

THE PROSECUTOR GENERAL OF ZIMBABWE**Versus****TAURAYI DZWITI****And****JOSHUA MABIKA****And****LOVEMORE MAGURA****And****NELLIE DUBE**IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 14 & 30 MARCH 2017**Application for leave to appeal***T. Hove* for applicant*A. Rubaya* for the respondents

MAKONESE J: This is an application for leave to appeal against the decision of a Provincial Magistrate sitting at Bulawayo handed down on 11th October 2016. The magistrate in the court *a quo* discharged and acquitted the respondents at the close of the state case in terms of section 198 (3) of the Criminal Procedure and Evidence Act (Chapter 9:07). The application has been purportedly brought in terms of section 61 (b) of the Magistrates' Court Act (Chapter 7:10). The application is contested by the respondents.

Background

The respondents appeared before a Provincial Magistrate facing charges of contravening section 3 (1) as read with section 3 (3) of the Gold Trade Act (Chapter 21:03); dealing in or

possession of gold without a licence or permit, and contravening section 182 (1) of the Customs and Excise Act (Chapter 23:02); smuggling. The facts of the matter are largely common cause.

The first and fourth respondents are husband and wife. The first and second respondent set out on a journey to Botswana using a motor vehicle driven by the second respondent. At the Plumtree Border Post the motor vehicle in which first and second respondent were travelling was subjected to a search. Underneath the floor carpet of the motor vehicle, police detectives discovered some gold nuggets. The gold is the subject of the charges on which the respondents were acquitted. The state led evidence from its witnesses and closed its case. The respondents through their defence counsel applied for a discharge at the close of the state case. The court *a quo* granted the application and discharged the respondents at the close of the case for the prosecution. The applicant is dissatisfied with the acquittal. The applicant submits that this application for leave to appeal carries reasonable prospects of success.

Points in limine

The respondents argue that there is no proper application before the court. The respondents contend that the section in terms of which the application has been brought is wrong. It is argued that section 61 (1) (b) of the Magistrates' Court Act upon which this purported application has been brought is predicated only applies to an acquittal other than that pursuant to a discharge of an accused person in terms of section 198 (3) of the Criminal Procedure and Evidence Act. The argument goes further to point out that the section relied upon by the applicant clearly applies to a case in which an accused person has been acquitted after a full trial or where proceedings are terminated. In this particular instance, though, the respondents were discharged at the close of the state case, therefore section 61 (1) (b) of the Magistrates' Court has no application.

It is necessary to revisit the provisions of section 61 (1) (b) of the Magistrates' Court Act which provides as follows:-

“61. Prosecutor General may appeal to High Court on point of law or against acquittal

If the Prosecutor General is dissatisfied with the judgment of a court in a criminal matter –

- (a) upon a point of law
 - (b) because it 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 the judge of the High Court, appeal to the High Court against that judgment ...”

It would seem that, the application for leave to appeal against the decision to acquit at end of the state case ought to have been brought in terms of section 198 (4) of the Criminal Procedure and Evidence Act which provides as follows:

“198 Conduct of trial

...

- (3) if at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge; or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.
- (4) if the Attorney General is dissatisfied with a decision –

...

- (b) of a magistrate in terms of subsection (3) he may with the leave of a judge of the High Court appeal against the decision to the High Court.”

(reference to the Attorney General refers to the Prosecutor General)

It is my view that by relying on the wrong statute, the applicant’s motion cannot stand. It is a nullity. The application is clearly fatally defective. I find support in the case of *Prosecutor General of Zimbabwe v Mtetwa and Anor* HH-82-16.

Where the court in deciding upon a point in limine such as the one raised in the matter stated as follows:

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“In my view the use or wrong citation of the wrong provision by the Prosecutor General who is expected to be well informed in terms of the law is not an issue which can simply be overlooked by this court or wished away. It is clear that section 61 of the Magistrates’ Court Act (Chapter 7:10) arises at the conclusion of the trial whereas section 198 (4) of the Criminal Procedure and Evidence Act (Chapter 9:07) applies during the course of trial at the close of the state case.”

I have no reason to depart from the reasoning of the court in the case of *Prosecutor General of Zimbabwe v Mtetwa (supra)*. An application based on a wrong statute is of no moment and does not deserve to be considered on the merits. It ought to be noted, however that the applicant conceded to the points taken by respondents in the application for discharge at the close of the state case in terms of section 198 (3) of the Criminal Procedure and Evidence Act before the court *a quo*. Applicant now seeks leave to appeal against a discharge granted by consent. It is not tenable at law to seek to appeal against an order properly entered with the consent of the parties.

I conclude, therefore, that is not necessary to dwell on the merits of the matter, and would dismiss this application on the basis that it is fatally defective, and therefore not properly before the court.

I would, accordingly make the following order:

1. The application for leave to appeal be and is hereby dismissed.
2. The exhibits held at Plumtree Police Station, namely the gold, Toyota March II registration number ACU 0538 and passports belonging to first and second respondents be and are hereby released to first and second respondents.
3. There is no order as to costs.

*Prosecutor General’s Office, applicant’s legal practitioners
Rubaya & Chatambudza c/o Dube-Banda, Nzarayapenga & Partners respondents’ legal practitioners*