GINGER VHIYANO

And

SIDINGUMUZI NCUBE

And

TYSON RUVANDO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 27 MARCH 2024 AND 2 MAY 2024

Application for Leave to Appeal to the Supreme Court

T. Tavengwa, for the 1st applicant
K. Ngwenya, for the 2nd applicant
K. Nxumalo, for the 3rd applicant

TAKUVA J: This is an application for leave to appeal against the interlocutory judgment of this court under HB 88/23 dismissing the 1st, 2nd and 3rd applicants' application for discharge at the close of the State Case. For the avoidance of doubt the 2nd accused did not apply for discharge at the close of the State Case. He is as a result not a participant in these proceedings. The application is based on the provisions of section 44 (5) of the High Court Act (Chapter 7:06) which states;

> "44
>
> (5) Subject to rules of court, where a Judge of the High Court has made an interlocutory judgment in relation to any criminal proceedings before the High Court –
>
> (a) the person against whom the criminal proceedings are being or will be brought;
>
> or
>
> (b) the Prosecutor-General;

> may with the leave of a Judge of the High Court or, if a Judge of that court refuses to grant leave, with the leave of a Judge of the Supreme Court, appeal to the Supreme Court against the interlocutory judgment."

The background facts are fully captured under HB 88-23. Briefly, they are that the three applicants together with one Japhet Changanda appeared before me facing a charge of "theft of gold" in contravention of section 113 of the Criminal Law (Codification and Reform) Act (Chapter 9:23).

The respondent led and presented its evidence and closed its case after which the 3 applicants applied for discharge in pursuance of the provisions of section 198(3) of the Criminal Procedure and Evidence Act (Chapter 9:23) on the belief that the state had failed to prove a *prima facie* case against all of them warranting them to be placed on their defences. This court dismissed the application in a judgment under HB 88/23 delivered on the 12th of May 2023.

The appellants were dissatisfied and intent to challenge this decision by appealing to the Supreme Court. This court's judgment dismissing the applicants' application for discharge at the close of the State case is an interlocutory judgment requiring leave to appeal to the Supreme Court as provided in section 55(5) of the High Court Act. Accordingly, all applicants seek an order granting them leave to appeal to the Supreme Court. Further, all the applicants tendered affidavits in support of their applications.

The application is opposed by the State

GROUNDS OF APPEAL

All three applicants filed their grounds of appeal separately.

FIRST APPLICANT'S GROUNDS (GINGER VHIYANO)

The summarized grounds of appeal are that the court *a quo* erred or misdirected itself in the following aspects;

1. In refusing to discharge the applicant at the close of the State case when the State had failed to prove a nexus between the applicant and 2nd accused person.
2. In refusing to discharge the applicant, yet the State failed to prove on a *prima facie* basis that Ex 5 is the duplicate of the armoury key.

3. In finding that a *prima facie* case had been proven, yet the State failed to establish the degree of participation in the alleged commission of the offence.

4. In omitting to decide material issues put before it rendering the whole judgement bat at law.

5. In making actual findings not supported by evidence to the extent that no reasonable court applying its mind would have arrived at the same conclusion.

6. In finding that the source of gold was a mystery and then say the 14.5 kg was part of the 28.5 kgs.

After going through the respondent's opposing affidavit, 1st applicant filed an Answering Affidavit in which he raised a flurry of points *in limine* challenging the Prosecutor's authority to prosecute this matter. He alleged rather surprisingly that the State Counsel *in casu* has no *locus standi injudicio* to represent the National Prosecuting Authority in these proceedings. He prayed for the opposing papers to be expunged from the record and the matter to be heard unopposed.

First applicant also contented that the affidavit relied on by the respondent is "irregular" and "fatally defective" for the following reasons;

(a) that the Commissioner of Oaths (a member of the ZRP) "is the State and the respondent is the State." Put differently, the State prepared its affidavit and commissioned it.

(b) that the person who commissioned the affidavit is unknown and his rank is unknown rendering the affidavit fatally defective.

DUPLICATION OF CONVICTIONS

The argument is that this is a case of *ultra fois* acquit in that applicant was acquitted at Plumtree Magistrates' court under CRB 118/18. This case involved theft of 14 kgs which the State now says was part of 28 kgs or so he is charged with *in casu*. He alleges that the facts are the same, the parties are the same and the evidence is the same.

MERITS

First applicant repeated his criticism of this court's findings on Ex 5 (the key) and what the respondent's witnesses said. He also relied on the fact that the evidence according to his interpretation or understanding does not link him to the 2nd accused. The 1st applicant averred that it is not for him to demonstrate how the "the key found its way to the 2nd accused." According to him, his "association" with the 2nd accused was not established by the State.

On these grounds, 1st applicant averred that his appeal has prospects of success.

SECOND APPLICANT'S GROUNDS OF APPEAL (SIDINGUMUZI NCUBE)

It is 2nd applicant's submission that this court erred and misdirected itself in law by dismissing the applicant's application yet the evidence adduced by the State did not prove a *prima facie* case to link the applicant to the charge of theft. It was also contented that this court erred and misdirected itself in both law and the facts by dismissing applicant's application based on "factual" findings which are not supported by evidence placed before the court.

As regards the link, it was argued that the respondent did not lead and/or place any evidence before this Court to show that he took any gold from the armoury. There is no evidence to show, *prima facie* that 2nd applicant unlawfully took 28,5 kgs of gold intending to deprive ZRP permanently of its possession and control of the said gold. It is for these reasons that 2nd applicant is of the view that there is no basis for placing him on his defence.

The contention that the court made certain factual findings against 2nd applicant is based on three factors namely;

(a) that the 14 kgs found in possession of Jephat Chaganda is part of the 28 kgs of gold.

(b) that Lovemore Sibanda said the $30 000-00 given to applicant by Jephat Chaganda is "my share of the loot"

(c) that Lovemore Sibanda's evidence is to the effect that the court was duped into believing a "concocted version of events."

Further 2nd applicant submitted that although superior courts are generally reluctant to interfere with incomplete proceedings as *in casu,* he however contend that this is an appropriate

case to so interfere and the interests of justice favours the granting of this application for the following reasons:-

(a) there is no prejudice to anyone if the application is granted.

(b) In terms of s. 69(3) of the Constitution he has a right of access to the courts.

(e) It is encumbent that this court grants leave to appeal to the Supreme Court.

Finally, 2nd applicant submitted that he has placed sufficient grounds justifying and warranting the relief being sought in the draft.

THIRD APPLICANT'S GROUNDS OF APPEAL (TYSON RUVANDO)

Third appellant argued that this court erred and misdirected itself in law by dismissing his application yet the evidence adduced by the State did not prove a *prima facie* case to link the applicant to the charge of theft.

Secondly, it was submitted that the court erred and misdirected itself by dismissing applicant's application based on factual findings which are not supported by evidence placed before the court.

As regards the 1st point it was submitted that there is no evidence before the court to show the relationship or link between the 28 kgs of gold that the applicant is said to have stolen and the 14.5 kgs of gold that was released to Lovemore Sibanda. Further, 3rd applicant argued that there was no evidence placed before the court to show that on the 7th day of July 2018, the 2nd applicant was in the company of Jephat Chaganda.

The factual finding impugned as not supported by evidence is that the applicant was "given his share of US$30 000-00" by Jephat Chaganda. The argument is that Lovemore Sibanda did not give such evidemce. In the circumstances, it was submitted that there is a reasonably arguable case and applicant has prospects of success on the intended appeal. Therefore leave should be granted.

THE LAW

As shown by the background facts, this application arises from a dismissal of an application for discharge at the close of the State case in pursuance of the provisions of section 198(3) of the Criminal Procedure and Evidence Act (Chapter 9:23). The section provides;

"(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 Prosecutor-General is dissatisfied with a decision –

a) of a judge of the High Court in terms of ss (3), he may with the leave of a Judge of the Supreme Court, appeal against the decision to the Supreme Court; or

b) of a Magistrate in terms of ss (3), he may, with the leave of a Judge of the High Court, appeal against the decision to the High Court."

This section was applied in many cases in our jurisdiction including *A.G* v *Bennett* 2011 (1) ZLR 396, *S* v *Tsvangirai & Ors* 2000 (2) ZLR 88 (H), *Rubaya* v *The State & Ors* SC 84-19.

As regards the right to appeal by an accused person at this stage, it was held by the Supreme Court per MATHONSI JA in *Rubaya* v *The State & Ors supra* that section 44(5) of the High Court Act grants an accused in such a scenario the right to appeal to the Supreme Court. In terms of the doctrine of *stare decisis*, I am bound by the Supreme Court's decision and I accordingly proceed on that basis.

In *Prosecutor General of Zimbabwe* v *Intratrek Zimbabwe (Pvt) Ltd & Ors* SC 19-19 while commenting on the requirement of prospects of success stated that:-

"As for the requirement of leave to appeal to be obtained before the right to appeal can be exercised, this Court is vested with an essentially gatekeeping function, *viz*, to allow only cases that deserve to be heard on appeal to pass … What this entails is an evaluation of the grounds of appeal to be relied upon and their prospects of success at the intended appeal, see *Chikurunhe & Ors* v *Zimbabwe Financial Holdings* SC 10-09, *Chipangura* v *Environmental Management Authority* SC 35-12"

See also *S* v *Kachipare* 1998 (2) ZLR 271 (S) at 276 D-E, *AG* v *Tarwirei* 1997 (1) ZLR 575 (S) at 575 g.

It is also a principle of our courts that superior courts will not ordinarily sit in judgment over matters that are still before the lower courts except in very rare cases where a grave injustice would occur if the court does not interfere. MATHONSI JA put it very succinctly in Rubaya's case *supra* when he said:

> "Superior courts are always very slow to interfere in the unterminated proceedings of a lower court except in cases of gross irregularities in the proceedings or where it is apparent that justice might not be attained by other means. See *A.G.* v *Makamba* 2005 (2) ZLR 54 (S) at 64 C. It is undesirable to express a view on unterminated proceedings and in the process interfere with the judicial discretion of the lower court still seized with the matter." (my emphasis).

At this stage of the trial, the State is not required to prove its case beyond a reasonable doubt, but merely to set out a *prima facie* case for the accused person to answer.

The court in *S* v *Tengende & Ors* 1981 ZLR 445 lessened the burden resting on an applicant for leave to appeal when it stated:-

> "I prefer therefore to approach the matter by considering not how good the prospects must be before leave is granted but how poor they must be before leave is refused. And for this reason I think the test that has been mooted that the applicant must show reasonable prospects of success – put the matter too high, in my view leave to appeal should be granted if the applicant makes out a reasonably arguable case."

APPLICATION OF THE LAW TO THE FACTS

FIRST APPLICANT

Let me deal with the points *in limine* first. The point *in limine* in respect of the authority of the Prosecutor to prosecute is devoid of merit for the following reasons;

Firstly, the Prosecutor is a member of the National Prosecuting Authority a body corporate established in terms of section 258 of the Constitution of Zimbabwe Amendment (No 20) Act, 2013. He was so appointed in terms of section 9 of the National Prosecuting Authority Act [Chapter 7:20] to institute and conduct criminal proceedings and to carry out any necessary functions incidental to instituting and conducting such criminal proceedings in accordance with the provisions of section 12(4)(5) of the National Prosecuting Authority Act. A Prosecutor is authorized in writing by the Prosecutor-General, or by a person designated by the Prosecutor General to appear in criminal matters.

I did not hear Counsel for the 1st applicant to allege or meaningfully challenge the appointment procedure outlined above. Once properly appointed, the State Counsel will be clothed with the power to file an opposing affidavit which is a function incidental to conducting a criminal trial in terms of section 12(1)(b) of the National Prosecuting Authority Act.

It should be noted that this point *in limine* was raised in the answering affidavit against a State Counsel who had all along been handling the matter. *Mr Tavengwa* for the 1st applicant further submitted quite strongly that the opposing affidavit filed by the State Counsel is defective and should be expunged from the record rendering the application unopposed.

He also submitted that the affidavit should not have been signed by a Commissioner of Oaths who is a member of the ZRP because in his words it would amount to the "State making and commissioning its own affidavit."

I am not persuaded at all by this argument. Firstly, the suggestion that *Mr Thobekani Mathanzima Nyathi* (the State Counsel) has no *locus standi* to swear to the opposing affidavit is ludicrous. It is common cause that *Mr Nyathi* is an employee of the National Prosecuting Authority. Further it is not disputed that the Prosecutor-General is the head of the National Prosecuting Authority and that *Mr Nyathi* is a subordinate of the Prosecutor-General. He has delegated authority to act on behalf of the Prosecutor-General – see section 9 of the National Prosecuting Authority Act.

This point *in limine* has no merit and is hereby dismissed.

As regards the alleged conflict of interest arising from the Commissioner of Oaths being an "employee" of the State, I find this submission fascinating. The Zimbabwe Republic Police and the National Prosecuting Authority are different entities – see The *Prosecutor-General* v *Beatrice Mtetwa* HH 82-16 where it was held that it would be far-fetched to allege that Commissioners of Oaths who are police officers are biased in favour of the National Prosecuting Authority. In my view, there is no conceivable bias *in casu* and the point *in limine* lacks merit. It is hereby dismissed.

Another startling submission is that the 1st respondent's opposing affidavit was not sworn to before a Commissioner of Oaths because it does not have confirmation that the deponent appeared before that Commissioner of Oaths and swore that he was aware of the contents of the affidavit.

I take the view that this contention arises from a misreading of the provisions of the Justice of Peace and Commissioners of Oaths Act. I say so because there is no provision in that Act that calls for the confirmation by the Commissioner of Oaths that the deponent appeared before him and swore that he was aware of the contents of the affidavit. Such a requirement is not part of our law – see *S* v *Hurle & Ors* (2) 1998(2) ZLR 42(H) where the court stated that the signature of the Commissioner of Oaths was enough confirmation that the deponent appeared before him and took an oath.

Earlier I stated that this submission is surprising because if we follow it to its logical conclusion it leads us to the conclusion that 1st applicant's own founding affidavit is also defective for the same reason. The 1st applicant is blowing hot and cold at the same time.

It follows therefore that the point in limine has no merit and ought to be dismissed.

Equally meritless is the allegation that the 1st respondent's opposing affidavit is defective for want of identification of the name of the Commissioner of Oaths. The laws that govern the signing of affidavits by the deponent and the Commissioner of Oaths require that the deponent must sign his affidavit before a Commissioner of Oaths who also signs that affidavit to confirm that the deponent appeared before him. See *Unified Africa Technologies (Pvt) Ltd* v *Twenty Third Century Systems (Pvt) Ltd* HH 118-16.

As regards the defence of *ultra fois acquit* applicant knows that this is a red herring in that this acquittal is strongly challenged by the respondent. In fact all the participants in that trial including the Magistrate, Prosecutor and Defence Counsel are facing criminal charges in this court. Accordingly this point *in limine* is dismissed.

I now turn to consider the arguments on merit.

The issue here is whether or not this is a case where leave to appeal should be granted. Put differently, the applicants must satisfy the court that their intended appeals enjoy prospects of success or that they have made out reasonably arguable cases.

1ST APPLICANT (GINGER VHIYANO)

All the grounds of appeal raised by this applicant are a repetition of points raised during the application for discharge at the close of the State case. I dismissed that application and gave my full reasons under HB 88-23. I hereby incorporate those reasons in this judgment as

no useful purpose will be served by merely regurgitating them. I will however summarise the reasons why I feel that the 1st applicant has no prospects of success on appeal.

Firstly, the intended appeal is one involving unterminated proceedings which this court still has to pronounce itself on the evidence placed before it. Superior courts will not ordinarily sit in judgment over such matters except in very rare cases where grave injustice would occur if the court does not intervene. *In casu* no gross irregularity has in the proceedings been committed. Also, there is no indication in the grounds of appeal that remotely reveal that justice might not be attained by other means.

Secondly the evidence that 1st applicant was the custodian of the armoury key is unshakable. The evidence of three State witnesses namely, Mangena, Munasireyi and Shumba clearly establish that point. The unprocedural hand over of the armoury key coupled with other pieces of evidence raises a *prima facie* case against the 1st applicant.

Thirdly, the possibility that gold could have been stolen during cleaning sessions was discounted by the evidence of Munasireyi, Mangena and Shumba whose testimony was that 1st applicant would always remain in attendance during these exercises. The link between 1st applicant and "2nd accused" is the key to the armoury that accused 2 took to the two State witnesses for duplication.

I am not persuaded that 1st applicant has good prospects of success on appeal. I also conclude that the applicant possesses no arguable case on appeal.

Accordingly I make the following order

1. The application for leave to appeal be and is hereby dismissed.

2ND APPLICANT (SIDINGUMUZI NCUBE)

The sentiments I raised about the grounds raised during the application for discharge and those being raised in this application being similar equally apply to this applicant. The link between the theft of gold and this applicant was established through direct and circumstancial evidence. The right of access to the Supreme Court is not absolute. Why was he given US$30 000-00 by Jephat Chaganda? By strenuously arguing that he should not be placed on his defence, the 2nd applicant is certainly not being candid with the court and is bent on placing wool over the court's eyes.

The criticism that the court erred and misdirected itself in both the law and the facts by dismissing applicant's application for discharge at the close of State case based on factual findings which are not supported by evidence placed before it is totally unfounded. The specific allegation is that this court found as a fact that Lovemore Sibanda's evidence is to the effect that the US$30 000-00 given to the applicant by Japhet Chaganda was his "share" of the loot when in actual fact this does not appear in Lovemore Sibanda's evidence as summarized in the State Summary. According to Ex 1. The summary produced by the state during the trial, the 2nd applicant was handed over the money in Lovemore Sibanda's presence. Lovemore Sibanda specifically referred to "his share". The finding is therefore not the court's creation. It was common cause from both State and Defence Counsel that a number of summaries were prepared and given to lawyers in this case. Counsel for 2nd applicant admitted that he was given "State papers" that included the Summary on more than one occasion before commencement of the trial. State Counsel submitted that he served defence counsel with copies of the same summary that the court used.

Quite clearly this court's reference to the phrase "his share" is not a misdirection by any stretch of imagination as it is based on an official document openly filed by the State. Therefore the finding is supported by the evidence on record. For that reason, it cannot be a basis for the submission that the 2nd applicant has prospects of success on the intended appeal in that there is a reasonably arguable case that may persuade the Supreme Court to arrive at a different conclusion.

The other finding complained about relates to the court *a quo* being "duped into believing a concocted version of events." It was forcefully argued that this does not appear in Lovemore Sibanda's evidence. This criticism has no merit in my view in that a close reading of Sibanda's evidence makes it apparent that he (Sibanda) was roped in to mislead the court *a quo* into believing that his "documents" were genuine. This was done to prove that indeed the gold belonged to Sibanda when in actual fact this was a lie. In fact his evidence shows that all the participants in that trial at Plumtree Regional Magistrates Court conducted a sham trial. It is common cause that the State is challenging this trial and the acquittal of Japhet Chaganda. It is also common cause that the court officials are facing criminal charges arising from the trial. On these facts, the finding is the only reasonable inference to be drawn from the entirety of Lovemore Sibanda's evidence. The court was duped and released the gold to Lovemore

Sibanda when in fact he was not the lawful owner. In the final analysis, this finding is not a misdirection.

A further link to the offence is provided by the evidence of two State witnesses, namely Norleen Nyika and Blessing Marwa who placed 2nd applicant at Plumtree Railway Station aboard a Botswana bound train. His passport shows that he exited Zimbabwe through Plumtree railway station on 7 July 2018 and entered Botswana on the same day. Surprisingly, the same passport has no stamp showing when he returned to Zimbabwe. Sight should not be lost of the fact that this is the same train in which Japhet Chaganda was arrested on the same date, time and place. This piece of evidence was not challenged by 2nd applicant.

Finally, the other piece of evidence against 2nd applicant is that according to Lovemore Sibanda he travelled to Plumtree in the company of one Sayi who upon arrival introduced him "to a police officer called Sidingumuzi Ncube" who was shown the documents relating to Lovemore Sibanda's mine. It is not disputed that these are the "documents" that were subsequently handed over to Chaganda's lawyer one Admire Rubaya who used them to secure 2nd applicant's acquittal. This evidence establishes a clear association between 2nd applicant and Japhet Chaganda. It links 2nd applicant to the stolen gold found in Chaganda's possession. It also links 2nd applicant to the gold's release at Plumtree Court.

In my view 2nd applicant has no prospects of success on appeal. His application ought to be dismissed

THIRD APPLICANT (TYSON RUVANDO)

The submission that there is no *prima facie* case against 3rd applicant lacks merit in that on his own admission he was given US$30 000-00 by Japhet Chaganda on the same day the gold was sold. The State contended that this money was part of proceeds of the sale of the stolen gold. The 3rd applicant has not challenged that. He has also not provided a reason for such a huge cash payment. His presence in Bulawayo has not been explained. Further, he has not explained why he had to meet Chaganda in Bulawayo shortly after the sale of the stolen gold.

The 3rd applicant was in the company of the 2nd applicant when they were given US$30 000-00 each. Lovemore Sibanda said this was their "share". The ground relating to "wrong findings" is similar to one raised by the 2nd applicant. The argument and findings thereon

equally apply herein. As regards the relationship between the 28.5 kg and the 14 kg recovered in Chaganda's possession, it is apparent that Chaganda is the one who procured a duplicate key to the armoury where the gold was kept. Once Chaganda is linked to the source of the gold, 3rd applicant is also linked to the gold through his association with Chaganda. The source of the gold according to the State is the armoury and it is not a mystery. It only becomes a mystery when one considers the defence case which alleges that it belongs to Sibanda who categorically denied this assertion. In that respect the source of the gold found in Chaganda's possession remains a mystery.

For these reasons, I find that 3rd applicant has no prospects of success on appeal. There is no arguable case against the order placing him on his defence.

In the circumstances, the applications for leave to appeal in respect of all three applicants be and are hereby dismissed.

National Prosecuting Authority, state's legal practitioners
Mutuso, Taruvinga and Mhiribidi Attorneys, 1st applicant's legal practitioners
T.J Mabhikwa and Partners, 2nd applicant's legal practitioners
Ncube and Partners, 3rd applicant's legal practitioners