

THE PROSECUTOR GENERAL OF ZIMBABWE
versus
SHMUEL KHAINAN KLEIN

HIGH COURT OF ZIMBABWE
CHITAPI & MUSHORE JJ
HARARE, 23 February 2017, 9 March 2017 and 14 February 2018

Criminal Appeal

CHITAPI J: In this appeal, the Prosecutor General pursuant to an order for leave to appeal having been granted by a judge of this court on 19 August, 2014, noted an appeal against the acquittal of the respondent by the Regional Magistrate Eastern Division on 26 April, 2012. The respondent then a 58 year old Israel National was charged on two counts of statutory contraventions. In the first count the respondent was charged with a contravention of section 3 of the of the Precious Stones Trade Act, [*Chapter 21:06*]. It was alleged against him that on 17 March, 2012 and at Harare International Airport, he unlawfully had in his possession 8 486.66 carats of rough diamonds whose estimated valued was \$2 437 708.22. In the second count, the respondent was charged with a contravention of section 12 (1) of the Immigration Act, [*Chapter 4:02*] which creates an offence called “entry by evasion”. It was alleged against him that at the same place and on the same date as in the first count, the respondent being the holder of a foreign passport unlawfully failed to present himself to an immigration officer and entered Zimbabwe without authority contrary to the law.

The respondent pleaded not guilty to both counts. In brief outline, the facts of the matter were that, the respondent was a pilot instructor employed by an airline domiciled and operating from Israel. He was booked to fly on a South Africa Airlines scheduled flight out of Zimbabwe. He had flown into Zimbabwe the same date, that is, 17 March, 2012. His boarding pass for exiting had been issued in South Africa at the time that he checked in to fly into Zimbabwe. The respondent was dressed in his pilot uniform. As part of the departure formalities for the return

journey, the respondent presented himself to an Aviation security screening point where his hand luggage was screened. Suspected precious stones were discovered and recovered in his luggage. These are the rough diamonds which grounded the charge in the first count.

On the second count, it was alleged against the respondent that on arrival at Harare International Airport, on 17 March, 2012, he did not present himself to an immigration officer but entered the country as a crew member yet he had travelled as a passenger.

The respondent denied both charges and with respect to the second count, he alleged that he was in fact on duty and wore his uniform. He had a valid boarding pass for Harare as with the rest of the passengers and the crew since boarding passes are issued to everyone on board an aircraft for accounting purposes should the plane be involved in a mishap or accident.

With respect to the first account the respondent averred that he was an agent for a licensed diamond company whose licence he produced as well as an affidavit authenticating the agency relationship. The respondent averred further that he was a transit passenger en route to Israel and that the diamonds for which he produced documents of origin did not originate from Zimbabwe but from South Africa.

The Regional magistrate after a full trial acquitted the respondent on both counts. In response to the grounds of appeal filed by the appellant, the magistrate supported his decision to acquit the accused on the basis that the state had consented to the production of the permit or licence to possess diamonds which the respondent produced. The magistrate held that on the evidence adduced by the State, the respondent fell into the group of persons who could lawfully deal in or possess diamonds in terms of the Precious Stones Trade Act and that the respondent was a transit passenger. There was no evidence that the origin of the diamonds was Zimbabwe. In respect of the second count, the magistrate held that the State did not lead any evidence as to what it alleged the accused had done in relation to the alleged failure to complete immigration formalities. At best the State had only led evidence of a generalized nature from a witness regarding procedures to be followed by a person who wishes to enter Zimbabwe.

The above extrapolation briefly sets out what the case against the respondent was all about. At the hearing on 23 February, 2017, the state prosecutor gave notice that he intended to abandon

and withdraw the appeal. He requested for the matter to postponed to 9 March, 2017 so that he would prepare and file the necessary papers to give effect to the State's withdrawal.

On 8 March 2017, the state Prosecutor filed supplementary heads of argument in support of the state's decision to withdraw its appeal. Both the prosecutor and the respondent's counsel made brief submissions in relation to the withdrawal. The question which exercised the mind of the court was, whether or not the Prosecutor General as appellant could just abandon and withdraw the appeal in circumstances where the court was seized with the appeal. Put differently, the question which arose for consideration was whether or not the court could if it had reservations with the reasons given for the withdrawal of the appeal, refuse to grant an order of withdrawal and direct that the appeal be argued on the merits. A consideration of various pieces of legislation will help inform the decision of the court in regard to answering the question arising.

Section 258 of the Constitution 2013 provides as follows:

“258 Establishment and Functions of National Prosecuting Authority”

There is a National Prosecuting Authority which is responsible for instituting and undertaking criminal prosecutions on behalf of the state and discharging any functions that are necessary or incidental to such prosecutions.”

Section 260 of the constitution provides as follows

“260 Independence of Prosecutor – General.

- (1) Subject to this Constitution, the Prosecutor General
 - (a) Is independent and is not subject to the direction or control of anyone; and
 - (b) Must exercise his or her functions impartially without fear, favour, prejudice or bias.

Section 12 of the National Prosecuting Authority Act, [*Chapter 7:20*] provides as follows:

12 Power to institute and conduct criminal proceedings

- (1) The Prosecutor General—
 - (a) shall institute and conduct criminal proceedings on behalf of the State; and
 - (b) shall carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
 - (c) may discontinue criminal proceedings; and
 - (d) shall issue certificates *nolle prosequi* in accordance with the Criminal Procedure and Evidence Act [*Chapter 9:07*], to persons intending to institute private prosecutions, where the Prosecutor-General chooses not to prosecute; and
- (2) The Prosecutor-General may assign any duty referred to in subsection (1) to the National Director of Public Prosecutions, subject to the control and directions of the Prosecutor-General.
- (3) Subject to the Constitution and this Act, a member shall, subject to the control and direction of the Prosecutor-General, exercise the powers referred to in subsection (1), in respect of –

- (a) the area of jurisdiction for which he or she has been appointed; and
 - (b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the Prosecutor-General.
- (4) A member shall be competent to exercise any of the powers referred to in subsection 91), to the extent that he or she has been authorised thereto in writing by the Prosecutor-General, or by a person designated by the Prosecutor-General.

The cited constitutional and statutory provisions speak to the powers and authority of the Prosecutor General in relation to conducting prosecutions of criminal cases on behalf of the state. Both on trial of an accused person and on appeal as in this case the Prosecutor General exercises the functions of prosecuting on behalf of the state as envisaged in s 258 of the Constitution.

In the absence of legislation to the contrary, the powers of the Prosecutor – General to undertake a prosecution also implies the power to stop a prosecution and a *fortiori* to withdraw a *prosecution brought by the Prosecutor General*. In the matter *Highstead Entertainment (Pty) Ltd t/a “The Club” v Minister of law and Order and Others*. 1994 (10 SA 387 (C) the court held that the discretion to decide whether to proceed with a prosecution or to withdraw it is one of the fundamental functions in exercising a duty to prosecute.

Section 260 of the Constitution provides for the independence of the office of the Prosecutor General in the discharge of prosecutorial functions. The Prosecutor-General “is not subject to the direction or control of anyone” in regard to discharging prosecutorial functions. It follows that a court has no power to order the Prosecutor General to mount a prosecution or how to conduct criminal proceedings, save perhaps to the extent that once the Prosecutor General decides to prosecute, such prosecution should then be conducted in terms of the procedural rules obtaining in the court in which the case is listed for determination.

In *R v Comptroller-General of Patents* (1899) IQB 909 at 914, in extrapolating on the independence of the Attorney General (equivalent of the Prosecutor General in this jurisdiction); the court held that when the Attorney General in exercising his functions as an officer of the Crown, such functions were not subject to review by the court of the Queens bench or any other court. The Zimbabwe Constitution, 2013 whilst entrenching the independence of the Prosecutor General has provided in section 260 (1) (b) safeguards which the Prosecutor General must have regard to when exercising his or her powers in terms of s 258 and 260 (1) (a) of the Constitution.

What this entails is that, where an aggrieved person complains of an infraction of his or her fundamental rights and can prove successfully that the Prosecutor-General has failed to have regard to the safeguards listed in s 260 (1) (b), the court in the exercise of its wide powers of review may enquire into such a complaint and grant an appropriate remedy. The court cannot however *mero motu* review the powers or decisions of the Prosecutor General made in the discharge of his or her prosecutorial functions. There must be a complaint of an infraction of someone's rights having been violated revised in this appeal. The complaint triggers an enquiry and review of the Prosecutor General's discharge of his functions. In casu, no such complaint has been raised against the Prosecutor General's actions or decisions. That being, the decision to withdraw the appeal is a matter peculiarly within the Prosecutor- General's discretion and however he or she has arrived at such decision is his or her responsibility.

It is to be noted that the Prosecutor-General in deciding to prosecute, stop a prosecution or withdraw it, does so taking into account the public interest, the interests of justice and the need to avoid an abuse of the court process. A lot of factors come into play when the Prosecutor General decides whether or not to prosecute or indeed to withdraw a prosecution. Some of the factors may not be in the public interest to disclose. In my judgment, the courts, save where there is a complaint by an affected or interested party must not interfere with the exercise of the prosecutorial functions of the Prosecutor General. The Prosecutor General should not be subjected to any pressure either by the Executive or by the courts in the proper exercise or discharge of his functions regarding prosecutions.

Indeed, where an affected party petitions the court that the Prosecutor General in the exercise of his or her functions has broken the law, the court will issue an appropriate remedy. An example of such an instance in this jurisdiction related to the refusal by the Prosecutor General (then Attorney General) to issue the complainant whose case he had refused to prosecute with a certificate "*nulle prosequi*". The certificate would have enabled the complainant to conduct a private prosecution against the person whom the complaint alleged to have committed a criminal offence from which the complainant suffered harm (see *Prosecutor General v Telecel Zimbabwe (Pvt) Ltd* SC 1/2014; 2015 ZWCC 10; CCZ 10/15. This was topical case. A reading of the High Court, Supreme Court and constitutional Court judgments will show that the courts did not

interfere with the Prosecutor General's decision to decline a prosecution. The courts simply ordered him to take the statutory step as required of him to issue a certificate *nulle prosequi* in terms of the Criminal Procedure and Evidence Act, [Chapter 9:07] at the instance or request of the complainant.

To conclude this judgment, I must point out that whilst the Prosecutor General's right of appeal to this court in relation to criminal appeals derives from ss 61 and 62 of the Magistrates Court Act which suffers the Prosecutor General to first obtain leave of a judge to appeal, there is nothing which stops him from subsequently throwing in the towel and withdrawing the appeal. The withdrawal of an appeal in respect of a matter brought by that party on appeal is a unilateral act which the court cannot stop nor review. It must follow that once the appellant has withdrawn an appeal the court cannot continue to deal with the matter. The court must endorse the withdrawal. There was therefore no need in this matter for Mr Nyazamba to file arguments or convince the court of the reasons nor their reasonableness for the Prosecutor General's decision to withdraw the appeal. It was the appellant's prerogative to withdraw the appeal.

Consequently the following order shall issue.

1. That the appeal by the Prosecutor General in case No. CRB R 263/12 is hereby withdrawn by the Prosecutor General as appellant.
2. The judgment of the Regional Magistrate dated 25 April, 2012 in the aforesaid case shall remain extant.

MUSHORE J agrees

National Prosecuting Authority, appellant's legal practitioners
Venturas & Samkange, respondent's legal practitioners