

THE STATE
versus
NIVEO PRANDINI

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 2 JUNE 2010

Criminal Review

KUDYA J: The question raised in the present review is whether an acquittal after a full criminal trial is subject to review at the instance of the complainant.

The record of proceedings was forwarded by the Provincial Magistrate Harare at the request of a firm of legal practitioners, which was instructed by the complainant who was dissatisfied with the acquittal of the accused person after a full trial. The letter is couched in these terms:

“We refer to the above matter in which judgment was handed down by a magistrate on 5 March 2010 acquitting the accused person. The complainant, whom we represent, has reason to believe that the ends of justice were subverted in that the accused prior to the handing down of the judgment was boasting that he had already been acquitted. There is therefore likelihood of interference with the manner in which the magistrate handled the matter. As you might be aware, that (*sic*) the matter was reported to the police. We therefore request that the record of proceedings in the matter be submitted for review to ascertain whether real and substantial justice was done.”

The accused was charged with the assault of the complainant in terms of s 89 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The State called the evidence of three witnesses who indicated how the accused first pushed and head butted the complainant before slapping him twice on the face at around 9 pm on 22 January 2010. The accused person testified and called two witnesses who confirmed his version that he did not in any way or manner assault the complainant. At the conclusion of the trial, the trial magistrate returned a verdict of not guilty. He highlighted the material discrepancies in the State evidence and held that the State had failed to discharge the onus of proof beyond a reasonable doubt. It is this decision which the complainant has sought a review.

The High Court, being a court of inherent jurisdiction has wide reviewing powers conferred upon it by both common law and statute. The law applicable in criminal matters has been conveniently set out by the legislature in s 29 of the High Court Act [*Cap 7:06*], which reads thus:

29 Powers on review of criminal proceedings

- (1) For the purpose of reviewing any criminal proceedings of an inferior court or tribunal, the High Court may exercise any one or more of the following powers—
 - (a) ... (not relevant)
 - (b) ... (not relevant)
 - (c) where the proceedings are not being reviewed at the instance of the convicted person, direct that any question of law or fact arising from the proceedings be argued before the High Court by the Attorney-General or his deputy and a legal practitioner appointed by the High Court.
- (2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings—
 - (a) are in accordance with real and substantial justice, it shall confirm the proceedings;
 - (b) are not in accordance with real and substantial justice, it may, subject to this section—
 - (i) alter or quash the conviction; or
 - (ii) reduce or set aside the sentence or any order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal:
Provided that—
 - (i) a sentence of imprisonment shall not be substituted for a fine unless the enactment under which the convicted person was convicted does not permit the imposition of a fine;
 - (ii) the substituted sentence shall not be more severe than that imposed by the inferior court or tribunal unless the convicted person—
 - (a) is a company; or
 - (b) was represented by a legal practitioner at the proceedings in the inferior court or tribunal concerned; and requested that the proceedings be forwarded on review or otherwise instituted the review; or
 - (iii) set aside or correct the proceedings of the inferior court or tribunal or any part thereof or generally give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made on any matter which was before it in the proceedings in question; or

- (iv) if the convicted person was convicted on one of two or more alternative counts, when quashing that conviction remit the case to the inferior court or tribunal with instructions that he be retried on one or more of the alternative counts before a presiding officer other than the presiding officer who recorded the previous conviction; or
 - (v) remit the case to the inferior court or tribunal with such instructions relative to the further proceedings to be had in the case as the High Court thinks fit; or
 - (vi) make such order relative to the suspension of the execution of any sentence against the convicted person or the admission of such person to bail or generally any matter or thing connected with such person or the proceedings in regard to him as the High Court thinks calculated to promote the ends of real and substantial justice; or
 - (vii) if the convicted person was convicted on one or more counts and acquitted on one or more counts and it appears to the High Court that the inferior court or tribunal intended to—
 - A. acquit him on one or more of the counts on which he was convicted; and
 - B. convict him on one or more of the counts on which he was acquitted; correct the proceedings in accordance with such intention;
 - (viii) If the convicted person has been convicted of an offence and the inferior court or tribunal could on the indictment, summons or charge have found him guilty of some other offence, whether because it was, according to law, a competent verdict or because that other offence had been alleged as an alternative count, and on the findings of the inferior court or tribunal it appears to the High Court that the inferior court or tribunal must have been satisfied of facts which proved him guilty of that other offence, the High Court may, when quashing the conviction, substitute for the judgment of the inferior court or tribunal a judgment of guilty of that other offence, whether or not the convicted person had been acquitted of that offence at the trial, and may—
 - A. subject to the provisos to subparagraph (ii), substitute a different sentence for that imposed at the trial; or
 - B. remit the case to the court or tribunal concerned for the passing of such sentence in substitution for the sentence passed at the trial, whether more or less severe, as may be warranted in law for that other offence.
- (3) No conviction or sentence shall be quashed or set aside in terms of subs (2) by reason of any irregularity or defect in the record or proceedings unless the High Court or a judge

thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred.

- (4) Subject to rules of court, the powers conferred by subs (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review.
- (5) A judge of the High Court before whom the record of criminal proceedings in a magistrates court has been laid in terms of s 55, 57 or 58 of the Magistrates Court Act [*chapter 7:10*]—
 - (a) may lay the proceedings before the High Court for its consideration in terms of this section; or
 - (b) may himself exercise the powers conferred by subsection (1), other than paragraph (b) thereof, or subsection (2): Provided that a judge of the High Court shall not exercise any of the powers conferred by subparagraph (i), (ii) or (iii) of paragraph (b) of subsection (2) unless another judge of the High Court has agreed with the exercise of the power in that particular case;
 - (c) shall, if he confirms the proceedings, cause the record to be endorsed with a certificate to that effect and returned to the court concerned.

The provisions of s 29, *supra*, may be divided into two parts. There are those matters which are brought for review by magistrates in terms of s 55, 57 and 58 of the Magistrates Court Act [*Cap 7:10*] and those which come to the notice of the High Court by some other means as provided in subs (4) of s 29, *supra*. The present proceedings fall into the latter category. Ordinarily criminal reviews seek to alter or quash a conviction; or reduce or set aside a sentence. The present matter is rare in that a complainant seeks the court to declare that an acquittal was not in accordance with real and substantial justice. In my view, this is permitted by s 29(1) (c), *ibid*, which gives the High Court a discretion to direct the Attorney General and a legal practitioner appointed by it to argue on any question of law or fact emanating from the proceedings. Section 29 (2) empowers the High Court to determine whether the proceedings are in accordance with real and substantial justice. If it finds that they conform to accepted norms of both adjectival and substantive law it approves of the proceedings. If the proceedings run foul of either the procedural or substantive legal requirements the court has a wide choice to draw from to correct the proceedings. The choices set out in s 29 (2) (b) are predicated on a conviction and not on an acquittal. This is because both sub paras (i) and (ii) of subs (2) of s 29

revolve around a conviction and sentence. An acquittal does not fit into this mold. The eight provisos to s 29 (2) (b) are triggered by either a conviction or sentence.

Proviso (vii) to s 29 (b) permits the High Court to convict an accused person who has been acquitted on one or more counts which are co joined with one or more counts for which he has been convicted but only in circumstances where the inferior court has made a deliberate error of acquitting when it actually wanted to convict. This proviso does not therefore authorize the High Court to convict an accused person on review where the trial magistrate, as in the present matter, intended to acquit.

The letter written on behalf of the complainant did not set out the basis for the review. It did not attack any of the findings of the trial magistrate. It obliquely suggested bias on the part of the trial magistrate but did not link that perception to the conduct or out come of the trial. The fact that an accused person boasts of his acquittal before the event may very well arise from his appreciation of the evidence led during his trial. That his opinion comes to pass would not objectively be reason to suspect bias or other untoward practice on the part of the trial magistrate.

I hold that s 29 (2) of the High Court Act is couched in language which is wide enough to permit a complainant to seek a review of an acquittal. On review of an acquittal the High Court has two options. The first is to confirm the proceedings if they meet the procedural and substantive legal requirements. The second is to decline to confirm the proceedings if they fall short of the requisite standard of justice. An unhappy complainant may seek a review of an acquittal notwithstanding that the Attorney-General may appeal against the acquittal in terms of s 61 of the Magistrates Court Act [*Cap 7:10*] or s 38A of the High Court Act.

The letter written by the complainant's legal practitioners, though framed in bald language, meets the minimum requirement that is sufficient to trigger a criminal review of the proceedings which resulted in the acquittal of the accused person.

The evidence of the complainant, a 70 year old man and the two security guards, Kudakwashe Mavhinga and Austin Hove, who supported his version, was as follows: He arrived at the back of his building at Avondale shopping centre in Harare, which was being rented out to the accused soon after the lawful eviction of the accused, at between 8 and 9 pm. The accused who was in a foul temper verbally abused him. He then proceeded to push him and head butt him. The complainant drove to the front of the shop where the accused followed

him and slapped him twice in the face. The State witnesses alleged that the place was well lit by electrical lighting emanating from a nearby shop.

There were discrepancies in the evidence of the three State witnesses. The complainant said that the accused used his stomach to push him on his stomach while Kudakwashe stated that the accused used his hands to push the complainant. The complainant stated that the accused struck him on his thigh with his head while Kudakwashe said the head butt was directed on the upper part of the complainant's body, above the waist. Austin was at the front of the shop and did not see what happened behind it. The complainant did not sustain any injuries. He did not scream in pain or call out that he was under attack. The accused denied pushing or head butting the complainant. The two witnesses he called were at a distance of between 2 m and 4m from where the two protagonists were. Both confirmed the accused's version that the two exchanged verbal insults which did not degenerate into physical assaults.

The trial magistrate correctly found that the complainant and Kudakwashe, who alleged that he was 2 m away from the protagonists at the back of the shop, were not credible witnesses in regards to the pushing and head butting. His finding cannot be faulted if regard is to the absence of any physical injuries on or cries of pain from the complainant.

As regards the assault at the front of the shop the complainant and his witness averred that he was slapped twice as he sat in the car. The complainant only revealed during cross examination that he was wearing spectacles which fell to the floor as a result of the slaps. The complainant stated that he managed to pick his unbroken spectacles after the accused had been restrained by his relatives. Kudakwashe and Austin averred that they restrained the accused after he had slapped the complainant. There was a discrepancy on the part of the State witnesses as to who restrained the accused person which the trial magistrate noted. None of the State witnesses averred that the slaps made any sound; they averred that they saw the accused do so yet they were behind him. The strangest part of the State's story was that the complaint stopped these security guards from apprehending the accused and only reported the incident some four days later after the accused appeared on national television accusing him of racism. He confessed under cross examination that he was irked by the accusation and he decided to report the assault which he had decided to consign to memory.

The two defence witnesses stated that they took accused to the front of the shop after restraining him from a verbal mudslinging match with the complainant. When the complainant drove to the front, the accused advanced towards him but they restrained him. The two

witnesses called by the accused disputed the version given by the State. Their evidence coupled with the probabilities satisfied the trial magistrate that the State had failed to prove its case beyond a reasonable doubt. That finding is unassailable.

Accordingly, I confirm that the proceedings in the present trial were in accordance with both procedural and substantive law.

CHITAKUNYE J, agrees.