ASSISTANT INSPECTOR MBWEMBWE 053020E
AND
CONSTABLE BANDA D 076625M
AND
CONSTABLE MLAMBO D 072 064E
AND
SERGEANT SITHOLE E 046373V
VERSUS
THE TRIAL OFFICER (SUPERINTENDENT MKANDLA
AND
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 3 & 19 JULY 2017

Opposed Application

N Mugiya for the applicants
N Muzuva for the respondents

TSANGA J: The applicants who are all members of the Zimbabwe Republic Police sought a declaratur to the effect that their conviction and sentence by the police force after having been charged in a court of law on allegations of theft and fraud was wrongful and unlawful. They also sought that the Commissioner General of Police be ordered to reinstate all four of them into the police service forth with.

Sometime in October 2014 the four applicants were charged with contravening paragraph 35 of the Schedule to the Police Act, [Chapter 11:10] which deals with "acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police Force". They were convicted and sentenced to 14 days imprisonment and also received a $10.00 fine.

Prior to that they had also been charged in a court of law with contravening s 136 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] which deals with fraud as well as s137 which deals with forgery or alternatively s 174 which deals with criminal abuse of duty as a public officer.

Their averment is that the facts and circumstances were the same save that the respondent, namely Superintendent Mkandla the single officer whom they appeared before for the disciplinary hearing, and the Commissioner General of Police, chose to charge them after they had been charged under the ordinary law. They were later discharged from the Police Service on the basis of their conviction under the Police Act, which decision they have appealed the Police Service Commission in terms of s 51 of the Police Act. This application having been silent on whether the applicants had been a convicted and sentenced by the Magistrate's court, counsel for applicants, Mr Mugiya stated that at the time of the filing of this application, the trial was in fact actually on going and they had not yet been convicted and sentenced. Materially, since there had not been a guilty or innocent adjudication, strictly speaking the plea of *autrefois* could not have been applicable at the time of bringing this application. Mr Mugiya further clarified at this hearing that the applicants had since been acquitted of those charges and therefore the central issue remained whether they had been subjected to double jeopardy.

Applicants drew on s 70 (m) of the Constitution[1] which accords every accused person the following right:

> "not to be tried for an offence in respect of an act or omission for which they have previously been pardoned or either acquitted or convicted on the merits."

This principle was previously encapsulated under s18 (6) of the repealed Constitution under provisions to secure the protection of the law as follows:

> (6) No person who shows that he has been tried by a competent court for a criminal offence upon a good indictment, summons or charge upon which a valid judgment could be entered and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save
> (a)……
> b)…….

[1] Constitution of Zimbabwe Amendment (no.20 Act 2013)

Mr Mugiya argued that unlike s 84 (6) of the repealed Constitution s 70 of the new Constitution is now worded in such a manner as to centralise the prevention of trying a person on the same merits. He also drew on s193 of the Constitution in so far as a tribunal that deals with cases under a disciplinary law may exercise or may be given criminal jurisdiction. It provides:

> **193 Criminal jurisdiction of courts**
> Only the following courts **may exercise or be given jurisdiction in criminal cases**—
> (*a*) the Constitutional Court, the Supreme Court, the High Court and magistrates courts;
> (*b*) a court or tribunal that deals with cases under a disciplinary law, to the extent that the jurisdiction is necessary for the enforcement of discipline in the disciplined force concerned.

He argued that at the hearing before the single officer, the respondents were in fact exercising criminal jurisdiction over the applicants. In addition, he further pointed to s 35 (1) of the Police Act [Chapter 11:10], whereby the proceedings "shall as near as may be, be the same as those prescribed for criminal cases in the courts of Zimbabwe." As such, he opined that even procedurally, the applicants were in fact faced with criminal proceedings.

Also broached was s 278 (2) of the Criminal Law Codification and Reform Act [Chapter 9:23] which provides as follows with regards to members of disciplined forces who include the defence forces, the police and prison services:

> **278 Relation of criminal to civil or disciplinary proceedings**
> (2) A conviction or acquittal in respect of any crime shall not bar civil or disciplinary proceedings in relation to any conduct constituting the crime at the instance of any person who has suffered loss or injury in consequence of the conduct or at the instance of the relevant disciplinary authority, as the case may be.
>
> (3) Civil or disciplinary proceedings in relation to any conduct that constitutes a crime may, without prejudice to the prosecution of any criminal proceedings in respect of the same conduct, be instituted at any time before or after the commencement of such criminal proceedings.

His argument was that the section has been misunderstood and is to be read in conjunction with s 4 of the Code which provides thus:

> **4 Application of Code to other enactments**
> (1) Subject to subsection (2), nothing in this Code shall affect the liability, trial and punishment of any person for a crime in terms of any other enactment.
> (2) Unless otherwise expressly provided in the enactment concerned, section *five* and Chapters II and XII to XVI of this Code shall apply to the determination of criminal liability of a person in terms of any other enactment.

The nub of his assertion was that when s 278 of the Criminal Code is read conjunctively with s 4, then s 278 violates s 70 (m) in that its result is to permit dual prosecution.

He further drew support for his argument against double jeopardy from the Standing Orders Volume 1 made by the Commissioner–General in terms of s 9 of the Police Act with respect to discipline, regulation and orderly conduct of the affairs of the police. In particular, Part 2, paragraph 45 of the Standing orders deals with discipline. Paragraph 45.1 defines criminal offence whilst paragraph 45.3 provides for members facing criminal charges. These paragraphs read as follows:

> "45.1. "Criminal offence" means any offence under the common law or statutory Definition enactment other than an offence under the Police Act.
>
> 45.3. Any member charged with a criminal offence shall not be tried by a Board of Officers or single Officer, but shall be dealt with in accordance with the provisions of the Criminal Procedure and Evidence Act, Chapter 59".

His observation was that para 45.3 therefore ousts jurisdiction from the police tribunals for allegations which constitute an offence in terms of the ordinary law. As such he argued that the respondents should not have subjected applicants to a criminal hearing. He further pointed to another internal document being the Uncoded Rules Vol 1 paragraph 3 which deals with the determination of choice of court in such criminal matters by the now Prosecutor General.

The Commissioner-General opposed the application on the basis that the applicants had no cause of action since neither the Constitution nor the Police Act or the Standing Orders bar disciplinary action against members facing or who have faced criminal charges for which they have either been acquitted or convicted. Mr Muzuva argued on his behalf that the central issue is whether or not disciplinary proceedings are criminal in nature. He maintained they are not.

Analysis

From the wording of s 70 (m) of the Constitution which captures the principle against double jeopardy, what emerges is that "offence" in terms of the act or omission, encapsulates the legal characteristics which make it an offence whilst conviction or acquittal on the "merits" constitute the facts which constitute the crime. In my view the plea of double jeopardy is still essentially grounded in the "offence" which is being charged from the same set of facts. In other words, it is not the evidence that is central to the plea but the fact that the person is facing the same charge from those facts. Whilst the wording of the principle on

double jeopardy may have changed under the new Constitution, the principle remains the same in that what is prohibited is being tried for the same offence where a person has already been convicted or acquitted of that offence on the merits. The new Constitution simply conveys this same principle in less convoluted language when compared to the wording under the previous Constitution. At the heart of the principle is that someone should not be punished twice for the same offence from the same set of facts.

Whether a disciplinary hearing constitutes being tried for the same offence had occasion to be considered against the backdrop of s 18 of the previous Constitution by the Supreme Court in the case of *Mhuridzo v The State* SC 143- 1987. The court made it clear in that case that findings by tribunals other than courts of law will not entitle an accused to a plea of *autrefois convict.* As regards disciplinary proceedings the court explained as follows:

> "..the disciplinary proceedings were a matter for internal discipline of the police, with which the trial court was in no way concerned. All that the trial court was obliged to do was to take into consideration, if the appellant had been punished by a disciplinary tribunal for an offence against discipline which arises from the same facts, the punishment imposed by the tribunal when it is itself passing sentence".

It cannot be said that the applicants were facing the same sort of proceedings and the same offence both in fact and in law as in the criminal charges. Before a single officer the applicants were not indicted for an offence but for disciplinary charges whose functions are different from those in criminal hearings. The disciplinary hearing had everything to do with the reputation of the police and maintaining public confidence in the police force. The applicants were in no peril of being convicted of the same offence and the same wrong for which they had been charged, namely, theft and fraud.

The fact that the procedure in a hearing before a single officer in terms of s 35 of the Police Act is as close to that as prescribed in criminal matters is not the point. This aspect relates to form of proceedings rather than the substantive content of the offence being dealt with. The Police Act is very clear in s 34 (9) that a member found guilty by a single officer of contravening the Police Act "shall not be regarded as having been convicted of an offence for the purpose of any other law". As such, applicants were not at all in double jeopardy of being convicted of the same offence. Section 193 of the Constitution which the applicants drew on says that a tribunal that deals with disciplinary matters may exercise or may be given jurisdiction in criminal cases. Nothing put before this court shows that the single officer was exercising criminal jurisdiction under any law.

As for the Standing Orders Vol 1 and the Uncoded Rules Vol 1 which are internal documents, transparency in how officers who violate the law of the land are dealt with is critical. When it comes to police officers faced with criminal allegations, it makes perfect sense for the internal rules and regulations as captured in paragraph 45.3 to insist on such criminal offences being dealt with by the courts as criminal matters and not by a single officer or board of officers. This is for transparency and fairness in the sense that the courts are independent from and unconnected to the individual officers whose conduct and actions lie at the core of the alleged criminal offence. It would indeed be improper where criminal conduct has been alleged, for the police not to be subjected to the same criminal laws as everybody else by having that criminal conduct dealt with through the criminal justice process. It is the criminal aspect of their conduct that is dealt with through the general criminal laws. The Standing Orders are clear and precise that where a criminal offence is involved the board officers and a single officer cannot try such a member. In as much as ordinary members of the public who violate criminal laws are brought before the criminal justice system, no more and no less should be expected of police officers. This is what the Standing Orders address in the relevant paragraph. The intention is to enhance and promote openness and credibility in how police officers who violate the laws of the land are dealt with. Whether they are acquitted or are found guilty does not bar disciplinary proceedings.

Section 278 of the Criminal Code in no way violates the letter and spirit of s 70 (m) of the Constitution. The Constitution does not bar disciplinary proceedings. What the Constitution bars is a person being punished twice for the **same offence** arising out of the same set of facts particularly where he was in jeopardy of being convicted of the charges at the earlier trial. Disciplinary hearings which address the failure to deal with members of the public in a professional and reputable manner and bringing the institution of the police into disrepute, are a totally different matter to being charged with a criminal offence. See *Nathan Chilufya v Commissioner General of Police & Ors* HH -89 -10*; Detective Constable Mujabuki v Trial Officer Supt Gudo & The Commissioner –General of Police* HB- 148 -17; *Sangu v Comm Gen of Police & Ors* HB -110-16. Accordingly, the application lacks merit.

In the result, it is ordered that:

The application is hereby dismissed with costs.

Mugiya & Macharaga Law Chambers, applicants legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners