

AMOS MUDEFI
and
EMMANUEL CHITENDERU
and
KENNETH CHITENDERU
versus
MS CHIBANDA N.O
and
THE PROSECUTOR GENERAL

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 15 September, 2022 and
23 February 2023

Application for Review

Mr *T Muzana*, for the applicants
Mr *C Muchemwa*, for the 2nd respondent
No appearance for the 1st respondent

DEME J: It is a well-established principle of our jurisprudential undertone that this court is loath to interfere with uninterminated proceedings at the lower courts. The applicant wishing to convince this court to interfere with such uncompleted proceedings must demonstrate existence of exceptional circumstances. The applicants made tireless and spirited efforts to display exceptional state of affairs but this court is of the opinion that the applicants' case is not a discernable paragon meeting the requisite threshold.

The first to the third applicants (hereinafter called "the applicants") approached this court seeking an order for review for the decision of the court *a quo* made by the first Respondent. The court *a quo* made an order for the dismissal of the applicant's application for discharge at the close of the State case. The applicants' grounds for review are as follows:

- "1. The 1st Respondent grossly misdirected himself (*sic*) by dismissing applicant's application for discharge at the close of the State case in circumstances where he (*sic*) had no discretion to write otherwise as the evidence adduced on behalf of the State was so manifestly unreliable that no reasonable court could safely act on it in that:
 - (a) The evidence of the key witness Manyandure Manyumbu, the Investigating officer clearly did not prove the exertion of illegitimate pressure by the accused persons, leaving only the complainant to state about the extortion of pressure without any evidence leaving the trial to be a boxing ring.

- (b) The evidence led clearly show (*sic*) that \$400 was never paid and therefore it was never recovered and therefore the complainant never lost the \$400 as alleged on the charge sheet.
- (c) The investigating officer said he was transferred before finishing the investigations and the State chose to close its case before calling the investigating officer who completed the investigations.
2. The 1st Respondent grossly erred by failing to discharge Applicant (*sic*) at the close of the State case in circumstances where the evidence led on behalf of the State did not establish a *prima facie* case in that:
 - (a) No credible evidence was led to prove that the accused persons exerted any pressure on the complainant.
 - (b) The two of the payments that is the \$5 and the \$400 were actually paid to third parties and these third parties were not called to explain the payments.
 - (c) The payment of \$200 was not proven at all as the complainant sent a person to pay money to a person whom he did not know and the money could have been paid to somebody else not the accused person.
 - (d) The state failed to prove any connivance among the accused persons.
3. The decision reached by 1st Respondent was so grossly irrational in its defiance of logic and common sense that it can only be explained on the basis of bias on her part or an inadvertent disregard of the rules governing considerations of applications made in terms of section 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].
4. The 1st respondent failed to analyze the exhibits which were submitted by the state which failed to support the state case as they were at variance with the evidence of the state witnesses especially
 - (a) The call records did not show any single call which was made by the 1st, 2nd and 3rd accused yet the complainant and the investigating officer said the accused persons were extorting the complainant through phoning the complainant.
 - (b) The letter by S. Rugwaro and Associates demanding the \$400 cannot be imputed to the accused persons and is better explained by S. Rugwaro and Associates.
 - (c) The calls of Farai Delight Ndudzo are at variance with his narration and this proves that he was misleading the court and his evidence should have been thrown out especially considering that
 - (i) He was never phoned by the complainant as he alleged.
 - (ii) He phoned his employer, the complainant, after he had already contacted the 1st accused.
 - (iii) He deviated from his statement on the issue of the second call but the police officer confirmed that he actually told the investigating officer that he made the second call.
5. The 1st Respondent grossly misdirected herself when she took the exhibits to be evidence on a balance of probability when in actual fact they proved nothing for the state and this gave rise to a gross miscarriage of justice.
6. The 1st Respondent grossly misdirected herself when she relied on the ecocash statement which was obtained without authorization from the court and was therefore unconstitutionally obtained.
7. The 1st Respondent committed a gross irregularity when he (*sic*) relied on a duplicate record as the original record is at the High Court.
8. The 1st Respondent misdirected herself when she failed to decipher the import of our application for discharge in that
 - (a) She dealt with the application perfunctorily and failed to apply her mind in that she misconstrued the degree of evidence that we used which is the requisite scale which is on a balance of probability.”

In light of the above-stated grounds, the applicants prayed for the setting aside of the decision of the court *a quo*. The applicants were arraigned before the court *a quo* charged with

the offence of extortion as defined in terms of s 134 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which provides as follows:

“(1) Any person who—

- (a) intentionally exerts illegitimate pressure on another person with the purpose of extracting an advantage, whether for himself or herself or for some other person, and whether or not it is due to him or her, from that other person or causing that other person loss; and
- (b) by means of the illegitimate pressure, obtains the advantage, or causes the loss;

shall be guilty of extortion and liable to—

- (i) a fine not exceeding level thirteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greater; or
- (ii) imprisonment for a period not exceeding fifteen years;

or both.

(2) For the avoidance of doubt it is declared that where a person, for the purpose of inducing or compelling the payment of any money or property as damages or as marriage compensation in respect of a deceased person, leaves or deposits the deceased person’s body, he or she shall be guilty of extortion or, if he or she fails to induce or compel the payment of any money or property, attempted extortion.

(3) If a court convicting a person of extortion is satisfied that, as a result of the crime, any money or property was paid to the convicted person, the court may order the convicted person to repay that money or property to the person who paid it to him or her.

(4) Subsection (2) of section 366 and sections 367 and 375 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] shall, with the necessary modifications, apply in relation to any order under subsection (3) as if it had been made in terms of Part XIX of that Act.”

The allegations of the State are that for the period extending from December 2016 to June 2017, the Applicants, on different occasions, and at 51 Selous Avenue, Harare, one or both of them, demanded substantial amount, exerted and obtained an amount of US\$605 from Martin Murimirambeva (hereafter called “the complainant”). It is the State case that the Applicant intentionally threatened to cause harm to the complainant’s family if he did not yield to their demands. The State also alleged that the applicants made threats of causing the arresting and prosecution of the complainant if he did not meet their demands. According to the State, the applicants also threatened the complainant with the causing of his dismissal from his employment if he did not yield to their demands. The applicants, according to the State, also indicated to the complainant that they would publish his incompetence in the newspapers of his duties as the executor to the Chitenderu Family Trust unless the chairman of the Chitenderu Family Trust was removed.

The State further alleged that the first applicant called the complainant some time in December 2016 where he inquired whether the complainant was the executor of the estate of

the late Reuben Chitenderu and the complainant responded affirmatively having been appointed as such on 3 November 2012. The State further alleged that the second and third applicants visited the complainant during December 2016 and they informed the complainant that he was supposed to assist them as an executor in the removal of the chairman of Chitenderu Family Trust. It is further alleged that the complainant advised the second and third applicants that it was not his duty to remove the chairman but this was the duty of the family members to remove the chairman.

It is further alleged by the State that the Applicants made police report against the complainant of false fraud charges with a view of exerting illegitimate pressure upon the complainant. On 23 May 2017, it is further alleged that the first applicant made further demands of more money which saw him receiving US\$200 from Zvikomborero Marvelous Tigere on the instruction of the complainant.

The State also alleged that on 24 May 2017, the first applicant demanded that the complainant must meet the legal costs of the second and third applicants to Messrs Rugwaro and Associates for the Court Application which they had filed with Harare High Court which they intended to cause the removal of the Chitenderu Family Trust chairman. According to the State, part of the payment was to ensure that the second and third applicants withdraw their fabricated fraud allegations against the complainant. It is further alleged by the State that on 24 May 2017, the complainant initiated the payment of US\$400 to Rugwaro and Associates before stopping the transaction two days later upon realizing that he was extorted by the applicants.

It is also alleged that on 25 May 2017, the first applicant made further demands of more money from the complainant. The complainant made payments of US\$5 through the Ecocash account of the third party namely Farai Ndudzo. It is also the case of the State that the US\$5 was deposited into the Ecocash account of the first applicant's wife. It is further alleged by the State that the details of the Ecocash account into which money was to be deposited were supplied to Farai Ndudzo by the first applicant.

The State also further alleged that on 19 June 2017, the complainant received the threatening letter from Rugwaro Legal Practitioners demanding to know why the payment was stopped. According to the State, the complainant never sought the services of Rugwaro and Associates despite being pressured to make such payments.

The Applicants tendered before the court *a quo* their defence outline which summarized their defence. In their defence, the applicants denied having committed the offence of extortion. According to the first applicant, he assisted the second applicant to peruse the file of the estate in which the complainant was the executor. It is the second applicant's case that he picked the anomaly in the transfer of the farm, which formed part of the estate of the late Reuben Chitenderu, in the estate which was duly reported to the Master of the High Court as he, the second applicant, was operating through a power of attorney on behalf of the surviving spouse and hence he was an interested party. The Applicants further alleged that a meeting was held at the Master's office which was attended by the second and third applicants as they are related to the deceased and therefore were interested parties. The applicants further affirmed that the Master wrote the letter to the complainant in his official capacity and was not influenced by anybody but because the farm was transferred without the following of due process.

According to the third applicant, he only attended the meeting at the Master's office and never dealt with the complainant in any way and is not aware why he is dragged into the extortion allegations. The applicants further alleged that the complainant engaged Rugwaro and Associates to assist in the reversal of transfer of the farm. It is the case of the applicants that Mr Rugwaro then approached the second applicant to depose to an affidavit for the application and the complainant paid for the application through bank transfer.

According to the applicants, it is Mr Rugwaro who demanded payment from his client, the complainant, and the applicants claimed having no connection with the payment in question and such payment has nothing to do with them. The applicants denied having pressured the complainant to make the payment in dispute to Rugwaro and Associates. According to the applicants, the complainant paid the payment to Rugwaro and Associates and also consented to the application.

It is the first applicant's case that he ceased being an employee of the Ministry of Justice in 2013 and the allegations by the complainant that he was in the employ of the Ministry of Justice are untrue and unfounded. The first Applicant further claimed that he never, on his own or through any other person, received US\$200. The applicants also maintained, in their defence, that they did not demand any money from the complainant. According to the applicants, the US\$5 deposited in the Ecocash account of the first applicant's wife can be best explained by the wife of the first applicant.

The Applicants further submitted that the police report of fraud allegations were *bona fide* and there was no intention to extort. It is the defence of the applicants that every court case is of public in nature and the fact that the complainant's case was in the press has nothing to do with the applicants but is a product of investigative journalism.

After going through its witnesses and tendering its evidence, the State chose to close its case. The applicants made an application for their discharge at the close of the State case. The application was made in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides as follows:

“(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.”

After interacting with the court, the counsel for the applicants, Mr *Muzana*, admitted that the sixth ground of review was improperly placed before this court as it raises a constitutional question which ought to have been referred to the Constitutional Court in terms of s 175(4) of the Constitution. After this admission, the sole question of whether or not the court *a quo* properly dismissed application for the discharge of the applicants at the close of the State case continues to exercise the mind of the court. Once this issue is determined, all the other issues raised by the applicants in their multiple grounds of review will be automatically resolved as well. This is so because the grounds for review relied upon by the applicants revolve around the height of evidence required for such application to succeed.

Application for discharge at the close of the State case has been resolved in our jurisdiction and beyond and this now resembles a well toured road. For the purposes of such application, the court will circumspectly examine whether or not the following issues have been satisfied:

- (a) Whether there is evidence to prove an essential element of the offence;
- (b) Whether there is evidence on which a reasonable court, acting carefully, might properly convict;
- (c) Whether the evidence adduced on behalf of the State is so manifestly unreliable to the extent that no reasonable court could safely act on it.

In the case of *The Prosecutor-General of Zimbabwe v Richard Masvire and Ors*¹, the court superbly postulated the essential requirements of the application for discharge of the accused at the close of the State case in the following apposite remarks:

“The legal position therefore, in application brought in terms of s 198 (3), may be summarised as follows:

- (a) an accused person is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself;
- (b) in deciding whether the accused is entitled to be discharged at the close of the State case, the court may take into account the credibility of the State witnesses, even if only to a limited extent;
- (c) where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot be relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted.”

See also *State v Shrien Prakash Dewani* CC 15/2014 (Constitutional Court of South Africa).

At that stage of a trial, the evaluation of the evidence is different from that involved at the end of the trial. It is a *sui generis* interlocutory application, which typically raises a question of law and not fact. A court seized with such an application must bear this in mind when adjudicating an application in terms of s 198 (3) of the Criminal Procedure and Evidence Act.

The words “no evidence” have been interpreted to mean no evidence upon which a reasonable court acting carefully may convict. Again the “no evidence” test is *sui generis*.

See *S v Shuping*.² It will be seen that at this stage there is not an onus in the usual sense of the law, and specifically not an onus on a *prima facie* basis to be met by the State. “*Prima facie*” is defined as that: if a party on who lies the burden of proof goes as far as he reasonably can in producing the evidence and that evidence calls for an answer, it is *prima facie* evidence. In the absence of an answer from the other side, it becomes conclusive. Therefore, once a *prima facie* case has been established the evidential burden will shift to the accused to adduce evidence in order to escape conviction. However, the burden of proof will remain with the prosecution.”

¹ HH5/19.

² 1983 (2) SA 119 (B).

See also the cases of *S v Bvuma*³, *S v Muzizi*⁴, *A.G. v Tarwirei*^{5,6}, *S v Kachipare*^{7,8}, *S v Tsvangirai*⁹, *AG v Makamba*¹⁰, *S v Benjamin Paradza*¹¹, *S v Christopher Tichaona Kuruneri*¹², *S v Bennet*¹³ and *S. v John Arnold Bredenkamp*¹⁴.

The cases of *Prosecutor-General of Zimbabwe v Richard Masvaire (supra and Kachipare (supra))*, have established a three-pronged approach to the application for discharge. Firstly, the court must cautiously analyse whether there are essential elements for the offence in question. Secondly, the court must investigate whether any court acting carefully may properly convict the accused persons. Lastly, the court must critically assess whether the evidence adduced is palpably unreliable

In casu, for the offence of extortion to have been committed, certain essential elements must be proved. Most of the offences in our jurisdiction do require the proof of *mens rea* and *actus rea*. *Mens rea* is the intention or mental capacity possessed by the accused at the time of the alleged commission of the offence while *actus rea* refers to the physical act involved in the alleged commission of the offence. Intention is to be proved using a subjective test according to s 13 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Thus, there must be an intention to exert pressure on another person by the Applicants as one of the essential requirements of extortion as established by Section 134(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. . For purposes of proving *actus rea*, the State must demonstrate that illegitimate pressure was exerted by the accused to gain an advantage for the accused concerned or for another person.

³ 1987 (2) ZLR 1996.

⁴ 1991 (2) ZLR 321.

⁵ 1997 (1) ZLR 575.

⁶ 1997 (1) ZLR 575.

⁷ 1998 (2) ZLR 271 S.

⁸ 1998 (2) ZLR 271 at 276C-277A.

⁹ 2003 (2) ZLR 88 at 89H-91A.

¹⁰ 2005(2) ZLR 54 at 64 G-65 B.

¹¹ 2006 (1) ZLR 20 at 24G-25F.

¹² HH 59-2007.

¹³ 2011 (1) ZLR 396 at 400D-401B.

¹⁴ HH305/13.

The complainant, in his testimony before the court *a quo*, highlighted that he was pressured in many respects. Firstly, he claimed that he was pressured by the first applicant to deposit money into the account of the first applicant's wife which he eventually did through Farai Ndudzo. Farai Ndudzo confirmed that he deposited US\$5 into the Ecocash account of Caroline Chamunorwa, the first applicant's wife. According to Farai Ndudzo, the first applicant instructed him to deposit into that Ecocash account. The evidence-in-chief for Farai Ndudzo is from pp 178 to 183 of the record.

The State begged leave to tender Ecocash statement confirming the allegations. The defence counsel vehemently opposed the request. Eventually, the court *a quo* ruled that the Ecocash statement should be part of the record. According to the Ecocash statement which is on p 247, US\$5 was deposited into the Ecocash account of 0777693299 which is the phone number of the first applicant's wife. The phone number of the initiator of the transaction is 0778553326, which is the phone number of Farai Ndudzo. This evidence was not destroyed by cross-examination which is on pages 183-187. The first applicant did not deny that Caroline Chamunorwa is his wife. According to the defence outline filed, the applicants submitted that the Ecocash transaction can only be explained by the first applicant's wife. Consequently, it is necessary that answers be extracted from the applicants as there are a lot of unclear areas. The only means of extracting such answers is to put the Applicants to their defence.

The complainant also maintained his evidence that an amount of US\$200 was paid in cash to the 1st Applicant through Zvikomborero Tigere, after being pressured by the 1st Applicant. Zvikomborero Tigere was called to substantiate this testimony. The evidence-in-chief of this witness is from p 169 up to p 171. The applicants, through their counsel, failed to shake Zvikomborero Tigere under cross-examination which is from p 172 up to p 178 of the record. The cross-examination leaves a lot of grey areas which require an answer from the Applicants. Such answer can only be obtained through putting the applicants to their defence.

The complainant also asserted that he was pressured to deposit US\$400 into the bank account of the Rugwaro and Associates after being compelled by the applicants. The document on p 241 of the record was tendered as exhibit. This document reflects an attempted transfer of US\$400 to Rugwaro Legal Practitioners. The complainant then later successfully reversed the transaction two days later, on 26 May 2017. The communication to reverse the transaction addressed to the bank is on p 242 of the record. Evidence of this nature definitely requires reply from the applicants.

In the circumstances, in my view, it is apparent, on a *prima facie* basis, that the essential elements of extortion are available with regard being had to testimonial and documentary evidence which was laid before the court *a quo*. On a *prima facie* footing, one can draw an inference that the applicants harboured intention to exert pressure on the complainant. After reaching this conclusion, a reasonable court acting carefully may properly convict. In the premises, the evidence led by the State cannot be deemed to be patently or manifestly unreliable.

Now turning to the grounds of review, it is pertinent to note that the investigating officer, Manyanya Marandure, is not a key witness as correctly observed by the State. The Applicants, in their first ground of review, had challenged the evidence of the investigating officer. The court will not bother itself in analyzing his evidence in light of the evidence of the three eye witnesses. In my view these three are key witnesses. Mr *Muchemwa*, on behalf of the second respondent, correctly argued that the investigating officer is not a key witness. The evidence of the investigating officer will be assessed by the court *a quo* at the appropriate time upon the conclusion of the trial. In any event, for the purposes of the application for discharge at the close of the State case, the court may take into account the credibility of the State witnesses, even if only to a limited extent as set out in the case of *Richard Masvair* (*supra*). The credibility of the three key witnesses called to testify on behalf of the State before the court *a quo* met this threshold of the limited extent.

In the seventh ground of review, the applicants had attacked the first respondent for using the duplicate record where the original record was before this Court. This ground is not clear as the applicants did not go on to allege prejudice suffered by the applicants as a consequence. The applicants did not aver that the duplicate record had insufficient information or documents. Further, this ground of review was not pursued any further in the subsequent pleadings and Heads of Argument. In the premises, in the absence of further submissions made by the applicants, I find no merit in this ground of review.

The rest of the grounds of review, are concerned with the base of the evidence established by the State. Having reached the conclusion that the State established a *prima facie* case, the other grounds of review, with the exception of the sixth ground which was abandoned, automatically fall away.

The court *a quo* certainly cannot ignore evidence placed before it by the State witnesses. Ignoring this evidence would put the administration of justice into disrepute. The height of evidence, at this stage, is only to establish a *prima facie* case as opposed to proving the case beyond a reasonable doubt which should be the case at the conclusion of the trial. When the court is faced with the trial of extortion, it is called upon to exercise a high degree of circumspection given that the accused may employ sophisticated organized systems to ensure that it may be difficult if not impossible to link the alleged commission of the offence with the accused.

In my considered view, the present matter does not fall within the province of the examples of cases requiring this court's interference with the unfinished proceedings of the court *a quo*. According to the case of *Richard Masvairé (supra)*, the issue that should exercise the mind of the court when faced with this application is the question of law and not the question of fact. This legal test can only be objectively determined after having regard to all surrounding circumstances. The court has to employ the reasonable man's test.

After a judicious and meticulous examination of all surrounding factual and legal circumstances, it is my considered opinion that the first respondent correctly and properly came to a logical conclusion that a *prima facie* case has been established. In accordance with the case of *Richard Masvairé (supra)*, the State went as far as it reasonably could in producing the evidence and such evidence placed before the court *a quo* calls for an answer from the applicants. I find no sound basis for setting aside the decision of the court *a quo*. Setting aside such a decision may constitute a flagrant affront to the sense of justice, in my view. The present application lacks merits. Consequently, the applicants must be put to their defence to answer the *prima facie* case that has been established by the State. In the result, **IT IS ORDERED AS FOLLOWS:**

The application be and is hereby dismissed with no order as to costs.

Tapera Muzana and Partners, first and third applicants' legal practitioners
National Prosecuting Authority, second respondent's legal practitioners.