

CONSTABLE TABARWA P992540V
versus
CHIEF SUPERINTENDENT NYONG'O T
(The Trial Officer)
And
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 11 October 2022
Written reasons provided on 7 June 2023

Opposed Application

N. Mugiya for the Applicant
T Undenge, for the Respondents

ZISENGWE J: The following are the reasons informing my decision to dismiss applicant's quest to have the decision of the 1st respondent set aside on review. The reasons are and provided at the behest of the applicant who has since mounted an appeal against that decision. The review application attacked the decision of the 1st respondent to refuse discharge the applicant at the close of the case for the prosecution. The applicant is currently on trial in terms of internal disciplinary proceedings conducted under the Police Act, [*Chapter 11:10*].

The applicant is a serving member of the Zimbabwe Republic Police (ZRP) and holds the rank of Constable. She stands charged with contravening paragraph 34 of the schedule to the said Act. The heading of the charge reads "*Omitting or neglecting or performing any duty as in any improper manner.*" At the time of the incident which gave rise to the charge the applicant was deployed at the Beit- Bridge border post. The nub of the charge is that she demanded and received

money from travellers at the aforementioned Border post in circumstances where she was not legally entitled to. She denied the charge. The Charge reads:

“In that on the 25th day of December 2020 and at Beitbridge border Gomba searching Bay, the defaulter, being a member of the Police Service, unlawfully omitted, or neglected or performed any duty in any improper manner, that is to say the defaulter was seen collecting or demanding bribes from motorists by Zimbabwe Anti-Corruption Commission officials. She was arrested and found in possession of R550 undeclared cash with the following serial numbers; R50-KT10834C; R50KM1185382C; R50KH5105966C; R50-KE8362815C; R50-LJ2842805C; R50KS0351529C; R100-PF638664D; R100- PB6614104D.”

The applicant denied that charge and presented a double pronged defence to the charge. Firstly, by way of exception she attacked the propriety or competence of the charge indicating as she did that the charge and the allegations were at variance. In this regard she indicated that the prosecuting authority should have preferred the charge of contravening paragraph 27 of the schedule to the Police Act which essentially proscribes unlawfully soliciting or accepting any bribe, reward or consideration.

Secondly, the applicant completely denied the allegations levelled against her branding them as malicious, contrived and unfounded. She also alleged that the officers who arrested her had attempted to plant evidence against her in a bid to falsely incriminate her. She therefore urged the trial court to acquit her on that basis.

The exception was challenged by the State which argued that same was unmeritorious as the apparent variance between the allegations and the charge was inconsequential. Although it did not say in as many words, the position of the prosecution was that any such perceived imperfection in the charge could be cured by the evidence.

The exception was dismissed by the trial court which found that the charge preferred was sufficiently wide in its ambit to encompass the conduct alleged.

Three witnesses testified for the prosecution, two of these witnesses namely *Lindiwe Sabeka* and *Sandra Taziwa* are employed by the Zimbabwe Anti-Corruption Commission (ZACC) as investigators. The third *Sgt William Mbiswe* is employed by the Zimbabwe Republic Police. A *precis* of each of their accounts will be given below:

Lindiwe Sabeka

This witness testified that she together with others who included the said state witness Sandra Taziwa were assigned to investigate reports to the effect that police officers manning a place called Gomba were unlawfully demanding money from Zimbabweans returning from South Africa. The money was meant to facilitate their release from that area. According to her this operation followed an anonymous tip off of the goings on at Gomba.

She testified that on the day in question., namely 25th of December 2020, she and two of her colleagues observed from their vantage point the applicant and others receiving money from returning residents. After observing this activity for some 3-4 hours, she then approached the applicant and placed her under arrest after having duly introduced herself. It was her evidence that although the applicant attempted to take flight, they managed to apprehend her. They then isolated her and recovered the sum of 550 South African Rands (ZAR). R250 of that amount was in her right trouser pocket and the rest in the right pocket of her shirt. She then recorded the serial numbers of the money so recovered in her diary following which applicant counter signed therein as acknowledgement of the witness having recovered those sums from her. This was witnessed by the 2nd state witness and one *Erick Chacha*. She further testified that in the wake of her arrest, the applicant was taken to Beit Bridge police Station for further processing. The seven 50-Rand bank notes and two 100-RAND bank notes were produced as exhibits during the trial.

She would categorically deny applicant's version that she was merely a sacrificial lamb for the other officers who had managed to make good their escape. She would equally deny applicant's defence that evidence was planted against her. She stated that as a matter of fact, the applicant had pleaded with her to be released and that she had apologised for her wrong doing.

She would be subjected to some lengthy cross examination on issues of varying relevance. Part of the cross examination related to the nexus between the charge and the facts it being suggested to her that only the applicant's principal who had assigned duties to her would be in a position to testify on the alleged deviation from her duties.

In response the witness maintained that the applicant as a public officer was duty bound to conduct herself with the requisite integrity befitting that office and that demanding and collecting money from travellers was inimical to her call of duty.

She was also ordered to give elaborate details of each of the travellers from whom the applicant had allegedly received money. She conceded that she was not in a position to do so. She was similarly quizzed on the apparent variance between the serial numbers noted in her statement vis-à-vis the South African Bank notes which were produced during the hearing as exhibits. She would be further questioned on the signature ostensibly appended by the applicant in the witness's diary and questions of its admissibility. In addition, she was questioned to some considerable length on the admissibility of certain of her exhibits in terms of the Criminal Procedure and Evidence Act, [Chapter 9:07 (the CPEA). She was questioned on two R50 bank notes whose serial numbers were not included in the witness's statement but were produced in count as exhibits and that according to that statement the sum of R450 was recovered from the applicant. The witness responded in the affirmative on both instances. She also admitted during cross examination that the figure of R550 appearing in her notebook was at variance with that of R450 appearing in her statement

Additionally, she was taken to task on why her diary bore two different dates namely 25 December 2020 and 20 December 2020 and that there was no name appended against the signature from whom the money was recovered. The witness however insisted that her statement, the applicant's signature and force number were indicative of the money in question having been recovered from the applicant. She would deny accusations put to her that the absence by a written statement by applicant in that diary was evidence of the witness having manufactured evidence against her.

She would also refute suggestions that it was not the applicant who had appended the signature appearing in the witness's diary, insisting as she did that it was hers.

The witness would however concede that the diary could only be admitted in evidence in terms of Section 115(b) as read with Section 256 of the CPEA and that these sections had not been compiled with to the letter and that the money was inadmissible on account of the provision of Section 49 (2) of the said Act. In both instances the witness would be given a copy of the Act and asked to read and interpret the said provisions.

It was also put to the witness that Section 70 (3) of the Constitution provides for the exclusion of evidence obtained contrary to the Law because it violates the accused's right to a fair trial.

Some of the concessions apparently made by this witness would form the backbone of the application that would subsequently be made at the close of the state case.

Finally, she was quizzed on why she had not bothered to retrieve CCTV footage from cameras which cover the area, to which she responded by indicating that she had not deemed the same necessary although such footage would have been useful in those proceedings.

Sandra Taziwa

The evidence of this witness for the most part mirrors that of the 1st State witnesses. In brief she testified about the reason for that mission, their surveillance of the goings in at Gomba area of Beit bridge and most pertinently of the events leading to the arrest of the applicant. This witness as with the preceding one are completely denied any malice against the applicant as having planted evidence in a bid to falsely incriminate her.

Her cross examination for all intents and purposes was similar to that of the 1st state witness where there were apparent contradictions between her account and that of Lindiwe Sabeka, these were pointed out. Issues pertaining to the admissibility of the recordings in Lindiwe's diary were also brought up in the cross examination of this witness

Sgt William Mbewe

As indicated earlier, this witness is a serving member of the ZRP and is applicant's superior at Beit Bridge border post.

According to this witness as per standard procedure, the applicant alongside her colleagues declared her valuables at a parade which he conducted prior to their deployment at the border post. In this regard the applicant declared the sum of R200, which sum of money she retained in her possession. The relevant declaration register was produced as an exhibit.

It was Mbewe's evidence that the applicant's duties included enforcing COVID-19 regulations which were in force at the time, protecting property, maintaining police presence and arresting general offenders.

Later that day at around 13:45 has he got wind of the fact that a police officer who later turned out to be the applicant had been arrested. He followed up on this information by proceeding to the charge office that is when he discovered that applicant had been arrested for soliciting for

bribes, needless to say this was something which did not constitute part of her official duties for which she had been assigned.

His cross examination consisted of a single question to the effect of whether he had any direct or indirect evidence related to the alleged incident of applicant demanding and receiving money from returning residents to which he answered in the negative. He however pointed out following a question by the trial officer that of the allegations of her being found with money in excess of what she had officially declared, then that would constitute “*an offence*”

With that the State closed its case

This was followed by an application for the discharge of the applicant at the close of the State case brought in terms of Section 198(3) of the CPEA. It was argued in applicant’s behalf that the State case fell woefully short of that of which constitutes a *prima facie* case.

In that application the applicant enumerated the instances where the evidence of the first two witnesses was contradictory. Further, as earlier stated the applicant relied on the concessions apparently made by the 1st witness in relation to the admissibility of certain evidence.

The evidence by the third State witness was branded irrelevant and unhelpful to the State’s cause

The application for discharge was opposed by the State on whose behalf it was argued that the evidence by the state witness was not so poor as to render it worthless. Regarding the provisions of section 49 (2) of the CPEA, it was argued that same was inapplicable to ZACC officials as it specifically refers to police officers.

More pertinently however, it was submitted on behalf of the State that the chain of evidence, its perceived shortcomings notwithstanding, showed that the applicant had not only been observed demanding and receiving money from travellers but also that she had been found in possession of money in excess to what she had declared at deployment.

Ultimately, the State insisted in its written submissions contesting the application for discharge that the State had made out a firm case against the applicant demanding a reply from him (*State V Hlambelo HB 251/20*) and that at this stage of the proceedings the test is not whether the State had managed to prove its case beyond reasonable doubt (*State V Luke Mungeza HMT 1/18*)

The applicant filed a replication digging in- and maintaining as she did, questioning *inter alia* the procedure adopted in recovery R550 from the applicant.

The trial officer dismissed the application for discharge. He gave brief reasons for doing so. He wrote:

“Having gone through all the above case documents alongside the record, this court’s position is that prima facie against the defaulter exists. The defaulter is hereby put to her defence so as to shed some light of some grey areas. For instance, possession of more money than what she had upon reporting for duty regards explanation.”

The applicant swiftly reacted by mounting this application for the review of that decision. She set out three grounds of review challenging that decision namely:

- 1. That the trial officer misdirected himself when he placed the Applicant to her defence where the State had failed to prove a prima facie case against the Applicant.*
- 2. That the trial officer misdirected himself when he failed to apply his mind to the matter and placed the Applicant on her defence to prove that she is not guilty.*
- 3. The trial officer misdirected himself when he failed to rebut the basis of the application.*

She therefore sought an order setting aside the dismissal of the application for discharge and its substitution with a verdict of not guilty and acquitted. She also sought costs against the Respondents on the attorney-client scale.

The application was opposed by the two respondents who apart from insisting that the decision of the trial officer could not be impeached, challenged the propriety of seeking the review of untermiated proceedings and it was primarily but not exclusively upon which I dismissed the application for review.

I pointed out then as I reiterate here that the applicant had failed to demonstrate absence of any other means by which the alleged grave injustice that she complains of can be redressed

There is a wealth of case law authorities to that effect that superior courts should be slow to interfere with untermiated proceedings of inferior courts or tribunals and should only do so in exceptional circumstances where grave injustice would otherwise be occasioned to the applicant when that relief is not granted at that stage. I can only refer to a fair such decisions.

The remarks of MAKARAU JA (as she then was) *In Prosecutor General of Zimbabwe v Intratek Zimbabwe (Pvt) Ltd & others* SC-67-20 are opposite. She said:

“The general rule on when a superior Court may interfere with the unterminated proceedings of a lower court was settled in Attorney General v Makamba 2003 (2) ZLR 54 (S) where MALABA JA (as he then was) had this to say at 64C

“The general rule is that a superior court should interfere in uncompleted proceedings only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant”

In *Ishmael & others v Additional Magistrate Wynberg & Another* 1963 (1) SA 1 (A) Steyn J at page 4 said

“It is not every failure of justice which would amount to a gross irregularity justifying intervention before completion... A superior court should be slow to intervene in unterminated proceedings in a court below and should generally speaking confine the exercise of its powers to rare cases where grave injustice might otherwise result or where justice might not by other means be obtained.”

In applying the above principles, I made the following findings in the brief *ex tempore* judgment I gave.

a) Whether there is some other avenue available to applicant for redress

In this regard I pointed out that the Police Act provides not only that there is automatic review of the decision of the single officer but also that she has a right of appeal against the decision of the single officer to the Commissioner General of the Police.

Subsections (3) and (7) of Section 34 of the Police Act read:

34. Trial before court consisting of one officer

(1)

(2)

(3) *Every officer who convicts and sentences a member under this section shall forthwith transmit the proceedings for review by the Commissioner General, who may-*

a) Confirm the conviction and sentence

- b) *Alter or quash the conviction or reduce the sentence or substitute a different but not severer sentence*
- c) *Quash the conviction and sentence and remit the matter for trial afresh before a different officer*
- d) *Remit the matter to the officer with instructions relative to further proceedings to be held in the case as the commissioner General thinks fit.*

Provided that no conviction or sentence shall be quashed or set aside by reason of any irregularity or defect in the record or proceedings unless the Commissioner General considers that a miscarriage of justice has actually occurred.

(4)

(5)

(6)

- (7) *A member convicted and sentenced under this section may appeal to the Commissioner-General within such time and in such manner as may be presented against the conviction and sentence and where an appeal is noted, the sentence shall not be executed until the decision of the Commissioner General is given.*

Further I also pointed out that it is now established that the decision of the Commissioner General of Police is subject to review by this Court at the instance of an aggrieved member.

Surely therefore there is sufficient scope for redress of at the conclusion of the trial should the applicant be aggrieved by the outcome thereof.

There was a belated attempt made on behalf of the applicant to suggest that an appeal to the Commissioner General would merely an exercise in futility as she would be denied her liberty the moment she was convicted. That submission was not meaningfully pursued or substantiated.

Whether the decision of the trial court was clearly wrong as to seriously prejudice the rights of the applicant

This question of necessity demands an interrogation of whether or not the decision of the 1st respondent to refuse the application for discharge was properly made. This in turn requires revisiting the law in such applications.

It is trite that in terms of Section 198(3) of the CPEA, the court is obliged to discharge an accused when it considers that there is no evidence that the accused committed the offence charged or any other offence of which he as she might be convicted and the court shall return a verdict of Not guilty, See *AG v Bennett* 2011 (1) ZLR 396 (S).

The words “*no evidence*” appearing in that section have been interpreted to mean “no evidence upon which a reasonable person might convict.” The test is not whether the state has proved its case beyond reasonable doubt, *State v Morgan Tsvangirai* HH 119/2003 & *AG v Bennett (Supra)*

In *AG v Bennett (Supra)*, the Supreme Court summarised instances where the court must discharge an accused at the close of the State case, these are:

- a) *Where there is no evidence to prove an essential element of the offence; AG v Bvuma & Another* 1987 (2) ZLR 96 (S) AT 102.
- b) *Where there is no evidence on which a reasonable court acting carefully might properly convict AG v Mzizi* 1991 (2) ZLR 32.
- c) *Where the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it; AG v Tarwireyi* 1997 (1) ZLR 575 (S)

The evidence which the state managed to establish which undoubtedly weighed on the 1st respondent’s mind can be summarised as follows: Firstly, collecting money from returning residents was not part of applicant’s remit yet the first two State witnesses indicated that they observed her (and others in her group) receiving money from returning residents. Secondly, the applicant upon assumption of duty declared the sum of R200, yet at the time of her arrest she was found in possession of an amount far in excess of what she had declared. The fact that it may have been R450 or R550 does not in the least detract from the fact that she had an amount exceeding what she had officially declared. This in part lends credence to the evidence of her having received money from travellers. Thirdly, the fact that she acknowledged the sum of money having been received from her and that according to the first state witnesses she appended her signature therein

is not insignificant. The admissibility of the witness's diary is a separate albeit related inquiry from her oral evidence that as a matter of fact applicant did acknowledge the said sum of money as having been recovered from her.

As earlier indicated the applicant's counsel enumerated some instances where in his view the first and second State witnesses contradicted each other or where they contradicted previous statements to the police. The thesis to which counsel apparently subscribes to is that in a case of conflict both versions should be rejected as false. This in my new, amounts to a *non sequitur*. In *State v Oosthuizen* 1982 (3) SA 571 (7) at 576 B-D NICHOLAS J had this to say:

“Where the statements are made by different persons, the contradiction in itself proves only that one of them is erroneous. It does not prove which one. It follows that the mere fact of the contradiction does not support any conclusion as to the credibility of either person. It acquires probative value only when the contradicting witness is believed in preference to the first witness, that is, if the error of the first witness is established.

‘It is not the contradiction, but the truth of contradicting assertion as opposed to the first one, that constitutes the probative end “(Wigmore [On evidence Vol III] at 653”

And with regard to self-contradiction, at 576 G-H

“But the process [of identifying contradictions of previous statements] does not provide a rule of thumb for assessing the credibility of a witness. Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness evidence.”

What can be gathered from the above, is that a list of contradictions between witnesses itself leads nowhere as far as dishonesty is concerned. It is only when it has been established on other grounds that the one witness is reliable and the other one not that the evidence of the latter can be rejected. This inevitably means, of course, that the evidence of the former will be accepted.

I must also hasten to add that the evaluation of evidence requires of the court to consider the evidence as a whole, instead of focusing to intently upon the separate and individual parts of the evidence. Doubt may indeed arise when one or more aspects of the evidence are considered in isolation but when evaluated with the rest of the evidence, such doubt may be set to rest.

Regarding the question of unconstitutionally obtained evidence the following exchange which appears *ex facie* the record took place during the cross examination of the first State witness.

Question Do you appreciate that in terms of Section 70(3) of the Constitution, any evidence that is obtained contrary to the law must be excluded as evidence as it violates the accused's [right] to a fair trial and due administration of justice

Answer I appreciate

Not only was the question a misarticulation of the correct Constitutional provision, but also the response by the witness betrays her appreciation of the salient principles attending thereto. Section 70(3) of the Constitution does not provide for a wholesale rejection of improperly obtained evidence. It requires of the court to balance the prejudicial effect of the admission of such evidence vis-à-vis its probative value. Such evidence is only rendered inadmissible if it would render the trial unfair. It reads:

258A Admissibility or inadmissibility of illegally-obtained evidence

(1) In determining for purposes of Section 70(3) of the Constitution, whether to exclude evidence that has been obtained in a manner that violates any provision of Chapter 4 of the Constitution, a court shall endeavour to strike a proper balance between-

(a) Safeguarding –

- (i) The rights of the accused concerned; and
- (ii) The integrity of the criminal justice system against serious or persistent breaches of the law by the police or other employees of the State; and

(b) The public interest in

- (i) Doing justice to the victims of the crime in question; and
- (ii) Upholding the confidence of the public in the ability of the criminal justice system to protect members of the public from crime, especially grave, violent as prevalent crime;

And in so doing the court must bear in mind, in general-

- (c) Only serious or persistent breaches of substantive rather than procedural rights or
- (d)

(2).....

(3).....

The point I make is that it was inaccurate for counsel to suggest that all unconstitutionally evidence is inadmissible. What Section 70(3) of the Constitution and S258A of the CPEA attempt to do so is to balance two equally compelling claims-the claim that society has that a guilty person should be convicted and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental or persistent nature, and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict, the former interest prevails.

The general approach was articulated in *Key v B Attorney General, Cape Provincial Division and Another* 1996 (4) SA 187 CC at 195 Gr- 196D where KRIEGLER J said the following:

*“In any democratic criminal justice System there is tension between, on the one hand the public interest in bringing criminals to book and on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international rights bodies enlightened legislators and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately as was held in *Ferreira v Levin*, fairness is an issue and which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally, never the lens be admitted”*

Counsel therefore needed to be candid with the witness and should have explained the above to her. More appropriately however, this was not a matter for debate with that witness but for legal arguments for the court’s adjudication.

Put in context therefore, the evidence which counsel claimed was automatically inadmissible was not necessarily so. It remained part of evidential material which the court in its discretion and upon applying the relevant principles would have decided to either accept or reject.

The approach which applicant’s counsel appeared to have adopted was to attempt to bamboozle the witnesses with legal arguments in cross-examination. The strategy employed was to confront the witnesses with a text of a statutory provision and ask the witness to read it, interpret

it and then apply it in the context of the facts. That approach is not desirable. Issues relating to the admissibility of evidence are in the province of the court. If any piece of evidence is in the opinion of a party inadmissible for whatever reason, that party is expected to object to its adduction and upon arguments being heard on the subject, the court would then be called upon to render a ruling on its admissibility or otherwise.

Moving on, the extra curial admission allegedly spontaneously blurted out by the applicant at the time of her arrest was not necessarily inadmissible. The first state witness testified that the applicant pleaded with her not to place her under arrest as she stood to lose her job yet she was the sole breadwinner for her family. I could not, for the life of me, comprehend the arguments advanced by Mr Mugiya why that evidence should have been disregarded or otherwise excluded. Such evidence remained crucial evidential material upon which the trial officer could act.

Equally bewildering was the suggestion that the evidence of the 3rd witness was innocuous. That evidence was critical as it established *inter alia*, not only how much the applicant declared at the time of her deployment but also that her duties did not include collecting cash from members of the travelling public.

I could go on *ad nauseum* but the fact remains that the decision of the 1st respondent was not patently wrong as the applicant wanted everyone to believe. There was sufficient evidential material upon which a reasonable person acting carefully might convict.

Ultimately it was for the twin reasons that the applicant has other means at her disposal for redress in the event she is aggrieved by the eventual outcome of her trial and the fact that I did not find the refusal to discharge her at the close of the state case to be clearly wrong that I dismissed the application to have the decision of the 1st respondent set aside with costs.

ZISENGWE J.

Mugiya and Muvhami Law Chambers, Applicants Legal practitioners

Civil Division of the Attorney General's office; 1st and 2nd Respondent's legal practitioners