

DISTRIBUTABLE (25)

TAWANDA SIBANDA
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & PATEL JA
HARARE, MARCH 21, 2013

I. Mureriwa, for the appellant

E. Mavuto, for the respondent

GOWORA JA: This is an appeal against the dismissal by the High Court of a chamber application made in terms of s 35 of the High Court Act [*Cap 7:06*].

In the High Court the appellant sought an order upholding an appeal and the quashing of conviction and sentence in respect of three (3) out of eight (8) counts wherein the appellant was convicted and sentenced by the Regional Magistrate on 18 September, 2013.

The appellant has already noted an appeal against conviction and sentence in respect of all eight (8) counts in the High Court.

In bail proceedings pending appeal before the High Court the State made concessions relating to the three (3) counts in question to the effect that the appellant had prospects of success on appeal.

Consequent to that concession, the appellant sought relief in terms of s 35 of the High Court Act through a chamber application. The learned judge before whom the chamber application was placed in the court *a quo* held that an application in terms of s 35 could only be made where the Prosecutor General, as the Attorney General is now referred to in the Constitution, has given notice to the Registrar of the High Court that he does not support the conviction. Accordingly, the court declined to grant the application.

Section 35 provides as follows:-

“35 Concession of appeal by Attorney-General

When an appeal in a criminal case, other than an appeal against sentence only, has been noted to the High Court, the Attorney-General may, at any time before the hearing of the appeal, give notice to the Registrar of the High Court that he does not for the reasons stated by him support the conviction, whereupon a judge of the High Court in chambers may allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives and without their appearing before him.”

In casu it is not in dispute that no such notice to the Registrar was given by the Prosecutor General. In our view the submissions made by the State in bail proceedings do not constitute the notice envisaged or contemplated in terms of s 35. That provision clearly requires a formal notice to be given by the Prosecutor General to the Registrar of the High Court that he does not, for reasons stated by him, support the conviction. This is a statutory requirement which is essential to the granting of any relief in terms of the section. Moreover any such application presupposes that the Prosecutor General has exercised his discretion and has applied his mind before giving the requisite notice. In the absence of such notice the High Court cannot entertain any application purporting to be made in terms of the said section.

Accordingly, the applicant was out of court both before this court and the High Court.

We see no reason to fault the decision of the court *a quo*.

In the result we are of the unanimous view that the appeal has no merit and should be dismissed.

Accordingly, it is ordered that the appeal be and is hereby dismissed.

GWAUNZA JA: I agree

PATEL JA: I agree

Scanlen & Holderness, appellant's legal practitioners

Prosecutor General, respondents' legal practitioners