HCH CRB 244/02

THE STATE
versus
MORGAN TSVANGIRAI
And
WELSHMAN NCUBE
And
RENSON GASELA

HIGH COURT OF ZIMBABWE
GARWE J
HARARE, 14-17 July 2003 and 8 August 2003

APPLICATION FOR DISCHARGE AT CLOSE OF STATE CASE

Mr B. *Patel* (with him Mr J. *Musakwa* and Mr M. *Nemadire)*, for the State

Advocate *G Bizos* S.C. (with him Advocate C*. Anderson S.C*. and Advocate E*. Matinenga)*, for the Defence

GARWE JP: The three accuseds in this matter have been undergoing trial on a charge of high treason. The allegation in broad terms is that on three separate occasions between October and December 2001 the accuseds requested Mr Ari Ben Menashe of Dickens & Madson, a consultancy firm operating in Montreal, Canada, to organize the assassination of President Mugabe and to overthrow the constitutionally elected government of Zimbabwe. It is further alleged that as part of that plot accused two faxed a memorandum of understanding to Dickens & Madson which was a cover for the unlawful plot to assassinate the President and to stage a military *coup d'etat.*

At the close of the evidence for the prosecution, defence counsel applied for the discharge of the three accuseds. The State has opposed the application and says the application appears to have been made as a matter of course.

It is, I think, necessary to clarify once again the law applicable in an application of this nature. The issue is certainly not whether the State has proved its case beyond a reasonable doubt as to justify a conviction. In terms of section 198(3) of the Criminal Procedure

and Evidence Act, [*Chapter 9:07*], the court shall return a verdict of not guilty if at the close of the State case:-

> "the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge or any other offence of which he might be convicted thereon."

The interpretation of section 198(3) has been considered in a long line of cases both in this country and South Africa. The position is now settled that:

> "So far as the law in Zimbabwe is concerned, there is no longer any controversy as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution, it has reason to suppose that the inadequate evidence adduced by the State might be supplemented by defence evidence…." - *S v Kachipare* 1998 (2) ZLR 271(S), 275.

In other words where the court considers that there is no evidence that the accused committed the offence it has no discretion but to acquit him. In particular the court *shall* discharge the accused at the close of the case for the prosecution where:-

(a) there is no evidence to prove an essential element of the offence – *Attorney-General v Bvuma & Another* 1987 (2) ZLR 96 (S), 102;

(b) there is no evidence on which a reasonable court, acting carefully, might properly convict – *Attorney-General v Mzizi* 1991 (2) ZLR 321, 323 B; and

(c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it – *Attorney-General v Tarwireyi* 1997 (1) ZLR 575(S), 576.

Whilst it is settled that a court shall acquit at the end of the state case where the evidence of the prosecution witness:

> "has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely

> convict on it." (practice note by Lord Parker cited with approval in *Attorney-General v Bvuma & Another*, (*supra)* at 102,103)

it is clear that such cases will be rare. This would apply:-

> "only in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed" (per WILLIAM J in *S v Mpetwa & O*thers 1983 (4) S.A. 262, 265 cited with approval by McNALLY JA in *Attorney-General v Tarwirei (supra)* at 576, 577.

Before considering whether or not the accused should be put on their defence, it is necessary to consider the law on the crime of treason because of its peculiar nature. In terms of our common law the crime of high treason:-

> "consists in any overt act committed by a person owing allegiance to a state possessing *majestas* with intent unlawfully to overthrow, impair, violate, threaten or endanger the existence, independence or security of the state, or to overthrow or coerce the government of the state, or change the constitutional structure of the state" - *South African Criminal Law and Procedure*, *Volume II, Common Law Crimes, Third Edition by J R L Milton.*

Since the time of the Roman Empire, the crime of treason has had a somewhat chequered and controversial history. It has been perceived in some quarters as a weapon of suppression and has come to be defined in terms which are vague and over inclusive - *South African Criminal Law and Procedure, Volume II*, (*supra)* at page 3. Because of the fact that the offence is the first among public crimes in order of origin and gravity, the fact that it is ill-defined and the consequences on conviction, section 2 of the English Stature of Treason of 1695 required that there should be evidence of two lawful witnesses to a charge of treason. This has been incorporated into the legislation of various former British colonies including Zimbabwe. In particular section 269 of our Criminal Procedure and Evidence Act provides as follows:

> "269. Sufficiency of one witness in criminal cases except perjury and treason.

It shall be lawful for the court by which any person prosecuted for any offence is tried to convict such person of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any competent and credible witness:

Provided that it shall not be competent for any court

(a).....

(b) to convict any person of treason, except upon the evidence of two witnesses where one overt act is charged in the indictment or, where two or more such overt acts are so charged, upon the evidence of one witness to each such overt act;

(c)....”

In addition the Criminal Procedure and Evidence Act has, in section 298, made provision that, on the trial of a person charged with treason, evidence shall not be admitted of any overt act not alleged in the indictment, unless relevant to prove some other overt act alleged therein.

There can be no doubt therefore that these special rules and, in particular, the requirement that there must be two witnesses in every case, were designed to protect an accused person facing a charge of treason. I agree with the remarks of De WET CJ in *Rex v Henning* 1943 AD 172 that:

“What I imagine the legislation in its original form had in mind was that treason should not be held to be proved simply because one person has come forward and alleged it against an accused. The evidence must be evidence of more than one person, which provides some protection against individual

> malice, but there need not, in my view, be any overlapping of the evidence ….” (at pages 177 and 178).

The issue that necessarily arises at this stage is how the two witness rule applies in practice where only one overt is charged on the one hand and where more than one overt act is charged on the other. Where two or more overt acts are alleged, the position is clear that there must be the evidence of one witness to each such overt act. During argument the State contended but later conceded that there would be no compliance with the Act if, in a case where more than one overt act is charged and there is only one witness, the same witness were to give evidence on each of the overt acts. In this regard I can do no better than cite the remarks of WATERMEYER CJ in *Rex v Strauss* 1947 AD 934, 939 where he stated:

> “It was, I think, intended to maintain the requirement of at least two witnesses in every case of treason so that, if there were two overt acts charged, the same witness could not, if he were the only witness, prove both of them.”

Considering the rationale for the two witness rule, there can be no doubt that where one overt act is charged at least two witnesses must give evidence on the overt act, although the evidence need not overlap. This is because:

> “an overt act maybe, and generally is, a composite thing, passing through distinct stages, and made up of various circumstances, and, to prove it in its integrity, several witnesses speaking to those different stages and circumstances my be necessary….” per De WET CJ in *R v Henning* (*supra)* at page 177

The learned Chief Justice further remarked on the same page:-

> “ The position is not the same as in the case of an accomplice, which needs only to be corroborated in some material particular either by another witness or by circumstances or possibly an admission on the part of the accused himself. The section does require that there should be for every charge of treason at

least two witnesses but that the object was not to insist on complete overlapping is, I think, shown by the fact that where there are two or more overt acts charged the law requires one witness to each such overt act. The protection required by the subsection does not go the length of requiring full overlapping in regard to all the evidence and I agree… that it would be most unsatisfactory and would lead to miscarriage of justice if that were the position……"

At page 178 the learned Chief Justice continued:-

"….when one overt act is charged in the indictment, each essential part of that overt act must be proved by the evidence of two witnesses. It follows that in the present case, in which the court is relying on the evidence of only two witnesses to prove the whole overt act, the evidence of each of these witnesses must be such that standing alone it would, if believed, be adequate to establish the fact that the accused committed the overt act of treason with which she is charged…."

I believe the above remarks correctly reflect the law on the matter.

There has been argument during this application on the number of overt acts forming the basis of the charge. The State submitted that there were four overt acts whilst the defence argued that there was only one as the meetings held subsequent to the meeting of 22 October 2001 were simply to record what had previously been discussed and not separate acts to further the alleged plot.

An overt act is any act manifesting the criminal intention and tending towards the accomplishment of the criminal object – see *R v Leibbrandt* 1944 AD 253, 284; *S v Banda & Others* 1990 (3) S.A. 466. It includes an attempt, incitement and conspiracy to commit the offence. It also includes the activities

of an accomplice and accessory after the fact. As noted in *R v Henning (supra)*, an overt act "generally is a composite thing, passing through distinct stages and made up of various circumstances and to prove it in its integrity several witnesses speaking to those different stages and circumstances may be necessary."

Having considered the evidence led in this case, it seems to me that in the present case there is but one overt act charged. That overt act is the agreement to request Dickens and Madson to arrange the assassination of the President and thereafter the staging of a military coup and to put in place transitional arrangements. The fact that three meetings were held does not mean there were three separate overt acts. In its heads the state submitted that the accused incited and conspired to commit treason in the manner alleged. The State further submitted that the subsequent meetings of 3 November 2001 and 4 December 2001 at which accused 2 and 3 were not present were a continuation of the plot. The contract faxed on 23 October 2001 according to the charge was a cover for the plot. In other words it was part and parcel of the plot. It was not an independent act designed to facilitate the assassination of the President and the staging of a military coup. The fax does not stand on its own. In my view and considering that an overt act may pass through distinct stages and is made up of various circumstances, only one overt act has been charged in the indictment although four different instances of it have been cited.

I now proceed to consider the application for discharge. I will consider the application in so far as it relates to accused one first and thereafter the second and third accuseds.

ACCUSED 1: MORGAN TSVANGIRAI

He attended all three meetings. Against him is the evidence of Ari Ben Menashe, Tara Thomas, and the video evidence. The question at this stage is whether –

(a) an essential element of the offence has not been proved

(b) there is no evidence on which a reasonable court, acting carefully, might properly convict, or

(c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.

The first aspect of the question does not really arise. In my view the State evidence has touched on all the essential elements of the offence. I appreciate that it was submitted by the defence that the meetings did not go beyond mere discussion and that Menashe never intended to act on the alleged plot. For purposes of the present application there is no need in my view for the court to dwell on this. The real question is whether there is no evidence upon which a reasonable court might convict and/or whether the evidence adduced by the State is so manifestly unreliable that no court could safely rely on it. This court was addressed at length on the credibility of Ari Ben Menashe and Tara Thomas as state witnesses. The defence submitted that this court cannot possibly believe their evidence. Submissions were also made on the audio and videotapes and this court was asked to find that that evidence is unreliable and cannot be relied upon. The court was also addressed on the probabilities. Whilst it is true that credibility is a factor that can properly be considered and that a discharge may be granted where the state evidence is manifestly unreliable, the position, as already noted, is that

> this happens rarely and only in really clear cases where the credibility of the witness has been so utterly destroyed that no part of his material evidence can possibly be believed.

The present case cannot be said to fit into that category. That the meetings took place is common cause. What is in issue is what was discussed exactly. The subject of the elimination of the President was touched upon although the defence case is that the first accused was entrapped. A video was taken of the third meeting. The court has watched that video. Whilst portions of the video are not audible, certain other portions are and it was possible to produce a transcript. Although the authenticity of the videotape has been questioned, the testimony of an expert called by the prosecution is that there is no evidence that the tape has been tampered with. There is talk in the video of the setting up of a transitional government involving the army before elections. This is a case where the court must look at the totality of the evidence. It cannot reasonably be argued that the evidence has been so utterly destroyed that no material part of the evidence can possibly be believed. The available evidence establishes a *prima facie* case against the first accused. In all the circumstances therefore I am satisfied that there is no basis upon which accused 1 can be acquitted.

ACCUSED 2: WELSHMAN NCUBE & ACCUSED 3: RENSON GASELA

> In respect of accused 2 and 3, the prosecution evidence is that accused 2 was surprised when told of the plan but that he went along with it. The following day the second accused faxed a contract which was a cover for the plot. The contract itself, it is common cause, does not speak of the plot but gives a mandate to Dickens & Madson to engage in lobbying for the MDC and generally to do all things for the MDC in pursuance of

its objectives. In respect of accused 3, the evidence is that he was also present at the London meeting (which is common cause) and Ari Ben Menashe's evidence that he and Rupert Johnson repeated that they had put a plan together and sold it to the first accused. It is said accused 3 actively participated in the discussion.

There is no further evidence against accused two and three. The evidence given against the two accuseds was given by Menashe. Only Menashe says they were part of the conspiracy.

The State has submitted that the three accused "incited and conspired" to commit the crime of treason. The State further says the subsequent meetings were a continuation of the first and that the two accused are criminally liable by reason of the fact that they were co-conspirators.

I have some difficulty with this submission by the State.

Firstly, only one witness has given evidence against them. No evidence has been given by a second witness that they incited and conspired as alleged. Both incitement and conspiracy to commit treason are acts of treason. They have to be proved by two witnesses at the very least.

Secondly, the evidence of Menashe himself is unclear on what basis exactly they become co-conspirators. "Going along" with what was being said or "actively taking part in a discussion" is vague. One is left wondering what exactly they did.

Clearly, whilst it is the State case that the subsequent meetings were a continuation of the first meeting, the evidence of Tara Thomas

does not implicate the two accuseds. It does not establish their involvement in the conspiracy or incitement. An incitement or a conspiracy to commit treason is itself treason. The position is different from that of an accomplice where corroboration would suffice. There must be the evidence of two witnesses and where one overt act is charged the evidence of each must stand independently and must speak to the overt act. Where more than one overt act is charged there must be the evidence of one witness to each such overt act. In the case of accused two and three there is the evidence of only one witness.

> Even if one were to accept that there is more than one overt act charged, it is clear there is no evidence implicating these two accused in the subsequent overt act or acts. It could not have been the intention of Parliament that, in a case such as the present, where the two accused were present only at one of the three meetings, the evidence of one witness would suffice. If that were the position the safeguards envisaged by section 269(b) would be negated. Put another way even if everything Mr Menashe said about the second and third accuseds was accepted in its entirety, the absence of a second witness to speak to the overt act means that the provisions of the section have not been met.
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> In the result therefore, this court would acquit accused 2 and 3. In respect of accused 1 however the application for his discharge is dismissed.

Attorney-General's Office, legal practitioners for the State

Atherstone & Cook, legal practitioners for the Accuseds