

THE PROSECUTOR GENERAL
versus
PHIBION BUSANGABANYE
and
MAGISTRATE N. MUPEIWA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 8 July and 22 July 2015 and 29 July 2015

Opposed Application

E Mauto, for the applicant
C Mawadze, for the respondent

BHUNU J: The applicant is the National Prosecuting Authority responsible for criminal prosecution of offenders on behalf of the State. The applicant instituted criminal proceedings in the Magistrate's Court against one Anderson Tagarira under case number CRB R 104/15 in which he was facing charges of fraud as an accessory after the fact as defined in s 206 as read with s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 09:23*]. Section 206 provides as follows:

“206 Assistance after commission of crime

Any person, other than an actual perpetrator of a crime, who

- (a) knowing that an actual perpetrator has committed a crime; or
- (b) realising that there is a real risk or possibility that an actual perpetrator has committed a crime; renders to the perpetrator or to any accomplice of the actual perpetrator any assistance which enables the actual perpetrator or accomplice to conceal the crime or to evade justice or which in any other way associates the person rendering the assistance with the crime after it has been committed, shall be guilty of being an accessory to the crime concerned.

The allegations against the accused Anderson Tagarira were that he clandestinely assisted one Ubert Angel who is still at large to unlawfully change ownership of a Bentley Continental motor vehicle registration number ACO 1759 belonging to Ndabazinengi Shava.

Upon change of ownership Ubert Angel is alleged to have sold the motor vehicle to the first respondent Phibion Basangabanye without the owner's consent.

At the conclusion of the trial the second respondent who was the trial magistrate convicted the accused of contravening s 206 as read with s 113 (2) which provides for the primary offence of theft of trust property, whereupon the State applied for the disposal of the motor vehicle in terms of s 61 (1) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provide that:

“61 Disposal of article after commencement of criminal proceedings

- (1) Subject to this Act and except as otherwise provided in any other enactment under which any matter shall or may be forfeited, the judge or magistrate presiding at criminal proceedings *may, at the conclusion of the proceedings, unless the article is further required as an exhibit at a trial, make an order that any article referred to in section sixty or produced in evidence—*
 - (a) if the person from whose possession it was obtained may lawfully possess such article, be returned to that person; or
 - (b) if the person from whose possession it was obtained is not entitled to the article or may not lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or
 - (c) if no person is entitled to the article or if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.”

Despite having convicted the accused the presiding magistrate refused to give a disposal order pointing out that the same motor vehicle was the subject of contestation in civil proceedings pending in a related matter in the High Court. The ruling prompted the Applicant to initiate these proceedings for review arguing that the magistrate's ruling was grossly unreasonable.

The applicant's complaint was that in terms of s 61 above, the second respondent was obliged to issue a disposal order consistent with his verdict of guilty by releasing the disputed motor vehicle to the owner as determined by the lower Court leaving the first respondent to pursue the fugitive Eubert Angel for civil remedies.

With respect, the State's complaints appear to be misplaced, irrational and wholly based on a serious misapprehension of the law. To begin with, the section is not couched in peremptory terms. It confers the trial magistrate or judge with a discretion to dispose or not to dispose of an exhibit at the conclusion of the criminal trial in so far as it uses the permissive

term ‘*may*’.

Secondly the section makes it clear that it is undesirable if not prohibited for a judicial officer to order disposal of an article which may be required in further or other judicial proceedings as an exhibit. The law maker’s employment of the indefinite article ‘*a*’ instead of the definite article ‘*the*’ when it says in ss (1) “*at a trial*” denotes an intention to extent the prohibition or restriction to other trials other than the trial at hand.

Now that the trial magistrate was faced with a situation where the ownership of the motor vehicle was the subject of litigation in a related matter in the High Court, his decision not to order disposal of the motor vehicle pending the determination of the superior court was eminently reasonable, for doing otherwise was fraught with the danger of placing the lower court on a collision course with the superior court.

Generally speaking courts are members of the same family and they treat each other with great respect at every level. For that reason they will not deliberately set each other on a collision course if it is avoidable. In any case the doctrine of binding precedent makes it sensible if not imperative for the lower court to await guidance from the superior court.

Fortunately, during the course of this hearing we were told that the High Court has now disposed of the matter thereby paving way for the second respondent to deal with the matter consistently without the danger of colliding with any judgment or order emanating from this Court.

For the foregoing reasons I come to the conclusion that there is absolutely no merit in this application for review. **It is accordingly ordered that the application be and is hereby dismissed with costs.**

The Prosecutor General’s Office, applicant’s legal practitioners
Manase & Manase, 1st respondent’s legal practitioners