MARTIN MUPONA
versus
SHEILA NANZOMBE N.O
and
THE STATE

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 7 November, 2024 & 15 January 2025

Opposed Application

TL Mapuranga, for the applicant
L Chitanda, for the 2nd respondent
No appearance for the 1st respondent

DEME J: The Applicant brought an application for review of the 1st Respondent's decision for the dismissal of the application for discharge made at the close of the State's case. The application was brought before this court based on the following grounds:

1.1 "That the ruling made by the first Respondent is grossly unreasonable and is as outrageous as it defies all logic that no reasonable magistrates' court applying its mind to the case would have arrived at such a decision.

1.2 That the first Respondent is un-procedurally (sic) and in a grossly irregular manner seeking to facilitate the second Respondent to bolster its otherwise very weak case through the defence's evidence. The first Respondent did not show in her ruling that she actually exercised caution in treating evidence of the complainant and in dealing with the evidence of identification as well as unjustifiably disregarding the material inconsistencies and contradictions which bedeviled the state evidence. This is clearly untenable at law because no onus is cast on an accused person to assist the State to prove his defence.

1.3 The first Respondent grossly misdirected herself by dismissing the Application for discharge without taking due regard to the nature and circumstances of the alleged commission of the alleged sexual offence which if carefully considered would have shown that the State failed to establish a prima facie case against the Applicant more so where there is no positive medical evidence linking the Applicant to the offence as well as three materially varying versions from the State witnesses which remained unresolved at the close of the state case.

1.4 The first Respondent has, in a grossly irregular manner, reversed the onus of proof in a criminal trial by seeking the Applicant to prove his defence of alibi and his innocence. The first Respondent's decision to place the Applicant to his defence in circumstances where there was clearly no *prima facie* case, will result in an unfair trial which is contrary to the Constitutional provisions mandated by s70 (1) (a) and 69 (1) as read with section 86 (3) of the Constitution of Zimbabwe."

The Applicant was arraigned before the Kadoma Regional Magistrates Court, with the first Respondent presiding over the case. The Applicant was facing a charge of rape as defined in terms of section 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The Applicant pleaded not guilty to the charge which saw the matter going to trial.

It is the Applicant's case that during the trial the State led its evidence through four witnesses and at the close of the State's case, the Applicant applied for discharge which application was opposed by the second Respondent and subsequently dismissed by the first Respondent. The Applicant then approached this court by way of the present application as he is of the view that he has been placed to his defence in circumstances where the State did not prove a *prima facie* case against him, which procedure is grossly irregular according to the Applicant.

It is the Applicant's case that the first Respondent did not consider the fact that there was no conclusive medical evidence linking the Applicant to the alleged offence. The Applicant asserted that there were also three inconsistent accounts of what happened given by three State witnesses. According to the Applicant, this fact was acknowledged by the 1st Respondent. The dismissal of the application for discharge at the close of the State case saw the Applicant being placed to his defence.

The Applicant averred that the first Respondent placed him on defence and failed to make a determination on the defence of alibi raised by the Applicant which ought to be disproved by the State. According to the Applicant, the 1st Respondent committed a grossly irregular procedure which is not provided for in the statutes. The failure to consider the Applicant's defence of alibi, in light of the Applicant's view, reversed the onus on the Applicant to prove his alibi.

On the issue of the "necessary considerations when dealing with evidence of children" the Applicant averred that these considerations were not taken into account. According to the Applicant, there is no evidence that the 1st Respondent exercised caution in its analysis of the children's evidence considering the manner of the Applicant's arrest, identification as the perpetrator as well as the defence of alibi raised.

It is the applicant's case that the medical practitioner who attended to the complainant did not conduct any scientific medical examination but, simply looked at the minor child's genitalia and determined that the tears were caused by the Applicant when he allegedly raped

her. This, according to the Applicant, cannot be conclusive evidence that warrants placing him on his defence.

The Applicant further asserted that he is not sure which State case he has to answer to as there are three varying accounts from the three State witnesses which amounts to a gross irregularity as there is no *prima facie* case against him established by the State. The Applicant also raised the issue that there was no proper identification parade conducted. It was further alleged by the Applicant that the complainant confirmed that she did not know the Applicant.

The Applicant further averred that a certain George Chibatabere (hereinafter called "the convicted person") had been convicted using the same evidence that was then used against him, a turn of events that makes his current prosecution irregular. It is therefore the Applicant's case that if the decision of the 1st Respondent is not overturned, his constitutional rights would be grossly prejudiced.

In the circumstances, the Applicant prayed for the following relief:

1. "The decision of the first Respondent dismissing the Applicant's Application for Discharge at the Close of State Case under Case Number CRB KAD R 358/22 be and is hereby set aside.
2. Applicant be and is hereby discharged and acquitted at the close of State Case under Case Number CRB KAD R 358/22.
3. Each party to bear its own costs."

The second Respondent opposed the present application. It averred that the courts are slow to interfere in ongoing proceedings to avoid creating a chaotic situation which results in disruptions of unterminated proceedings. According to established case law cited by the 2nd Respondent, the power to review an interlocutory decision should be exercised sparingly, only in situations where failing to do so would result in a grave injustice.

The second Respondent averred that the court *a quo* took the necessary precautions when dealing with the evidence of the minors that was adduced. On the issue of the medical evidence that was adduced on behalf of the 2nd Respondent, it was averred that the evidence proved the commission of the alleged offence.

It is the second Respondent's case that the witnesses' testimonies were consistent and there were no differing versions as alleged by the Applicant. The 2nd Respondent further averred that there was no mistaken identity as the Complainant succinctly identified the Applicant as "Baba Noku" and knew where he resides.

The second Respondent denied that it has failed to prove its case and seeks to bolster its case by putting the Applicant to his defence. The second Respondent maintained that the State was able to prove a *prima facie* case against the Applicant. It was argued on behalf of the second Respondent that the evidence adduced on behalf of the State is not so unreliable that a reasonable court would not have come to the same decision as the one that the 1st Respondent made. The second Respondent also averred that at this stage proving its case beyond a reasonable doubt is not the threshold, it simply has to prove a *prima facie* case against the Applicant.

In the circumstances, the second Respondent averred that the Applicant has failed to show the existence of exceptional circumstances warranting the granting of the present application. The second Respondent maintained that the first Respondent made a decision that was sound in law and based on the facts and can therefore not be deemed unreasonable.

The sole issue that arises for determination is whether this court may set aside the decision of the court *a quo* based on one or more of the grounds for review outlined by the Applicant in his application.

The application for the discharge of the accused at the close of the State case is provided for by 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."

It is an established principle in our jurisdiction that superior courts must be reluctant to act where it is invited to interfere with unterminated proceedings from the inferior courts where exceptional circumstances have not been demonstrated. In the case of *Machipisa V Nduna No and Anor*[1], the Supreme Court beautifully propounded as follows:

> "It is now trite that superior courts will not lightly interfere with unterminated proceedings brought on review before them. They can only do so in exceptional circumstances where the trial court's proceedings will have been affected by gross irregularities which irredeemably vitiates the proceedings. Unterminated proceedings can also be reviewed and set aside if the interlocutory order of the trial court is clearly wrong."

[1] SC89/23

Further, the superior courts can only interfere with unfinished proceedings from the lower courts where the superior court has detected gross miscarriage of justice which cannot be corrected by any other means. In the case of *Attorney General v Makamba*[2], Malaba JA (as he then was) said:

> "The general rule is that a superior court should intervene in uncompleted proceedings in the lower courts 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".

The reasoning behind the superior court's reluctance to interfere with uncompleted matters from the lower courts is to encourage finality to litigation. Entertaining applications based on unterminated proceedings in the absence of exceptional circumstances would militate against the speedy conclusion of the criminal justice system. The favoured approach, in the absence of compelling reasons, which has been adopted by our superior courts, is to wait for the finalisation of the proceedings. In the case *of Prosecutor General of Zimbabwe* v *Intratek Zimbabwe (Pvt) Ltd, Wicknell Munodaani Chivayo & L Ncube*[3], MAKARAU JA (as she then was) dealing with the same issue at p 8 of the cyclostyled judgment said:

> "Thus, put conversely, the general rule is that superior courts must wait for the completion of the proceedings in the lower court before interfering with any interlocutory decision made during the proceedings. The exception to the rule is that only in rare or exceptional circumstances where the gross irregularity complained of goes to the root of the proceedings, vitiating the proceedings irreparably, may superior courts interfere with on-going proceedings.
>
> The rationale for the general rule may not be hard to find. If superior courts were to review and interfere with each and every interlocutory ruling made during proceedings in lower courts, finality in litigation will be severely jeopardised and the efficacy of the entire court system seriously compromised.
> Further, it is not every irregular and adverse interlocutory ruling or decision that amounts to an irreparable miscarriage of justice. Some such lapses get corrected or lose import during the course of the proceedings. And in any event, as observed by STEYN CJ in *Ishamel & Ors* v *Additional Magistrate Wynberg & Anor* (*supra)*, it is not every failure of justice which amounts to a gross irregularity justifying intervention before completion of trial. Most can wait to be addressed on appeal or review after final judgment."

In his first ground for review, the Applicant attacks the decision of the court *a quo* on the basis that the court *a quo* failed to consider material inconsistencies which arose in the State

[2] 2005 (2) ZLR 54 (S) at 648D
[3] SC 67/20

case. The Applicant also averred in his first ground that there is no evidence that the court *a quo* employed the cautionary approach when dealing with the evidence of the children who gave evidence before the court a quo.

It is clear that the court *a quo* was alive to the need to exercise a cautionary approach in this matter. The court *a quo* ruled that:

> "The State case is mostly hanged on the evidence of a juvenile 9 years. The court has taken into account the necessary consideration when dealing with evidence of children."

What is only missing from the first Respondent's ruling is how the court *a quo* applied the cautionary approach. In my view, that defect cannot be cured by the present application. It is my considered view that the irregularity complained of in the first ground does not irredeemably vitiate the proceedings before the court *a quo*. If the first Respondent fails to explain this in her final ruling at the conclusion of the trial, the Applicant will still be entitled to appeal or review whichever is appropriate. Similarly, the issue of alleged material inconsistencies does not cause permanent injustice to the Applicant which cannot be cured by appeal or review at the end of the proceedings at the court *a quo*. The issue of the identification method employed to pinpoint the Applicant can be adequately addressed at the conclusion of the trial at the court *a quo*. This is not something which results in irredeemable prejudice to the Applicant. Accordingly, the first ground for review lacks merit.

In the second ground for review, the Applicant impugned the decision of the court *a quo* on the basis that:

> "the State failed to establish a prima facie case against the Applicant more so where there is no positive medical evidence linking the Applicant to the offence as well as three materially varying versions from the State witnesses which remained unresolved at the close of the state case."

The test for *prima facie* case has been laid down in our jurisdiction. What is clear is that a *prima facie* case may be open to doubt. At the end of the State case, the court must not discharge the accused where the State has established its case on a *prima facie* basis. The proof will shift to a higher level at the conclusion of the trial. According to Thomson Reuters[4], *prima facie:*

[4] https://uk.practicallaw.thomsonreuters.com › ...

"is used in both civil and criminal law to denote that, on its face, **sufficient evidence exists to support a case**."

The requirements of the application for discharge of the accused at the close of the State case now resemble a well-travelled path in our jurisdiction. The court will 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.

The application for the discharge at the close of the State case has been settled by a plethora of cases in our jurisdiction including *S* v *Bvuma*[5], *S* v *Muzizi*[6], *S* v *Tarwirei*,[7] *S* v *Kachipare*,[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].

In the case of *The Prosecutor-General of Zimbabwe v Richard Masvaire and Ors*[15], the court propounded the essential requirements of the application for discharge of the accused at the close of the State case in the following remarks:

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

[5] 1987 (2) ZLR 1996.
[6] 1991 (2) ZLR 321.
[7] 1997 (1) ZLR 575.
[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.
[15] HH5/19.

(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.*[16] 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 whom 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."

I have already addressed the issue of alleged inconsistent statements above as I was highlighting the first ground for review. With regards to the issue of lack of medical evidence, it is apparent that the nurse, Ms Gota, who examined the complainant, gave evidence before the court *a quo*. It has not been disputed that she is the one who examined the complainant on 9 September 2022 which is after the date when the complainant was allegedly raped. Such oral evidence by Ms Gota amounts *to prima facie* case against the Applicant. In my view, the admissibility or otherwise of such evidence cannot be remedied at this stage whilst the proceedings have not been concluded. This is something that can be adequately addressed by way of review or appeal at the completion of the proceedings.

Related to this ground, the Applicant's counsel argued that the same evidence was used against the convicted person who was convicted based on this same evidence. I have not been

[16] 1983 (2) SA 119 (B).

favoured by the record of the other case. In light of this, I may not be able to make a determination of this issue from an informed perspective in the absence of the record of the convicted person. What is clear from this case is that the complainant was examined on 9 September 2022 after the alleged date of rape.

It is lamentable that our criminal justice system has not adopted DNA evidence as part of admissible evidence in sexual offences. I am sure that the present case justifies the need for amendment of the relevant laws in order to get conclusive evidence where two people are accused of having sexually assaulted the same complainant. From a practical perspective, it is possible that one person may be sexually battered by at least two persons whether at the same time or at different intervals. Gang rape is one such example where the complainant is sexually attacked at the same time by different persons. To this end, in my view, a *prima facie* case was established against the Applicant through the oral evidence of Ms Gota who examined the complainant after the alleged date of rape.

It was also argued on behalf of the Applicant that Mrs Chibatabere a relative of the convicted person also examined the complainant. Adv Mapuranga contended that the relative had an interest in exonerating the convicted person as the examination occurred before the conviction of Mr Chibatabere. In my view, this alone cannot invite this court to interfere with unterminated proceedings. Any injustice which may arise from this allegation can still be adequately redressed at the time of appeal or review, whichever will be appropriate, upon the conclusion of the proceedings at the court *a quo.* In light of this, I am of the considered view that the second ground for review is unmerited as it fails to raise incurable prejudice which may not be remedied by way of appeal or review upon the termination of proceedings at the court *a quo*.

In his third ground for review, the Applicant impugned the decision of the court *a quo* for failing to address the defence of *alibi* which he raised in his defence outline. In paragraphs 3-4 of his defence outline, the Applicant stated that:

> "3. He states that he was involved in an accident on the 7th of September 2022 at around 10 30 am at the 111 km peg along Bulawayo- Harare Road where after he was admitted into Chegutu Hospital for him to receive medical attention for the remainder of the day since he suffered moderate injuries which required medical attention. In the circumstances, he could not have met the complainant at his house at the same time that he was admitted at Chegutu Hospital.

> 4. As for the 8th of September 2022, the Accused was at his place of residence on his sick bed wherein, he was nursing his injuries and attending to various visitors who were visiting his residence throughout the day in question. Therefore, he could not have had access to the complainant on his own for purposes of committing the alleged offence in the manner alleged or at all. During the alleged time in question, the Accused could not have been on his own at the place of residence in question since there were tenants and other visitors who had visited the Accused's place of residence to commiserate with him consequent to the moderate injuries he had suffered during the Accident."

In the state outline, it was alleged that the alleged rape occurred on 8 September 2022. Reference is made to paragraph 4 of the State outline. Adv Mapuranga argued that the court *a quo* ought to have made a determination on the defence of *alibi* relied upon by the Applicant. Although it is an irregularity for the court *a quo* to have failed to determine the defence of *alibi* in her ruling, it is apparent that further analysis of paragraphs 3 and 4 of the defence outlines suggests that there is no defence of *alibi*. The Applicant, in paragraph 4 of his defence outline states that he was at home on 8 September 2022. Consequently, it is common cause that the Applicant was at his home on 8 September 2022, the alleged date of rape. This is consistent with paragraph 4 of the State outline. I am sure that at the time of preparing his defence outline, the Applicant or his legal practitioner was alert to the alleged date of rape.

The only issue which remains to be resolved by the court *a quo* in terms of paragraphs 3 or 4 of the Applicant's defence outline is whether the Applicant had visitors throughout the day of 8 September 2022, which could have made it impossible for him to sexually attack the complainant. This allegation can still be dealt with in the defence case. This is not something which may warrant this court's intervention before the completion of the full trial as this can be remedied thereafter. The defence of *alibi* would have been valid if the Applicant was still hospitalised by 8 September 2022. Having visitors at the alleged place of offence does not constitute the defence of *alibi*. In the circumstances, the third ground for review lacks merit.

It is evident that the present application fails to meet the requisite threshold justifying this court's intervention. The superior courts can only interfere with the unterminated proceedings at the lower courts in rare or exceptional cases in order to avert horrendous injustice. The learned authors of Gardiner and Lansdowne (6 ed Vol 1 p 750) state:

> "While a superior court having jurisdiction on review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other

> means be attained ...In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available."

In conclusion, I am of the view that the court *a quo* correctly ruled that the 2nd Respondent managed to establish a *prima facie* case against the Applicant. The case established by the 2nd Respondent calls for answers from the Applicant. Thus, it is expedient and in the interest of justice that the Applicant be put to his defence.

In the circumstances, I am of the view that the present application lacks merit. The application for discharge lodged by the Applicant at the court *a quo* was not merited. The present application does not raise irreparable prejudice faced by the Applicant as a result of the 1st Respondent's decision which may warrant this court's intervention. The injustice complained of, if they persist up to the end of the trial, may be remedied by some other means at the conclusion of the trial at the court *a quo*. In the result, the following order is made:

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

Rubaya and Chatambudza, applicant's legal practitioners.
National Prosecuting Authority, second respondent's legal practitioners.