DOUGLAS MWONZORA
v
THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC & MAVANGIRA JCC
HARARE, JANUARY 8, 2015 & NOVEMBER 23, 2016

T Zhuwarara, for the applicant

E Nyazamba, for the respondent

MALABA DCJ: The magistrate referred for determination in terms of s 24(2) of the former Constitution ("the Constitution"), the question whether s 33(2)(a) of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] ("the Criminal Law Code") violated the fundamental right to freedom of expression entrenched by s 20(1) of the Constitution.

The constitutional matter arose in proceedings in the magistrates' court where the applicant was charged with the offence of undermining the authority of the President in contravention of s 33(2)(a) of the Criminal Law Code. The charge was clumsily worded. It read:

> "**UNDERMINING THE AUTHORITY OF THE PRESIDENT AS DEFINED IN SECTION 33(2)(a) OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*]".**
>
> In that on 21 March 2009 and at Ruwangwe Growth Point, Nyanga, Douglas Togarasei Mwonzora publicly, unlawfully and intentionally made statements about or concerning the President of the Republic of Zimbabwe with the knowledge or realising that there is a real risk or possibility that the statements were false and that

they may engender feelings of hostility towards the President in person or in respect of the President's Office, that is to say accused being a third guest speaker at a political gathering of the Movement for Democratic Change (Tsvangirai faction) uttered during his speech Shona statements that are false, with intention or realising that there is a real risk or possibility that the statements may engender feelings of hostility towards or cause hatred, contempt or ridicule of the President of the Republic of Zimbabwe, His Excellency Comrade Robert Gabriel Mugabe in person or in respect of his Presidential Office as follows:

> "President Robert Mugabe chikwambo uye achamhanya….Ndawona Mugabe achigeza, tauro muchiuno, sipo muhapwa uye ndebvu hwapepe … Pamberi ne M.D.C. Pasi nechihurumende chembavha chinosunga vanhu vasina mhosva chichitora zvinhu zvavo…" literally meaning "President Robert Mugabe is a goblin and will run … I saw Mugabe bathing, towel on waist, soap under his armpits and big beard … Forward with M.D.C., Down with bad Government of thieves which arrest innocent people and taking away their property"."

Section 33 of the Criminal Law Code provides:

"**33 UNDERMINING AUTHORITY OF OR INSULTING PRESIDENT**:
"In this section –
"publicly", in relation to making a statement, means –
(a) making the statement in a public place or any place to which the public or any section of the public have access;
(b) publishing it in any printed electronic medium for reception by the public;
"statement" includes any act or gesture
(2) any person who publicly, unlawfully and intentionally –
(a) makes any statement about or concerning the President or any acting President with the knowledge or realising that there is a real risk or possibility that the statement is false and that it may –
(i) engender feelings of hostility towards, or
(ii) cause hatred, contempt or ridicule of; the President or any acting President, whether in person or in respect of the President's Office.
(c) Makes any abusive, indecent or obscene statement about or concerning the President or an acting President, whether in respect of the President personally or the President's Office;
shall be guilty of undermining the authority of or insulting the President and liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both."

The outline of the case for the prosecution from which the particulars of the charge were taken read as follows:

"(1) The accused in this case is Douglas Togarasei Mwonzora, a male adult aged 41 years of Nyamubarwa Village, Chief Saunyama, Nyanga and is the

Honourable Member of the House of Assembly from the Movement for Democratic Change (Tsvangirai faction) for Nyanga North Constituency.

(2) The complainant is the State.

(3) On 21st day of March 2009 between 1300 hours and 1700 hours and at Ruwangwe Growth Point, Nyanga, accused being a third guest speaker at a political gathering of the Movement for Democratic Change (Tsvangirai) Party made statements concerning the President of the Republic of Zimbabwe, His Excellency Robert Gabriel Mugabe well knowing that there is a real risk or possibility that those statements may engender feelings of hostility towards or cause hatred, contempt or ridicule of the President in person or his office.

4. The accused during his speech uttered words to the effect that President Mugabe is a goblin and will vacate office running as quoted in Shona, "President Robert Mugabe chikwambo uye achamhanya literally meaning that "President Robert Mugabe is a goblin and he will run" a statement that will engender the President in person. (*sic*)

5. To ensure that the President Mugabe's goblin statement is understood by the gathering, the accused sang a song commonly known as "GEHENA" (ARMAGEDEON) in which he led the song with the following Shona lyrics: "Ndawona Mugabe achigeza, tauro muchiuno, sipo huhapwa nendebvu hwapepe" literally meaning "I saw Mugabe bathing, towel on waist, soap under armpits and big beard" and he started fanning his nose as if the goblin he was talking about was smelling.

6. The accused also uttered some statements which may cause hostility or hatred towards the President's Office when he said that only the Movement for Democratic Change must live long casting other Governments as bad, corrupt, full of thieves, arresting innocent people and illegally taking away people's property well knowing that President Mugabe belongs to ZANU-PF which was once the ruling Government when the accused said the following in Shona.

"Pamberi ne MDC. Pasi nechihurumende chembavha, chinosunga vanhu vasinamhosva, chichi vatorera zvinhu zvavo" literally meaning "Forward with MDC, down with the bad Government of thieves which arrests innocent people and takes away their property."

7. Police Officers who were on duty at the gathering and independent individuals who attended the gathering saw and heard the accused making the statements which are being taken as undermining or insulting the President of the Republic of Zimbabwe in person and his office."

At the commencement of the hearing of submissions on the question referred for determination, Mr *Zhuwarara* raised a preliminary point to the effect that the charge was verbose, repetitive and lacked the precision and clarity of particulars of the alleged offending conduct to enable the applicant to know the case he was to answer. The contention was that the vagueness of the charge violated the applicant's right to the protection of the law ensnhrined in s 18(1) of the Constitution. The further contention was that the facts which

were alleged to constitute the offending conduct would not if proved at the trial constitute the criminal offence with which the applicant was charged.

If the Court finds that the facts on which the charge was based would not if proved at the trial by available evidence have constituted an offence, it would not be necessary to go into the question of the constitutional validity of s 33(2)(a) of the Criminal Law Code. Basing a criminal charge on facts which if proved at the trial would not constitute an offence would be a violation of an accused's right to the protection of the law.

No one can be subjected to criminal proceedings before a Magistrates' Court without a charge or summons. The public prosecutor is given the power as a representative of the Prosecutor General to prefer a charge against a person accused of an offence in the magistrates' court on behalf of the State. As the content of the right to the protection of the law guaranteed to every person under s 18(1) of the Constitution s 18(3)(b) requires that any person who is charged with a criminal offence must be informed as soon as reasonably practicable in a language that he or she understands and in detail, of the nature of the offence charged.

Section 139 of the Criminal Procedure and Evidence Act ("CP & E Act") [*Cap. 9:07*] provides that where a public prosecutor has by virtue of his or her office determined to prosecute any person in a magistrates' court for any offence within the jurisdiction of that court, he or she shall forthwith lodge with the clerk of court a statement in writing of the charge against that person setting forth shortly and distinctly the nature of the offence and the time and place at which it was committed. (the underlining is mine for emphasis).

The object of a charge is to inform the accused person in sufficient detail and clear language of the offence with which he or she is charged to enable him or her to consider the accusation. The charge must state the essential elements of the offence with sufficient precision and provide sufficient particulars of the acts or omissions alleged to have been committed which constitute the criminal offence. The accused person must not be left to guess or speculate as to the true nature of the offence he or she is charged with and the case he or she has to answer.

In *S v Hugo* 1976(4) SA 536(A) at 540E MILLER JA said:

> "The clear intention is and indeed it is only fair that sufficient particulars should be furnished in order to enable an accused to prepare his defence".

As the public prosecutor is *dominus litis* and has the right to determine the charge which he or she wants to prefer against an accused person, it is his or her duty to ensure that the accused is charged with the correct offence. It is also the public prosecutor's duty to ensure that only necessary particulars relating to acts or omissions alleged to have been committed by the accused person which constitute the offence are included in the charge.

Where the offence relates to specific types of statements made with an intention to bring about a prohibited consequence only particulars of such statements need to be included in the charge. The charge preferred against the applicant included statements he is alleged to have uttered to the audience at the political gathering the contents of which were not about or concerning the President. The contents of the statements could not be said to be false nor could they be said to have the consequences prohibited by the statute. For example,

the political slogan exalting the MDC-T party and the statement on corruption in government had nothing to do with the essential elements of the offence.

The charge was made up of three parts. The first part was a recitation of the essential elements of the offence. The second part was irrelevant. Whilst it opened with words that suggested that it referred to false statements the applicant was charged with making, it revealed a misconception of the essential elements of the offence charged.

It was alleged in part two of the charge that the statements made in the Shona language were false. There was no allegation that the applicant knew that the statements were false. There was instead an allegation that the applicant had an intention "that the statements may engender feelings of hostility towards or cause hatred, contempt or ridicule of the President". It would have been difficult for the applicant to understand the nature of the offence he was alleged to have committed when the charge was based on different statements made in his speech which were open to contradictory meanings. There was the statement that the President was a goblin. That was put together with a political slogan exalting the MDC-T and a statement that there was corruption in Government. All these statements were said to be about or concerning the President. They were all said to be false and made with the intention of engendering feelings of hostility towards the President. All the statements could not constitute particulars of the essential elements of the offence the accused was charged with.

The manner the charges were levelled against the applicant violated his right to the protection of the law. The State did not comply with the requirements of s 18(3)(b) of

the Constitution. It also failed to comply with the requirements of s 139 of the CP & E Act designed to protect a person charged with a criminal offence.

There are remedies provided for by the law for the protection of a person charged with an offence from the consequences of defects in the charge related to lack of clarity in the particulars of the offence he or she is alleged to have committed. Section 178(1) of the CP & E Act gives an accused person the right to apply to the court, before pleading, to quash the charge on the ground that it is calculated to prejudice or embarrass him in his or her defence. Section 180(1) of the CP & E Act gives the accused person who considers that a charge is framed in vague language or that the particulars of the offence are not disclosed in a manner that enables him or her to answer the charge to except to it on the ground that it does not disclose any offence cognizable by the court. The magistrate is obliged to hear the exception and determine whether it is well founded. If the exception is well founded the magistrate has the power to dismiss the charge.

The procedure provided for under s 178(1) of the CP & E Act is based on the presumption of the fact that there are facts of the conduct of the accused on the basis of which a reasonable suspicion exists of him or her having committed the offence charged. The defect in the charge would lie in the failure by the public prosecutor to state the particulars of that conduct in clear and sufficient detail so as to inform the accused of the nature of the offence to enable him or her to answer it. If it is a defect that can be rectified without prejudice to the accused's ability to defend himself or herself his or her right to the protection of the law is enforced by an order that the defect be removed or rectified. The procedure provides appropriate remedy for the redress of the type of wrong arising from the drafting of

the charge. The type of wrong suffered by the applicant could not be addressed by the application of that remedy.

Initially the complaint was that s 33(2)(a) of the Criminal Law Code violated the applicant's fundamental right to freedom of expression enshrined in s 20(1) of the Constitution. At the commencement of the hearing the court directed counsel to file supplementary heads of argument to address the question whether the facts on which the charge was based would, if proved at the trial, constitute an offence. There is public interest in the strict enforcement of the rule in the field of criminal law to the effect that no person should be charged with an offence on the basis of facts which if proved at the trial would not constitute an offence. Section 180(1) of the CP & E Act gives an accused person the right to invoke the protection of this fundamental principle of the right to the protection of the law. Effective judicial protection of a person charged with a criminal offence requires strict enforcement of the rule in question.

In *Williams & Anor v Msipha N.O. & Ors* 2010(2) ZLR 552(S)the applicants had been charged with contravening s 37(1)(a)(i) of the Criminal Law Code. They raised before a magistrate who was about to commence the trial of the charge preferred against them the question of the unconstitutionality of s 37(1)(a)(i). They also raised the question of the violation of their fundamental right to the protection of the law enshrined in s 18(1) of the Constitution. They requested the magistrate to refer the question of the constitutional validity of s 37(1)(a)(i) of the Criminal Law Code to the Supreme Court for determination on the ground that their prosecution and remand based on the alleged contravention of that law were a violation of their right to the protection of the law.

The magistrate in *Williams case supra* refused the request for a referral of the constitutional question to the Supreme Court for determination on the ground that the raising of the question and *ipso facto* the request for referral was frivolous and vexatious. On an application in terms of s 24(1) of the Constitution the Supreme Court did not go into the question of the Constitutional validity of s 37(7)(a)(i) of the Criminal Law Code. It took the view that the facts on which the charge was based would not, if proved at the trial constitute the offence charged or any other offence.

The Supreme Court proceeded, in *Williams case supra*, on the basis of the assumption that s 37(1)(a)(i) of the Criminal Law Code was valid. At p 571C the Court set out the applicable principle saying:

> "To determine the question whether the conduct committed by the applicants and for which they were charged with the crime of contravening section 37(1)(a)(i) of the Act would, if proved at the trial, constitute the offence they were charged with, the magistrate was required under s 13(2)(e) of the Constitution to take into account the essential elements of the offence and the conduct which if proved at the trial would constitute the offence charged. He was required to apply the knowledge of the statute to the conduct actually committed by the applicants and decide whether it constituted the proscribed conduct.
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> The thrust of Mr *Mpofu's* argument was that the effect of the protection the Constitution provides for the fundamental right to personal liberty would be evaded if a court did not examine the facts on which a charge laid on an accused person is based and evaluate them according to the objective standards prescribed by section 13(2)(e) of the Constitution."

The court held at 570G-H said:

> "A reasonable suspicion that an accused person has committed the offence with which he or she is charged presupposes that the facts on which the charge is based would, if proved at the trial, constitute the offence. Where the accused person challenges the legality of the charge on the ground that the offence itself was not committed, the onus is on the State to first show that, if proved at the trial, the facts on which the charge is based would constitute the offence with which the accused person is charged."

Applying the test enunciated in *Williams case supra* to the facts of this case it is apparent that the applicant did not commit an offence. One of the essential elements of the offence of contravening s 33(2)(a) of the Criminal Law Code is that the statement about or concerning the President must be false. The outline of the State case made no reference to the falsity of the statements the applicant was accused of having uttered. All the statements contained in the outline of the State case allegedly made by the applicant could not be false.

The prohibited statement must be about or concern the President or his office. The slogan exalting the MDC-T political party and the statement on corruption in Government could not have been about or concerning the President. They could not be described as false statements either. The sarcasm in the conveyance of the message may have offended some of the listeners. It did not, however, make the message itself false. It was necessary for the State to indicate the false statements uttered by the applicant because it was required to state facts that would prove that the applicant had knowledge of the falsity of the statements.

The statement that the President was a goblin was obviously a false statement. The offence is however not committed because a person has uttered at a public place a false statement about or concerning the President. The statement must be accompanied at the time of its utterance by the knowledge of its falsity and an intention to use it to engender feelings of hostility in the audience against the President. That is not even enough for the offence to be committed. The State must prove beyond reasonable doubt that the false statement about or concerning the President was capable of deceiving the hearer into believing it is true and that it was likely to arouse in the audience feelings of hostility towards the President or his office.

A patently false statement to the effect that the President is a goblin was unlikely to deceive any right thinking person into believing that it is true. It was unlikely to engender in the hearer feelings of hostility towards the President. In other words, a statement that is patently false that no right thinking person can believe it to be true cannot carry the intent to inflame in the audience feelings of hostility towards the President.

The statement the applicant is alleged to have uttered did not even allege that the President had done anything that could have adversely affected the interests of people generally or those in the audience for it to arouse feelings of hostility towards the President. Such a statement cannot hold up the President to ridicule.

The public prosecutor did not understand the essential elements of the offence. The outline of the State case suggests that he or she thought that the statute criminalised the causing of some danger to the President. The outline of the facts alleged that the statement that the President was a goblin would "engender the President in person". That is, of course, meaningless. The outline of the case for the prosecution goes on to allege that the false statement was "taken as undermining or insulting the President". What is undermined under s 33(2)(a) of the Criminal Law Code is the authority of the President. The applicant was not charged with the offence of insulting the President. Proof of that offence which is under s 33(2)(c) of the Criminal Law Code would not require proof that an accused person made a false statement about or concerning the President as an essential element of the offence.

The finding by the Court is that if the facts alleged in the outline of the case for the prosecution were proved at the trial of the applicant they would not have constituted an offence.

It is declared that the prosecution of the applicant on allegations of having contravened s 33(2)(a) of the Criminal Law (Codification and Reform) Act [Cap. 9:23] amounted to a deprivation of his personal liberty save as would have been authorised by law in contravention of s 13(1) of the Constitution and was a denial of the fundamental right of the applicant to the protection of the law guaranteed under s 18(1) of the Constitution. There shall be no order as to costs.

The application for an order declaring s 33(2)(a) of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] unconstitutional is for the purpose of this case dismissed with no order as to costs.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA AJCC: I agree

Messrs Bere Brothers, applicant's legal practitioners

Prosecutor General's Office, respondent's legal practitioners