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DANIS DAVID KONSON
v
THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, GWAUNZA JCC,
GARWE JCC, GOWORA JCC, HLATSWAYO JCC,
PATEL JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE, MARCH 11 & JULY 22, 2015

L Nkomo with him *R Ndlovu*, for the applicant

A Mureriwa, for the respondent

GOWORA JCC: On 3 February 2014 under Case No HB 158/13, the High Court sitting at Bulawayo convicted the applicant of murder with actual intent to kill. After finding that there were no extenuating circumstances surrounding the commission of the offence, the court passed a sentence of death.

The background facts surrounding the applicant's conviction and sentence were the following. The deceased and the applicant had a love relationship which had, at the time of the deceased's demise, lasted a number of years. As a measure of his love, the applicant set the deceased up in business, in the form of a shop in the rural area in which the deceased resided. The deceased was allegedly not happy with the treatment that the applicant was subjecting her to and terminated their relationship. She subsequently entered into a new relationship with another man.

The applicant was not happy with this development. After unsuccessful attempts to resuscitate the relationship, he proceeded to her residence accompanied by a friend and a police detail. Thereafter the parties proceeded to the business premises where the applicant shot the deceased and the policeman after conducting enquiries on the status of the business venture. The deceased died at the scene leading to the arrest of the applicant and thereafter his conviction. An automatic appeal followed against the conviction and sentence by operation of law.

On 17 November 2014, in his appeal before the Supreme Court, the applicant alleged that the High Court had violated his right to a fair trial and applied that the matter be referred to this Court in terms of s 175 (4) of the Constitution of Zimbabwe, (“the Constitution”). The relevant section reads:

“(4) Powers of courts in constitutional matters

If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and if so requested by any party to the proceedings must refer the matter to the Constitutional Court unless he or she considers the request as merely frivolous or vexatious.”

The Supreme Court agreed that the request was neither frivolous nor vexatious and consequently made the following order:

“IT IS ORDERED THAT:

Two constitutional issues have arisen.

- 1. The appellant alleges that his right to a fair hearing guaranteed by s 69(1) of the Constitution of Zimbabwe was violated by the presiding Judge who descended into the arena.**
- 2. The appellant was given a sentence which was not competent in terms of the law. In particular he was sentenced at a time where Parliament had not enacted a law providing the circumstances in which a death sentence may be imposed in terms of s 48(2) of the Constitution of Zimbabwe.”**

Before us, counsel for the applicant and the respondent are agreed that the application is properly before this Court. I proceed now to consider each of the issues referred to this court for determination.

WHETHER THE APPLICANT'S RIGHT TO A FAIR HEARING WAS VIOLATED

The object of a criminal trial is for the truth surrounding the commission of the offence to be established. The role of the judge is therefore an onerous one as his task is to see that justice is not only done, but that it is seen to be done. In this exercise he should conduct himself in such a manner that he is not viewed or perceived to have aligned himself with either the prosecution or the defence. He is not precluded from questioning the witnesses or the accused person but such questioning must not be framed in such a manner as to convey an impression that he is conducting a case on behalf of one of the parties. The judge must avoid questions that are clearly biased and show a predisposition on the part of the judge. The judge should neither lead nor cross-examine a witness.

The complaint by the applicant is that the trial court descended into the arena of conflict between himself and the State thereby violating his right to a fair trial as guaranteed by s 69(1). The applicant further contends that the record of proceedings shows that the court was not impartial. It is argued further that the questioning of the applicant by the trial judge was such that, because of its frequency, length, timing, form, tone, content, it was apparent that the trial judge was hostile to the applicant.

The limits to which a judicial officer may question a witness or an accused person in a criminal trial were aptly set out by TROLLIP AJA in *S v Rall* 1982 (1) SA 828 at 831H-832H in the following terms:

“While it is difficult and undesirable to attempt to define precisely the limits within which such judicial questioning should be confined, it is possible I think, to indicate some broad, well-known limitations, relevant here, that should generally be observed (see e.g. *S v Sigwala* 1967 (4) SA 566 (A) at 568F-H).

- (1) According to the above quoted dictum of CURLEWIS JA the judge must ensure that “justice is done”. It is equally important, I think, that he should ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused (see, for example, *S v Wood* 1964 (3) SA 103 (O) at 105G; *Rondalia Versekeringskorporasie van SA Bpk v Lira* 1971 (2) SA 586 (A) at 589G; *Solomon and Anor NNO v De Waal* 1972 (1) SA 575 (A) at 580H). The judge should consequently refrain from questioning any witness or the accused in such a way that, because of its frequency, length, timing, form, tone, contents or otherwise conveys or is likely to convey the opposite impression (cf *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 570E-F; *Jones v National Coal Board* (1957) 2 All ER 155 (CA) at 159F).
- (2) A judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. As LORD GREENE MR observed in *Yull v Yull* (1945) 1 All ER 183 (CA) AT 189B, if he does indulge in such questioning-

“He, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.”

(See, too, the Jones case (supra) at 159C-E). Or, as expressed by WESSELS JA in *Hamman v Moolman* 1968 (4) SA 340 (A) at 344E, the Judge may thereby deny himself-

“The full advantage usually enjoyed by the trial judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts.”

The quality of his views on the issues in the case, including those relating to the demeanour or credibility of the witnesses or the accused or the relative probabilities, may in consequence be seriously impaired (see eg, *R v Roopsingh* 1956 (4) SA 509 (A) at 514-5). And, if he is sitting with assessors, that may well adversely influence their deliberations and opinions on those issues.

- (3) A judge should also refrain from questioning a witness or the accused in such a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility. As LORD GREENE MR further observed in Yull’s case supra at 189B-C:

“It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he is being questioned by counsel, particularly when the judge’s examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue.”

In this case, it was contended on behalf of the applicant that the manner in which the learned judge in the trial conducted himself revealed hostility to the applicant. In *S v Mangezi (1) ZLR 272(S) DUMBUTSHENA CJ* commented as follows:

“It is not only when a judicial officer shows his bias that his leading or cross-examination of a witness may be condemned, it is also the fact of taking over the examination of the prosecution or defence witness that is not permissible.”

Further to the above, the applicant has contended that the intensity of questioning by the judge whilst he was under cross-examination was more extensive than that of the prosecutor. Whilst the prosecutor put a total of 144 questions to the applicant during his cross-examination, the questions from the judge during the same cross-examination was a record 122. When the applicant’s counsel sought to re-examine the applicant, the learned trial judge put to the applicant an additional 24 questions bringing the total number to 146.

However, it is not just the number of questions or their longevity that the applicant contests, it is also the content of the questions and the form that they took that is being complained of. Mr *Nkomo* drew the attention of the court to the impugned exchanges between the court and the applicant. To illustrate the gravity of the complaint, I set out a few examples of the same. The learned judge, after an answer to a question by the applicant, was heard to interject:

“No, no, no ... this does not make sense. What was happening to the money, you were making profits and that is why you were running the business, so what was happening to the money?”

Further on in the record, the learned judge, during the cross-examination of the applicant, also commented to an answer by the applicant in the following terms:

“And when she tells you that she was married and you did not believe her and you go there to find out if she is married, and you find the deceased coming out of the husband’s house you say that is provocation? You wanted to go and find out whether she was married and you found out she was married and you still say it was provocation?”

As submitted by Mr *Nkomo*, the inescapable conclusion that emerges from the record is that the judge descended into the arena and as a consequence he deprived himself of the detached impartiality required of a judicial officer. The fairness of the trial was clearly undermined. He had prejudged the issues of the trial that was before him. The remarks of HOLMES JA in *S v Sigwala* 1976 (4) SA 566 (AD) are apposite. At p 568F-H, the learned jurist stated:

“The principle is clear. A judicial officer should ever bear in mind that he is holding a balance between the parties, and that fairness to both sides should be his guiding star, and that his impartiality must be seen to exist. There are occasions, particularly where a party is unrepresented, when the judicial officer will properly take some part in the examination of witnesses, but in the main, and as far as is reasonably possible, he will usually tend to leave the dispute to the contestants, interrupting only when it is necessary to clarify some point in the interests of justice. Thereby he is better able to form objective appraisals of the witnesses who appear before him, and he also avoids creating wrong impression in the minds of those present.”

Section 69(1) of the Constitution reads:

“Right to a fair hearing

1. Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.”

One of the fundamental principles of criminal law is that a person charged with a criminal offence is presumed to be innocent until the prosecution proves that he committed the offence with which he is charged. Thus the State has an onus to establish every element of the offence.

The rules of natural justice require that whoever takes a decision should be impartial, having no personal interest in the outcome of the case and that a decision should not be taken until the person affected by it has had an opportunity to state his case. A judicial officer has an obligation to ensure that a trial is conducted in a manner that is fair to all parties before him. To that end, the judicial officer is required to leave the dispute to the parties before him as far as is reasonably possible, and should interrupt only when it is necessary to clarify some point in the interests of justice.

In view of the stance assumed by the learned trial judge, the defence proffered on behalf of the applicant was not properly evaluated thus further undermining the trial. His right to a fair hearing as guaranteed under s 69(1) was clearly violated.

In my view the finding that the trial was not fair determines the application, and it becomes unnecessary to resolve the question relating to the constitutional validity of the sentence of death imposed upon the applicant. One of the two issues referred to this court by the Supreme Court has been decided in favour of the applicant. Both counsel are agreed that it would be in the interests of justice if the proceedings in the High Court were to be set aside as being inconsistent with s 69(1) the Constitution. Under such circumstances no benefit would ensue from a determination on the question of the constitutional validity of the sentence when the trial proceedings have been set aside. It is further agreed between counsel that it would be in the interests of justice if the matter were to be remitted for trial *de novo* before a different judge.

Accordingly it is declared that:

1. The applicant's right to a fair hearing in accordance with s 69(1) of the Constitution has been violated by the proceedings in Case No HCB 158/13.

Accordingly the following order will issue:

IT IS ORDERED THAT:

1. The proceedings conducted under Case No HCB 158/13 be and are hereby set aside.
2. The matter be and is hereby remitted to the High Court in Bulawayo for trial *de novo* before a different judicial officer.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA AJCC: I agree

Messrs R Ndlovu & Company, appellant's legal practitioners

The National Prosecuting Authority, respondent's legal practitioners