REPORTABLE (57)

DOUGLAS TOGARASEI MWONZORA & 31 ORS
v
THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC, & MAVANGIRA AJCC
HARARE, JUNE 11, 2014

Z T Chadambuka, for the applicants
E Nyazamba, for the respondent

GARWE JA:

[1] After perusing the papers filed of record and hearing counsel, the court dismissed the application and indicated that the reasons for the order would follow in due course.

[2] What follow are the reasons for that order.

FACTUAL BACKGROUND

[3] The applicants appeared before a Magistrate at Nyanga on 18 February 2011 facing charges of public violence as defined in Section 36 of the Criminal Law [Codification and Reform] Act, [*Chapter 9:23*]. The applicants were legally represented. At the hearing the applicants raised a number of complaints regarding the manner of their arrest. The matter was thereafter postponed on a number of occasions to enable the Court to deal with the various issues raised. On a date that is unclear on the record but in May 2011, the applicants, without giving notice to the prosecution, applied to the

magistrate for the matter to be referred to the Supreme Court in terms of s 24 (2) of the former Constitution of Zimbabwe. They tendered a written application in which they chronicled various violations of their constitutional rights at the instance of the State and other persons.

[4] In the application, the applicants raised the following issues:

- Whether or not the manner of their arrest violated their right to liberty protected by s 13(1) of the former Constitution.
- Whether or not the failure by the police to apprehend the persons who had abducted, tortured and assaulted them violated their right to the protection of the law enshrined in s 18 (1).
- Whether or not the discretion to arrest bestowed upon the police was not improperly exercised.
- Whether or not the assaults, perpetrated upon them, as well as the subsequent torture and denial of medical attention, constituted inhuman and degrading treatment.
- Whether or not the failure by the State to cause investigations to be carried out into these complaints violated their rights under s 18 (1) and 18 (1) (a) of the Constitution.
- Whether or not their detention at Nyamaropa and Nyanga Police Stations was under conditions that constituted inhuman and degrading treatment.
- Whether or not s 121 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which provides that a person who has been granted bail by a court shall remain in custody for a period of up to 7 days once the Attorney- General indicates that he intends to appeal the decision, violates their right to the protection of the law.

[5] During the hearing before the Magistrate, the applicants did not lead any evidence to substantiate these claims.

[6] In his response, the prosecutor indicated that the application for referral was opposed. He denied the suggestion that the police did not have a reasonable suspicion that a crime had been committed at the time they arrested the applicants.

[7] In a terse judgment, the magistrate held that the issues of over detention and alleged kidnapping of the applicants deserved "the attention of the Supreme Court which court would need to make a proper inquiry". On that basis he then referred the matter to the Supreme Court.

ISSUES FOR DETERMINATION BEFORE THIS COURT

[8] In his submissions before us, Mr *Chadambuka,* for the applicants, submitted that the rights of the applicants have been violated in several respects. He therefore implored the court to issue various *declaraturs* and, as consequent relief, an order permanently staying the criminal proceedings they were being subjected to.

[9] On the other hand, Mr *Nyazamba,* for the State, urged this Court to find that no proper inquiry had been carried out before the Magistrates' Court and, most importantly, the failure by the applicants to lead evidence to substantiate their allegations was fatal. He therefore prayed for the dismissal of the application.

WHETHER THE MATTER WAS PROPERLY REFERRED

[10] The position is settled that a judicial officer faced with an application for referral has no option but to refer, unless, in the opinion of the Court, the raising of the question is frivolous and vexatious – *Martin v Attorney-General* 1993 (1) ZLR 153 (S) 156 H.

[11] The Magistrate at Nyanga did not, as he should have, ask himself whether the issues raised were not frivolous and vexatious. Indeed it appears the magistrate was not sure as to what was required of him. He made no finding that the application was not frivolous or vexatious. In justifying the referral of the issues to the Supreme Court, he stated:-

> "Over-detention and alleged kidnapping of some of the accused persons would need the Supreme Court to look into the matter.
>
> It is therefore clear as the issues complained of are also linked to the death of one of the accused persons. The Supreme Court would need therefore to make a proper enquiry *(sic*).
>
> The court is of the decision that the issues raised concerning the declaration of rights are referred to Supreme Court for determination."

[12] The above remarks clearly demonstrate that the Magistrate had no idea what he was supposed to do. He seemed to think that the factual inquiry was to be undertaken by the Supreme Court – clearly a misdirection on his part. This misdirection resulted in an even more serious irregularity, to which I now turn.

AN APPLICANT MUST ADDUCE EVIDENCE

[13] Various allegations of impropriety had been made against the police and supporters of the Zanu (PF) Political Party. No evidence was led to substantiate these. The prosecutor made it clear that the facts were in dispute.

[14] Before permitting an accused person to raise the question whether his constitutional rights have been violated, it is a requirement that ample written notice of such an application should be given to the State. This is because the prosecution is entitled to be afforded the time and opportunity to investigate the complaint and to be ready to adduce evidence, if necessary - *S v Banga* 1995 (2) ZLR 297.

[15] Further it is insufficient to make a statement from the bar, as the applicants' legal practitioners did in this case. The applicants should have been called to testify under oath in order to substantiate their complaints that their rights had been violated. Had that happened the prosecutor would then have had the opportunity to cross -examine the applicants and, thereafter, to adduce such evidence as he may have considered necessary to contradict the allegations made by the applicants. Only after hearing evidence from both sides would the magistrate have been in a position to make findings of fact, which findings he would have been bound to take into account in deciding whether or not to refer the issues raised to the Supreme Court. In short, it is the responsibility of the court referring a matter to resolve any disputes of fact before making such a referral.

[16] The absence of oral evidence can be fatal to an application of this nature because it completely disables findings to be made on the complaints raised. It is on the basis of those findings that the Supreme Court is called upon to deal with the allegations raised and, where necessary, afford appropriate relief.

[17] In *S v Banga (supra)* GUBBAY CJ remarked at p 301 E-G:-

> "I trust that I have made it clear that it is essential for an accused, who requests a referral to this court of an alleged contravention of the Declaration of Rights to ensure that evidence is placed before the lower court. It is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on that record that the Supreme Court hears argument and then decides if a fundamental right had been infringed. Only in exceptional circumstances will an applicant be permitted to supplement the record of the proceedings before the lower court by the production of affidavits."

[18] The above remarks have been repeated by this Court in several other cases since then. See for example the following: *Matutu v S* SC 34/13, *Hellen Matiashe v* (1)

The Honourable Magistrate Mahwe N.O. (2) *The Attorney General of Zimbabwe CCZ 12/14.*

APPLICATION NOT PROPERLY REFERRED

[19] This application was therefore not properly referred to the Supreme Court sitting as a Constitutional Court.

[20] In the circumstances, the Court had no option but to dismiss the application.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA AJCC: I agree

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Attorney General's Office, respondent's legal practitioners