KEVIN DOUGLAS SMIT

Versus

THE REGIONAL MAGISTRATE, WESTERN DIVISION

And

THE ATTORNEY-GENERAL OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 20 NOVEMBER 2006 & 15 MAY 2008

Advocate S Nkiwane, for the applicant
T Mkhwananzi, for the respondents

Criminal Review

NDOU J: This is an application for review in terms of Rule 257 of the High Court Rules, 1971. What is brought on review is a decision of the 1st respondent. The decision is the refusal of the 1st respondent to accept the applicant's objection. The salient facts are the following. On 2 May 2006, the applicant, who was represented by counsel, was arraigned before the 1st respondent charged with two counts of theft by conversion. In the first count it was alleged:-

> "In that on the 31st march 2005 and at Bulawayo, the accused Kelvin Douglas Smit N R …. received and took possession from Brian Adams Jeremy N R … 62,500,00 Rands for him to purchase a motor vehicle from Singapore via South Africa. Thereafter the accused instead of buying and importing the vehicle he unlawfully and intentionally converted the money to his own use.
> …
> Count 2 – In that on the date unknown to the prosecutor but during the month of July 2005, the accused … received and took possession from Roberts Charles Jenkinson $120 000 000,00 in Zimbabwe currency and 20 000,00 Rands in South African currency for him to purchase a motor vehicle from Singapore via South Africa. Thereafter accused instead of buying and importing the vehicle he unlawfully and intentionally converted the money to his own use."

By written notice presented by counsel the applicant took objection to the charges as amplified by the state outline, basing his objection on the ground that even

if all facts alleged by the state would be ultimately found proved, no offence cognisable in our law would be established.

Argument on the objection was ultimately heard by the 1st respondent on 28th May 2006. At the time argument was presented the state had abandoned the 1st count on the strength of the objection and it then redrafted the 2nd count and the state outline as part of argument it was sought to annex the complainant's statement to the police on the re-drafted count that the state sought to proceed with. Objection was taken by the state to the production of, and by necessary implication, reliance upon, the said complainant's statement, which objection was upheld by the 1st respondent. It is that ruling that triggered the instant application for review. Generally, it is submitted that the decision (ruling) to exclude from consideration the statement made by the complainant to the police was grossly irregular and is thus reviewable both at common law and in terms of section 27(1)(c) of the High Court Act [chapter 7:06]. ….., it is argued additional and alternatively that the prosecution in instituting or in persisting with the prosecution of the applicant on the charge preferred, or any charge at all, is acting maliciously, and the decision of the 2nd respondent so to act is *mala fide* and thus open to review in terms of section 27(1)(b) of the High Court Act, *supra,* and at common law. In light of the concession by the 2nd respondent on the 1st count no further comment is required as the charge has been abandoned. I will only dwell on the amended 2nd count. In the latter the applicant is faced with one count of theft by conversion in that on the 28th day of July 2005, and at Radiator and Tinning (Pvt) Ltd he received and took possession from Robert Charles Jenkinson a silver Nissan Sunny sedan motor vehicle registration number 821-621H for the purpose of selling and handover the money to Jenkinson. Applicant sold the vehicle and instead

of remitting the money to Jenkinson he unlawfully and intentionally converted the money to his own use.

According to section 178(1) of the Criminal Procedure and Evidence Act [chapter 9:07], (the Code) the accused may, before pleading apply to the court to quash the charge on the grounds that it is calculated to prejudice or embarrass him in his defence. Further, for one to except to the charge in terms of section 171(1) of the Code, he must prove that:

(a) the charge does not disclose an offence; and,

(b) that the charge does not disclose reasonably sufficient particulars to inform the accused of the nature of the charge against him.

In casu, the charge and the facts alleged in the state outline are consistent, and essential elements of the charge are contained in the state outline. The applicant is, therefore clearly informed of the nature of the charge against him.

The Supreme Court, in *Attorney-General* v *Blumears & Anor* 1991(1) ZLR 118(SC) laid down the following principles:

> "The state must allege facts that constitute a crime and justify a reasonable suspicion that the accused committed the crime. The accused may submit that the state has not alleged such facts. Although the onus is on the state, it does not have to show guilt beyond reasonable doubt or on a balance of probabilities. The court cannot reject state allegations simply because they seem to be of doubtful validity."

In casu, there is no reason for the court to reject state allegations which clearly constitute a crime and justify a reasonable suspicion that the accused committed the offence. In an application under section 178(1) of the Code, the applicant must prove that the allegations by the state do not disclose an offence. The issue is not whether or not the state has evidence to prove its case beyond a reasonable doubt. In the

circumstances it is improper for the applicant to seek to compare the state outline and the complainant's statement to the police at this stage. The production of the complainant's statement at this stage is tantamount to dealing with the merits of case before the accused has pleaded to the charge. In any event, the 2nd respondent only has to prove a *prima facie* case for the applicant to be put to trial. I doubt the propriety of tendering the complaint's unsworn statement in his absence. The complainant's statement is usually not exhaustive. The complainant may want, under oath, to add or expand on the issues in the statement to clarify them. Rules relating to cross-examination do not apply in applications of this nature – *Attorney-General* v *Blumears & Anor supra* and *R* v *Hartley* 1966 RLR 522 at 526A.

Consequently, there is no legal basis to quash the charge in terms of section 178(1) as the applicant failed to satisfy the required grounds. There is absolutely no evidence to show that the charge is calculated to prejudice or embarrass the applicant in his defence. The 1st respondent cannot be faulted.

Accordingly, the application fails and is dismissed.

Coghlan & Welsh, applicant's legal practitioners
Criminal Division, Attorney-General's Office, respondents' legal practitioners