponed *sine die* (*whatever that meant in context of the matter*) and that the State would proceed by way of summons.

The apparent drama continued in this matter. The trial Magistrate granted a rather bizarre order with reads as follows;

“Application for stay of proceedings is granted. Further remand is refused. State to proceed by way of summons.”

In my view it was improper for the trial Magistrate to stay his or her own proceedings. The competence of such an order is clearly in doubt.

Secondly, it is not clear why “further remand” was being refused and why this matter would be shelved and only to be resuscitated by way of summons.

Thirdly, contrary to the submissions by *Mr Maboke* the record of proceedings shows both applicants admitted that they were served for trial on 14 August, 2019 when the trial commenced on 10 September, 2019.

As per the record of proceedings on 10 September, 2019 both applicants indicated that they were represented by *Mr Maboke* and that *Mr Maboke* was not at court. The record of proceedings shows that the applicants were given the choice to either have the matter postponed to 11 September, 2019 to allow them to contact *Mr Maboke* for trial to commence or to proceed later that day at 14.15 hrs with the trial. Again the record of proceedings shows that the applicants chose the latter. The matter was stood down in the morning as the applicants said they would contact *Mr Maboke* telephonically and resume at 14.15 hrs. At 14.15 hrs there is nothing to suggest that the applicants despite the absence of *Mr Maboke* objected to proceed with the matter. This is understandable since it is the choice they had made in the morning of that day. Given these facts it is therefore difficult to appreciate why now the applicants are alleging that that they were dragged into the trial kicking and screaming as it were in the absence of their legal practitioner *Mr Maboke*.

A sober reading of the record shows that both applicants gave their defence outlines and cross examined the complainant.

In his defence outline the 1st applicant gave a fairly lengthy account of how he got involved in this matter and clearly denied assaulting the complainant in any manner.

The 2nd applicant also detailed how he denies the charge stating that the apparently intoxicated complainant mistook the 2nd applicant as one of the assailants. Infact the 2nd applicant said that he was a victim as the complainant is the one who damaged the 2nd applicant's house. The 2nd applicant said he even made a police report to that effect.

After the complainant testified on how he was attacked, the role of each applicant and injuries he sustained both applicants reasonably cross examined him on material issues and in tandem with their defence outlines. This shows they clearly understood and exercised their rights.

I am therefore not convinced as alleged that the applicants were denied their right to legal representation. They opted to proceed with matter unrepresented. There is nothing *ex facie* the record which shows that the applicants' right to a fair trial was infringed or violated. On the basis alone I am not satisfied that the applicants have made a case for the order sought.

The law

As already said this application is plagued with procedural frailities.

The first issue is whether procedurally it is proper to make a court application for a criminal review in terms of s 29 of the High Court Act [*Cap 7:06*] as read with Order 33 of the High Court Civil Rules 1971. Does this not amount to a conflation of both criminal and civil procedure.

Indeed Order 33 of the High Court Rules 1971 is an umbrella provision which seemingly does not distinguish applications for review in civil or criminal matters. Be that as it may the High Court Rules 1971 are rules designed to deal with civil rather than criminal matters. It is doubtful that these Civil Rules can be competently invoked in criminal processes.

This problem confronted my brother KWENDA J in the matter of *Sesedzai Munobvana and Another v The Presiding Magistrate N.O. (Mr Mudonhi and 2 Others)* HH 280/19, and on page 2 of the cyclostyled judgment he had this to say;

“I am of the firm view that the practice and procedure of setting down applications for criminal review to be dealt with by a single judge in the Motion Court is undesirable for various reasons -----.”

At pages 2 – 5 of the cyclostyled judgment in the matter of *Sesedzai Munobvana* supra KWENDA J lucidly discusses the practical problems and I associate myself with those views.

In casu both respondents were served with this court application for criminal review on 17 September, 2019. None of them filed any notice of opposition. The applicants proceeded to set the matter on the unopposed roll on 24 March, 2021. I was seized with this matter in the Motion Court as an unopposed matter.

The general powers of review of this court are set out in s 26 of the High Court Act [Cap 7:06]. Section 27 of the same Act [Cap 7:06] provides for grounds for review. What is critical *in casu* relates to the powers of review in criminal proceedings set out in s 29 of the High Court Act [Cap 7:06]. Indeed in terms of s 29(2) (b) (iii) this court is vested with powers to set aside any criminal proceedings on review. However the question is how such powers should be exercised. Can such powers be competently exercised by a single judge presiding in the Motion Court (where a matter has been set as per Order 33 of the High Court Rules 1971)?

To my mind the answer lies in the proviso to s 29 of the High Court Rules 1971 which states as follows;

“Provided that a judge of the High Court shall not exercise any of the powers conferred by paragraph (i), (ii) and (iii) of paragraph (b) of subsection (2) unless another judge of the High Court has agreed with the exercise of the power in that particular case;”

The practical problem in this matter is that if I am to accede to the request made by both applicant’s and quash these criminal proceedings (and order a trial *de novo*) I can only competently do so with the concurrence of another judge, and not as lone ranger High Court Judge sitting in the Motion Court. See also *Attorney General v Makamba* 2004 (2) ZLR 63(S [the matter per ZIYAMBI JA and not MALABA JA]. This on its own shows the impropriety of setting down criminal reviews on the unopposed roll purportedly in terms of Order 33 of the High Court Rules 1971.

The other problem in this matter is that I am being requested to intervene in unterminated or incomplete proceedings before the Magistrates Court.

In terms of s 171(1) (b) of the Constitution this court has powers to supervise the Magistrates Court by way of review. The pertinent question is how or when should the High Court exercise such powers in respect of uncompleted criminal proceedings before the Magistrates Court.

John Reid Rowland in the book *Criminal Procedure in Zimbabwe* at 26-11 states as follows in an answer to the question I posed;

“Incomplete proceedings

The High Court’s statutory powers of review can be exercised at any stage of criminal proceedings before an inferior court. However, in uncompleted cases this power should be sparingly exercised. It would only be appropriate to do so in those rare cases where otherwise grave injustice might result or justice might not be obtained. For example if grave irregularity or impropriety occurred in the proceedings, it might be appropriate for the High Court to consider the matter. Generally, however it is preferable to allow proceedings to run their normal completion and seek redress by appeal or review.”

See also;

Ndlovu v Regional Magistrate Eastern Division & Anor. 1989(1) ZLR 264(H); *Dombodzvuku & Anor v Sithole N.O. & Anor.* 2004 (2) ZLR 242 (H) at 245 A – F; *Levy v Benata* 1987 (1) ZLR 120 (S); *Masedza & Ors v Magistrate Rusape & Anor.* 1998 (1) ZLR 26 (H); *Attorney General v Makamba* 2005 (2) ZLR 54 (S); *Alphonsus Obioma Achinalo v Maphios Moyo N.O. & The State* HB 226/16; *Elizabeth Shava v Primrose Magomere N.O. & Anor.* HB 100/17; *Saviour Kasukuwere v Hosea Mujaya N.O. & Zivanai Macharaga N.O. & The State* HH 562/19;

The common thread which runs through all these cases is the general rule that the High Court loathes or should always be slow to intervene in uncompleted or uncompleted proceedings before an inferior court. Such an intervention, as an exception to this general rule, can only be exercised in rare situations where grave injustice would result if the High Court does not intervene.

I am not satisfied that the applicants in this matter have shown that this is such a case which warrants this court’s interference. I have already alluded to the contents of the record of proceedings. Again on this basis the request by the applicants cannot succeed.

I have already made reference to the incompetent order granted by the court *a quo*. That order should be set aside. This matter should be allowed to run its normal course in the court *a quo* without intervention or interference from this court. I have also considered the merits of the application made, despite the wrong procedure having been adopted in the interest of justice.

In light of what I have said I can only make a competent order in resolving this dispute with the concurrence of a fellow judge of this court. I have therefore sought the concurrence of my brother ZISENGWE J in this matter.

Conclusion

My findings are therefore as follows;

- 1. The order by the trial Magistrate to stay his or her own proceedings is incompetent.
- 2. The procedure adopted by the applicants in setting this matter on the unopposed roll under the guise of Order 33 of the High Court Rules 1971 is improper
- 3. The application for criminal review itself clearly lacks merit.
- 4. There is no basis upon which this court should interfere with these uncompleted proceedings in the Magistrates Court.

Disposition

In the result I make the following order;

IT IS ORDERED THAT;

- (a) The order by the court *a quo* staying the proceedings be and is hereby set aside.
- (b) The application for review be and is hereby dismissed.
- (c) The applicants should be summoned to court as soon as reasonably possible for the trial to continue before the same Magistrate and the applicants may engage any counsel of choice if they so wish.

ZISENGWE J. agrees

Ruvengo Maboke and Company, counsel for applicants
National Prosecuting Authority, counsel for 2nd respondent (cited despite non- appearance for purposes of complying with the Order)