WALTER MAGAYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 6 & 13 June 2018

Assessors: 1. Mr Chivanda
2. Mr Mtambira

Application for leave to appeal

R Goba, F Muronda & J Uladi, for the State
T Mpofu, A Rubaya, E Chatambudza & O Marwa, for the applicant

TSANGA J: An application has been made for leave to appeal to the Supreme Court. The backdrop to the application is this. The criminal trial in this matter commenced on the 3rd of April. The charge was put to the accused and the accused pleaded not guilty. However, he did not present his defence outline. He insisted as he had indeed done at the commencement of the trial that he had an application to make which hinged on why the continuation of the trial would be a violation of his constitutional rights. He asserted that the rape complainant had withdrawn her complaint and that as such the State was acting with *mala-fides* in choosing to continue with the trial. The state was vehemently opposed to the application as unprocedural. It was common cause that an application on the constitutional issue had been placed before a full Constitutional Court which struck the matter off the roll in September 2017. Counsel for applicant argued at the trial that placing the record of the Constitutional matter before this court would bolster his case that the application was now properly before the court. I asked for written submissions and both parties submitted these.

The order sought by the applicant is essential to reproduce. It is an order that:

1. In light of the confessions made by the complainant on oath which the state has no basis to treat as false, the decision to continue with applicant's prosecution under the circumstances is unlawful, unconstitutional and consequently void.

2. The accused person having already pleaded to the charges is entitled to his acquittal in terms of s 180 (6) of the Criminal Procedure and Evidence Act.

In its written submissions, the State raised a point *in limine* whose facets were that the application was irregular and amounted to the accused prosecuting his own case. It emphasised that this is a criminal trial and the implications of s198 (3) which states that:

> "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."

The State also raised the issue that the constitutional matter had previously been placed before the Constitutional Court and no constitutional issues had been found to arise.

Having read the documents in full, on the 6th of June when the court reconvened on the issue of the application and I asked the parties to condense their points. The State zeroed in on two issues namely, the fact that the Constitutional Court had struck off the matter because there were no constitutional issues raised or that were properly before it, and, secondly the irregularity of the civil application in a criminal proceeding.

Counsel for applicant argued that the point *in limine* was ill taken. The gist of his argument was that this was the court that should hear the application as the matter was about prosecutorial misconduct whereby the State sought to harass a person in respect of whom a confession of the falsity of the complaint had been made. Considerable time was spent in court going through the record of the constitutional court for the various key observations that had been made in striking the matter off the roll. What emerged very clearly from the record was that the Constitutional Court concluded that there was a procedural ruling of a magistrate which had not been appealed against to the effect that the matter should proceed for trial in the High Court, and that the ruling could not just be set aside in favour of a constitutional argument.

The State maintained that the application ought to be dismissed as the Criminal Procedure and Evidence Act is applicable in a criminal trial. It argued that the applicant sought to introduce new procedures into a criminal trial.

I ruled that applicant was indeed relying on two unrelated procedures and that the state was correct that at this point the trial had to proceed in terms of the Criminal Procedure and Evidence Act. Indeed Order 1 rule 2 (2) of the High Court Rules 1971, outlines very

clearly the limited situations under which the civil rules will be allowed to apply in criminal matters. This was not one such situation outlined.

I also ruled that the State is indeed *dominis litis* and that s 198 (3) would be applicable in the event of the state failing to prove its case. I upheld the holistic point in limine and dismissed the application.

The application for leave to appeal

Applicant's counsel immediately made an application for leave to appeal on the following ground:

> "That a constitutional application can be made at any time and that it was clear from the record that the application had per se not been determined by the constitutional court. That on this score the point *in limine* ought to have failed as the application goes to the validity of the exercise by the State of its functions".

Mr *Mpofu* further argued that this court had rendered a determination on a point that had not been determined, on a point much broader than the point *in limine*, and on issues not put before the court as a judicial officer. He posited that given all the above, the Supreme Court was likely to interfere with the ruling. He threw the same accusation at the Constitutional Court that had stuck the matter off the roll that it too had also decided on a wrong point *in limine.*

The State's response to this application for leave to appeal to the Supreme Court is that it exemplifies a continuing abuse of court process as there is no prejudice to the applicant in following criminal procedure and continuing with the trial. The application is said to be a deliberate plot to delay at any cost. The State emphasises that such delay, unnecessary as it is, would not harbour well for the administration of justice as people would lose confidence in the courts. The order sought is said to make a mockery of the criminal justice system in that what the applicant effectively seeks is a dismissal of his matter without a hearing in spite of the State's position that he has a case to answer. Furthermore the State emphasised that the trial has started and that a criminal trial follows certain procedures.

Determination on the application for leave to appeal

The application for leave to appeal lacks merit and is dismissed for the following reasons. The decision I rendered in court on the point *in limine* was on the **holistic aspects** of the point *in limine* as raised fully in the State's written submissions and as articulated in court. It cannot be said that my ruling on the point *in limine* as articulated fully in the written submissions was erroneous. This argument is simply clutching at straws. The fact that I deliberately asked for points to be highlighted was precisely because the parties had written

submissions which had been read by the court. Applicant's counsel is also fully aware that the Constitutional record was thoroughly canvassed and that it simply emphasised the point already articulated regarding the ruling referring the matter to trial. The ruling I gave regarding the State being *dominis litis* is very much a central issue to the point *in limine*.

The argument that a constitutional application point can be raised at any time misses a crucial point. Applicant's counsel appears to miss or perhaps deliberately dismiss the fundamental point at this stage that the Constitution of Zimbabwe constitutionalises all law with its requirement that all laws be consistent with the Constitution. The very conduct of a criminal trial is within the dictates of the Constitution. The legal provisions and procedures laid out in the Criminal Evidence and Procedure Act on the conduct of a criminal trial do not in any way interfere with the accused's right to a fair trial. There is nothing unconstitutional where the State proceeds to trial on the basis of a reasonable suspicion that a crime has been committed. It is not for the court to silence the State at this point and it is not for the accused to refuse to be tried. Applicant appears to have been led to misconstrue his right as being the liberty to do whatever he wants to do as the basis of "constitutionalism" as opposed to doing what is correct within the confines of appropriate procedures laid down in the law.

Furthermore, whether or not his constitutional human rights have been or are being violated can only be properly assessed once this court has heard the State's case against him from the evidence. Applicant's counsel neglects some vital constitutional constructs embedded in the Constitution as to how courts arrive at a rational conclusion that there has been a constitutional violation of rights. Constitutional rights are indeed vital rights but they do not become constitutional violations by force and mere say so. The court is seized with balancing and proportionality as these are the key constitutional constructs that underlie s86 of the Constitution of Zimbabwe in deciding on rights infringement.[1] In other words, the proportionality analysis is key to deciding whether the infringements complained of are justified or unjustified. In a criminal trial such analysis can in reality only be fully engaged with once the State has led its evidence. This is particularly so in a case such as this where the State decided to proceed to trial. The court is then seized with a criminal trial and must proceed to verdict. The accused, as with all accused persons, is presumed innocent until proven guilty. An application that he not be tried when the State still has the onus to place its evidence before the court and to prove its case, is irregular. It would be out of sync with these principles which are perfectly constitutional in the conduct of a criminal trial to pre-

[1] Amendment Act (No.20) Act 2013

emptively hold that the trial should not take place when the State itself says it has reasonable grounds for suspecting that a crime was committed. This point equally emerges from the Constitutional Court record as underlying its reasoning in striking of the matter off the roll.

The trial should proceed.

The application for leave to appeal lacks merit and is accordingly dismissed.

Rubaya & Chatambudza Legal Practitioners, applicant's legal Practitioners
National Prosecuting Authority, respondent's legal practitioners