REPORTABLE ZLR (22)

Judgment No. S.C. 33/2000
Civil Application No. 132/2000

CHENJERAYI HUNZVI v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, MAY 11, 2000

IN CHAMBERS, before GUBBAY CJ

An application for leave to appeal filed in terms of s 44(5)(a) of the High Court Act [*Chapter 7:06*]

Z F Joubert SC, with him *E T Matinenga*, for the applicant

N Sibanda, with him *M Zimba*, for the respondent

The applicant was indicted for trial to the High Court on four counts of fraud arising from allegations that on diverse occasions he had forged medical reports, thereby causing prejudice to the War Victims Compensation Fund in an amount of $517 537.72. A plea of not guilty was entered in respect of each charge.

At the close of the case for the prosecution defence counsel applied for the discharge of the applicant on all counts. The contention advanced was that the evidence of one of the State's witnesses, Mr R Blackmore, a questioned document examiner, had been so discredited that no reasonable court could safely convict on it. The application, which was strongly opposed, was dismissed by the learned trial judge. He held that, apart from the testimony of Mr Blackmore, there was other evidence relied on by the prosecution, including that of a circumstantial nature, upon

which a reasonable court, acting carefully, might properly convict. Consequently, the defence was invited to present its case.

Dissatisfied with the ruling, defence counsel applied to the learned judge for leave to appeal, presumably in terms of s 44(5)(a) of the High Court Act [*Chapter 7:06*]. The grant of leave was refused on the ground that no right of appeal lies against the decision of a court refusing to discharge an accused at the close of the case for the prosecution.

The applicant now seeks leave from a judge of the Supreme Court to appeal to the Supreme Court against what is claimed to be the interlocutory judgment of the High Court.

If the learned judge was correct in the view expressed that his decision refusing to discharge the applicant is not appealable, the application now before me is misconceived. Obviously, the absence of a right to appeal against such a judgment makes it impermissible for both a trial judge, and a judge of this Court, to grant leave to appeal.

Thus, only if the learned judge was wrong on the issue of appealability will it become necessary to decide: (a) whether his judgment was interlocutory in form; and, if so, (b) whether in a situation in which, in the exercise of the discretion vested by s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the learned judge was of the opinion that there was sufficient evidence to place the

applicant on his defence, it is appropriate for a judge of this Court to grant leave to appeal against that judgment.

In *S v Kachipare* 1998 (2) ZLR 271 (S) I said at 279 C-D:

> "It is to be noted that subs (3) of s 198 gives the accused person no right of appeal against a refusal to discharge. Only the Attorney-General under subs (4) may, with the leave of a judge of the Supreme Court, exercise the right of appeal, if dissatisfied with a decision given in terms of subs (3). However, the express grant to an accused may have been considered unnecessary by the Legislature as s 44(2)(a) of the High Court Act [*Chapter 7:06*] permits a person convicted in a criminal trial, held by the High Court, to appeal as of right to the Supreme Court against such conviction on any ground of appeal which involves a question of law alone."

What was being pointed out was that in terms of s 198(4)(a) of the Criminal Procedure and Evidence Act the Attorney-General, with leave of a judge of the Supreme Court, may appeal against a verdict of not guilty returned at the close of the case for the prosecution; for the trial has then come to an end. But an accused, on the other hand, is not given a right to appeal against a refusal to discharge him because at that stage the final determination of the trial has not been reached. The proceedings are still on-going.

The specific and sole mention of the Attorney-General in s 198(4)(a) warrants the conclusion that the Legislature was minded to exclude the accused. Having regard to the fact that for the Attorney-General a discharge of the accused means an acquittal and a termination of the trial, the maxim "*expressio unius est exclusio alteris*, is apposite. Its application does not lead to inconsistency or injustice. In the event of conviction, the accused has the absolute right, under s 44(2)(a) of the High Court Act, to appeal to the Supreme Court on any ground

involving a question of law. A refusal to discharge is a question of law and so may be relied upon as a ground of appeal.

In sum, after but not before, the final determination of the trial the Attorney-General, with leave, and the accused as of right, may appeal against the decision of the trial court which had either discharged or refused to discharge, the accused at the close of the case for the prosecution. But insofar as the accused is concerned, the appeal on that ground will only succeed if it is found that at the close of the prosecution's case evidence justifying a conviction was absent and the defence case furnished no proof of guilt.

It is only necessary to add that the passage quoted from the judgment in *Kachipare's* case *supra* was concurred in by SANDURA JA. Although McNALLY JA came to a different conclusion with regard to the interpretation of s 198(3) of the Criminal Procedure and Evidence Act, I do not understand anything said by him to signify disagreement with the *obiter* dictum that an accused is given no right of appeal against a refusal to discharge.

It follows that s 44(5)(a) of the High Court Act is of no application since there was no right to appeal against the judgment of the court *a quo*.

The application is accordingly dismissed.

Musunga & Associates, applicant's legal practitioners