

REPORTABLE (4)

JABULANI SIBANDA
v
THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC et MAVANGIRA AJCC
HARARE: JUNE 10, 2015 AND MARCH 17, 2017

S. Gula-Ndebele, for the applicant

E. Nyazamba, for the respondent

GARWE JCC

[1] In this application, referred to this court pursuant to the provisions of s 175(4) of the Constitution, the applicant seeks the following order:

1. It is declared that the prosecution of the applicant Jabulani Sibanda in respect of his address to war veterans and others at Herbert Mine, Mutasa District, on 27 October 2014 is unlawful in that it is in violation of ss 60 and 61 of the Constitution of Zimbabwe.
2. No propagation and expression of one's ideas and opinions should be subjected to prosecution under s 33(2)(b) of the Criminal Law (Codification and Reform) Act.
3. That the court issues such order as it deems appropriate in terms of its powers under s 175 of the Constitution.

[2] In heads of argument filed with this court, the State has taken the preliminary point that the matter was not properly referred by the court *a quo*. After hearing submissions from both counsel, this court reserved judgment on the preliminary point raised and postponed the hearing of the matter on the merits.

FACTUAL BACKGROUND

[3] The applicant was the chairperson of the War Veterans Association at the time of the alleged commission of the offence. On 27 October 2014, he addressed a gathering of war veterans at Herbert Mine in the Mutasa District of Manicaland Province. The war veterans had gathered at the mine shaft to exhume the bodies of deceased war veterans and thereafter re-bury them.

[4] It is alleged by the State that at about 14:00 hours on that day, the applicant, in a lengthy speech, uttered words to the effect that the President of Zimbabwe and his wife were plotting a bedroom coup to remove the State Vice-President from both the party and Government and replace her with Dr Grace Mugabe, the President's wife. He was quoted as further saying that power "was not sexually transmitted" and that he was going to mobilise youth, women and war veterans to march to State House and confront the President of Zimbabwe. The applicant denies making these utterances.

[5] On a date that is either 30 November 2014 or 1 December 2014, the applicant appeared before the court of a Provincial Magistrate at Harare Magistrates' Court facing a charge of contravening s 33(2)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. More specifically it was alleged by the State that in uttering the words in question he had insulted the office and person of the President.

[6] During the initial remand proceedings, the applicant's lawyer, Mr *S. Gula Ndebele*, made two applications, one for bail pending trial and another for the referral of the matter to the Constitutional Court. The application for bail merits no further comment as it is not germane to the determination of the issues that arise in the present application.

PROCEEDINGS IN THE COURT A QUO

[7] Mr *Gula-Ndebele* requested the court to refer the matter to this Court. The request was from the bar. No written application was filed. The applicant was not called to give evidence. He did not file an affidavit in support of the request. There was no specific indication how, in the particular case of the applicant, s 33 infringed his Constitutional rights. Mr *Gula-Ndebele* addressed the court thus:

“I request the court, in terms of section 175 of the Constitution to refer this matter to the Constitutional Court on the grounds that:

(1) It is humbly submitted that the charge presented by the State contravening (*sic*) section 33(2)(b) of the Code of insulting or undermining authority of the President has the effect of infringing on the rights of the accused person. The rights are fundamental rights. These rights are enshrined in section 60 of the Constitution which deals with freedom of conscience which at 60(1)(a) (*sic*) include freedom of thoughts (*sic*), opinion and section 61 of the Constitution deals with freedom of expression and freedom of the media. Every person has the right to freedom of expression which includes;

(a) Freedom to seek, receive and communicate ideas and other information.

I concede that this is not the first time the issue has been raised in these courts. I am aware of 3 cases brought to the courts challenging this very section of the code.

I refer you to the case of *Owen Maseko v the Attorney General*. The State withdrew the case ... The State conceded that the provisions are not proper. The provisions contravene the Constitution. May the court refer to Constitutional Court.”

[8] The State Prosecutor opposed the application. He urged the court to dismiss the request and to proceed with “the remand issues”. He said nothing about the factual dispute whether or

not the applicant had indeed uttered the words alleged. Nor did he comment on the validity of the charge, *viz* s 33(2) (b) of the Codification Act, in the light of the provisions of ss 60 and 61 of the Constitution.

[9] The court *a quo* determined that the “application” should be referred to the Constitutional Court, it being not frivolous or vexatious. The court then referred the matter to this court, hence the present proceedings.

SUBMISSIONS BY THE RESPONDENT

[10] Both in heads of argument and oral submissions, the State raised the preliminary point that the matter had not been properly referred to this court. It further made the following submissions. The applicant should have been called to give *viva voce* evidence. It was insufficient for the applicant’s counsel to tender a very short and generalised submission on the legal provisions without first establishing a factual basis for such argument. Further, the trial magistrate does not appear to have appreciated the need to establish the facts and the constitutional issue that arose from those facts before deciding to refer the matter.

SUBMISSIONS BY THE APPLICANT

[11] In his submissions, counsel for applicant argued that there was no compelling reason to lead evidence. What was in issue was the constitutionality of s 33(2)(b) of the Act. It was in respect of the constitutionality of the section that he had addressed the court *a quo*.

ISSUES FOR DETERMINATION

[12] Two issues therefore fall to be decided by this court. These are, firstly, whether the applicant should have given *viva voce* evidence and, if he did not, whether his request is, for

that reason alone, fatally defective. Secondly, whether the magistrate *a quo* properly referred this matter to this court.

WHETHER APPLICANT SHOULD HAVE ADDUCED EVIDENCE

[13] The first question that arises is whether the failure by the applicant to lead evidence in support of the application is fatal. It is correct, as the respondent points out, that in various decisions, this court has stressed the need for an applicant seeking a referral, to lead *viva voce* evidence in support thereof, and for the prosecution to be given the opportunity, not only to cross examine witnesses called by the applicant to give evidence, but also to lead evidence in rebuttal. Indeed, cases such as *S v Njobvu* 2007(1) ZLR 66, *S v Banga* 1995 (2) ZLR 297, *Sivako v AG* 1999 (2) ZLR 279 and, more recently, *Douglas Mwonzora & 31 Others v The State* CCZ 9/15, stress this point.

[14] These cases however, were decided in the context of an application for a permanent stay of criminal proceedings. In such an application, an applicant has to traverse various factors such as the length of the delay, the reasons for such delay, the question of prejudice in the conduct of the trial and whether the applicant asserted his right to a speedy trial. In *Mutsinze v Attorney General of Zimbabwe* CCZ 13/2015, this court went further to look at other considerations such as the interest of society in having persons alleged to have committed criminal offences tried and a verdict given, the general principle that a permanent stay is granted only in very limited circumstances where the court does not want to involve itself in an illegality and that, where a record of proceedings goes missing in very suspicious circumstances, there is need for such record to be reconstructed. Further, that it is in very rare cases that a permanent stay would be granted owing to the disappearance of a court record.

[15] For the above factors to be properly considered by a court, evidence will, almost invariably, be required. Questions such as whether the applicant asserted his right to a speedy trial and whether he has suffered prejudice in the conduct of his case will, no doubt, require *viva voce* evidence, and cross-examination, before they can be determined.

[16] The present case is different. The applicant is alleged to have made certain remarks, which remarks offend the provisions of s 33(2)(b) of the Act. The applicant however denies making those remarks. That notwithstanding, the applicant is saying that the section under which he was charged is not constitutional. He did not give evidence on the circumstances surrounding his arrest, whether the words he is alleged to have uttered are correct and what constitutional issue arises from his arrest and remand.

[17] Section 24 of the Constitutional Court Rules, 2016 has made provision for the procedure to be followed in referrals of matters to this court, whether by a court *mero motu* or at the request of a party to the proceedings. Sub rule 4 thereof further provides that where there are factual issues involved, the court seized with the matter shall hear evidence from the parties and determine those factual issues. Where there are no disputes of fact, the parties are required to prepare a statement of agreed facts. Further, the record of the proceedings is required to contain evidence led by both parties and the specific findings of fact made by the judicial officer and the issue or question for determination by this court.

[18] The Constitutional Court Rules, 2016 were promulgated on 10 June 2016. The decision to refer this matter to this court was made on 16 March 2016 i.e. just over three months before the Rules came into operation. The promulgation of the Rules has not brought into existence

new requirements. The Rules have simply incorporated various sentiments expressed by this court in various cases that have come before it.

[19] In my view, notwithstanding that there were no Rules in operation at the time the request for referral was made and, notwithstanding the fact that the cases cited by the respondent refer to instances where a permanent stay is sought, there is need, in general terms, in applications for a referral to this court, for an applicant to give evidence on the circumstances surrounding his arrest and why he alleges that his arrest on a particular charge contravenes a particular right given to him by the Constitution. The trial magistrate before whom the application is made must be afforded all the information necessary so that he is in a position to determine, firstly, the factual position giving rise to the request for referral and thereafter, whether the facts give rise to a constitutional question and, importantly, what the constitutional question is that should be referred to this court.

[20] I readily accept that there are cases where the leading of evidence will not be necessary, particularly where the facts giving rise to the request are common cause. In such a case it would serve no meaningful purpose for the parties to be required to give *viva voce* evidence. Where however the facts are not common cause, the parties must, as a general rule, be required to give evidence.

[21] In the particular circumstances of this case, my considered view is that it was not, strictly speaking, necessary for the applicant to give evidence. The facts giving rise to the request for referral were not in dispute. His legal practitioner appears to have been simply saying his prosecution on a charge of contravening s 33(2)(b) of the Codification Act was violative of his rights under ss 60 and 61 of the Constitution. I have used the word “appears”

deliberately as Mr *Gula-Ndebele* was not very clear on this aspect when he addressed the court *a quo*, an aspect I deal with next.

WHETHER THE COURT A QUO PROPERLY REFERRED THE MATTER

[22] The second question is whether the court *a quo* properly referred the matter to this court. It is apparent from the record of the proceedings that the request made by Mr *Gula-Ndebele* was unclear. He submitted that “the charge presented by the State contravening s 33(2)(b) of the Code infringed on the fundamental rights of the accused person.” It is not clear from the record exactly what he was referring to. Was he saying the charge contravened s 33(2)(b) of the Codification Act? Or was he saying the charge of contravening s 33(2)(b) infringed his fundamental rights? No one can say for sure. In case it was the latter Mr *Gula Ndebele* did not indicate how, in the case of the applicant, s 33(2)(b) violated his fundamental rights. The presiding Magistrate did not help matters by not specifically indicating, in his reasons for referral, what he understood the request to be.

[23] In deciding to refer the matter to the Constitutional Court, the trial magistrate reasoned thus:

“I will now turn to the issue of the referral of the matter to the Constitutional Court. Mr *Sobusa Gula-Ndebele* for the defence cited 3 cases of a similar nature. My comment in this regard is that the Constitutional Court has not made any ruling or passed judgment in such matter. In other words, no application has been decided on the merits

...

The law or guiding principles governing applications for referral to the Constitutional Courts are very clear. The underlining (*sic*) factor is whether the application for referral is frivolous or vexatious or not. Once established that it is frivolous and vexatious the court *a quo* will to dismiss the application (*sic*). On the contrary if the application is not frivolous and vexatious the court *a quo* has to refer the matter to the Constitutional Court.

I would like to point out that our jurisprudence has not been developed in this regard and especially on the provision being challenged which the accused is being charged under. We definitely need guidance from the superior court of the land.

The application made by the accused is not frivolous and vexatious and I don’t hesitate to refer it to the Constitutional Court...”

[24] The trial magistrate was correct in restating the requirement that the court must refer the question unless it considers that the request is merely frivolous or vexatious. However in deciding to refer the matter, he did not explain why he was of the opinion that the request was not frivolous or vexatious.

[25] He did not consider how s 33(2)(b) may contravene the Constitution. He did not explain which sections of the Constitution may be violated if an accused person undergoes a trial on a charge of contravening s 33(2)(b). In short, he was under the impression that simply regurgitating the provision was sufficient. In this he was wrong.

[26] In *Jennifer Williams and Another v P. Msipha N O and Ors* SC 22/10, the Supreme Court, sitting as a Constitutional Court, made the following pertinent remarks at pages 17-18 of the cyclostyled judgment: -

“... The opinion which the person presiding in the lower court is required to form is a particular opinion in the sense that he or she is expected to form it by reference to specific criteria. The raising of a question in a court of law is an action or legal proceeding which includes all material facts required to be proved by the party raising the question to entitle him or her to relief ...

The judicial officer is required to have knowledge of the ordinary and natural meaning of the words “frivolous and vexatious,” which constitutes the standard which he or she must conscientiously and objectively apply to the facts on which the question as to the contravention of the fundamental human right or freedom is raised.”

[27] I agree entirely with the above remarks. A lower court must consider the facts of the case and determine, on the basis of those facts, what provision in the Constitution may be violated and the specific question that requires determination by the Constitutional Court.

[28] In the present case, there was no such analysis of the facts and the constitutional provisions that may be violated. There is little doubt that the magistrate did not properly apply his mind to the principles of referral. He appears to have been uncertain as to what was required

of him. Nor is it clear from his reasons what question exactly he referred for determination by this court. It follows therefore that the matter was not properly referred.

MINISTER NOT CITED

[29] Moreover, the Minister, under whose administration the Act is assigned, must be a party to the proceedings. How can this court grant the relief sought that s 33(2)(b) of the Act is unconstitutional without hearing the Minister charged with the administration of the Act, particularly in a case, such as the present, where a final, not a provisional order, is sought? It goes without saying that such relief is not available consequent upon the failure to cite the relevant Minister.

CONCLUSION

[30] The preliminary point therefore succeeds. The matter is therefore struck off the roll with no order as to costs.

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 JCC: I agree

Gula-Ndebele and Partners, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners