TIRIVANGANI MATARE
versus
ESTERE CHIVASA N.O
and
THE STATE
and
JONATHAN TANDANGU
and
OSCAR KWARAMBA
and
DUVAI MUZENDA
and
MARIA FUNGISAI CHIURIRA
and
LINDA MANGOVE

HIGH COURT OF ZIMBABWE
CHIKOWERO AND KWENDA JJ
HARARE, 21 September 2021 and 31 January 2022

Court Application

T L Mapuranga, for the applicant
A Muziwi, for the 2nd respondent

CHIKOWERO J

This is a court application for review of the Magistrates court's decision refusing to order a separation of trials.

Proceedings *a quo*

The applicant is appearing at the Regional Court in Harare. He is the second accused person. The third, fourth, fifth, sixth and seventh respondents are jointly charged with the applicant. They are, respectively, the first, third, fourth, fifth, sixth and seventh respondents. The first and second respondents are the magistrate presiding at the trial and the state, as represented by the prosecution, in that order.

The main charge is fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9: 23*] (the Criminal Law Code). The allegations are that the applicant and one or more of the third to seventh respondents, acting in common purpose, misrepresented

to the Zimbabwe Defence Forces that an entity called Ollyman Investments/Marlbereign Suspension had rendered vehicle repair services to the Zimbabwe Defence Forces (the ZDF) by means of the misrepresentation, caused the ZDF to pay $751 150-35 to Ollyman Investments. The allegations are that the misrepresentation was made through the medium of fictitious invoices generated by the applicant and his co-accused persons.

The alternative charge is criminal abuse of duty as public officers as defined in s 174(1)(a) of the Criminal Law Code. The allegations are that the accused persons again acting in common purpose, and being public officers by virtue of being employees of the ZDF and in the exercise of their duties as public officers acted in a manner inconsistent with or contrary to their duties as public officers by generating fictitious invoices purporting that an amount of $751 150-35 was due to Ollyman Investments by the ZDF for vehicle repair services rendered to the latter by the former well knowing that no such services had been rendered. The allegations are that the applicant and his accomplices thus showed favour to Ollyman Investments and prejudice to the ZDF because they caused ZDF to pay $751 150-35 to Ollyman for no service rendered.

The applicant is the ZDF's principal accountant while the third and the fifth respondents are the Director Procurement and Assistant Accountant respectively. The fourth, sixth and seventh respondents are accountants. All these persons are employed by the ZDF.

On 17 November 2020 the charges were put to the applicant and the third to the seventh respondents. All pleaded not guilty to both the main and alternative charges. Immediately thereafter, they tendered written defence outlines. These were read into the record.

The applicant, through counsel, applied for a separation of trials. So did the fourth respondent. Both applications were opposed, and dismissed.

Application for review

Aggrieved by this outcome, the parties filed separate applications for review. We became aware of the pendency of fourth respondent's application at the hearing of the present application. We reserved judgement, indicating to *Messrs Mapuranga, Muziwi and Kufandada* (the latter, retained by the fourth respondent in the other application for review, was following the proceedings in this matter from the gallery) that we would deliver a composite judgement as it was convenient to do so.

As it turned out the fourth respondent withdrew his application, filed under HACC 26/20, on the4th November 2021. This was pursuant to the court posing certain questions *to* Mr *Kufandada* during the course of argument. Mr *Kufandada* conceded that the proper thing was for the third respondent (then the applicant) to withdraw the application, which was duly done.

This background explains why we are delivering judgement now in a matter argued as way back as 21 September 2021. It explains also why this is not a composite judgment.

Before the Magistrates court, the applicant predicated the application for separation of trials on the defence outlines tendered by the other respondents. It was argued that the defence outlines of the third, fourth, fifth and seventh respondents reflect that they are actually defence witnesses of the applicant. He could not be tried together with his witnesses. If that were to happen, it would violate the applicant's constitutional right to adduce and challenge evidence. This was so because in the event of the said respondents choosing to remain silent the applicant could not, unlike the court and the state, put questions to those respondents. The applicant would have been prejudiced.

As for the defence outline of the sixth respondent, the applicant argued before the Court *a quo* that the said respondent implicated him. What was said to be prejudice would arise in this manner. Counsel for the sixth respondent would cross-examine the state's witnesses after the applicant's own counsel would have done so. This would deprive the applicant of an opportunity to deal with any damaging responses arising from the sixth respondent's cross-examination of the state witnesses.

Decision *a quo*

In dismissing the application for separation of trials, the first respondent considered that s 190 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA) gives the trial court a discretion to either grant or refuse the application. She considered the likely prejudice to both the applicant and the second respondent in the event that she allowed the application.

She observed that there is no rule of law that trials should be separated where an inessential part of one accused person's defence outline amounts to an attack on a co-accused. She regarded the starting point in determining an application for separation of trials as this. Persons charged with the same offence may be tried together. Section 158 of the CPEA is pertinent in this regard. The second respondent has a right to decide on the person or persons

to charge and how to adduce evidence from its chosen witnesses. The third to seventh respondents have the right to tender their respective defence outlines. There is no legal principle requiring the defence outlines to be consistent with each other. That the sixth respondent's defence outline is inconsistent with that of the applicant is not prejudicial to the applicant. All it shows is that which is self-evident namely that the sixth respondent and the applicant's defences are different.

That the sixth respondent is likely to incriminate the applicant (in the event that the matter proceeds to the defence case and the sixth respondent maintains her defence) was not what the application for separation of trials turned on. The 1st respondent (court *a quo*) took the view that what was paramount is that the accused persons are facing the same charge and the second respondent would be relying on the same witnesses and the same evidence. It would be prejudicial for the same witnesses to be called by the second respondent to testify in a number of separate trials when all that the witnesses would be doing was leading evidence on what in reality is a single trial. This is so because both the charge sheet and state outline reflect that the basis for the joint charge is that the seven are alleged to have acted in common purpose in committing the offences.

As for the submission that the defence outline of the sixth respondent and the likely responses of the state witnesses to questions likely to be put to them under cross-examination by the sixth respondent was likely to "taint" the second respondent and influence the outcome of a possible application by the applicant for discharge at the close of the state case, the first respondent observed that a defence outline is not evidence. Hence it was premature to speculate on what evidence the second respondent would actually have adduced at the close of its case.

Ultimately, having found that the applicant had not gone beyond establishing a mere possibility of prejudice if a separation of trials were not ordered, the first respondent dismissed the application.

Grounds of this application

The instant application is based on the contention that there is a gross irregularity in the decision refusing a separation of trial. In this regard, s 27(1) (c) of the High Court Act [*Chapter 7:06*] is apposite. It reads, in relevant part, as follows:

> "27. Grounds for review
> (1) Subject to this Act and any other law, the grounds on which any decision may be brought on review before the High Court
> shall be-

(a) ……..
(b) ……
(c) gross irregularity in the …. decision"

The grounds for review in the present matter are as follows:

"1. The first respondent's decision to dismiss the applicant's application for separation of trials from third- seventh respondents' trial is so outrageous in its defiance of logic that no sensible court having applied its mind would arrive at it in that:

1.1 The first respondent's decision flies in the face of the applicant's constitutional right to adduce and challenge evidence regard being had to the fact that the seventh respondent's defence would require applicant to lead evidence from some of his co-accused persons. This is an infraction of the applicant's right to adduce and challenge evidence as set out in s 70(1)(h).
1.2 The first respondent completely lost its path by failing to exercise its discretion judicially on the question of separation of trials resulting in the applicant likely to suffer improper prejudice which will lead to a miscarriage of justice as he will require to defend himself from two cases that is one from the state and the other one from the 7th respondent yet he would be in one trial.

1.3. The first respondent is procedurally seeking to assist the second respondent to bolster its otherwise very weak case through the 7th respondent's evidence in circumstances where the confession evidence from the 7th respondent will not be admissible against the applicant but may, taint the first respondent's thought process rendering the trial unfair. Proceeding with the joint trial will render the trial unfair. This is an infraction of the applicant's right to a fair trial as set out is s 69(1) as read with s 86(3) (e) of the constitution.

1.4. First respondent's decision to refuse separation of trials is not vacated before the trial runs its full course applicant stands to suffer unconscionable and irreparable prejudice and applicant will at any rate forfeit his right to separation of trials enacted under s 190 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]."

The applicant prays that the decision *a quo* be set aside and that his trial be separated from that of the seventh respondent.

Merits of this application

The applicant's reference to a separation of his trial from that of the seventh respondent is an error because the defence outline which implicates him is in fact that of the sixth respondent. Nothing turns on this mistake because the matter was argued on the basis of the correct facts.

The applicant complains that the refusal to order a separation of trials deprives him of an opportunity to call the third, fourth, fifth and seventh respondents as defence witnesses to deal with the incrimination manifest in the sixth respondent's defence outline. If the third, fourth, fifth and seventh respondents refuse to give evidence or to answer questions in the joint

trial (s 199 of the CPEA), the applicant's right to adduce and challenge evidence (s 70(l)(h)) of the constitution would have been violated because, as a co-accused, s 199 of the CPEA does not avail him with a right to put questions to these respondents in such circumstances.

This is not a ground for review. It is a rights issue. This is not a constitutional application. In other words, this is not an application challenging the constitutional validity of s 199 of the CPEA in light of s 70 (1)(h) of the constitution. That is not an issue before us. See *Zambezi Gas Zimbabwe (Pvt) Limited and Limited* v *NR Barber (Private and The Sheriff for Zimbabwe* SC 3/20 at p 7. The applicant ought to have filed a proper constitutional application in terms of s 85 of the Constitution as opposed to adopting an omnibus approach. See *CABS* v *Stonelope and others* SC 15/21. For this reason, we find ground of review number 1.1 invalid and we struck it out.

The remaining grounds for review are speculative in nature. They invite us to determine this application on what may or may not happen at the joint trial. The principle of ripeness precludes us from disposing of this matter on the basis of conjecture.

In respect of ground for review number 1.2, we highlight that the sixth respondent's defence outline is exactly that. It is not another charge sheet. It is not another State outline. It is not evidence. There are no "two cases in one trial" to talk about.

Ground for review number 1.3 is both presumptuous and speculative in nature and substance. The second respondent has not yet opened its case. It is not possible to proceed on the basis that the second respondent already has a very weak case. The criminal justice system, in particular, the remedies of appeal and review (after the conclusion of a trial), are designed to deal with, both wrong and grossly irregular decisions. We cannot interfere now on the basis that during the course of the trial the first respondent's thought process 'may" be tainted by what may be placed before her, leading to a gross irregularity in the judgment. If the expressed fear turns into reality, this court will deal with it on appeal, if the matter proceeds that far. See *S* v *Andeya* 1981 ZLR 35 (AD).

With specific reference to ground for review number 1.4, we make these observations. The applicant does not have a legal right to a separation of trials. Since the applicant and third to seventh respondents are implicated in the same offences, the second respondent jointly charged them so that they would be tried together. This is in line with s 158 of the CPEA.

The application for separation of trials was made in terms of s 190 of the CPEA. The provision reads as follows:

> "190 separation of trials
>
> When two or more persons are charged in the same indictment, summons or charge, whether with the same offence or with different offences, the court may at any time during the trial on the application of the prosecutor or of any of the accused, direct that the trial of the accused or of any of them shall be held separately from the trial of the other or others of them, and may abstain from giving a judgment as to any of such accused." (underlined for emphasis)

It is settled law that this section reposes discretion in the judicial officer seized with an application for separation of trials. Thus, in *S* v *Ismail* 1994(1) ZLR 377 (S) KORSAH JA, with the concurrence of the other members of the court, said at 381C-D:

> "….it is not a rule of law that every time it appears that one prisoner as part of his defence means to attack another with whom he has been jointly charged a separate trial must be ordered. There reposes in the judicial officer a discretion to separate the trials of the co-accused. This discretion is sometimes exercised in favour of an applicant where evidence admissible against one of the accused would not be admissible against the others, or where the separate trial would enable the State to call an accomplice as a witness. But it remains a discretion."

See also *S* v *Andeya* (*supra*); *Ngwenya and Another* 2010(1) ZLR 457(H)

We have already set out the reasons why the second respondent ruled against a separation of trials. The reasons are sound. The exercise of discretion did not result in a miscarriage of justice. No improper prejudice has been created by the decision to order a joint trial. There was no gross irregularity in the decision rendered *a quo*.

Finally, we agree with Mr *Muziwi* that this is not one of those rare cases warranting interference by a Superior Court with unterminated criminal proceedings before the Magistrates court. There is nothing grossly irregular in the decision ordering a joint trial. That decision neither seriously prejudices the rights of the applicant nor can it be seriously argued that justice might not by other means be attained. See *AG* v *Makamba* 2004 (2) ZLR 63(S). The applicant must proceed to defend himself at the joint trial and, should there be need to do so, may pursue the ordinary remedies of appeal or review at the conclusion of the trial.

Disposition

In the result, the application for review of the first respondent's decision dismissing the applicant's application for separation of trials under CRB ACC 98-100/19 and ACC 16-19/20 be and is dismissed.

Kwenda J, agrees: ……

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