

THE PROSECUTOR GENERAL OF ZIMBABWE**Versus****ALLAN COURTNEY RORY MUIL**IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 20 & 23 JUNE 2016**Application for leave to appeal***Ms N. Ngwenya* for applicant
V. Zvobgo for the respondent

MAKONESE J: The respondent appeared before a magistrate at Plumtree facing allegations of contravening section 3 (1) (a) of the Gold Trade Act (Chapter 21:03), being in possession of gold without a licence and violating section 182 (2) of the Customs and Excise Act (Chapter 23:02), smuggling. The respondent was acquitted on both counts. The applicant has filed an application for leave to appeal in terms of section 61 (b) of the Magistrates' Court Act (Chapter 7:10).

The relevant provision of the Magistrates' Court stipulates as follows:

- “61. If the Prosecutor-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 a judge of the High Court, appeal to the High Court against that judgment.”

The applicant has filed a draft notice of appeal and the grounds of appeal are stated as follows:

- “1. The court *a quo* erred when he misconstrued the law in rejecting the evidence of the state witnesses in toto.

2. The court *a quo* erred when it acquitted the respondent on facts which could not be reasonably entertained, the motor vehicle from which the gold was recovered was in the respondent's name.
3. The court *a quo* erred by disregarding the fact that at the time of his arrest respondent did not mention or implicate his defence witness as the owner of the gold but only made mention of his co-accused at the main trial who was subsequently acquitted at the close of the state case due to insufficient evidence.
4. The court *a quo* erred in believing the testimony of Mabusa Chachaya who alleged to be the one who had concealed the gold in the wiper compartment of the car.
5. Ultimately, the learned magistrate erred at law by finding respondent not guilty and acquitted him when there was overwhelming evidence against respondent."

I observe that the respondent was acquitted by the Plumtree Magistrates' Court on the 2nd of February 2016. This application is being brought almost 6 months after the judgment. No explanation has been given for the delay in the late application for leave to appeal. Although there is no time specified within which such an application should be filed from the date of judgment, it is trite law that such application should be brought within a reasonable time. Where there is an inordinate delay, the application should be filed with an application for the condonation for the late noting of an application for leave to appeal. Only when such leave has been granted, can the application be properly argued in court. It is not in the interests of justice and indeed of the respondent to file an application for leave to appeal which on face value is simply meant to buy time and to frustrate the order of the trial magistrate ordering the release of the exhibits held by the Minerals and Border Control Unit.

It is my view, that the office of the Prosecutor General should be reminded that they cannot simply walk into court at any time and as they please. In my mind that smacks of an attitude that the applicants can bring any application at any time and at their pleasure. That attitude cannot be accepted. The respondent expects to be treated fairly and at any rate there must be finality to any proceedings.

I have taken a close look at the proposed grounds of appeal and it is clear that applicant does not set out clearly whether there are any points of law being raised, but rather there are general grounds criticizing the manner in which the trial court assessed the evidence. There is

nothing to suggest that the decision reached by the trial court constitutes a view of the facts which could not be reasonably entertained. The applicant should establish that the inference drawn from the primary facts is so inconsistent with logic and common sense that the judgment is perverse. It is not enough to state that the trial court made mistakes in the evaluation of the evidence or that he should have treated the assessment of the evidence in a particular manner.

In the case of *Attorney-General v Paweni Trade Corp (Pvt) Ltd* 1990 (1) ZLR 24 (5) KORSAH JA, (as he then was) held that:

“it is only when the inference drawn from the primary facts is so inconsistent with logic and common sense that the Attorney-General can succeed ... if there are reasonable grounds for taking certain facts into consideration, and all the facts, when taken together, point inexorably to the guilt of the accused beyond pre-adventure, but the trial court nonetheless acquits the accused, then the trial court has taken a view of the facts which could not be reasonably be entertained. Put in another way, if, on a view of the facts the court could not reasonably have inferred the innocence of the accused, then the verdict of acquittal is perverse, and the Attorney-General is entitled to attack it.”

See also the remarks in *Attorney-General v Lafleur and Another* 1998 (1) ZLR 520 (H)

In the more recent cases of *Prosecutor General v Beatrice Mtetwa and Another* HH-82-16 and *Prosecutor General of Zimbabwe v Tendai Chinembiri* HB 125-16, this court did emphasise the importance of filing an application for leave to appeal timeously. In both cases the court ruled that the Prosecutor General must not take the court for granted. In my view, although no time limit is laid down for bringing an application in terms of section 61 of the Magistrates’ Court Act, it is clear that this drastic power to appeal against an acquittal must be exercised reasonably and in the interests of justice and therefore such application should be filed without delay.

In the result, I am not satisfied that the applicant has discharged the onus on him to establish that this case falls within the ambit of the provisions of section 61 of the Magistrates’ Court Act. Further, I do not consider it in the interests of justice that the applicant should be allowed to proceed with this appeal.

I would accordingly dismiss the application for leave to appeal.

National Prosecuting Authority, applicant's legal practitioners
Mauwa & Associates, respondent's legal practitioners