THE STATE
versus
SHEPHERD CHINHARA

HIGH COURT OF ZIMBABWE
TSANGA & MUSHORE JJ
HARARE, 3 February 2017

Criminal Review

TSANGA J: The record in this matter was submitted for review by the Chief Magistrate's Office which raised concerns following receipt of a complaint from the Zimbabwe Prisons and Correctional Services regarding the acquittal of the accused person by the magistrate. The accused had been charged with assisting one Kudakwashe Nyashanu, a serving prisoner at Mutimurefu prison, in escaping from prison. The inmate, who was later apprehended, had implicated the accused in a sworn affidavit. The magistrate was said to have committed gross procedural irregularities in the following conduct:

a) Dismissing a key witness before the witness had testified.
b) Discharging the accused before the prosecutor had closed its case.

The magistrate is said to have acted arbitrarily in so doing, which conduct led to the miscarriage of justice in that an otherwise guilty person was acquitted without any legal basis at all.

The main witness in the case was the inmate who had expressed his discomfort in testifying against a prison officer. He had been told by the prosecutor that he was required to testify. It is said that the magistrate had ruled that no person could be forced to testify and had excused the inmate from testifying. This was said to be contrary to s 244 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which states that:

> "Every person not expressly excluded by the Act from giving evidence shall be competent and compellable to give evidence in a criminal case in any court in Zimbabwe."

Four other witnesses are said to have testified, after which the prosecutor requested a postponement to enable him to call his last witness. This is said to have angered the

magistrate who allegedly went into a tirade and discharged the accused person. In placing the record for review, the Chief Magistrates Office stated as follows:

> "From the record it is not clear whether this was a discharge at the close of the state case or not because:
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> i) The state had not closed its case but had simply asked for a postponement which the defence did not even seriously object to.
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> ii) The accused was represented by counsel and ordinarily counsel would have made an application for discharge at the close of the state case if that was necessary.
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> iii) Mr Mudzongachiso mentions in the record that the state can proceed by way of summons but this was after indicating that he had acquitted the accused. The entries on the charge sheet also state that he discharged the accused person."

I sought input on the matter from the National Prosecuting Authority as they were the affected party. Mr *Uladi* who responded on behalf of the Acting Prosecutor General, opined that the appropriate remedy in this case would be for this court to set aside the proceedings before the trial magistrate and to remit the matter back to the magistrate's court in Masvingo for a trial *de novo* before a different magistrate.

The broad principle enunciated in s 244 of the Criminal Procedure and Evidence Act, which I outlined above, is that unless expressly excluded any person is competent and compellable as a witness in a criminal trial. A competent witness is one who may lawfully give evidence, whilst a compellable witness is one who is competent, and, in addition can be forced to testify. Materially, in terms of s 245 of the Act it is the court which is competent to decide upon all questions concerning the competence and compellability of a witness to give evidence. It is not the party who decides whether or not they should be compellable. It is couched as follows:

> **"245 Court to decide questions of competency of witnesses**
> It shall be competent for the court in which any criminal case is depending to decide upon all questions concerning the competency and compellability of any witness to give evidence".

Whilst s 245 states that it shall be competent for the court to decide upon all questions concerning competence and compellability of any witness, the Act is equally not devoid of parameters on competency and compellability. In terms of lack of competence, general exclusions as outlined in s 246 of the Act relate to a person who is suffering from a mental disorder or defect and intoxication whilst under the influence of such malady or disability.

A spouse is also only competent and compellable to give evidence without the accused consent where certain offences that are specified in s 247 of the Act have been committed against such spouse or any one of their children. Whilst in terms of s 248 of the Act, an accused person or their husband or wife may be a witness for the defence at every stage of the proceedings, a husband or wife cannot be called as a witness for the defence except upon application by the accused person. Other than these parameters a witness is competent and compellable.

The witness in this case whom the magistrate tried to shield from giving evidence did not fall within any of these parameters. He was competent and compellable as a witness in the criminal trial. The purpose of compellability to be sworn in to give evidence where a person is competent and compellable, has been explained succinctly as follows:

> "It is needed to force people who are competent but unwilling to testify, to come to the assistance of the determination of the truth and hence of the dispensation of justice. That is to say there are people who are competent; but for one reason or another, whether it is that testifying in court will cost them dear in time and money or life, they refuse to be witnesses. Compellability imports the legal obligation to give evidence, the breach of which represents a contempt of court. If witnesses are compellable, they must, **whether they desire it or not**, come forward as witnesses. If compellable, they may be subpoenaed to attend as witnesses"[1]; (My emphasis)

In this instance it would appear that the witness's evidence would in fact have been necessary to assist the court in determining the truth of what had actually happened regarding the prisoner's escape. Whether he desired to or not was not the point since he was competent and compellable. In addition, his evidence was necessary for the dispensation of justice. Furthermore, it is trite that an application for discharge can only be made by the defence at the close of a state case. It is also trite that such application cannot be made if there is evidence that the accused may have committed the offence. The effect of such an application, if successful, is that it terminates the case completely.

In casu, the witnesses had not finished testifying, leaving the state case open and thereby depriving the accused of his right to apply for the discharge at the closure of the State's case if he had so desired, or, had he felt that it was necessary for him to make such an application. In all events, it was therefore incompetent and un-procedural for the court to have assumed the rights and position of the State by having acquitted the accused prior to the

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[1] Tan Yock Lin., **Reforming Competence and Compellability** *Singapore Law Review 1994 pp. 133-170 at p134*

State closing its case. To that extent an injustice and procedural irregularity occurred, which irregularity militates against the concept of judicial impartiality.

Section 29 (2) of the High Court Act [*Chapter7:06*], which the National Prosecution Authority relied on for their view on the way forward, provides as follows:

> (2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings—
> (*a*)…………..;
> (*b*) are not in accordance with real and substantial justice, it may, subject to this section—
> (i) ………..…or
> (ii) …………
>
> (iii) s**et aside or correct the proceedings of the inferior court or tribunal** or any part thereof or generally give such judgment or impose such sentence or make such order as the inferior Court or tribunal ought in terms of any law to have given, imposed or made on any matter which was before it in the proceedings in question;…..

I am in agreement that the appropriate remedy in this case is to set aside the proceedings that were held before Magistrate Mr Oliver Mudzongachiso and that the matter be tried *de novo*. Accordingly, I make the following order:

1. The proceedings before Mr Oliver Mudzongachiso in CRB MSVP 746/16 are set aside.
2. The matter is remitted back to the magistrate's court for a trial *de novo* before a different magistrate.

TSANGA J: ……………………………..

MUSHORE J: agrees …………………….