

THE PROSECUTOR GENERAL
versus
SIMBARASHE KANGARA
and
OSTEN CHITAKE
and
MUNYARADZI T. GOTEKA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 September 2021

Application for leave to appeal by Prosecutor General

C Mutangadura, for the applicant
Respondents in default

CHITAPI J: This is an application for leave to appeal against the judgment of the magistrate courts wherein the Regional Magistrate J Mabeza Esquire sitting at Gwanda Regional Court acquitted three respondents on certain charges which I will set out in detail later. The applicant was dissatisfied with the acquittals and filed this application for leave to appeal against the judgment of the convicting court on 9 February 2016. Regrettably the record of the application was misfiled. The record has since been located. I also wish in this regard to acknowledge the efforts of the applicant's representative who in the meantime supplied the applicant's copy of the record and a copy of the certificate of service of the application upon the respondent's legal practitioners, *Messrs Manyurureni & Company Legal Practitioners*. Service of the application was according to the certificate of service, effected upon the respondent's legal practitioners receptionist one, Simbarashe at the legal practitioners offices at 5th Floor, Morgan House, 27 George Silundika Avenue, Harare at 1245hours.

Despite service thereof, the respondents did not file any opposing papers. This application is therefore not opposed by the respondents. Despite the non-opposition, the applicant must nonetheless establish a case to meet the relief of leave to appeal. I will therefore only grant the applicant's prayer if I am satisfied that the applicant has established a case for the relief sought. In this application the Prosecutor General applies for leave to appeal *against*

the judgment of the Magistrate as provided for in s 61 of the Magistrates Court Act, [Chapter 7.10]. The provision of the said section reads as follows:

“61. Prosecutor General may appeal to the High Court on point of law or against acquittal.

If the Prosecutor General is dissatisfied with the judgment of a court in a criminal matter –

- (a) upon a point of law or;
- (b) because it has acquitted or quashed the conviction of any person who was the accused in the case on a view of the facts which could not reasonably be entertained:

he may with the leave of a judge of the High Court appeal against that judgment.

Provided that the person who was the accused in the case shall have the right should he so desire, at his own expense to appear in person or to be legally represented or a judge of the High Court may order that such representation shall be defrayed out of moneys appropriated for the purpose by Act of Parliament.”

As I have indicated, the respondents did not oppose the application nor did they indicate that they wished to appear and exercise their right to be heard. Consequently I did not consider the appointment of a legal practitioner to represent the respondents they having chosen not to oppose the application.

Upon an analysis of s 61 as quoted above, the right of the Prosecutor General to appeal is limited to two instances. Firstly the right is available if the intended appeal is based upon a point of law. Secondly the right is available where it is shown that the court has acquitted or set aside the accused’s conviction basing its decision on facts which could not reasonably be entertained. In *casu* the applicant has filed his draft notice of appeal. It contains two grounds of appeal which are couched as follows:

“GROUNDS OF PPEAL

1. The court *a quo* misdirected itself in finding that despite admissibly of the accused person’s confessions (extra curial statements which were confirmed by a magistrate and subsequently held to have been made freely and voluntarily by the accused), the state had not proved its case beyond reasonable doubt when in fact, the court should have found that the evidence adduced by the arresting details who had received information of the intended smuggling by the accused actually corroborated their suspicion by detecting stashed gold upon the 1st respondent’s pointing it out.
2. The court *a quo* misdirected itself by finding that the person who should have been arrested was Kudzai Kangara and yet the same court acquitted the respondents using evidence of the same Kudzai Kangai who exculpated the respondents from criminal liability. It was therefore incompetent for the court to impute criminal liability to a witness whom it had *mero motu* called and believed.”

The applicant prays in the draft notice of appeal for an order setting aside the acquitted and substituting it with a verdict of guilty and for a sentence of five years imprisonment with one year suspended on conditions of future good behaviour.

The grounds of appeal are circuitous and not clear and concise in my view. Not without effort or difficulty I have distilled the thrust of the grounds of appeal. I must point out that it is important that the applicant prepares clear and concise grounds of appeal lest the appeal court determines that the notice of appeal is invalid for want of form. It is also important that in drafting the grounds of appeal, the applicant because of the limited nature of the grounds upon which he can appeal, shall relate each ground to one or other or both of the two limited grounds of appeal set out in s 61(a) or (b) as the case maybe because the two grounds limit the scope of the extent to which the right of appeal is available to the Prosecutor General.

From a distillation of the two proposed grounds of appeal, they raise points of law the complaint made is that the magistrate based the acquittals on facts which could not reasonably be entertained. Without getting into great detail the applicant averred that the magistrate was misdirected to acquit the respondent in the face of their admitted confessions which corroborated the evidence against them of the arresting details coupled with the fact that police recovered gold hidden in the vehicle which the respondents were riding in and under their control, that being a fact which the respondents did not deny at their trial.

The applicant also complained that the magistrate was misdirected to rely on the evidence of a witness called at the instance of the court to acquit the respondents. This argument would amount to a point of law since it requires the appeal court to determine the propriety and legality of what the trial court did.

In such applications, the approach of the court is to grant leave to appeal where the applicants demonstrates that the intended appeal has reasonable prospects of success. In other words, the intended appeal must not be hopeless or doomed to a predictable dismissal. The proposed appeal should not amount to an abuse of the court appeal system. It is proper for leave to appeal to be denied where there are demonstrably, no prospects of the appeal succeeding. I therefore now deal with the facts of the matter, the judgment and the prospects of the appeal succeeding and will then grant or refuse to grant leave.

The facts of the matter were not seriously in dispute if it could be said they were in dispute at all. The respondents were charged with the offences in the main of contravening s 3(1)(a) as read with s 3(a) of the Gold Trade Act, [*Chapter 21:03*]. The provisions create the offence of unlawful possession of Gold without a licence. In the second charge they were

charged with the offence of smuggling as defined in s 182 of the Customs & Excise Act, [Chapter 23:02]. In the third count, they were charged with the offence of possession of Articles for Criminal use as defined in s 40 of the Criminal Law (Codification & Reform) Act, [Chapter 9:23].

The brief facts of the matter were that the respondents were travelling as a trio in a Toyota Harrier motor vehicle on 23 August 2014 destined for South Africa. When they got to Beitbridge border post they cleared immigration and customs formalities. At the exit gate police who claimed to have had prior knowledge that the respondent's vehicle was carrying gold stopped the vehicle. The vehicle was searched at the police station. A substantial amount of gold that comprised eight smelted bars of gold weighing 7.269 kilograms valued at USD\$ 268 953.00 was recovered hidden in the wiper motor compartment of the vehicle. The gold was hidden in an unlikely place for storage of items in a motor vehicle. Police also recovered three affidavits authorizing use of the motor vehicle in question. However the names of the user or driver was left blank. To this charge the third applicant who was the driver of the vehicle pleaded guilty and was fined \$300 in default 1 month imprisonment. I can only express my view that the commissioning of incomplete affidavits constituted a serious offence. The Commissioner of Oaths concerned ought to have been called to account and give a clear explanation as to why he would commission an affidavit with blank spaces for a later insertion of information to be made. Such a Commissioner of Oaths if he infact commissioned an incomplete affidavit deserves to have his commission stripped. Hopefully the alleged misconduct of the named Commissioner of Oaths will be investigated and appropriate action taken. That said, the first and second respondents were acquitted on this charge which formed the crux of the charge of possession of articles for criminal use.

I must remain careful not to usurp the functions of the appeal court by going deeper into the merits of the intended appeal. I am persuaded that the magistrate *inter-alia* was misdirected at law to call upon the court witness *mero mutu* for purposes of giving what the magistrate described as "His audience is crucial to the determination of the matter". With respect to the magistrate, the so called court witnesses was in fact a defence witness because it was the respondents who having been found in possession of hidden gold bars in the vehicle attributed the ownership of the gold to that witness. It was up to the respondents who were arrested in possession of the vehicle which conveyed the gold and other articles for criminal use to establish the veracity of their defence by calling the witnesses. By *mero mutu* calling the witnesses, the court sought to close a gap in the defence case. Whether or not this was

appropriate is a point of law which in my view has reasonable prospects of success on appeal. On this score alone, I would grant leave to appeal.

Accordingly, it is my order that the applicant has established sufficient grounds to merit the grant of leave to appeal against the acquittal of the three respondents on the first and second counts. It is decreed as follows:

Order

1. The applicant is granted leave to appeal against the acquittal of the first, second and third respondents on the first and second counts in the case of *State v Simbarashe Kangara, Osten Chitate and Munyaradzi Tatenda Goteka* case No. GR19-21/15.
2. The applicant shall file the proposed appeal within ten (10) days of the date of this order .

National Prosecuting Authority, applicant's legal practitioners