WILLIAM LORENZO PARSON
and
WENDALL PARSON
versus
MAGISTRATE CHIBANDA N.O.
and
THE ATTORNEY GENERAL

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 30 AUGUST AND 5 SEPTEMBER 2013

Urgent Chamber Application

H. Nkomo, for applicants
S. Fero, for respondents

MUSAKWA J: This is an application for stay of criminal proceedings instituted against the applicants pending the determination of a review application that has been filed with this court.

The applicants have, in the Magistrates Court pleaded not guilty to a charge of fraud. At the time of pleading they also excepted to the charge on the ground that it does not disclose an offence.

The charge against the applicants is framed as follows:

> "In that between 28 March 2013 and 17 May 2013 and at Alliance Insurance Company, Westgate, Harare, William Lorenzo Parson, Wendell Parson or one or both of them unlawfully and with intent to defraud misrepresented to Alliance Insurance Company by presenting claim forms which indicated that William Lorenzo Parson was involved in a road traffic accident on 28 March 2013 instead of 16 March 2013. As a result of this misrepresentation, Alliance Insurance Company processed a claim of USD 25 000-00 for the Ford Ranger registration number ABI 0788 which was involved in an accident and was said to be beyond economic repair to the prejudice of Alliance Insurance Company."

The outline of state case alleges that on 16 March 2013 the first applicant was involved in an accident whilst driving a Ford Ranger registration number ABI 0788. The motor vehicle was damaged beyond economic repair. It was not insured. The accident was reported at Borrowdale Police Station.

On 18 March 2013 the second applicant approached AK Insurance Brokers and applied to insure the motor vehicle together with two trailers. A comprehensive policy, number DMOCP41948 was issued , commencing from 18 March 2013 to 26 October 2013.

The applicants subsequently filed a claim purporting that the accident had occurred on 28 March 2013. An indemnity of USD23 750-00 was then processed. Before awarding the claim Alliance Insurance Company conducted investigations through their risk department in collaboration with Borrowdale Police. It was then established that the accident had occurred on 16 March and not 28 March.

The first applicant approached Weber Sithole of risk department and offered him USD2 000-00 as an inducement to process the claim. On 17 March 2013 the second applicant went to Alliance Insurance Company to collect the USD23 750-00 and he was then arrested.

Mr *Nkomo* submitted that because the applicants pleaded and excepted at the same time and the exception was upheld, there was no question for the trial court to order that the charge be amended. He thus submitted that the trial court should have ordered the discharge of the applicants. In support of this submission he referred to s 180 (6) of the Criminal Procedure and Evidence Act [*Cap 9: 07*]. The provision states 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."

However, Mrs *Fero* countered Mr *Nkomo*'s submission by referring to *proviso* (i) to s 180 (6). She argued that where an accused pleads not guilty irrespective of whether he has also excepted, the matter proceeds to trial.

Mrs *Fero* also cited s 170 of the Act which provides that-

> "(1) Any objection to an indictment for any formal defect apparent on the face thereof shall be taken by exception or by application to quash such indictment before the accused has pleaded, but not afterwards.
> (2) Any objection to a summons or charge for any formal defect apparent on the face thereof which is to be tried by a magistrates court shall be taken by exception before the accused has pleaded, but not afterwards.
> (3) Any court before which any objection is taken in terms of subsection (1) or (2) may, if it is thought necessary and the accused is not prejudiced as to his defence, cause the indictment, summons or charge to be forthwith amended in the requisite particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared."

The above provision does not dispose of the matter because, Mrs *Fero* again relied on s 171 which states that-

> "When the accused pleads and excepts together, it shall be in the discretion of the court whether the plea or exception shall be first disposed of."

Therefore, Mr *Nkomo* was not correct in his submission that the applicants were entitled to a verdict once the trial court upheld the exception. In the first place Mr *Nkomo* lost sight of s 180 (1) which states that-

> "If the accused does not object that he has not been duly served with a copy of the indictment, summons or charge or apply to have it quashed under section one hundred and seventy-eight, he shall either plead to it or except to it on the ground that it does not disclose any offence cognizable by the court"

The applicants did not invoke s 178 which relates to quashing of an indictment that is calculated to embarrass or prejudice an accused in his defence.

It does not follow that once an accused pleads and excepts together, then he is entitled to a verdict. This is because an objection to a defective charge or indictment can only be done by way of exception in terms of s 170. A court before which an exception is made has discretion to order an amendment if this does not prejudice the accused in his defence. It is therefore erroneous for Mr *Nkomo* to argue that the trial court erred in ordering the amendment *meromotu*. In any event, once an accused pleads to a charge the issues raised by such plea must be tried. In this respect see s 186 which states that-

> "If the accused pleads any plea or pleas other than the plea of guilty or a plea to the jurisdiction of the court, he is, by such plea without any further form, deemed to have demanded that the issues raised by such plea or pleas
> shall be tried by the court."

It is worth noting that the applicants filed a defence outline in which they denied the charge. That on its own already means they were not prejudiced in their defence. That notwithstanding, the charge preferred against them was not drafted with precision. The essentials of an indictment are well summed up in s 146 which states that-

> "(1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
> (2) Subject to this Act and except as otherwise provided in any other enactment, the following provisions shall apply to criminal proceedings in any court, that is to say—
> (*a*) the description of any offence in the words of any enactment creating the offence, or in similar words, shall be sufficient; and
> (*b*) any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negatived in the indictment, summons or charge, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the prosecution.
> (3) Where any of the particulars referred to in this section are unknown to the prosecutor, it shall be sufficient to state that fact in the indictment, summons or charge.
> (4) Where a person is charged with a crime listed in the first column of the Second Schedule to the Criminal Law Code, it shall be sufficient to charge him or her with that crime by its name only.[Subsection inserted by section 282 of Act 23 of 2004]
> (5) No indictment, summons or charge alleging the commission of a crime mentioned in subsection (4) shall be held to be defective on account of a failure to mention the section of the Criminal Law Code under which the crime is set forth."

See also *S* v *Sikarama* 1984 (1) ZLR 170.

It is noted that the offence in the present case is described by name. The dates and place of commission as well as the person against whom the offence was allegedly committed are stated. The drafter of the charge ommitted to allege that when the applicants insured the motor vehicle on 28 March, it had already been written off in an accident on 16 March.

This comes out well in the outline of state case. A charge or indictment does not exist in a vacuum. It is beyond question that it is prepared from witnesses' evidence which is condensed in an outline of state case. That is why a defective charge may be cured by evidence. See s 203.

In light of these observations, is there merit in ordering a stay of proceedings pending review of the trial court's decision to uphold the exception and order amendment of the charge. Mr *Nkomo* submitted that the state will not be prejudiced by a stay of proceedings. It is significant to note that after the trial court pronounced its decision on the exception counsel for the applicants made the following submission-

"I have no problems proceeding with the charge n (sic) its present state."

On the other hand Mrs *Fero* submitted that the charge is going to be amended to disclose the missing averments. Assuming that the state does not amend the charge as ordered (which in my view is inconceivable), Mrs *Fero* further submitted that it would risk an application for discharge at the close of its case. Thus, according to Mrs *Fero*, the applicants' remedy lies in an appeal and not a review. This, I take it, would be the remedy in the event of a conviction.

With the clear provisions of the law that I have articulated, I am of the view that there is no prospect of success in the review proceedings that have been instituted. It is generally accepted that superior courts are reluctant to interfere with uncompleted proceedings. They only do so where grave injustice might be occasioned. In this respect see *Attorney-General* v *Makamba* 2005 (2) ZLR 54 (S) and the authorities cited therein as well as *Dombodzvuku and Anor* v *Sithole NO and Anor* 2004 (2) ZLR 242 (H).

In the result, the application is hereby dismissed with costs.

Mtetwa&Nyambirai, applicants' legal practitioners
Attorney-General's Office, legal practitioners for respondents