HB 62/16
HCA 05/16
X REF CRB 547 & 673/15

THE PROSECUTOR GENERAL

Versus

FRANCIS MARANJISI

And

NATHAN MNABA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 24 FEBRUARY & 3 MARCH 2016

Application for leave to appeal

T. Hove for applicant
N. Mashizha for respondents

MAKONESE J: On the 8th day of September 2015, the respondents appeared before a magistrate at Plumtree facing one count of unlawful possession of gold without a licence in violation of section 3 (1) of the Gold Trade Act (Chapter 21:03). The respondents faced an additional count of smuggling in contravention of section 182 of the Customs & Excise Act (Chapter 23:02). Respondents both pleaded not guilty. At the close of the state case the respondents applied for discharge at the close of the state case. The trial magistrate granted the application for discharge and acquitted the respondents. Aggrieved by the ruling, applicant filed an application for leave to appeal against the decision of the trial magistrate.

Background

The brief facts as disclosed in the charge sheet are that on the 24th day of June 2015 and at Plumtree Border Post, 1st and 2nd respondents or one or more of them unlawfully smuggled 8.05kg of gold from Zimbabwe into Botswana. It is alleged that on the same date at the Plumtree Border Post the 1st and 2nd respondents possessed gold without a licence. Both respondents denied the allegations. In his ruling, acquitting the respondents at the close of the state case, the learned magistrate concluded that:-

(a) the state relied on the unconfirmed extra curial statements of 1st respondent that he knew that he had gold in the fuel tank of the car he was driving.
(b) the unconfirmed warned and cautioned statement was not admitted into evidence and could not be used to establish the mental element of possession.
(c) there were several contradictions and inconsistencies in the evidence of the state witnesses to such an extent that the evidence presented by the state at the close of the state case could not be relied upon.
(d) the state failed to rebut the assertion that 2nd respondent was the agent of a holder of a valid licence to deal in gold.
(e) no evidence was led at all to indicate the role played by 2nd respondent.
(f) the state failed to prove a *prima facie* case against both respondents in respect of both counts.

The law regarding the application for discharge at the close of the state case

An application for discharge at the close of the state case is premised on the provisions of section 198 (3) of the Criminal Procedure and Evidence Act (Chapter 9:07) which states that:-

> "If at the close of the state case for the prosecution the court considers that there is no evidence that the accused committed the offence charged or any other offence he might be convicted thereon, it shall return a verdict of not guilty."

The law on this subject is fairly well settled in our jurisdiction when considering discharge, the court must consider whether the state has made a *prima facie* case against the accused person and NOT whether the state had proved the guilt of the accused beyond a reasonable doubt. This position was taken in the case of *State* v *Hartlebury & Another* 1985 (1) ZLR[1] (HC). The court must be satisfied that:

1. 1985 (1) ZLR 1 (HC)

(a) there is no evidence to prove an essential element of the offence. See *Attorney General* v *Bvuma & Another* 1987 (2) ZLR 96 at page 102.
(b) there is no evidence on which a reasonable court acting carefully might properly convict. See *Attorney General* v *Mzizi* 1991 (2) ZLR 321 (5) at page 323B.
(c) the evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act upon it. See *Attorney General* v *Tarwirei* 1997 (1) ZLR 515.

The legal position as pointed out in the cases referred to above is summarised in the case of *State* v *Tsvangirai & 2 Others* 2003 (1) ZLR 88.

It is now settled law that in instances where any of the three factors highlighted exists, the court must exercise its discretion in favour of the accused person and pronounce a verdict of not guilty. The court held that:

> "the court shall retain a verdict of NOT GUILTY if at the close of the state case the court considers that there is no evidence that the accused committed the offence charged or any other offence which he or she can be convicted in the charge. The court must discharge the accused at the close of the state case –"

The learned trial magistrate applied these broad principles, assessed the evidence adduced in court and granted the application for discharge.

Leave to appeal: The Law

For the applicant to succeed in this application it ought to comply with the provisions of section 61 of the Magistrates' Court Act (Chapter 7:10) which provides as follows:

> "If the Attorney 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 be reasonably entertained;

> He may, with the leave of the judge of the High Court, appeal to the High Court against the judgment."
>
> See the case of *Prosecutor General of Zimbabwe* v *Douglas Mwonzora* HH 186/15

In the matter of *Attorney General* v *Lafleur and Another* 1998 (1) ZLR 520 (H), the court held that the onus is on the Prosecutor General (the applicant in cause) to bring the application within the terms of section 61 of the Magistrates' Court Act. In this regard the judge stated at page 522 as follows:

> "A point of law must relate to a decision made by the trial court on a legal issue relevant to the acquittal (which the applicant believes to be wrong) and on which the trial court based its acquittal."
>
> See also *Attorney General* v *Paweni Trade Corporation (Pvt) Ltd* 1990 (1) ZLR 24 (5)

The grounds of appeal as set out by the applicant insinuate that the trial magistrate's decision was irrational and outrageous in his assessment of the facts. In other words the applicant seeks to argue that the trial magistrate failed to appreciate the facts established by the state at the close of the state case.

> In *Telecel Zimbabwe (Pvt) Ltd* v *Attorney General of Zimbabwe* SC-1-14,
>
> The court held that:
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> "By 'irrationality' I mean what can now be succinctly referred to as the 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1947] 2 ALL ER 680, [1948] IKB 223. It applies to a decision which is so outrageous in its defiance of logic or of accepted morals that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there should be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes)* v *Bairstow* [1955] 3.

> ALL ER 48 [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision maker.
>
> 'Irrationality' by now can stand on its own feel as an accepted ground on which a decision may be attacked."

It is my view that for the applicant to succeed, they ought to demonstrate the injury to justice and rule of law done by the trial magistrate in acquitting the respondents. The conduct of the trial magistrate, his assessment of the facts and the evidence, his conclusions on the law must not only be unreasonable but grossly unreasonable to defy logic and common sense.

A perusal of the application for leave to appeal shows that applicants are challenging the substantive correctness of the trial magistrate's decision. Applicants contend that the decision to acquit the respondents at the close of the state case was unreasonable both on the facts and the law. This court will put on the hat of an appellate court which is sitting to consider findings of fact made by an inferior court. The Supreme Court and this court have adopted the attitude that an appeal court will be slow to interfere with the factual findings of an inferior court. The principle behind this approach is simply that the trial court is better placed to assess the credibility of the witness and the strength of the state case, by listening to the evidence and assessing the demeanor of the witnesses.

See the cases of *Nyahondo & Others* v *Hokonya & Others* 1997 (2) ZLR 475 (SC) and *S* v *Isolano* 1985 (1) ZLR 62 (SC).

Conclusion

There is no sound legal or factual basis in my view, to hold that the trial magistrate's decision was irrational or unreasonable. Once the magistrate was satisfied that the state had failed to overcome the first hurdle of establishing a *prima facie* case that the respondents were in unlawful possession of the gold in question he was obliged to discharge the respondents at the close of the state case. I am in no doubt that the applicant has no prospects of success on appeal. The appeal has no merit and leave to appeal must be refused. The respondents pray for the

dismissal of the application for leave to appeal and for an order that the clerk of court, Plumtree Magistrates' Court be ordered to release the gold, motor vehicle, passports held as exhibits to the 2nd respondent.

It is accordingly ordered as follows:

1. The application for leave to appeal be and is hereby dismissed.
2. The clerk of court Plumtree Magistrate's Court be and is hereby ordered to release the exhibits held at Plumtree Magistrates' Court, namely, gold, Toyota Verrosa Registration Number ADK 5253 and passports to the 2nd respondent.

Prosecutor General's Office, applicant's legal practitioners
Hallmark Law Group c/o Masawi & Partners, respondents' legal practitioners