

ANDREW MUTUMANI
Versus

THE MAGISTRATE P GWEZHIRA N.O
And

THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 25 March 2021 and 1 April 2021

Opposed Application

T. Tazvitya, for the applicants
J. Chingwinyiso, for the Second Respondent

MWAYERA J: In what appears to be fashionable amongst some legal practitioners, the applicant approached the court for review of the magistrate's decision to dismiss an application for discharge at the close of the state case. The first respondent sued in his official capacity naturally did not file an opposition papers an indication he will be bound by the court's decision. The second respondent opposed the application. In this case the issue that the court has to decide on is whether or not there is gross irregularity in the record of proceedings warranting interference with unterminated proceedings of the trial court by this court.

The brief facts of the case are as follows. The applicant was arraigned before the magistrate court for trial before the first respondent. The allegations being that the applicant was found in possession of a live pangolin, a specially protected animal without a permit in contravention of s 45 (i) (b) as read with s 128 (i) (b) of the Parks and Wildlife Act. [*Chapter 20:14*]. The applicant pleaded not guilty and trial commenced. Three witness gave evidence on behalf of the state. The state thereafter closed its case and the applicant in terms of section 198 (3) of The Criminal Procedure and Evidence Act [*Chapter 9:07*] applied for discharge and acquittal which application was dismissed by the first respondent. The relevant section 198 (3) reads:

“If at the close of the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge or other offence of which he might be convicted therein, it shall return a verdict of not guilty.”

In the present case the court dismissed the application for discharge and ruled that there was a *prima facie* case against the accused person warranting accused placement on his defence. It is that decision directing proceeding to the defence case which the applicant seeks to be reviewed with a prayer for his acquittal. A perusal of the record of proceeding from the Magistrate Court reveals that the state adduced both *viva voce* and documentary evidence before it closed its case. The two police officers who were at the scene of crime testified and so did the parks official who certified the animal in issue as a pangolin. The pangolin was weighed and evaluated and the documentary evidence was adduced before the court by consent. In assessing the evidence adduced the trial court observed that material evidence of the state witnesses tallied in so far as they arrested the applicant whilst he was in possession of a pangolin. The minor differences on circumstances of arrest did not go to the root of the matter. Effectively it was placed before the court that at the time of the applicant's arrest the latter had a pangolin in his possession. The said pangolin was weighed and confirmed as a pangolin by a parks officer of 29 years experience. The pangolin was further weighed at ZIMPOST and witnesses and the applicant (then accused) attested by signing on the weight certificate. The trial court made a finding that the discrepancies of detail on arrest did not cloud the evidence that the state witnesses recovered a pangolin from the applicant. The trial court ruled that the evidence adduced established a *prima facie* case. The court in coming up with its decision was alive to the import of s 198. The trial magistrate further relied on cases submitted by the applicant on assessing whether or not to discharge, among others the cases of *A G v Bvuma* and others 1987 (2) ZLR 96, *A G v Mzizi* 1991 (2) ZLR 32 and *The State v Tsvangirai and Others* HH 1190/03. The Tsvangirai case spelt out that a discharge at the close of the state case will be in order were:

- a. There is no evidence to prove an essential elements of the offence or
- b. There is no evidence on which a reasonable court acting carefully might properly convict
or
- c. The evidence is so manifesting unreliable that no proper court could safely act on it.”

The trial court was appreciative of what falls for consideration in deciding whether or not a *prima facie* case has been established and it concluded that there was indeed evidence linking the applicant with the commission of the offence. The question which falls for consideration is whether or not at the close of the state case there is evidence upon which a reasonable court acting carefully might convict. If the answer to this question is in the affirmative then the accused person ought to be placed on his defence. The establishment of a *prima facie* case is a condition precedent to placement of an accused to his defence. The trial court has a

mandate and discretion to assess whether or not there is evidence amounting to a *prima facie* case warranting the placement of the accused to his defence. In the case of *S v Petronella Nyarugwe* HH 42/16 case cited by respondent counsel. A *prima facie* case was held to exist when one can say there has been shown, on evidence led, a probable case to put the accused on his defence. Generally probable cause or *prima facie* case is made where all the essential elements of the offence charged, or any other offence on which accused may be convicted have been proved on a balance of probabilities. See also *S v Veldthuizen* 1982 (3) SA 413 A at 416 and *S v Hartelebury and Another* 1985 (1) ZLR 1 (H) 3.

In the present case the trial court concluded that the discrepancies in the witness's testimony were not of such a nature and magnitude as to distort the essential elements of the offence. The court deduced from the evidence adduced at the close of the state case that the applicant was arrested while in possession of a pangolin which was confirmed as such and also taken for weighing. The court held that such evidence constituted a *prima facie* case and thus directed the matter proceeds to defence case.

The applicant took offence with the dismissal of its application and argued that the court by ruling that applicant be placed on his defence in the circumstances was a gross misdirection as the decision was irrational and unprocedural. The applicant further argued that by including words to the effect that the accused explain his side of the story the court shifted the onus of proof to the accused for him to prove his innocence. I must hasten to mention that it is unfortunate that Mr *Tazvitya* sought to scrutinise reasons for ruling piece meal with the net effect of distorting the court order. The court order is clear on p 76 of the record. The trial magistrate having ploughed through the law and evidence concluded that a *prima facie* case had been established and order as follows:

“Accordingly the application for discharge at the close of the state case is not upheld.”

The net effect of the order is that the application for discharge at the close of the state case was dismissed. Even if one were to take the piecemeal approach to the ruling adopted by Mr *Tazvitya* the wording of the ruling complained of does not by any chance shift any onus on the accused to prove his innocence. The trial court reasoned as follows:

“The court is however convinced that the evidence led this far suffices to establish a *prima facie* case against the accused person. The accused person should be placed to his defence so that he can explain his side of the story.”

This by no means does not mean the accused has the onus to prove his innocence neither does it impugn on the right of the accused to remain silent during the defence case. It

is simply that there is a *prima facie* case warranting the placement of accused on his defence for his version to be heard. If he elects not to testify that is his version and if on the other hand he elects to testify that is his version. This certainly does not detract from the fact that in a criminal trial the state has the onus to prove the guilty of accused beyond reasonable doubt. Section 18 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is instructive. Section 18 (1):

“Subject to subsection (2), no person shall be held to be guilty of a crime in terms of this Code or any other enactment unless each essential element of the crime is proved beyond a reasonable doubt.”

This is not the same measure at the close of the state case. It is worth noting that at the close of the state case, the state is only mandated to establish a *prima facie* case unlike at the close of all evidence when the guilty is to be established beyond reasonable doubt. The trial court thus reasoned that the evidence by the 2 police officers, the parks official and documentary evidence adduced at the close of the state case sufficed to prove a *prima facie* case or established that accused has a case to answer. The applicant sought to impugn the finding of a *prima facie* case on the basis that the live pangolin was not produced in court. It is interesting to note that the applicant in the trial court consented to production of the certificate of weight of the pangolin in question and also the value. Not that it would make a difference but worth highlighting is the fact that applicant’s counsel is counsel of record in the trial court. With regards to the fact that the live pangolin was not produced that would not have an effect on the court’s finding of there being a *prima facie* case established at the close of the state case. The observation of the court in *S v Kamone* HH 216/18 (cited by respondent) on production of live exhibits in court shades light and is instructive. It was held that:-

“It did not need to have the animal itself in face of solid testimony from an ecologist, an animal expert in his own right and his certificate of identification, any more than a court needs to see the corpse in a murder case, in the face of the testimony of a pathologist and his post mortem report.”

In this case the court basing on the fact that accused was arrested in possession of a pangolin duly confirmed as such by the parks officer held that there was a *prima facie* case warranting placement of the applicant to his defence. In any event such confirmation of the pangolin by the official is authentic as the presumption of the species of the animal alleged is legally sanctioned in favour of the prosecution unless the contrary is proved. Section 97 (13) of the Parks and Wildlife Act [*Chapter 26:14*] is opposite. It reads:

“Whenever in any prosecution in respect of an offence in terms of this Act it is alleged in any indictment or charge that the offence was committed in connection with or in respect any species of animal, fish or plant stated in such indictment or charge, it shall be presumed that the offence was committed in connection with or in respect of such species of animal, fish or plant unless the contrary is proved.”

As at the close of the state case it was clear the charge involved violation of the Parks and Wildlife Act by alleged possession of a pangolin which animal other than the presumption operating in favour of the prosecution was confirmed by the parks official who testified. Thus the fact that the pangolin was not physically tendered as an exhibit does not taint the trial court’s finding that the applicant was arrested at the crime scene whilst in possession of a pangolin which was taken for weighing. It is on that basis that the court ruled there was a *prima facie* case warranting placement of the applicant to his defence. The argument that the applicant was entrapped and lured to the crime scene again does not give credence to the applicant’s attack of the court’s finding of there being a *prima facie* case at the close of the state case. The use of informers and traps is not foreign to the criminal justice legal system. The manner and nature in which the entrapment occurs falls into consideration but generally entrapment is not a defence in the criminal law system. Section 260 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is instructive. It provides as follows:

“It shall not be a defence to a crime that the accused was trapped into committing the crime concerned, that is to say that the police or other authority or person, by using any inducement or encouragement, caused the accused to commit it for the purpose of obtaining evidence of its commission, but a court may, where it considers that unfair or undesirable entrapment methods were used by the police or other authority or person, take the manner of such entrapment into account as a factor in mitigation of sentence.”

In the present case the fact that there was entrapment and that the informer did not testify does not change the colour of evidence adduced before the trial court. The charge sheet and state outline and the witnesses Salecio Gunda and Johannes Mukwaira mentioned the accused was arrested at Tanganda Halt. That the two police officers’ evidence does not tally on whether the accused approached the vehicle or the details approached him is not a material discrepancy for it does not distort the basis of the finding of the trial court. The trial court concluded that the applicant was arrested at the crime scene in possession of a pangolin. That is the basis of concluding that at the close of the state case, the state has established a *prima facie* case calling for placement of the accused to his defence. The discrepancies in the witness’s testimony is immaterial as it left the crucial evidence of arrest of the accused in

possession of a pangolin intact. See *S v Nduna and Another* 2003 (1) ZLR 440 in which the court held that:

“Discrepancies in witnesses’ evidence must be of such magnitude and value that it goes to the root of the matter to such an extent and their presence would no doubt give a different complexion of the matter altogether. Discrepancies whose presence do not usher in that change should be regarded as immaterial and as such of no value to determination of the truth or otherwise of the matter at hand”

As in the present case the discrepancy in evidence on the issue of how applicant was approached at the scene to effect arrest does not affect the material nature of evidence in that the basis of coming to the conclusion that a *prima facie* case was established was that the applicant was arrested at the crime scene in possession of a pangolin. See *S v Mpetha and Others* 1983 (4) SA 262 in which the court emphasised that at the close of the state case a court may acquit where the evidence of the prosecution witness has been discredited and or utterly destroyed by cross examination that no part of his material evidence can possibly be believed.(underlining my emphasis) See also *AG v Tarwireyi* SC 83/97. *In casu* the evidence that the applicant was arrested at the crime scene in possession of a pangolin remained intact despite the cross-examination. That the evidence of alleged possession and confirmation that the animal is a pangolin (protected species) renders nugatory the applicant’s assertion that the trial court’s decision to place the accused to his defence was irrational, unprocedural and unlawful. The trial court was alive to the evidence adduced when it concluded that the state had established a *prima facie* case warranting placement of the accused to his defence.

Both counsel addressed the court extensively on the settled position on interference with uninterminated cases. The cited case of *AG v Makamba* 2002 (2) ZLR 54 (S) summarises the general position adopted that superior courts do not encourage the bringing of incomplete proceedings for review. In the *Makamba* case MALABA JA (as he then was) stated as follows:

“The general rule is that a superior court should intervene in uncompleted proceedings of the lower courts only in exceptional circumstances of proved gross irregularity violating the proceedings and giving rise to the miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the right of the litigant.”

See also *Ndlovu v Regional Magistrate Eastern Division and Another* HH 54/89 and *Murapo and Others v Bhila NO and Another* 2010 (1) ZLR 321. In the present case it is apparent the applicant is seeking to have the judgment of the trial court dismissing an application for discharge at the close of the state case set aside. The basis being that the court

came to a wrong conclusion on facts and law. The applicant argued the evidence of the witnesses was unreliable as it was woven with inconsistencies. This on its own speaks volumes on the nature of challenge not being a procedural challenge which calls for review but it is clearly attacking the court's conclusion as a wrong conclusion on facts and law. The latter is an infraction which would require redress by way of appeal and not review. The remarks by HUNGWE J in *Rose v S* HH 71/12 are pertinent. He opined that the essential question in review proceedings is not the correctness of the decision under review but its validity. See also *Masedza and Others v Magistrate Rusape and Another* 1998 (1) ZLR 36 which was quoted with approval in remarks by MATHONSI J (as he then was) in *Archinulo v Moyo and Another* 2016 (2) ZLR 417 C when the judge held that:

“A superior court should always be slow to intervene in untermiated proceedings in an inferior court and will ordinarily not sit in judgment over a matter that is before a court below except in very rare situations where grave injustice would occur if a superior court does not intervene.... The general rule is that this court's power of review is exercised only after termination of criminal case.”

The common thread in all these cases is that the superior courts should be wary of the difference between a review and an appeal. A review targets procedural issues and not the correctness or otherwise of the decision. The superior court should only interfere in untermiated proceedings in the lower court in exceptional circumstances of gross irregularities which would occasion injustice. In the present case the applicant seems aggrieved by the decision of the court *a quo* and argues primarily that the decision is not justified by evidence. This clearly does not call for redress by way of review but appeal. Generally in criminal matters appeals are entertained in completed matters. The applicant simply does not agree with the court's finding that a *prima facie* case has been established at the close of the state case. That the applicant does not agree with the decision is not a ground for review as it does not speak to any procedural irregularity. The application is further premised on a misinterpretation of the court's ruling that placement of the accused to his defence to give his version would amount to shifting the onus to the applicant. No one has taken away the applicant's right to silence if he makes that election during the defence case.

The record of proceedings from the trial court is clear and the court's finding on there being a *prima facie* case is well anchored on assessed evidence. The applicant in expressing disagreement with the court's finding sought to unprocedurally question the correctness or otherwise of the decision by way of review. There is nothing untoward, unprocedural and

injudicious displayed to warrant interference with the proceedings in the court *a quo*. The application for review is baseless and must fail.

Accordingly it is ordered that:

1. The application for review be and is hereby dismissed.
2. The matter is remitted to the Magistrate Court for continuation of trial before the same magistrate.
3. The matter is to proceed to the defence case as directed by the 1st Respondent.

Bere Brothers, applicants' legal practitioners
National Prosecuting Authority, state's legal practitioners