

THE STATE
versus
ROGER CHIKONYE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 12 April 2023

Criminal Review

MAWADZE J: The haste with which the learned trial magistrate convicted the accused resulted in a serious misdirection in this matter.

This matter was referred to this court by the Chiredzi magistrate under cover of a minute dated 6 February 2023 which reads as follows;

*“THE STATE v RODGER CHIKONYE CHD 565/22
The above matter refers
May the record be placed before the Honourable Judge
I humbly place the record before you with the following remarks;
The accused applied for discharge at close of state case to section 198 (3) of “CPEA”
sic.
The court in error went on to pronounce a final judgment and pronounced verdict of guilty.
The trial magistrate concedes to this regrettable error and seeks the Justice’s directions.”
[sic].*

On 17 February 2023 I responded to the learned trial magistrate in the following manner;

- “(1) Your minute dated 6 February 2023 refers.*
- (2) What order or direction is the trial magistrate seeking*
- (3) What are the views of the state and the accused*
- (4) Your letter is dated 6 February but the said erroneous judgment is dated 8 February 2023.”*

I only got the learned trial magistrate's response on 6 April 20223 and the minute reads as follows;

- “1. *The trial magistrate seeks that the judgment entered in error he quationed or whatever honourable Justice may deem seek. [sic]*
2. *Enclosed are the views and submissions of the state and the accused.*
3. *The dating was a typing error and that is regrettable. My apologies.” [sic]*

The facts of the matter giving rise to this case are as follows;

The accused was arraigned before the trial magistrate sitting at Chiredzi for contravening section 7 (5) of the *Maintenance of Peace and Order Act [Chapter 11:23]* which creates an offence of failure to give notice of a gathering to a Regulatory Authority.

The 46-year-old accused who resides at No. 2332 Bimha road, Tshovani Township, Chiredzi is apparently a local councillor under the auspices of either the Movement for Democratic Change Alliance political party [MDC Alliance] or the Citizens Coalition for Change party [CCC]. It is not clear to which political party the accused actually belongs to.

It is alleged that on 11 July 2022 at about 1630hrs the accused person convened a meeting under a baobab tree in Melourne Park, Chiredzi where about twenty-five people attended.

The police were allegedly tipped off about the said meeting or gathering resulting in the police pouncing upon the accused. The accused is said to have been asked by the police to produce the authority for convening the meeting. It is said the accused failed to do so resulting in his arrest.

The accused who was legally represented pleaded not guilty to the charge.

In his defence outline the accused stated that the type of the meeting he was holding did not require the requisite notice envisaged in section 7 of the *Maintenance of Peace and Order Act [Chapter 11:23]*. The accused alleged that it was not a public gathering or meeting. Instead, the accused said he was simply discharging his duties as an elected local councillor by giving the residents a feed back on what involves those who elected him.

In the course of the trial a number of state witnesses including the police officers and another elected councillor [presumably from a rival political party] testified.

At the close of the prosecution case the accused applied for a discharge in terms of section 198 (3) of the Criminal Procedure and Evidence Act *[Chapter 9:07]* ostensibly on the

basis that no *prima facie* case had been established against him. This application was opposed by the state.

After hearing submissions from both the accused's counsel and the trial prosecutor the learned trial magistrate proceeded to deliver a full dressed judgement in which the accused was found guilty as charged.

The learned trial magistrate inappropriately applied the provisions of section 198 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07] and entered the following verdict;

"The accused is hereby found guilty as charged"

It is needless to say that the accused had not given evidence in his own case and or called his own witnesses. Instead, a final judgment in the matter was rendered prematurely for reasons which are difficult to follow or understand.

The trial magistrate even in the referral minute does not state what informed this course of action. Was it sheer ignorance on the part of the learned trial magistrate or he was so overzealous and keen to convict the accused that all procedural sanity was tossed out of the window? It is not clear as at what stage the learned trial magistrate experienced his or her Damascene moment. Probably it was when he or she was about to sentence the accused that the Emperor was alerted by the parties that he or she was not dressed as it were.

One would be forgiven to believe that the interpretation of section 198 (3) of the of the Criminal Procedure and Evidence Act [Chapter 9:07] which relates to the discharge of an accused at the close of the prosecution case is a well beaten path. The *locus classicus* is the case of *State v Kachipare 1998 (2) ZLR 271 (S)*. See also *Prince Chokuwa & Anor v The State HMA 53/20*.

In considering the provisions of section 198 (3) of the of the Criminal Procedure and Evidence Act [Chapter 9:07] the court at that stage would not be dealing with the accused's defence. This is so because at that stage no evidence would have been adduced or placed before the trial court by the accused. What is therefore subjected to scrutiny at this stage is the prosecution case in order to establish as to whether a *prima facie* case has been made.

The irregularity or misdirection in *casu* is therefore self-evident or clear. A final judgment was prematurely rendered before the criminal trial ran its full course as it were.

It is clear that this resulted in a serious miscarriage of justice borne out of gross irregularity and a misunderstanding of the law. All the learned trial magistrate was to do was to give a ruling on an application made in terms of section 198 (3) of the of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and not to render a final judgment in the matter.

The next stage in the circumstances is to consider the appropriate action to take. This is why I directed the learned trial magistrate to also seek both the views of the trial prosecutor and counsel for the accused before referring this matter to this court.

In terms of section 65 (i) of the Constitution an accused irrespective of the alleged offence is entitled to a fair trial or hearing before an independent and impartial court. Further, in terms of section 70 (i) (h) of the Constitution an accused is entitled to adduce and challenge evidence led against him or her. All these rights derived from the Constitution were clearly not observed but were instead violated by the learned trial magistrate in his or her incomprehensible haste to convict the accused for unclear reasons.

I do not agree with *Mr Chavi* for the accused who in his written submissions after I requested for both parties' views [See the attached written submissions] argued that the proper course of action in the circumstances is to grant a permanent stay of proceedings.

While I do concede that a gross injustice has occurred and that the accused has been clearly inconvenienced the remedy prescribed by the counsel for the accused is a wrong one.

In my respectful view this record of proceedings is being referred to this court ostensibly for review in terms of section 29 (1) of the *High Court Act [Chapter 7:06]*. To that extent therefore this court can only exercise its review powers.

There is no application which has been made by the accused or by any party to seek an order for a permanent stay of these criminal proceedings. It is for this simple reason that *Mr Chavi* for the accused completely misses the target by a thousand miles as it were when he submitted that an order for a permanent stay of the proceedings should be granted in the circumstances.

It is clear that *Mr Chavi* conflates the procedure for review and the permanent stay in criminal proceedings. The requirements for a criminal review and those of a permanent stay of proceedings are different and distinct as day and night as it were. The considerations are different.

Put differently a court can not competently grant a permanent stay of criminal proceedings in the absence of such an application having been made and under the guise of exercising its review powers.

The appropriate remedy in *casu* which would cure the said misdirection can only be in terms section 29 (1) of the *High Court Act [Chapter 7:06]*.

The proceedings in the matter, for reasons already stated, cannot be allowed to stand. They should be quashed and the purported verdict entered set aside. This is so because the procedural irregularity is so fundamental. It goes to the root of the trial itself. One may even venture to say as things stand there is no trial at all to talk about. The so called guilty verdict entered against the accused is a result of gross irregularity as the accused was not even afforded the constitutional right to properly defend himself by adducing evidence.

The panacea in the circumstances would be to quash the proceedings and order a trial *de novo*. For purposes of transparency and fairness such a trial *de novo* should be before a different magistrate. Such a course of action would ensure that justice is not only done but seen to be done to both parties involved in this matter. Further the accused would be assured that this trial would be before an impartial court not a tainted one as the initial court *a quo*.

In the exercise of my review powers in terms of section 29 (b) (1) of the *High Court Act [Chapter 7:06]* I shall proceed to quash the proceedings. In terms of section 29 (b) (v) of the *High Court Act [Chapter 7:06]* I shall remit the matter for a trial *de novo* before a different magistrate. This is in line with the powers vested in this court in terms of section 29 (b) (i) to (viii) of the *High Court Act [Chapter 7:06]*. The substantial miscarriage of justice in this case would thus be cured.

In the result it is ordered that;

- i) The proceedings in this matter be and are hereby quashed and the verdict set aside.
- ii) The matter be and is hereby remitted for a trial *de novo* before a different magistrate.

MAWADZE J

ZISENGWE J agrees.....