

THE STATE
versus
LOVEMORE KUROTWI
and
DOMINIC MUBAIWA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 16 February 2011 and 17 February 2011 and 31 January 2012 and 1 February

C Mutangadura and P Mpofu, for the State
B Mtetwa, for the 1st accused
L Uriri and U Sahle, for the 2nd accused

BHUNU J: This is an application for amendment of the charge in terms of s 202 of the Criminal Procedure and Evidence Act [*Cap 9:07*] which reads:

“202 Certain discrepancies between indictment and evidence may be corrected

- (1) When on the trial of any indictment, summons or charge there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or particulars that ought to have been inserted in the indictment, summons or charge have been omitted, or that any words or particulars that ought to have been omitted have been inserted, or that there is any other error in the indictment, summons or charge, the court may at any time before judgment, if it considers that the making of the necessary amendment in the indictment, summons or charge will not prejudice the accused in his defence, order that the indictment, summons or charge, whether or not it discloses an offence, be amended, so far as is necessary, by some officer of the court or other person, both in that part thereof where the variance, omission, insertion or error occurs and in every other part thereof which it may become necessary to amend.
- (2) The amendment may be made on such terms, if any, as to postponing the trial as the court thinks reasonable and the indictment, summons or charge shall thereupon be amended in accordance with the order of the court, and after any such amendment the trial shall proceed at the appointed time upon the amended indictment, summons or charge in the same manner and

with the same consequences in all respects as if it had been originally in its amended form.

- (3) The fact that an indictment, summons or charge has not been amended as provided in this section shall not, unless the court has refused to allow the amendment, affect the validity of the proceedings thereunder.

The accused were indicted to the High Court for trial on a charge of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] on 10 January 2011. They were initially jointly charged with three others whose charges have since been withdrawn before plea. The State intends to use them as State witnesses against their erstwhile co-accused persons. It has now applied to amend the original charge before plea to incorporate this new development with the charge and summary of the State case substantially remaining the same.

The main thrust of the amendment has to do with the manner in which the alleged offence was committed and the involvement of the erstwhile co-accused persons turned State witnesses. Whereas the State previously alleged that the two accused persons acted in consort and common purpose with the reprieved co-accused persons, it now wishes to allege that they acted on their own.

The rest of the application also seeks to amend the facts and the charge so as to synchronize, align and harmonize them by removing contradictions and ambiguities. In doing so the charge remains basically the same.

What the State is seeking to do in this case is diametrically different from what it sought to do in the case of *S v Shand* 1994 (2) ZLR 99. In that case it sought to replace a charge under one section of the Act with a charge under a different section in the same Act. In that case the Court correctly ruled that this was unacceptable because it was in fact not an amendment of the original charge but a substitution of the original charge with a different charge albeit under the same Act.

Section 202 was precisely meant to facilitate the correction, alignment, synchronization and harmonization of the facts and the charge depending on the exigencies of the case at any given time. This is what the State intends to do in this case. Thus the State is perfectly entitled to effect the amendments sought provided there is no prejudice to the other party. If however, there should be any prejudice that prejudice

should be capable of extinction in terms of subs (2) of the same section. In other words, the amendment can be made on such terms, if any, as to postponement of the trial as the court thinks reasonable in the circumstances of the case.

This position accords with the general rule governing amendments. In both civil matters and criminal cases the general rule is that amendments will always be allowed provided there is no prejudice or injustice to the other party. That legal position was well articulated by WATERMAYER J way back in 1927 in the case of *Moolman v Estate Moolman* 1927 CPD 27 at 29 where the learned Judge remarked that:

“The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs or in other words the parties cannot be put back for the purposes of justice in the same position they were when the pleading it is sought to amend was filed.”

In criminal cases the rule becomes that an amendment will always be allowed unless the application is *mala fide* or unless such an amendment would cause an injustice or prejudice to the other side which cannot be cured by a postponement.

In this case there is no suggestion that the application is being brought in bad faith. I can also perceive no prejudice or injustice that cannot be cured by a reasonable postponement to enable the accused to amend their defenses to suit the amended charge and facts

That being the case the application must succeed. The application to amend is accordingly allowed subject to the matter being postponed for a period of two weeks to enable the accused to amend their respective defenses in line with the amended charge and facts.

*The Attorney-General's Office, State's legal practitioners
Mtetwa & Nyambirai, 1st defendant's legal practitioners
Kantor and Immerman, 2nd defendant's legal practitioners*