THE STATE
versus
INNOCENT CHIBAYA
and
COSMAS CHIRINGA
and
DENFORD MASIYA
and
SIMBARASHE MUZARARI
and
ROBSON MAKONI

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 20-21 and 23 November 2006 and 1 February 2007

Criminal Trial

L Chikafu, for the State
Advocate D Mehta, for the first accused
C Warara, for the second accused
P Takaidza, for third and fourth accused
S Machiridza, for fifth accused

GOWORA J: The accused are all facing one count of attempting to defeat or obstruct the course of justice. None of the accused tendered a plea. Instead an application was launched on behalf of all of them by Advocate Mehta with the concurrence of all counsel. In the application the accused seek that the State furnishes them with certain documents which are in its possession.

The background to this matter is as follows. The accused were initially charged together with the Minister of Justice, Legal and Parliamentary Affairs on the same charges that they currently face. An application to have his trial dealt with separately succeeded before the Magistrate in Rusape. Thereafter the accused were arraigned before her Worship Mrs Mukunyadzi in Rusape. The accused then brought proceedings before this Court to have those proceedings stayed. On 21 September 2006, this court granted an order setting aside those proceedings and ordering the trial to set down in the High Court. As a consequence, the accused were then indicted for trial in the High Court on the same charge. The allegations against the accused

are based on events which allegedly occurred on 16 January 2006 when they were supposed to have been charged with an offence related to public violence. After the complainants in that matter withdrew the charges, suspicion fell upon the accused leading to their eventual arrest and prosecution.

The accused had sought as one of the further particulars, the transcript of the trial before her worship Mrs Mukunyadzi. After an initial opposition the State has conceded that it cannot legally refuse to make the transcript available and has as a result released the entire record of those proceedings to the defence. What remains is the transcript of the trial of Mr Chinamasa, the Honourable Minister of Justice. The State contends that the transcript of the trial of Chinamasa cannot be furnished to the accused as the proceedings themselves are not relevant to this trial. The charges against Chinamasa are based on events which are alleged to have occurred on 18 December 2005. As indicated by me earlier, the charges in *casu* are alleged to have occurred on 16 January 2006.

I notice that neither counsel for the defence or the State picked up on the fact that the trial of Chinamasa was in the public domain. The record of proceedings is thus a public document. (See Hoffman and Zeffert: *South African Law of Evidence* 3ed p 486). It may well be that the record is not relevant to the proceedings in which the accused are being charged for an offence, but I cannot find any legal justification for denying the accused access to something which is legally in the public domain. It is obvious that the record in its present form would not be of assistance to the accused, hence the request that they be afforded a transcript of the same.

There was in my view, a concession on the part of Mr Takaidza that the transcript is not within the ability of the prosecution to provide, but that the prosecution can assist. The court records are under the control of the Clerk of Court and there is no indication that an approach to that office had been made. It seems to me that I cannot order the Attorney-General to provide what he cannot. I therefore venture to suggest that the transcript be furnished to the accused on payment by them of the costs of production

of such transcript. I cannot however make an order for the provision of the record by the Attorney-General.

The only enquiry now before me relates to the request by the accused for the provision of statements made by witnesses on 16 January 2006 or immediately thereafter but before 15 March 2005 and including any police entries in a diary log from that day up to 15 March 2006.

An accused person facing a criminal charge is entitled to a fair trial by independent and impartial court established by law. This right is enshrined in our Constitution. It is also trite that a prosecutor tasked with the prosecution of a criminal offence owes a duty to the court to conduct the trial in a manner which embraces the concept of providing a fair trial to the accused person. This duty includes the duty to disclose to the court any facts or documents that are in favour of the accused person. In situations where a witness has made statements which are contradictory or are inconsistent with the evidence presented to court, it is incumbent upon the representative of the State to make known these inconsistencies or furnish the defence with the statements concerned. (See R v *Tapera* 1964 RLR 197). Our courts have now gone further in the duty to disclose. In *S v Sithole*[1] DEVITTIE J held that unless the State was able to justify non-disclosure of witnesses' statements on grounds of public interest or some other legitimate basis, the accused ought to be provided with copies of the statements he has requested. Thus the accused's entitlement to information contained in the docket has been expanded subject to certain limitations. The duty to disclose ought not to depend upon a request by the accused but must be premised by considerations of affording an accused person a fair trial unless non-disclosure is justified or can be justified.

The entitlement of the accused to witness statements contained in the police docket is thus part of our law. He is entitled to be furnished by the State of all information that would enable him to adequately prepare for the trial and mount a defence to the charges confronting him. Considerations of fairness should I believe make it imperative that such

[1] 1996 (2) ZLR 575 (H) at p 593

statements be provided subject, however, to the qualifications referred to by DEVITTIE J in S v *Sithole*(supra).

In the application before me the accused seek entitlement to statements in addition to what they have already been afforded. There is no dispute that the statements sought by the accused exist, the only dispute being whether or not the accused are entitled to be furnished with copies of the same. According to State Counsel the information requested does not pertain to this matter. His submission is to the effect that when James Kaunye produced an affidavit on 16 January 2006 withdrawing the charges in which he was a complainant, the Director of Public Prosecutions requested him to write a statement narrating what had led to the withdrawal of the charges. This statement was later on reduced to an affidavit which was commissioned on 15 March 2006. Other witnesses were also requested to make statements as part of an enquiry because of the alleged role of the Minister of Justice in the matter. Although initially the state had indicated that the statements were irrelevant in so far as the trial of the accused was concerned, the statements, all dated 15 March 2006 were handed over to the accused prior to their trial in the High Court.

It then remains for me deal with the issue relating to the police diary log for the period 16 January 2006 to 15 March 2006. The locus *classicus* in our jurisdiction on the provision of documents to an accused person facing a criminal charge is that of S v *Sithole* (supra). The learned judge therein only considered an application for the provision of witness statements. The question of an accused's entitlement to other information contained in the document did not arise for consideration. Prior to the case of *S v Sithole* (*supra*) the common law position in our law was that an accused was not entitled, as of right, to demand access to information in the police docket, the rationale being that the contents of the docket were privileged. The position is stated thus by TREDGOLD CJ in *R v Steyn*[2]:

> ".....the defence cannot as of right demand to see the statements of the crown witnesses. Disclosure must be left to the discretion of the Attorney-General or his Deputy. The prosecutor

[2] 1953 SR 75 at 79

> stands in a special relation to the court, and where there is a serious discrepancy between the proof (statement) of a Crown witness and what he says on oath at the trial, the court has the right to expect that the prosecutor will, of his own motion, direct attention to the fact, and unless there are special and cogent reasons to the contrary, make a statement available for cross examination…….. But, on the other hand a prosecutor is amply justified in refusing disclosure of such a statement where there is no foundation for the suggestion that the witness has materially altered his story. There is no obligation on him, without adequate reason, to open the door to the captions and hairsplitting form of cross examination, which all too often, is based upon previous statements made by a witness."

An appeal was launched against the judgment of TREDGOLD CJ which appeal was dismissed in *R v Steyn*[3]. In a judgment rendered by GREENBERG JA the court found that statements that had been obtained from witnesses for the purpose of litigation or which contain details of what the witnesses would say in a trial were protected against disclosure until the conclusion of the trial. The court found that the privilege attendant upon such statements extended to both civil and criminal trials, as the court found no basis to differentiate between civil and criminal trials. Accordingly, it became established law that the contents of a police docket enjoyed privilege and that an accused could not as of right demand access to any witness statements contained in the docket in the prosecution of his defence.

In the matter of *S v Sithole (supra)* the applicant premised his application on the provisions of s 18(2) of the Constitution. It was argued in that case that the rule in *Steyn*'s case was inconsistent with the provisions of the Constitution. After a consideration of the various Constitutions that have existed in this jurisdiction prior to and post independence, authorities within this jurisdiction and South Africa, the court considered that it was necessary to keep abreast with developments in other jurisdictions which had adopted a less rigid approach to the provision of information to an accused person facing a criminal trial. The learned judge concluded that we ought to adopt a position that entitles an accused person who is indicted for trial to receive copies of witness statements subject to certain limitations.

[3] 1954 (1) SA 324.

Ultimately, however the overriding principle is whether justice demands there should be disclosure of witness statements to an accused.

The question of the diary logs made by the police is a different matter. The applicants have not invoked before me any legal premise upon which an accused facing a trial is entitled as of right access to these documents. The diary logs are not evidence that would be produced at the trial. It would appear that the application was launched at the eleventh hour without any effort on the part of the legal practitioners to research on whether or not their clients were entitled to the documents that were the basis of the application. The submissions that were made before me did not state why an accused person would be entitled to have access to the police diary log. Given that this is a running commentary on the efforts by the police to investigate the matter, what possible assistance can it provide to an accused person in the prosecution of his defence. It may well be that a court may find that it would be fair for an accused to be given access to the diary log, but such a case has not been made out before me nor has proper argument been placed before me for me to consider it. My attention has not been drawn to any pertinent authority within our jurisdiction nor was any reference made in the application to any statutory provision that would be a ground for such application. The accused have not indicated the legal principle upon which the application is premised nor has a proper foundation been laid for this court to enquire into whether or not an accused person is, as of right, entitled to have access to the police diary log for purposes of preparation of or mounting a proper defence to the charges facing him. I must mention that the application launched on behalf of the accused was not properly presented. No case authority was presented to court on the day of the application, authority being presented only when I enquired on the status of the proceedings that were set aside by the High Court. It is the duty of legal practitioners to present arguments which are aimed at assisting the court. An application, such as this, which is devoid of any supporting authorities is still born as the court cannot go on a fishing exercise to find authorities in support of the application. In conclusion none

of the accused has established that he is entitled to be furnished with the police diary log.

The application is dismissed.

Muzenda & Partners legal practitioners for the first accused
Warara & Associates legal practitioners for the second accused
Takaidza & Company legal practitioners for the third and fourth accused
Muzangaza, Mandaza & Tomana legal practitioners for the fifth accused