PROSECUTOR-GENERAL
versus
RICHARD MUSVAIRE
and
PETER MUJAYA
and
TOBACCO SALES LIMITED represented by WASHINGTON MATSAIRE
and
MRS SANDRA MUPINDU N.O.

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 21 October 2015

Application for Leave to Appeal against acquittal at the close of the State Case

Ms *S Fero*, for the applicant
ABC Chinake, for the respondent

HUNGWE J: This is an application for leave to appeal against the acquittal by the magistrate (fourth respondent herein) of the first, second and third respondent at the close of the state case. The application was made by way of an ordinary chamber application. The first three respondents, upon getting notice of the chamber application, immediately notified the registrar that they wished to be heard before a decision on the application was made. I allowed them time to file opposing papers. I then invited both parties to file heads of argument in support of their respective positions. These are the reasons for the decision in that application.

The application is made in terms of s 198(4) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. That section provides:

"198 Conduct of Trial

(1)…….

(2)……..

(3)…….

(4) If the Attorney-General is dissatisfied with a decision-

(a) of a judge of the High Court in terms of section (3), he may with the leave of a judge of the Supreme Court, appeal against the decision to the Supreme Court; or

(b) of a magistrate in terms of section (3), he may with the leave of a judge of the High Court appeal the decision to the High Court."

The first, second and third respondent faced a charge of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] ("the Criminal Code"). The charge alleged that:-

"in the month of August 2011 and at Tobacco Sales Limited Company, 28 Simon Mazorodze Road, Harare, Richard Musvaure, Peter Mujaya, and Tobacco Sales Limited Company or one or more of them misrepresented to Mahomed Ibrahim Yakub that the business of growing flowers being done by Luxaflor Roses, a subsidiary company of Tobacco Sales Limited Company was genuine and that the farm Lot1 of Lot 1 Manyewe Estates where the business was being conducted from belonged to them. In actual fact to Richard Musvaire, Peter Mujaya and Tobacco Sales Limited Company's knowledge the farm in question belonged to the State, was acquired for resettlement purposes in 2002 and any business activity being conducted there would be stopped at any time to allow the apportionment of the land to new settlers by the State. When Richard Musvaure, Peter Mujaya, and Tobacco Sales Limited Company made the misrepresentation they intended to deceive Mahomed Ibrahim Yakub to act upon the misrepresentation to his prejudice. The misrepresentation caused prejudice to Mahomed Ibrahim Yakub thereby inducing him to pay US$600 000, 00 for the lease of the farm and purchase of the flower business."

Section 136 of the Criminal Code provides:-

"**136 Fraud**

Any person who makes a misrepresentation-

(a) intending to deceive another person or realising that there is a real risk or possibility of deceiving another person; and
(b) intending to cause another person to act upon the misrepresentation to his or her prejudice, or realising that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice;

shall be guilty of fraud if the misrepresentation causes prejudice to another person or creates a real risk or possibility that another person might be prejudiced, and be liable to-

(i) a fine not exceeding level fourteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greater; or
(ii) imprisonment for a period not exceeding thirty-five years; or both."

The state outline alleged that the accused connived and hatched a plan to defraud complainant of his monies by flighting advertisements for the sale by Luxaflor Roses (Pvt) Limited, a subsidiary of Tobacco Sales Limited Company of 50% shares in the flower

business as well as the lease of the land upon which the business was being conducted at Lot1 of Lot 1 Manyewe Estates, Mazowe. Complainant's attention was drawn to the advert. He visited Tobacco Sales Company. He was referred to accused one. In the negotiations which followed, complainant was advised that the price for the business as a going concern would be US$600 000, 00 of which US$200 000, 00 would be paid directly to the third accused. He would pay off third accused's debtors and other obligations as well as an agreed rental of the land pegged at US$1 800, 00 per month.

By October 2011 the accused's legal practitioners had drafted the relevant agreements. For his part, the complainant's lawyers and accountants had carried out due diligence and were satisfied about the business deal and the asking price for it. Complainant paid out funds in terms of the agreements and took occupation of the land where the business was located in Mazowe. Before the end of February 2012, the complainant was approached by a private individual who claimed that the land subject of the deal had in fact been allocated to her under the land reform program. She occupied a house on the piece of land on the strength of an offer letter dated 2008. The complainant queried this turn of events with the first accused who initially assured him that there was no valid offer letter but later on dithered about resolving the complainant's predicament. He approached the Lands Ministry. He learnt for the first time that the farm had been gazetted for acquisition as far back as 2002. He learnt too that the State had not abandoned the acquisition process.

Evidence led at trial indicates that one of the accused had been aware of the gazetting and intended acquisition of the farm by the Ministry of Lands. They had approached the relevant lands committee in Mazowe and made representations in respect of the pending acquisition. They had been referred to the Provincial Lands Committee. The respondents' representatives had been categorically advised that the farm had been gazetted for acquisition. They did not come back to the district lands committee. The evidence also shows that they did not disclose this threat to their tenure on the farm during negotiations with the complainant in 2011.

At the close of the State case the accused, through Mr *Chinake*, applied for their discharge. In her ruling, the fourth respondent appears to have latched on a perceived wrong complainant having been subject of the fraud. She reasoned:

> "When considering an application for discharge at the end of the State case, the court should consider whether or not the State has established a *prima facie* case against the three accuseds. It must be pointed out that the starting point is that evidence can only be considered

> where there is a right complainant, not a wrong complainant. The purported complainant Mahomed Yakub when he was examined by court at the end of his evidence exonerated the first and second accuseds from the commission of the offence as he told court that first and second accused persons were representing third accused in the transaction entered between third accused and ZAZU (Private) Limited and that they were not acting in their personal capacity. …..
>
> If ever was (*sic*) any fraud committed by the three accuseds, they were supposed to have made a misrepresentation to ZAZU Private Limited and ZAZU Private Limited was to act upon the misrepresentation and ZAZU Private Limited should have suffered either potential or actual prejudice as a result of the misrepresentation. The evidence on record does not prove these essential elements of fraud since there is a wrong complainant before the court, Mahomed Yakub"

In considering whether an application for leave to appeal should succeed or fail, it is trite that the test is whether the appeal carries with it prospects of success. See *S* v *Mutasa* 1988 (2) ZLR 4 (SC). Put differently, an applicant for leave to appeal must show reasonable prospect of success as opposed to there being an arguable case. It is not sufficient for an applicant to put forward an arguable case. The case must demonstrate reasonable prospects of success. If there is no prospect of success, the application must fail; on the other hand if there are prospects of the appeal succeeding, then the application ought to be granted. In deciding whether an applicant for leave enjoys prospects of success the court must necessarily examine the evidence upon which the discharge was based and apply the test relevant to the matter before the court seized with that application.

It is trite that where the court considers that there is no evidence that the accused committed the offence, it has no discretion but to acquit him – *S* v *Kachipare* 1998(2) ZLR 271(S) at 275 and *S* v *Tsvangirai & Ors* 2003(2) ZLR 88(H). In particular, the court shall discharge the accused at the close of the state case for prosecution where:

1. There is no evidence to prove an essential element of the offence: *AG* v *Bvuma & Anor* 1987(2) ZLR 96(S) at 102;
2. There is no evidence on which a reasonable court, acting carefully, might properly convict: *AG* v *Mzizi* 1991(2) ZLR 321(S) at 323B; and
3. The evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act on it: *AG* v *Tarwirei* 1997(1) ZLR 575 (S) at 576.

A reading of the ruling by the presiding magistrate shows that the court relied on the fact that the State had nominated the wrong complainant in the charge. It is evident that the court grievously misdirected itself in the application of the principles relevant to an application for discharge at the close of the State case. There are basically three grounds upon which an application for discharge at the close of the state case can succeed. These are that there is no evidence led in the trial to prove an essential elements of the offence; that there is no evidence upon which a reasonable court, acting carefully, might properly convict. She did not find that the evidence adduced on behalf of the State was so manifestly unreliable that no reasonable court could safely act on it. The learned magistrate did not discharge the accused on the basis that there was no evidence to prove an essential element of the offence, or that there was no evidence on which a reasonable court acting carefully might properly convict; or that the evidence adduced on behalf of the State was so manifestly unreliable that a reasonable court could safely act on. She emphasised that because a wrong complainant was cited in the charge therefore the state case was doomed. Clearly this was serious misdirection at law. It is elementary knowledge that any irregular citation in the elements cited in the charge can be cured by evidence (s 146 of Criminal Procedure and Evidence Act, [*Chapter 9:07]).* There can be no suggestion that the essential elements were not proved. As for manifestly unreliable evidence being a possible basis as suggested by Mr *Chinake* in his heads of argument, GARWE J (as he then was) had this to say:

> "Whilst it is settled that a court shall acquit at the end of the state case where the evidence of the prosecution witness:
>
> > "has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it (Practice Note by Lord Parker cited with approval in *AG* v *Bvuma & Anor supra,* at 102-103.
> >
> > It is clear <u>that such cases will be rare.</u>
>
> This would apply:
>
> <u>"only in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed.</u>(per WILLIAMSON J in *S* v *Mpetwa & Ors* 1983(4) SA 262 at 265, cited with approval by McNALLY JA in *AG* v *Tarwirei (supra*) at 576-577." (Emphasis added)"

Applying the above tests it is clear that the appellant's case enjoys reasonable prospects of success.

I now deal with the procedural objections raised by Mr *Chinake* regarding the manner in which this application was made.

The main objection to this application for leave appears to be that the application for leave to appeal is woefully out of time in that it is made six months after the ruling that the appeal proposes to attack. The first point to make is that s 198(4) under which the applicant proposes to appeal, only applies to the Attorney-General (now National Prosecuting Authority) ("NPA"). The time limits set out in the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, S.I. 504 of 1979 appear to deal with situations where a convicted person seeks to appeal after the determination of the case. Time limits are given within which to file various notices including heads of argument and so on. Rule 7 that deals with the appeals by the NPA on a point of law is the closest to an application for leave to appeal against an acquittal at the close of the case for the State. A comparison with other provisions in terms of which the NPA may file an appeal, makes it clear to me that the legislature left the time limits open purposely since generally such appeals do not affect the finality of the matter. Where it does, the reason for the appeal will be to ensure that justice is achieved. Shackling the NPA with *dies induciae* may, in my respectful view, actually result in a perpetuation of the very injustice the procedure is meant to cure.

Generally, appeals by the NPA are declaratory in nature. In other words they are meant to implore the superior courts to pronounce on the correctness or lack thereof, of decisions of the lower courts. It will be seen that as safeguard against failures of justice, it is up to the NPA to study complaints raised regarding the conduct of trial, judgments and sentences. If the NPA's exercise of discretion were to be dependent upon acting within the specific *dies induciae* suggested by the respondents, then the whole criminal justice system would be brought into disrepute where, as here, failure to act timeously would defeat the chances of correcting any perceived irregularity. Rules of court are meant to safeguard the court's inherent power to ensure that justice is done. This power is ensconced in rule 4C of the High Court Rules, 1971. Superior courts need this power to effectively supervise all inferior courts and tribunals. I do not see how this would in any way infringe a party's Constitutional right to a fair hearing. To the contrary, in my view it can only strengthen the enjoyment of that right generally.

In light of the above in my view there is no basis in the opposition to the application. In the result the application for leave to appeal against the acquittal of the first, second and third respondent be and is hereby granted.

There will be no order as to costs.

National Prosecuting Authority, applicant's legal practitioners
Kantor & Immerman, 1st 2nd & 3rd respondents' legal practitioners