THE STATE

VERSUS

LOVENESS MATIONE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
GWERU 7 MAY 2010 AND 10 JUNE 2010

Review Judgment

CHEDA J: The matter at hand was forwarded to me by the Attorney General's Office, Gweru for the review of the Gweru Regional Magistrates' Court's decision.

The accused is a resident magistrate in Shurugwi. Complainant and accused know each other as they are both residents of Shurugwi.

It is alleged that sometime in March 2009 complainant was being investigated by the police, at Shurugwi for theft by finding of gold.

Accused heard about complainant's case and approached him. She then solicited for a bribe in the sum of $2000-00 so that she could omit to act in relation to her principal's affairs as she was the sole resident Magistrate for Shurugwi charged with presiding over all cases that occur in that area.

Complainant made a report to the police, a trap was set up which led to accused's arrest after she received $250-00 from him.

Complainant testified in court wherein he narrated in detail the events surrounding this case. Accused's explanation of the circumstances of the case was basically that she and complainant were lovers, the allegation which complainant denied. He told the court that in

fact accused was his friend's girlfriend he had nothing to do with her as he was already married to nine wives.

Evidence was also led from the arresting details who stated that they observed complainant handing money to accused. It was further their evidence that on receipt of the money accused did not count it, but only said "its bho ndichazokuona" meaning its ok, I will see you.

At the close of the state case, the defence applied for a discharge which was granted. The basis of the application was that the state witnesses were not truthful and unreliable.

Our law provides for a discharge of an accused at the close of the state case, if the court considers that there is no evidence that accused committed the offence. Section 198 of the Criminal Procedure and Evidence Act [Chapter 9:07] reads:

> "**198 conduct of trial**
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> (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."

What emanates from the above section is that a discharge at the close of the state will be justified where:-

(a) there is no evidence to prove an essential element of the offence, see *S v Ruzani* 1984 (1)ZLR 334,(4) and *Attorney General v Bvuma and Another* 1987 (2) ZLR 96 (SC) at 102 F-G, or

(b) there is no evidence on which a reasonable court might convict, see *R v Herboldt* (3)1956(2) SA 722 (W) and *Attorney General v Mzizi* 1991 (2) ZLR 321 (S) at 323 B, or

(c) the evidence adduced by the prosecution is so manifestly unreliable that no reasonable court could safely act on it, see *S v Hurtlebury and Another* 1985(1) ZLR 1(H) at 3, per McNally J (as he then was); *S v Moringer and Others* 1993(4) SA 479 and *Attorney General v Tarwirei* 1997(1) ZLR 575 (S) at 576 G.

The above principle was clearly laid down in *S v Kachipare* 1998 (2) ZLR 271 (S) and followed in *Attorney General v Makamba* 2005(2) ZLR 54(S).

The trial court has a discretion to discharge or continue with the trial. However, the most important factor is that the discretion must be exercised judicially.

In the present case, the trial court decided after hearing evidence of the State case that the said evidence was not truthful, particularly after it concluded that there was a love affair between accused and complainant. What the court did not sufficiently address was the meaning of remarks attributed to the accused and the circumstances surrounding the alleged commission of the offence. In my view, the State had placed its evidence before the court, which evidence, to a reasonable court, should have raised questions about accused's conduct. In view of this questionable conduct the court should have then placed the accused on her own defence since what was before the court was no doubt a prima facie case. In our law the court can not discharge the accused at the close of the State case as long as the State has proved a prima facie case. On perusal of the record there is nothing which indicates that state witnesses

have been discredited as a result of cross-examination or is manifestly unreliable. In the case of *Attorney General v Tarwirei* 1997(1) ZLR 575(S) a correct procedure in analyzing such cases was laid down. In that case it was held that it was a misdirection for the magistrate to treat the assertions made by the accused during cross-examination as though they were evidence of the accused.

It seems this was the position taken by the magistrate in this case, which position was erroneous, and, and it is this approach which led her to an erroneous decision.

The discretion vested on the trial court must be judicially exercised, see *Attorney General v Bvuma and Another* 1987 (2) ZLR 96 (S.C). In my mind, with respect to the trial court this discretion was not judicially exercised.

It is for that reason that I find that the magistrate misdirected herself in discharging the accused at the end of the state case where the state had proved a prima facie case against accused.

In light of the above the following order is made:-

(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.

Kamocha J.....I agree