

**THE STATE**

**Versus**

**MEMORY CHUMA**

**AND**

**MEVISI SIBINDI**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 20 SEPTEMBER 2012

Review Judgment

**MAKONESE J:** This matter has been forwarded on review from the Provincial Magistrate, Western Commonage magistrates' court with a covering note in the following terms:

*"Please place the record of proceedings before the learned Reviewing Judge with the following comments:-*

*Pursuant to an application by Counsel, a magistrate sitting at Western Commonage made the following order:-*

- 1. The proceedings be and are hereby permanently stayed.*
- 2. No order as to costs.*

*We believe that the magistrate is not vested with such powers hence the order, in our respectful view is not competent. Our request is that the order be set aside."*

Before the record was forwarded for review, the Resident magistrate at Western Commonage had also raised concern at the propriety of the order made by the magistrate and had prepared a detailed memorandum to the Provincial Magistrate, Matabeleland North Province as follows:

*"The above cited matter refers.*

*Please find attached the record of proceedings relating to the above cited matter. On the 18<sup>th</sup> June 2012 Mr T Chimiso, sitting at Western Commonage magistrates' court made the following order, pursuant to a written application by Counsel for the accused person that his client's right to a fair trial had been infringed.*

- "1. The proceedings be and are hereby permanently stayed.*
- 2. No order as to costs."*

*It is clear to myself that no magistrate whatsoever has the jurisdiction to issue such an order and that this order needs to be set aside. Such powers are vested in the Supreme Court of Zimbabwe or the High Court as certain precedent indicates. I believe section 24 of the Constitution clearly indicates that the remedy Mr T Chimiso granted was not supposed to be granted by him. He was supposed to refer the matter to the appropriate court if he believed that an issue relating to the violation of the accused person's rights under section 18 of the Constitution had been infringed and that the raising of this matter was not frivolous and vexatious.*

*A reading of the application drafted by the lawyers T. Hara and Partners seems to suggest that a trial de-novo was ordered. I am not certain whether that was necessary for to my mind the trial was simply supposed to start afresh. I am unable to gather why the trial has not started afresh over the years. In any case a perusal of the record does not indicate the state's attitude to this application was.*

*The record of proceedings is respectfully referred so that appropriate corrective measures be taken."*

The background of this matter is briefly that on 20<sup>th</sup> December 2004 the accused persons appeared for an initial remand before a magistrate at Western Commonage Magistrates facing allegations of contravening section 4 (b) of the Dangerous Drugs Regulations Government Notice 1111/75 as read with section 6(2) of the Dangerous Drugs Act [Chapter 15:02]. The allegations are that on that on the 17<sup>th</sup> December 2004 and at Number 61466 Pelandaba, Bulawayo both accused persons or one or more of them unlawfully dealt in 55 kilograms of dagga without a licence or a permit. The accused persons were granted bail on the 3<sup>rd</sup> of January 2005. Both accused persons attended remands up to the 6<sup>th</sup> September 2007 when the "record fell off the system." On the 15<sup>th</sup> April 2010 accused persons appeared before a magistrate after they had been apprehended by the police and brought to court for an

application for a cancellation of the warrant of arrest. The magistrate's handwritten notes reflect that the warrant of arrest was cancelled but the magistrate who had partly heard the matter had since left the Ministry for greener pastures. The magistrate did indicate then that an application would be made to the High Court to have the proceedings quashed for a trial to be conducted *de novo*.

For reasons that are not very clear from the record the matter dragged on slowly until the 18<sup>th</sup> of May 2012 when the accused person's defence counsel launched an application in the magistrate court for a "Permanent stay of proceedings." I have perused the record and observe that on at least three occasions between 2006 and 20<sup>th</sup> February 2012 the accused's legal practitioners had sought the postponement of the matter on the grounds that they were involved in other commitments elsewhere. In the result both the State and the defence counsel contributed to the delays occasioned in the conclusion of the matter.

On the 18<sup>th</sup> June 2012, the magistrate sitting at Western Commonage granted an order for the permanent stay of proceedings. There are no reasons given for the decision which is clearly incompetent and inappropriate. The accused persons' application was premised on the provisions of section 18(2) of the Constitution of Zimbabwe which reads as follows:

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing."

Section 24(2) of the Constitution of Zimbabwe provides as follows:

2. "If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

In terms of section 24(2) the court may on its own accord refer a constitutional issue to the Supreme Court. When a party to the proceedings applies for referral the court must refer the issues to the Supreme Court unless it finds that that application for referral is frivolous and vexatious.

In *casu* when an application for referral to the Supreme Court is made, the court before which, it is made, has a very limited role to play. It has to refer the case to the Supreme Court if it cannot find that the application is frivolous and vexatious. See the case of *Concillia Chinanzvavana and others v The State* HH 73/09.

The learned magistrate should have referred the application for a permanent stay of prosecution or proceedings against the accused person, to the Supreme Court in terms of section 24(2) of the Constitution of Zimbabwe. The magistrate clearly fell into error when he granted the order for a permanent stay of proceedings because he had no such jurisdiction to do so.

It is not necessary for the purposes of this review judgment to consider the merits of the application for a permanent stay of prosecution. What I have considered is the propriety of the order issued by the magistrate.

In the result I make the following order;

1. The order of the magistrate of the 18<sup>th</sup> June 2012 is hereby set aside.
2. The matter is referred back to the magistrate's court for trial *de novo* before a different magistrate.

Makonese J.....