MAROWA NYAMANDE

Versus

THE MINISTER OF HOME AFFAIRS

And

THE COMMISSIONER GENERAL OF THE ZIMBABWE REPUBLIC POLICE

And

CHIEF SUPERINTENDENT NCUBE (N.O.)

And

THE ATTORNEY-GENERAL'S OFFICE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 21 JANUARY and 3 FEBRUARY 2011

H. Shenje for applicant
Ms Murefu for respondents

Opposed Court Application

KAMOCHA J: The applicant was a member of the Zimbabwe Republic Police who had attained the rank of assistant inspector at the time he was discharged from the police force. The circumstances which led to his dismissal were as follows:

He was alleged to have contravened the provisions of paragraph 34 of the schedule to the Police Act [Chapter 11:10] hereinafter called "the Act". In that he had allegedly performed "any duty in any improper manner" on two occasions during the period extending from 1 April 2008 to 31 August 2008.

On the first occasion he was alleged to have withdrawn an unknown number of bags of maize and exchanged them for 4 cattle and 4 goats without permission from the officer-in-charge. He had not entered the beasts in the official records known as bin card. He had allegedly slaughtered one goat for his personal use. The 4 cattle and 3 goats were recovered.

Secondly, on 20 December 2008, he had been assigned to purchase maize from GMB Gweru for the ZRP Gweru town mess. He purchased 7 tonnes of maize but only delivered 6 tonnes to the mess. He, without authority, took 18 x 50kg bags of maize to a grinding mill for reasons only known to him.

He was served with notice to appear before a court presided over by an officer, to be held at 0900 hours at CID provincial headquarters Gweru on 3 February 2009 to answer the above allegations.

On 29 January 2009 he addressed a letter to the prosecutor wherein he elected in terms of section 32 of the Act, that he wished his matter to be tried in the magistrates' court. Section 32 of the Act is couched in the following terms:

> "If notice is given, in the manner and time prescribed, by a member whom it is proposed to try before a board of officers in terms of paragraph (c) of subsection (1) of section twenty-nine that he wishes that the charge against him be tried by a magistrates' court and not by a board of officers, the charge shall be tried by a magistrates' court."

The above provisions relate only to a member who is to be tried by a board of officers. A member whose trial is before a court consisting of one officer is excluded from having recourse to the above provisions. The provisions expressly mention trials before a board of officers which has the effect of excluding trials before one officer according to the maxim *expressio unius est exclusio alterius.* See Craies on Statute Law 7th edition by S G G Edgar at pages 259 and 260. It therefore follows that applicant was not entitled to be tried by the magistrates' court. The correct forum for the trial of his case was before one officer.

After the hearing, the applicant was convicted of the first count but was found not guilty and was acquitted on the second count. He was sentenced to undergo 14 days imprisonment at Fairbridge Support Unit detention barracks. He appealed to the Commissioner General of the Zimbabwe Republic Police.

On appeal the Commissioner General after examining the evidence which was on record concluded that the applicant had been wrongly charged with performing any duty in any improper manner breaching the provisions of paragraph 34 of the schedule to the Act. The Commissioner General held that the applicant should have been charged with contravening paragraph 39 of the schedule to the Act *id est* "Improperly using position as a member for private advantage".

The Commissioner General sitting as an appeal court then proceeded to substitute the conviction of the trial court with one for "improperly using position as a member for private advantage".

The applicant complained that the Commissioner General sitting as a court of appeal fell into error by substituting a conviction for a charge that was not put to him so that he could respond to it.

The attitude of the respondents to the applicant's complaint is summarised in their heads of argument was as follows:

> "It is common cause that when a person is being charged for having committed an offence, there is an alternative charge that may be preferred against the accused person. This is an elementary rule of procedure which applicant should be aware of as he left the Zimbabwe Republic Police after having attained the rank of assistant inspector. The case of alternative charges is taught to recruits in depot and should not be an issue to a person facing a main charge but being convicted on the alternative charge; the *audi alteram partem* rule he cites recognizes this simple issue.
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> The respondents are at a loss as to what applicant is trying to put forward with this statement that "accused must also be charged with an offence that is an offence at the time of its commission and which is recognized as such by law." When one is being charged for any offence at any particular time, there is the possibility that he may face alternative charges; there is nothing peculiar about this".

The above submissions by the respondents are without foundation. Where it is felt that the accused must be charged with a main charge and an alternative charge both charges ought to be put to him. He ought to be charged with both the main and alternative charge so that he prepares his defence in respect of both charges. He must be heard in respect of each charge. He may elect to plead not guilty to the main charge but guilty to the alternative charge. He is entitled to make that election. He may plead not guilty to both the main and alternative charge in which case the court may, convict him of the charge that is supported by the evidence adduced before it. The court must find him not guilty of the charge which is not supported by the evidence before it. It is not competent for the court to convict the accused of both the main and alternative charge.

Alternative charges are provided for by section 145 of the Criminal procedure and Evidence Act [Chapter 9:07] where it is doubtful what offence has been committed. Section 145 reads thus:

"If by reason of the nature of an act or series of acts, or of any uncertainty as to the facts which can be proved, or if for any other reason whatever it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with having committed all or any of those offences, and any of such charges may be tried at one time, or the accused may be charged in the alternative with having committed some or one of those offences." Emphasis added

These provisions become clearer when read with section 279(b)(ii) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] which recites as follows:-

"279. Concurrent and alternative charges

In this Code the use of the word –

(a) …
(b) "alternatively" whether in the phrase "concurrently or alternatively" or on its own in relation to the charging of a person with two or more crimes, means that the person may be charged –
    (i) …
    (ii) With both or all those crimes in the alternative, if for any reason whatsoever it is doubtful which of them he or she can be proved to have committed."

What these provisions mean is that the accused ought to be charged with both the main charge and the alternative before the court commences to hear evidence in order to determine which of the crimes he or she committed.

In casu, the accused was not charged with the alternative charge which was substituted for the one the trial court had convicted him. That was a serious irregularity entitling the accused to bring the proceedings on review as he was not heard in respect of the charge. That was contrary to the rules of natural justice in particular the *audi alteram partem rule.*

An accused person may be convicted for a crime other than the one he was charged with where the essential elements of such crime include the essential elements of the other crime as provided for in section 274 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. Section 274 recites that:-

"Where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he/she committed the crime charged."

In casu the elements of the crime that the accused was charged with and those of the substituted conviction are completely different. Paragraph 34 of the schedule to the Police Act reads thus:-

> "Omitting or neglecting to perform any duty or performing any duty in any improper manner".

Paragraph 39 on the other hand recites as follows:-

> "Improperly using his/her position as a member for his/her private advantage".

The essential elements of the offences constituted by these two paragraphs are completely different. It was therefore, not proper for the appeal court to substitute the conviction of the offence charged with one that was not charged.

Summary

(1) A member to be tried by a court consisting of one officer is not entitled to elect that his case be tried by the magistrates court as the provisions of section 32 of the Act expressly relate to trials before a board of officers.

(2) Where it is intended to charge an accused person with an alternative charge that alternative charge ought to be charge together with the main charge so that he can respond to it too as failure to do so falls foul of the *audi alteram partem rule*.

In conclusion the application for review succeeds. The applicant did not seek for an order for costs. The order of this court is as follows.

It is ordered that the conviction of the applicant which had been substituted for that of the court a quo be and is hereby set aside.

Gundu & Mawarire Co. applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners