TAKUDZWA ADMIRE DZITIRO

versus

MUKANGA ESQ (In her capacity as judicial officer and magistrate)

And

THE NATIONAL PROSECUTING AUTHORITY

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 18 & 25 JUNE 2020

Application for review of criminal proceedings in terms of Order 33 of the High Court Rules, 1971

L. Nyamapfeni, for the applicant

DUBE-BANDA J: This application was placed before me in the unopposed motion Court of the 18 June 2020. When this matter was called during the middle of the roll, I stood it down to the end of the roll, in order not to inconvenience other legal practitioners who had simple and unopposed matters to deal with. I noted that the 2nd respondent filed an affidavit conceding the relief sought by the applicant.The matter is not opposed. I asked counsel for the applicant to make submissions, on whether a single judge of this court, may hear argument on the merits and set aside a conviction arising from a criminal matter. At the conclusion his submissions, I reversed my judgment.

This is an application for review of criminal proceedings. The application is anchored on Order 33 of the High Court Rules, 1971 (Rules). Applicant seeks this court to order that his conviction and sentence by the court magistrate's court be set aside, and that the matter be remitted for a hearing *de novo* before a different magistrate.

Briefly, the background to this application is that the applicant was arrested on 28 February 2020. He was arraigned before the Magistrate's Court, Bulawayo on the 29 February 2020, being charged with theft as defined in section 113 of the Criminal Law [Codification and Reform] Act Chapter 9:23. He pleaded guilty and was sentenced to six years imprisonment, with one year suspended on the usual conditions.

In terms of rule 257 of the High Court Rules, 1971 (Rules) a court application for review shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. The application contains the following grounds for review:

1. The court *a quo* grossly misdirected itself by confirming the plea of guilty of the Applicant in circumstances where the charge before the court was that of theft when the facts read to the court *aquo* supported albeit partially, and in relation to the sum of $108,412.38 an offense of fraud. Additionally the court *a quo* grossly erred and misdirected itself at law in confirming the plea of guilty by the Applicant in circumstances where the charge alleged that the Applicants "unlawfully took cash" while the facts in the state outline are in total variance with the allegation made in the indictment.
2. The Magistrate in the court *a quo* committed a serious procedural irregularity in that she returned a guilty verdict without confirmation of the elements of the offence by the Applicant and in particular without the Applicant admitting that he took cash as alleged in the charge sheet and even as not alleged in the State Outline. Additionally the court *a quo* committed a gross procedural irregularity by concluding that Applicant understood the facts without the Applicant saying so himself.
3. The magistrate in the court *a quo*committed a procedural irregularity in treating what was clearly different and distinct counts and offences as one count of theft of cash in the sum of $128,241.40.
4. The learned Magistrate in the court grossly misdirected herself as to commit an irregularity in confirming the Applicant's plea of guilty in circumstances where 99 counts were reduced into one count not for purposes of sentence but for purposes pleading thereby denying herself to the prejudice of Applicant, the opportunity to confirm each and every count.

I accept that the grounds for review meet the requirements of the Order 33 rule 257 of the High Court Rules.

The first inquiry is to determine whether the High Court Rules are applicable or deployable in criminal proceedings? Order 1 rule 2 (2) of the Rules provides that these rules shall not have effect in relation to any criminal proceedings other than proceedings to which Order 33, Order 34 or Order 45 relates. This review application is in relation to criminal proceedings. It has been filed in terms of Order 33 of the Rules. Therefore, to the extent that this is an application in terms of order 33, it has been properly filed in terms of the High Court Rules. Order 1 rule 2(2), as read with Order 33 of the Rules provide applicant with a procedural avenue to place his review application before this court.

Having located the procedural route for an applicant aggrieved by the alleged irregularity emanating from criminal proceedings, the next inquiry is to identify where the

substantive right is located. The substantive right is located in sections 26 and 27 of the High Court Act[chapter 7:10]. Section 26 of the High Court Act provides that subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe. This is the empowering provision which gives this court jurisdiction to review criminal proceedings.

Section 27 of the High Court Act sets out the grounds, on which proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe may be set aside on review. These are:

> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
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> (*a*) absence of jurisdiction on the part of the court, tribunal or authority concerned;
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> (*b*) interest in the cause, bias, malice or corruption on the part of the person presiding over the court ortribunal concerned or on the part of the authority concerned, as the case may be;
>
> (*c*) gross irregularity in the proceedings or the decision.

Section 27 of the High Court Act spells out the grounds upon which this court may find that the criminal proceedings emanating from the Magistrates' Court are not in accordance with real and substantial justice.

Once it has been found that the criminal proceedings emanating from the magistrate's court are not in accordance with real and substantial justice, the next issue remains is what remedy is available to victims of such proceedings. The remedy is located is section 29 (2)(b) (i) of the High Court Act, which says if on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings are not in accordance with real and substantial justice, it may alter or quash the conviction.

This is what applicant is asking this court to do, to quash the conviction of the Magistrates' Court. In terms of section 29 (5)(b) of the High Court Act, a single judge of the High Court shall not quash the conviction unless another judge of the High Court has agreed with the exercise of the power in that particular case. Therefore, for a conviction to be quashed, two judges of this court must concur.

Counsel for the applicant contends that section 29 (5) (b) of the High Court Act applies to matters brought to this court in terms of the Magistrate's Court Act [7:10], what is

colloquially referred to as automatic review, and does not apply to matters brought at the instance of the accused. I take the view that this is a distinction without a difference. The rational is that a conviction cannot be quashed, whether in an appeal or review, by a single judge of this court, without concurrence of another judge. To me this also includes a review at the instance of an accused. Counsel could not point to a statutory provision which excludes the review at the instance of the accused from the requirement that, in the event of quashing a conviction, there must be a concurrence by another judge. It is not about the route the review matter has been brought to this court – whether via the Magistrates' Court Act or Order 33 of the High Court rules - it is about the remedy of quashing. A conviction cannot be quashed without the concurrence of another judge. This is peremptory. This is cast in stone.

In *Attorney-General v Makamba* 2004 (2) ZLR 63 (S), Supreme Court, in considering a similar issue, held that:

> The learned regional magistrate, after considering the detailed submissions from both parties, dismissed the application for discharge and ordered that the accused be placed on his defence. The accused commenced his evidence and the matter was remanded to 29 July 2004 for continuation.

During the adjournment, the accused filed an application to the High Court for a review of the proceedings and for an order, *inter alia* -

> (1) setting aside the judgment of the regional magistrate dismissing the application for discharge; and
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> (2) discharging the accused and acquitting him on all counts.

The application was upheld by the learned judge (High Court) who presided over the matter.

> "In determining the matter, the learned judge purported to exercise powers of review. His powers are set out in the High Court Act. In terms of subpara (iii) of para (b) of subs 2 of s 29, he is empowered to set aside or correct the proceedings of any inferior court or tribunal or any part thereof:
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> However, this power can only be exercised if another judge of the High Court has agreed with the exercise of the power in that particular case. See the proviso to para (b) of subs (5) of s 29 of the High Court Act. The learned judge did not obtain the concurrence of another judge. He accordingly had no power to set aside the judgment of the regional magistrate.
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> For this reason it was clear to me that the learned judge had committed a gross irregularity which could only be corrected on appeal and I was satisfied, having regard to the urgency of the matter, that leave to appeal could be granted without prejudice to the respondent, since submissions from him would not alter the stark fact that the learned judge was not empowered to grant the order that he did".

It would be a gross irregularity for a single judge of this court, to quash a criminal conviction in the unopposed motion court.

In matters brought to this court on automatic review which judges deal with every day, when a decision to quash proceedings is made, the record is then referred to another judge to read and decide whether they concur with the decision or not. In such a review case, there is no argument. All that is there is a record emanating from the magistrate's court. A judge being asked to concur is availed the record of proceedings, to enable him or her to make an informed decision.

The question is, can a single judge in unopposed motion court or in the opposed applications court, hear argument on the merits of an application for review, make a decision, and then ask for concurrence from another judge. My thinking is that such a procedure would be inappropriate. It would be akin to a single judge of this court, hearing an appeal, making a decision and then asking another judge for concurrence. This procedure would reduce the requirement for concurrence to a matter of form, not substance. The two judges must sit together. Hear argument together. Decide the matter together. The unopposed motion court is presided over by a single judge of this court, therefore, it cannot hear an application for review where the quashing of a conviction is being sought.

Therefore, I hold the view that the remedy sought by applicant is not available in the unopposed motion court, for the simple reason that this court is presided over by a single judge of this court. Such matters must not be set-down in the unopposed motion court.

My thinking is that such applications must either be set-down in the civil appeals court or some other court, but not the unopposed motion court nor opposed applications court, in the event the matter is opposed.

As a result of the above, I did not deal with the merits of this application. What is the point of dealing with the merits of the matter, when as a single judge I cannot accede to the relief sought in this application? What I can do, is to remove this matter from the unopposed motion court roll, and leave it to the Registrar to find a court, where this matter may be set down and argued before two judges of this court.

Disposition

In the result: this application is removed from the unopposed motion court roll.

Masiye-Moyo and Associates, applicant's legal practitioners