

LOVENESS MATIONE
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, HLATSHWAYO JA, & MAVANGIRA AJA
HARARE, MAY 20, 2014 & JULY ..., 2015

A Masango, for the appellant

S Fero, for the respondent

MAVANGIRA AJA: This is an appeal against a decision of the High Court in terms of which the appellant's discharge by the magistrate at the close of the state case was set aside and the matter remitted to the magistrate for continuation of trial.

The background to this matter is that the appellant was arraigned before the Regional Magistrate at Gweru, on a charge of bribery as defined in s 170 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*], alternatively extortion as defined in s 134 of the same Act. She pleaded not guilty. The State led its evidence and after the closure of the state case the defence made an application for the discharge of the appellant. The application was granted by the Regional Magistrate who found the appellant not guilty and acquitted her.

The Chief Law Officer in the Attorney General's office wrote a letter to the Registrar of the High Court in Bulawayo requesting (a) that the record of proceedings be placed before the reviewing judge for consideration; (b) that the decision by the magistrate be

set aside; and, (c) that the trial be ordered to start afresh before a different magistrate. In a review judgment in HB 21/10 the High Court held that the trial magistrate had misdirected herself in discharging the appellant at the close of the State case in circumstances where the state had proved a *prima facie* case against the appellant. It made the following order:

- “1. The discharge of the accused at the end of the State case be and is hereby set aside.
2. The matter is referred back for the continuation of the trial.”

An application was made to the High Court, sitting at Harare, by the appellant’s legal practitioners, seeking the setting aside of the judgment in HB 21/10. The application is said to have been dismissed on the basis that it ought to have been made in Bulawayo. The appellant was subsequently arrested and brought before the Gweru Magistrates Court on 2 October 2012 where a trial *de novo* was commenced before a different magistrate and prosecutor. These fresh proceedings were then set aside subsequent to an urgent chamber application that was filed with the High Court. Thereafter a judge of the High Court granted condonation for the late noting by the appellant of an appeal against the judgment in HB 21/10. The appellant further states in her heads of argument that her prosecution before yet another magistrate, sitting at Gweru, has been stayed pending the determination of this appeal whilst she is on remand. The full circumstances of this allegedly pending trial are, however, not clear on the papers.

The appellant now appeals against the High Court decision in HB 21/10 on the following grounds:

1. The Honourable Court *a quo* erred and grossly misdirected itself in assuming jurisdiction in a matter that it did not have jurisdiction over.

2. The Honourable Court *a quo* erred in treating a letter from the Attorney General Office as an application for review when it did not comply with the law and proceeded to review the matter when in fact there was no service on the appellant and in the absence of any submissions from her.
3. The Honourable Court erred and grossly misdirected itself in overruling the findings of fact of the trial magistrate, Mrs Pise, sitting at Gweru Magistrates Court, when there were no allegations by the State of any gross misdirection on the facts by Mrs Pise which could have warranted the Court's interference.

The appellant prays for the appeal to be allowed with costs and for the order of the High Court in HB 21/10 to be set aside and substituted with an order that:

“The appellant remains acquitted as per the ruling of Her Worship Mrs Pise under Case Number CRB 571/09.”

The grounds of appeal raise one central issue. The issue is whether the High Court has jurisdiction to intervene in the circumstances of this case. The appellant submitted that the only recourse that was open to the respondent was an appeal in terms of s 198 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. That section reads, in relevant part, as follows:-

“198 Conduct of trial

- (1) ...
- (2) ...
- (3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.
- (4) If the Attorney General is dissatisfied with a decision of a Magistrate in terms of subsection (3), he may with the leave of the Judge of the High Court appeal against the decision to the High Court.”

It was the appellant's submission that the State could only act in terms of the above section and consequently, that the court *a quo* proceeded to assume authority in circumstances where it did not have the authority to do so as the letter that was written by the respondent was not in accordance with the said s 198(4)(b).

In response the respondent submitted that the provisions of s 198(4) do not preclude the State from seeking a review of proceedings in terms of s 29 of the High Court Act, [Chapter 7:04]. The respondent further submitted that the High Court has inherent powers of review in terms of s 29 of the High Court Act. Furthermore, that in terms of s 29(4), the High Court or a judge thereof may exercise such review powers whenever it comes to its or his or her notice that any criminal proceedings of any inferior court are not in accordance with real and substantial justice.

S 29(4) of the High Court Act provides:

“Powers on review of criminal proceedings

(1) ...

(2) ...

(3) ...

(4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge 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 and have not been submitted to the High Court or the judge for review.” (emphasis added)

Section 198 (4) of the Criminal procedure and Evidence Act provides that if the Attorney General is not satisfied with the decision of a magistrate, he may, with the leave of a judge of the High Court, appeal against the decision to the High Court. That the Attorney General was dissatisfied appears to be obvious from a reading of the papers.

However, the letter written by or on behalf of the Attorney General to the Registrar of the High Court, Bulawayo, does not purport to be an appeal to the High Court as envisaged in s 198 (4). The letter does not seek to institute or trigger an appeal procedure. It specifically seeks a review by a judge of the High Court of the proceedings before the magistrate at Gweru. The letter having come to the attention of the judge of the High Court, the proceedings in issue came “to the notice of the High Court or a judge of the High Court” and, once that happens, s 29 (4) of the High Court Act empowers the High Court or a judge thereof to exercise review powers.

The powers conferred by s 29(4) are exercised “subject to rules of court.” The court is not aware of, nor was the court’s attention drawn to, any rule of this court in terms of which such review powers ought not to have been exercised *in casu*. Furthermore, s 29 (4) specifically provides that such review powers may be exercised notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review. The Act does not prescribe the form of the notice. The manner in which the proceedings come to the attention of the High Court or a judge of the High Court is not regulated and is thus of no relevance. The fact is that there was sufficient and legitimate cause for the High Court to invoke its powers under s 29 (1) and (2) of the Act. The High Court thus properly assumed jurisdiction on the basis of the alleged gross irregularity.

The Attorney General’s letter to the High Court Registrar states in part:

“In discharging the accused at the close of the State case, the magistrate erroneously applied the wrong test. She made reference to the fact that an accused’s guilt has to be proved beyond reasonable doubt. She also made reference to the State’s failure to call witnesses i.e the prosecutor and the investigating officer in the case in which the state witness was an accused. However, the State is not compelled to call a potentially hostile witness.”

The letter further states:

“The trial court had committed a fundamental misdirection in deciding that a State witness was not worthy of belief by accepting the version put by the accused in cross examination as evidence.”

The above factors set out by the Attorney General pointed to an irregular decision and laid the basis for review. There was therefore nothing amiss in the judge or the High Court reviewing the proceedings or decision that had come to his or its notice. The magistrate adjudged the State case against the threshold of proof beyond a reasonable doubt when she ought to have asked the question whether a *prima facie* case had been established. The magistrate also fell into error in accepting the version put forward by the appellant during cross examination of State witnesses. For these reasons, the Attorney General contended that the decision to discharge the appellant was irregular and warranted the interference of the High Court by way of review. No other provision of this Act or any other law that would preclude the exercise of review powers in terms of s 29 of the High Court Act, by a judge of the High Court or by the High Court itself has been brought to our attention. The fact that the proceedings or decision came to their notice by way of a letter authored by or on behalf of the Attorney General is of no consequence in so far as the exercise of the said review powers is concerned.

For the above reasons the appeal has no merit. The court *a quo* properly assumed jurisdiction.

Section 29 (2) (b) (iii) of the High Court Act becomes pertinent. It provides:

“29 Powers on review of criminal proceedings

(1)

(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings —

(a)

- (b) are not in accordance with real and substantial justice, it may, subject to this section—
- (i); or
 - (ii); or
 - (iii) set aside or correct the proceedings of the inferior court or tribunal or any part thereof or generally give such judgment or impose such sentence 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; or (emphasis added)

Section 29 (2) (b) (iii) of the High Court Act gives the High Court power to correct any part of proceedings of an inferior court or tribunal. In *casu* the High Court corrected the part of the proceedings before the Regional Magistrate in terms of which she granted the application for discharge at the close of the State case. It did so for reasons indicated earlier in this judgment. The court *a quo* was correct in so setting aside the discharge of the appellant by the Regional Magistrate. It also correctly referred the matter back to the magistrates' court for continuation of the trial.

The trial that was commenced before another magistrate at Gweru on 2 October 2012 would not have been properly commenced in the face of the judgment in HB 21/10, which was then extant. In terms of that judgment, the proceedings before the Regional Magistrate were remitted for continuation before the same court. It therefore follows that the fresh proceedings were irregular and were properly set aside. If it is true that there were further proceedings before yet another magistrate at Gweru, such proceedings would also be irregular

In the result, it is ordered as follows:

1. The appeal is hereby dismissed.
2. For the avoidance of doubt, the order in HB 21/10 stands.

GWAUNZA JA: I agree

HLATSHWAYO JA: I agree

Musunga & Associates, appellant's legal practitioners

The Attorney General's Office, respondent's legal practitioners