

THE STATE

Versus

CATHERINE MURAKATA

And

MAVIS MURAKATA

HIGH COURT OF ZIMBABWE

MAWADZE J,

MASVINGO, 24 JULY, 2018

Criminal Review

MAWADZE J: The issue which arises in this matter is a novel one.

This matter was referred to this court by the learned Provincial Magistrate for Masvingo under cover of a minute dated 20th July 2014. The said minute summarised the history of the matter and explained why the matter was being referred for review. In essence the learned Provincial Magistrate wanted to be advised whether this matter is a partly heard matter. Two of the Magistrates which had dealt with it had arrived at different conclusions. Further, the learned Provincial Magistrate inquired whether a fellow Magistrate could competently go against the ruling of a fellow Magistrate on the same point. Lastly this court was asked to consider to order a trial *de novo* in the matter.

It is important to put into context these issues by dealing with the background facts of this matter.

The two female accused persons aged 23 years and 29 years respectively appeared before the Magistrate a Mr Mudzongachiso at Masvingo on 4 July 2016 facing the charge of contravening section 57(1)(c) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] which relates to dealing in dangerous drugs. They both pleaded not guilty to the charge.

The facts alleged were that on 12 April 2016 the police in Masvingo received a tip off that the two accused persons were in possession of dagga at accused 1's residence at No. 19930 Chiremwaremwa Street, Rujeko 'C' in Masvingo. The police swiftly acted on this information and proceeded to the said house where they allegedly found both accused persons packing 130 cobs of dagga, 76 sachets of dagga and 31 twists of dagga which were contained in three 20 litre plastic containers and a black plastic bag. Both accused persons were arrested. The said dagga weighed 6,715 kg with a street value of US\$ 1350.00.

Both accused persons who were represented by a *Mr Shumba* pleaded not guilty to the possession of the said dagga found at the said house. They tendered a defence outline in which they implicated other tenants at this house whom they said were also present at the time of their arrest especially one Edmore. They said it is surprising that the police decided to only arrest the two of them. When both accused persons appeared before Mr Mudzongachiso and pleaded not guilty to the charge accused 2 was pregnant and not feeling well. The trial for that reason could not proceed after the defence outline had been tendered and the certificate of weight of the dagga produced. The matter was postponed to 23 August 2016.

The matter never took off until both the prosecutor handling the matter and Mr Mudzongachiso transferred from Masvingo Magistrates Court. From the record of proceedings other than the certificate of weight of the dagga produced no other evidence had been led.

On an unspecified date the matter was brought before another Magistrate Mr Mohamadi at Masvingo for trial. The defence objected to proceeding with the matter indicating that it was improper for Mr Mohamadi to proceed with the trial since this was a partly heard matter before Mr Mudzongachiso. The state argued otherwise.

Both the state and the defence filed written submissions in support of their positions. The prosecutor relied on the case of *Chipuza v Dzepasi* H 487-15. The defence cited the cases of *S v Sibanda* SC 169/06 and *S v Dehwe* 1987 (2) ZLR 231. The state argued that Mr Mohamadi should proceed with the trial. On the other hand, the defence argued that the matter should be referred to this court for the proceedings to be quashed and a trial *de novo* ordered.

Mr Mohamadi after hearing counsel found favour with the submissions made by the defence and ruled that the matter was a partly heard matter before Mr Mudzongachiso. He ruled that the matter should be placed before Mr Mudzongachiso who should proceed with the trial

and that if that became impossible the matter could be referred to the High Court for the proceedings to be quashed and a trial *de novo* ordered.

When Mr Mudzongachiso came to Masvingo to deal with his other partly heard matters this matter was placed before him together with Mr Mohamadi's ruling on 14 June 2018. He did not find favour with Mr Mohamadi's ruling and declined to deal with the matter. Mr Mudzongachiso was of the view that this matter was not a partly heard matter and that any other Magistrate at Masvingo Magistrates Court could deal with the matter. He proceeded to so endorse on the record. This is what prompted the learned Provincial Magistrate to refer this matter to this court as earlier on explained.

The task before me is to decide whether this matter is a partly heard matter or not and what course of action to take. I was also asked to pronounce whether it was proper for Mr Mudzongachiso to overrule the decision of Mr Mohamadi.

In the matter of *AG v Gavaza* 1984 (2) ZLR 212 GUBBAY ACJ (as he then was) dealt with an interpretation of the then s163(5) of the Criminal Procedure and Evidence Act [Cap 59] which bears some similarity to the current s 180(6) of the current Act and made the following remarks at pp 214 E – F;

“But the ratio which emerges clearly from the judgment is that as soon as an accused has pleaded to a charge in a court properly constituted and appointed to try him, that court and no other court assumes jurisdiction and is seized with the trial. From that moment onward, and irrespective of whether any evidence in support of the charge has been placed before it, that court is obliged to conduct the trial to finality unless it becomes impossible for it do so.”

The LEARNED ACTING CHIF JUSTICE at page 215H supra stated that the Legislature had to intervene to deal with the problems arising from the provisions of the then s 163(5) of the Criminal Procedure and Evidence Act [Cap 59].

The Legislature has answered to the call by the then ACTING CHIF JUSTICE in the current s 180(6) of the Criminal Procedure and Evidence Act [Cap 9:07] which provides as follows;

“180. *Pleas*

(1) Not relevant

- (2) Not relevant
- (3) Not relevant
- (4) Not relevant
- (5) Not relevant
- (6) *Any person who has been called upon to plead to any indictment, summons or charge shall, except as is otherwise provided in this Act or in any other enactment, be entitled to demand that he be either acquitted or found guilty by the judge or magistrate before whom he pleaded:*

Provided that—

- (i) *where a plea of not guilty has been recorded, whether in terms of section two hundred and seventy-two or otherwise, the trial may be continued before another judge or magistrate if no evidence has been adduced;*
- (ii) *where a plea of guilty has been recorded, the trial may be continued before another judge or magistrate if no evidence has been adduced or no explanation has been given or inquiry made in terms of paragraph (b) of subsection (2) of section two hundred and seventy-one.” (my emphasis)*

In my view the proviso to s 180(6) of the Criminal Procedure and Evidence Act [Cap 9:07] is clear and invites no other interpretation. *In casu* both accused persons had pleaded not guilty before Mr Mudzongachiso who recorded their pleas of not guilty. The record shows that no evidence had been adduced by the state in support of the charge of contravening s 57(1)(c) of the Criminal Law (Codification and Reform) Act [Cap 9:23]. This means that the trial of both accused persons may be continued before another Magistrate.

It was therefore incorrect for Mr Mohamadi to make a finding that this was a partly heard matter before Mr Mudzongachiso. In that vein it was competent and proper for Mr Mohamadi or any other Magistrate to proceed with the trial. All what had been produced was the accused persons' defence outline and a certificate of weight of the dagga. The state had not adduced any evidence. Any other Magistrate may therefore continue with the trial and assess the credibility and demeanour of witnesses called. See *S v Lance Kennedy* HH 70-17 at pp 3 of the cyclostyled judgment.

The last issue I have to consider is what course of action should Mr Mudzongachiso have taken.

While it is trite that a Magistrate cannot overrule the decision of another Magistrate it is folly to have expected Mr Mudzongachiso to go along with the decision of Mr Mohamadi which clearly flies in the face of the provision of s 180(6)(1) of the Criminal Procedure and Evidence Act [*Cap 9:23*]. The finding by Mr Mohamadi that this matter is a partly heard matter is clearly legally wrong. Mr Mudzongachiso could not have been expected to endorse a wrong decision and worse still act upon it by complying with such a decision. It was well within Mr Mudzongachiso's rights to decline to implement a wrong decision at law. This does not at all mean that Mr Mudzongachiso reviewed Mr Mohamadi's decision or that he acted as an appellate court. He simply declined to act in accordance with a clearly wrong decision. What other option would Mr Mudzongachiso have had other than declining to endorse a wrong decision?

Lastly, in the circumstances I am not obliged to quash the proceedings and or order a trial *de novo*. This trial should simply proceed before another Magistrate of competent jurisdiction at Masvingo. For the avoidance of doubt I shall however set aside the order or ruling by Mr Mohamadi.

It is accordingly ordered that;

1. The order or ruling by Mr Mohamadi be and is hereby set aside.
2. It is directed that the trial shall proceed before any other Magistrate of competent jurisdiction at Masvingo Magistrates Court.

Mafusire J: agrees