THE STATE
versus
BRIAN MUGODHI

HIGH COURT OF ZIMBABWE
MUSAKWA J
HAHARE, 14 February 2017

Criminal Review

MUSAKWA J: The accused person was arraigned on a charge of rape. He was subsequently convicted of indecent assault. The record of proceedings was submitted to the High Court for review in terms of s 57 (1) of the Magistrates Court Act [*Chapter 7:10*].

When the record of proceedings was initially received I queried Mr Mzinyathi's authority to preside over the matter. This is because trial commenced before the late regional magistrate, Mrs Kudumba who died before she handed down the verdict. The record reflects that the verdict had been prepared as of 11 July 2012. Mr Mzinyathi, a provincial magistrate then handed down the verdict on 13 September 2016 and proceeded to pass sentence.

As authority for entertaining the matter, Mr Mzinyathi referred to s 334 (7) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The provision in question reads as follows:

> "If, in a magistrates court, sentence is not passed upon an offender forthwith upon his conviction or if, by reason of any decision or order of the Supreme Court or High Court, as the case may be, on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a magistrates court, or to pass sentence anew in such court, any magistrate of that court may, in the absence of the magistrate who convicted the offender or passed the sentence, as the case may be, pass sentence on the offender after consideration of the evidence recorded and in the presence of the offender."

My construction of s 334 (7) is that it is applicable to situations where only sentence is outstanding. In other words, where a verdict has not been passed no magistrate can take over proceedings that were commenced before another magistrate who is no longer available. In the present case there is no question of sentence not having been passed forthwith because the verdict had not been pronounced. The other instances provided in the provision do not apply.

There are very few instances where a judicial officer may continue with proceedings that were commenced before a different judicial officer. In addition to s 334 (7) above, the other provision that comes to mind is s 180 (6) of the Criminal Procedure and Evidence Act which provides that:

> "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*."

Except as provided in s 180 (6) or s 334 (7) I know of no other provision that permits a magistrate to continue a matter that was commenced before another magistrate who has since died. Therefore, when a judicial officer dies before proceedings are completed, those proceedings become a nullity except for those situations as provided in s 180 (6) and s 334 (7).

I find support in this proposition from several authorities. In *S* v *Makoni and Ors* 1975 (2) RLR 75 it was observed that there was no statutory provision covering a situation where a magistrate dies or becomes incapacitated before proceedings are completed. In that case a magistrate who was presiding over several cases fell ill and it was indicated he would be away for three months. The proceedings were set aside and it was ordered that they be commenced afresh. Citing the case of *S* v *Gwala and Ors* 1969 (2) SA 227 Davies J at 76 had this to say:

> "It seems to me that in principle where a magistrate is incapacitated through illness from continuing with a case, justice requires that the proceedings should in fact be set aside and commenced de novo before another magistrate, if the incapacitation of the magistrate is likely to persist for a considerable period……."

In *Attorney-General* v *Gavaza* 1984 (2) ZLR 212 (SC) the accused pleaded guilty to theft. In the course of canvassing the essential elements of the offence the accused gave an explanation that prompted the magistrate to alter the plea to that of not guilty. The proceedings were then adjourned. Trial later resumed before a different magistrate who convicted and sentenced the accused to a term of imprisonment. On review the proceedings were set aside on the ground that the magistrate who completed the trial had no jurisdiction. This prompted the Attorney-General to appeal to the Supreme Court.

In dismissing the appeal, GUBBAY ACJ had this to say at 216:

> "The position then which obtains is that s 163(5) of the Act contemplates that the judicial officer before whom the accused has pleaded remains available to hear the whole of the trial. If he should become no longer available by reason of retirement, resignation or discharge from the service, death, physical or mental incapacity which is likely to persist for a considerable period, or recusal, he becomes *functus officio*. The proceedings are aborted and become void. As a matter of practice, where the judicial officer is a magistrate, the proceedings are submitted for review by the High Court and a declaration of nullity is made, leaving the way open for a fresh trial to be brought (See *S* v *Makoni & Ors* 1975 (2) RLR 75; *S* v *Godfrey and Ors* G-S-100- 1976)."

John Reid Rowland in *Criminal Procedure In Zimbabwe* at 28-6 makes the following observation:

> "If evidence has been led and the presiding magistrate dies or is incapacitated (other than temporarily), the proceedings must be regarded as a nullity and the accused may be tried again. It would not be permissible for the new judicial officer to start from where the former left off. If the judicial officer retires or resigns, the proceedings are abortive (except to the extent that a judge of the High Court or Supreme Court may complete proceedings begun by him) and lapse without their having to be set aside."

The observations by John Reid Rowland were reaffirmed GILLESPIE J in *S* v *Tsangaizi* 1997 (2) ZLR 247 (HC) who at 249 made the following remarks:

> "The first proposition, that the death or incapacity of a magistrate brings about the nullity of the incomplete proceedings, is entirely correct. The point is exemplified in a number of cases, which I shall shortly examine below. The principle is that if during the course of proceedings a judicial officer ceases to have jurisdiction then the proceedings up to that point are abortive. In such an event, the person on trial cannot demand a verdict since the presiding officer is incapable of bestowing one. The part-heard matter is accordingly a nullity and may be commenced afresh. Without any order of a higher court setting aside the incomplete proceedings."

In *S* v *Likwenga and Ors* 1999 (1) ZLR498 (H) BARTLETT J made similar observations regarding the fate of incomplete proceedings and referred to a number of authorities including *S* v *Tsangaizi* **supra**.

One other aspect has exercised my mind. Can it be said the decisions in *S* v *Tsangaizi* **supra** and *S v Likwenga and Others* **supra** are not in tandem with that in *Attorney-General* v *Gavaza* **supra** in as far as whether it is necessary for a higher court to declare such proceedings a nullity and order trial afresh? It may be noted that in *Attorney-General* v *Gavaza* **supra** Gubbay CJ held that the practice is for such proceedings to be submitted for review in order to have them nullified. In my respectful view there is no conflict in the judgments because a nullity amounts to nothing.[1] In any event it was inevitable that the

[1] Mugwebie v Seed Co Ltd & Another 2000 (1) ZLR 93 (SC); MacFoy v United Africa CO. Ltd [1961] 3 All ER 1169

present proceedings had to be referred to the High Court as they were liable for automatic review.

Therefore, the present proceedings became a nullity upon the death of the trial magistrate. On the strength of the authorities cited, it would not have been necessary to set aside the proceedings but for the assumption of jurisdiction by Mr Mzinyathi where he had none.

Accordingly, it is ordered as follows:

a) The conviction and sentence is hereby set aside.
b) The matter is remitted for trial afresh before the appropriate court.

CHATUKUTA J: agrees