

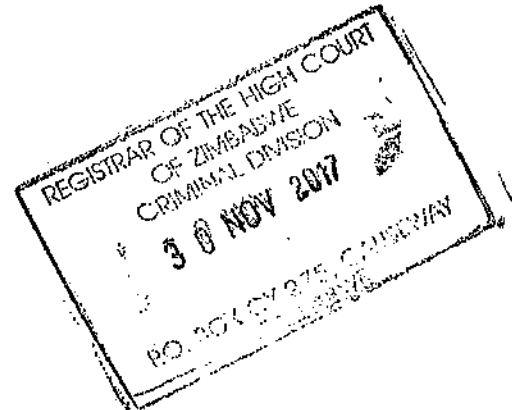
THE STATE
versus
EVAN MAWARIRE

IN THE HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE; 25, 26, 28 September 2017, 11 October 2017, 29 November 2017

Assessors: 1. Mr. I Chidyausiku
2. Mr. C. Gweme

Criminal Trial

C Mutangadura, for the state
H. Nkomo, for the accused



CHIGUMBA J: “The only attack that is made on the settlers is that they are ‘selfish, die hard, and reactionary. These are certainly uncomplimentary words but I do not think that they can be regarded as very much more than that and I do not think they are the sort of words that are likely to promote feelings of hostility, or to expose people to contempt, ridicule or disesteem. They would never, for example, found an action for damages for defamation...”. See *R v Mugabe*¹.

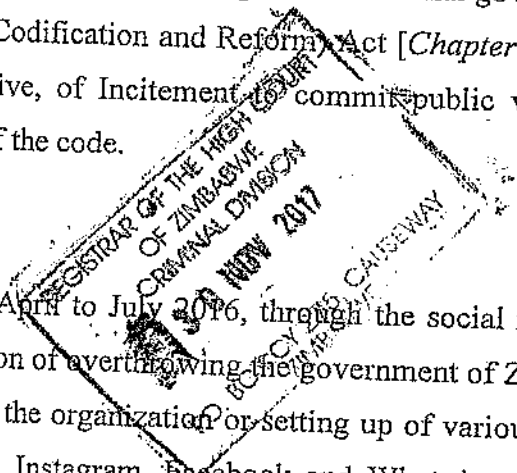
The offence of overthrowing or attempting to overthrow a government by unconstitutional means is a serious offence that carries a penalty of up to twenty years imprisonment. Unconstitutional means for purposes of this offence is defined as any process which is not provided for in the Constitution and the law. This definition implies, in my view, that the functions of government can be taken over in terms of the law, and that a constitutional government can be overthrown, by constitutional means. It is arguable that a general election, which may be provided for in terms of a Constitution and the law, if it results in a change of government, can be said to have resulted in the taking over of government functions by a

¹ 1965 (1) SR 514 @ 518 E-F p10 Accused's heads of argument. A

different group, and may be defined as a legitimate or constitutional means by which a government elected and formed in terms of the same constitution, may be removed.

It is imperative that the State, in bringing such charges against an accused person, carefully substantiate, by way of cogent evidence, which 'unconstitutional means' will have been used in the commission of the offence. If the means used are merely an exercise of a right conferred on the accused in terms of the Constitution, then there can be no 'unconstitutional means' to speak of. This case hinges on the sufficiency, and veracity of the evidence adduced against the accused at the close of the state case. The accused contends that the essential elements of the charges against him have not been proved. The State has urged the court to find that the essential elements of the charges against the accused person have 'either been proved or shown to be probable'²

The accused was charged with two counts of subverting a constitutional government as defined in s 22 (2) (a), of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], (the Code) as well as two counts in the alternative, of Incitement to commit public violence as defined in s 187 (1) (a), as read with s 36 (1) of the code.

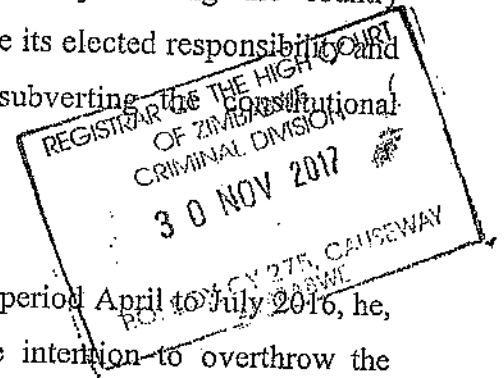


COUNT 1

It was alleged that, during the period April to July 2016, through the social media and the internet, he, unlawfully and with the intention of overthrowing the government of Zimbabwe, organized or set up, or advocated or suggested the organization or setting up of various internet accounts styled Hashtag This Flag on Twitter, Instagram, Facebook and WhatsApp platforms through which he communicated subversive ideas and incited persons unknown with the intention of overthrowing or attempting to overthrow the Government by unconstitutional means or usurping the functions of government, or coercing or attempting to coerce the government through boycotts, civil disobedience or passive resistance to law, realizing that there was a real risk or possibility that his actions might subvert the constitutional government of Zimbabwe.

² P4 state's submissions to the accused's application for discharge at the close of the state case- R v Mtembu on the meaning of degree of proof-line between proof by a balance of probabilities and proof beyond a reasonable doubt-inferences to be drawn from facts.

That is to say, on or about 6 July 2016, he posted two separate videos of himself on electronic media urging all Zimbabweans to participate in what he termed;-"shutting Zimbabwe down", inviting "all workers to stay at home", urging "parents not to take their children to school", accusing the government of enacting laws willy-nilly, inciting commuter omnibus operators not to ferry people, whilst urging all the people who saw the video to spread the message and the video to other citizens thereby causing boycotts, civil disobedience or resistance to law, realizing that there was a real risk or possibility that his actions of setting up internet accounts on Twitter, and Facebook, and electronic media such as WhatsApp and Instagram for connecting people in disseminating subversive views and ideas to the public to engage in boycotts and civil disobedience knowing or realizing that such activities might paralyse government services, operations and all electronic activity thereby making the country ungovernable through the chaos and coerce government to abdicate its elected responsibilities and be overthrown or unlawfully removed from power thereby subverting the Constitutional government of Zimbabwe.



ALTERNATIVELY

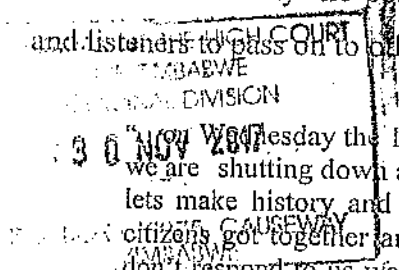
Incitement to commit public violence, in that, during the period April to July 2016, he, through social media and the internet, unlawfully and with the intention to overthrow the Government of Zimbabwe he did all those things set out in the main charge, as well as causing disturbances in Bulawayo and Manicaland where unknown people barricaded roads, damaged a police vehicle and burnt some tyres in Harare province while public violence erupted in various areas of Bulawayo resulting in a number of properties being damaged, including police vehicles and violence also erupted in Chipinge.

COUNT 2

It was alleged that during the period 6 July to December 2017 and on divers occasions, the accused, through social media and the internet, unlawfully and with intent to overthrow the government of Zimbabwe, organized or set up, or advocated, urged or suggested the organization or setting up of various internet accounts styled Hashtag this Flag on Twitter, Instagram, Facebook and WhatsApp platforms through which he communicated subversive ideas to unknown persons, with the intention of overthrowing or attempting to overthrow the government

of Zimbabwe by unconstitutional means or usurping the functions of the government or coercing or attempting to coerce the government, boycott, civil disobedience or passive resistance to law, realizing that there was a real risk or possibility that his actions might subvert a constitutional government of Zimbabwe.

That is to say he posted on the internet two separate videos in which he asked viewers and listeners to pass on to other citizens and in which he uttered the following words:-



“...on Wednesday the 13th and Thursday the 14th of July we are shutting down Zimbabwe again we are shutting down again you cannot carry on doing that to us...on 13 and 14 citizens join me lets make history and make this government change...on the 6th of July last Wednesday the citizens got together and we made a statement to our government together as citizens...if you don't respond to us we are going to shut down again. Citizens I want from you a favor, I know that we did this together last week, lets prepare to do it again, I plead with you citizens this is the only way that this government will understand. This coming Thursday, Wednesday, Wednesday the thirteenth and Thursday the fourteenth. I will speak to you some more I will come back to you again but lets do this again, I know its tough but we must be tougher, stay at home, forward this video to as many people as you can...”

Thereby causing a boycott, civil disobedience or passive resistance to law, realizing that there was a real risk or possibility that his actions of setting up internet accounts for connecting people in disseminating his subversive views and ideas to the public in order to paralyse government services, operations and all economic activity to coerce the government to abdicate its elected responsibility and be overthrown or unlawfully removed from power thereby subverting the constitutional government of Zimbabwe.

ALTERNATIVELY

Incitement to commit public violence in that, he did all the things outlined in the main charge, as well as inciting unknown persons to act in concert with each other, to forcibly disturb the peace to a serious extent, and to disturb the order or security of the public and invade the rights of others.

According to the outline of the State case, the accused uploaded videos of himself on electronic media, in which he urged the Zimbabwean people to revolt against and overthrow a constitutionally elected government. He urged all Zimbabweans not to go to work. He encouraged members of the public to resist the government policy of introducing bond notes, and SI 64-2016, and to defy visibility of traffic officers on public roads. On the 6th of July 2016, following the incitement to overthrow the government which was advocated for and organized

by the accused, some people from Epworth, Mabvuku, Mufakose, Budiriro and Marimba suburbs barricaded Chiremba road, Mutare road, Muonde road and roads leading to Budiriro and Marimba from the Central Business District, with stones, logs, and burning tyres. The accused's incitement caused some people not to carry out their day to day duties due to his unlawful campaign to shut down the country.

In Epworth suburb a group of people found by the police barricading the roads fought with the police who wanted to arrest them, resulting in two police officers being injured. The protestors forcibly took one police helmet and a baton stick preventing the police from executing their constitutional mandate. A police Toyota Hilux motor vehicle registration number ZRP 452F was stoned in an attempt by the mob to subvert a constitutionally elected government. The vehicle sustained a shattered windscreen. On 7 and 8 July 2016, the accused attempted to usurp the functions of the government and to overthrow it. He went on social media and thanked those who had participated in the public violence and stay away in the following words:-

“...Congratulations fellow citizens, well done...shut down Zimbabwe 2016 is already a success a few hours to go before we start zvatovharana...kana manga musati manyatsofunga kuti murikuenda kubasa kana kuchikoro make a decision now nekuti masara mega...makorokoto well done...we are done with them”. Translated to mean; “congratulations fellow citizens, well done...shut down Zimbabwe 2016 is already a success a few hours to go before we start it is all done...if you had not clearly thought about whether to go to work or school make a decision now because you are left behind alone. Congratulations well done we are done with them”.

It was alleged that the accused urged Zimbabwean citizens to prepare and participate actively in another violent demonstration scheduled for 13 and 14 July 2016 as an attempt to coerce the government out of power. It was alleged further that, using the same *modus operandi*, during 6 July to December 2016, the accused incited Zimbabweans not to go to work via electronic media and subsequently thanked them for blocking roads and fighting against the police.

The Law

The application for discharge at the close of the state case was brought on behalf of the accused in terms of s 198 (3) of the *Criminal Procedure and Evidence Act [Chapter 9:07]*; (the CPEA) which provides as follows:-

"...if at the close of the case for the prosecution 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, it shall return a verdict of not guilty."

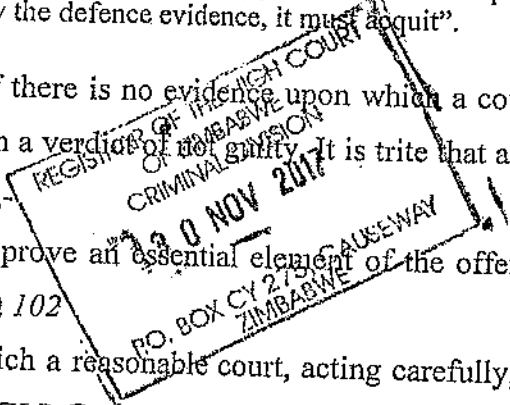
It was submitted that, where there is insufficient evidence to prove the state's case, the court has no option, no discretion, it should of necessity return a verdict of not guilty.

The court was referred to the case of *S v Kachipare*³, which interpreted s198 (3) of the CPEA as follows:-

"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 favor 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 cemented by the defence evidence, it must acquit".

It was contended that, if there is no evidence upon which a court acting carefully might properly convict, it should return a verdict of not guilty. It is trite that a court should discharge at the close of the state case where:-

- (a) There is no evidence to prove an essential element of the offence. See *AG v Bvuma & Anor* 1087 (2) ZLR (S) @ 102
- (b) There is no evidence which a reasonable court, acting carefully, might properly convict. See *AG v Mzizi* 1991 (2) ZLR @ 323B
- (c) The evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court can safely act upon it. See *AG v Tagwirei* 1997 (1) ZLR 575 @ 576 This test was applied in the case of *S v Tsvangirai & Ors*⁴



The two main charges, of subverting or attempting to subvert a constitutional government are provided for in s 22(2)(a) of the Code which provides that:-

22 Subverting constitutional government

(1) In this section—

"coercing" means constraining, compelling or restraining by

(a) physical force or violence or, if accompanied by physical force or violence or the threat thereof,

boycott, civil disobedience or resistance to any law, whether such resistance is active or passive;

³ 1998 (2) ZLR 271 (S) @ 275

⁴ 2003 (2) ZLR 88 H

or

(b) threats to apply or employ any of the means described in paragraph (a);
“unconstitutional means” means any process which is not a process provided for in the Constitution and the law.

(2) Any person who, whether inside or outside Zimbabwe—

(a) organises or sets up, or advocates, urges or suggests the organisation or setting up of, any group or body with a view to that group or body—

(i) overthrowing or attempting to overthrow the Government by unconstitutional means; or

(ii) taking over or attempting to take over the Government by unconstitutional means or usurping the functions of the Government; or

(iii) coercing or attempting to coerce the Government”

It was submitted on behalf of the accused person that, that, in order for a person to be convicted of this offence he/she must;-

1. Inside or outside Zimbabwe

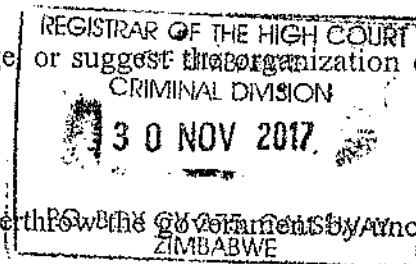
2. Organize or set up, or advocate, urge or suggest the organization or setting up of, any group or body;

3. With a view to that group or body-

4. (a) overthrowing or attempting to overthrow the Government by unconstitutional means; or

(b) taking over or attempting to take over government by unconstitutional means or usurping the functions of government;- or

(c) coercing or attempting to coerce the government.



Unconstitutional means are defined as any process which is not provided for in the Constitution and the law. I agree with the submission that this definition implies that the functions of government can be taken over by constitutional means.

In the alternative the accused is charged with the crime of attempting to commit public violence in terms of s 187(1) (a), as read with s 36 (1)(a), which provides that;-

“36 Public violence

(1) Any person who, acting in concert with one or more other persons, forcibly and to a serious extent—

(a) disturbs the peace, security or order of the public or any section of the public; or

(b) invades the rights of other people;

intending such disturbance or invasion or realising that there is a real risk or possibility that such disturbance or invasion may occur, shall be guilty of public violence and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both.”

The following factors are to be taken into account in determining the seriousness of the alleged public violence;-

(2) In determining whether or not a disturbance of peace, security or order or an invasion of rights is sufficiently serious to constitute the crime of public violence, a court shall take into account all relevant factors, including the following—

- (a) the nature and duration of the disturbance or invasion;
- (b) the motive of the persons involved in the disturbance or invasion;
- (c) whether the disturbance or invasion occurred in a public place or on private property;
- (d) whether or not the persons involved in the disturbance or invasion were armed and, if so, the nature of their weapons;
- (e) whether or not bodily injury or damage to property occurred in the course of or as a result of the disturbance or invasion;
- (f) whether or not there was an attack on the police or on other persons in lawful authority;
- (g) the manner in which the disturbance or invasion came to an end.

The following shall be considered as aggravatory;-

- (3) It shall be an aggravating circumstance if, in the course of or as a result of the public violence—
 - (a) there was an attack on the police or on other persons in lawful authority; or
 - (b) bodily injury or damage to property occurred; or
 - (c) the person who has been convicted of the crime instigated an attack on the police or other persons in lawful authority or instigated the infliction of bodily injury or the causing of damage to property. [my emphasis].

It was submitted on behalf of the accused that he did not, during the material period attempt to act in concert with anyone, and that, he did not, forcibly, and or to a serious extent;-

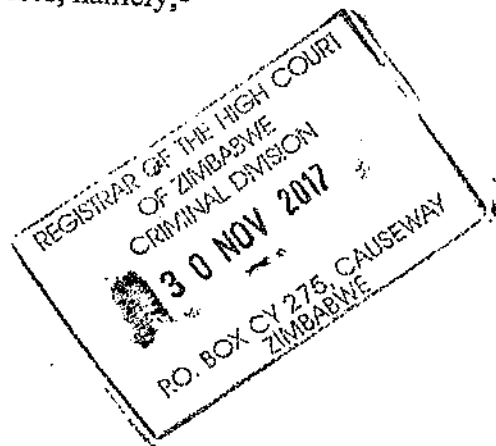
- Disturb the peace, security or order of the public or any section of the public; or
- Invade the rights of other people; or
- Intend such disturbance or invasion

It was contended that the accused person disseminated a message of PEACE at all times.

The Evidence

In order to prove its case, the State relied on a Video Compact Disc, which was produced as exh 1, and which had eight eyewitnesses, namely;-

1. Edmore Muchineripi Runganga
2. Jeremiah Murenje
3. Muvhuro Richard Mhlanga
4. Innocent Chipangura
5. Crispen Makedenge
6. Patrick Romeo Moyo



7. Lawrence Njodzi
8. Marshall Dube

The evidence of witnesses 3, 7 and 8 was admitted in terms of s 314 of the CPEA, thereby dispensing with the need for those witnesses to testify in court. Their evidence was admitted as it appears in their statements to the police. Exhibit 1 the video compact disc raises the contentious issue of whether or not the contents of the words of the accused person which are captured there were subversive or capable or calculated to incite members of the public to commit public violence. It was submitted that the words of the accused as they are recorded in exh 1 be given their literal meaning. Four videos which are on the disc were played in open court and a properly transcribed version of these videos now forms part of the record which is before the court.

It was submitted on behalf of the accused that there is no evidence in any of these videos that he incited anyone to engage in violence on unconstitutional behavior. It was submitted that accused said;-

"Wednesday 6th of July we are shutting down...we are staying at home...all workers, all school children are not going to school...High School students do not go...teachers do not go...civil servants, you have not been paid do not go to work...to commuter bus operators, do not ferry people, commuters stay at home. Indians, keep your shops closed, white people, keep your shops closed, black people keep your shops closed..."

Did the State discharge the onus on it of proving, beyond a reasonable doubt, beyond a shadow of a doubt, that this shut down which was advocated for by the accused amounted to subverting a constitutional government and or to inciting public violence?

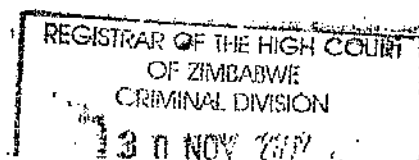
It is correct that in the first video the accused can be heard clearly saying, amongst other things;-

"...but remember no violence, no fighting, let us keep it truthful to this government to let them know that we want to build a different Zimbabwe until they understand that...keep praying for this country..."

In the second video accused said, amongst other things;-

"We love Zimbabwe too much to keep watching it burn, to keep watching it go down. So there shall be no violence, there shall be no marching, there shall be no protesting in the towns or roads..."

In video 3 the accused was commenting on a video that was going around in social media of the police brutally assaulting some people. He concluded this video by reminding people to



pray for Zimbabwe. In video 4 accused was criticizing arbitrary arrests of those who criticized government. He registered his displeasure with the introduction of bond notes by government; the rampant corruption by ministers; the ban on the importation of certain goods imposed by S I 64/2016; the general unemployment in the country.

It was submitted on behalf of the accused that, in all four videos his message on non-violent confrontation of government (constitutional means) was clear, as well as his message of peace and respect for the law, sprinkled with his overall acknowledgement of the Supremacy of the Lord almighty, as a Pastor, a man of God. It was submitted that the accused expressed his thoughts in a lawful manner and that, he never mentioned or wanted to remove the government by unconstitutional means, or to incite or incite anyone to commit acts of public violence. The court was referred to the following Constitutional provisions;-

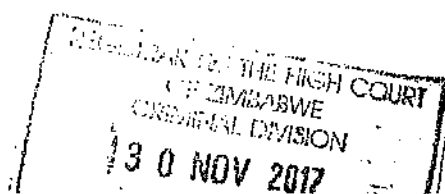
S58 (1);- Every person has the right to freedom of assembly, association, and the right not to assemble or associate with others.

S59 The right to demonstrate and petition ;- Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully.

S61 (1) (a) Every person has the right to freedom of expression, which includes;- freedom to seek, receive and communicate ideas and other information.

S67 (2) (d);- Every Zimbabwean citizen has the right to participate, individually or collectively, in gatherings or groups or in any manner, in peaceful activities, to influence, challenge or support the policies of the government or any political or whatever cause.

It was submitted on behalf of the accused that it was a violation of the abovementioned rights which are enshrined in the Constitution to criminalise the accused's conduct. It was contended that the accused has a right to peacefully challenge government policies, and to criticize them, and that his words did not promote feelings of hostility or incite anyone to commit public violence. *Viva Voce* evidence was led from witnesses 1, 2, 4, 5 and 6. Detective Chief Inspector Edmore Muchineripi Runganga of the Zimbabwe Republic Police is currently stationed at Criminal Investigation Department, Law and Order Harare. He told the court that the offence was committed when the accused urged Zimbabweans not to go to work. He said that the accused was responsible for the disturbances which took place on the 6th of July. It is common cause that the video in which the accused congratulated his fellow Zimbabweans, video 1 was posted before 6 July 2016. It is further common cause that in this video the accused said that shut

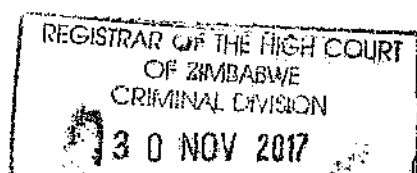


down Zimbabwe was already a success a few hours before it was due to start, and that Zimbabweans should not go to work the following day. Logically the accused could not have been congratulating anyone for the violent public disturbances, and destruction of property which took place the following day before it transpired.

We did not hear the accused person incite the citizens to stone motor vehicles and commuter omnibuses ferrying people to work. It is also telling that none of the people who were allegedly injured by the violent demonstrations were called to testify or even mentioned by name. Jeremiah Murenje stated that the accused posted on the internet website U-Tube a video which called upon Zimbabweans to shut down Zimbabwe by urging them not to go to work and calling upon parents not to send their children to school. During cross examination, this witness admitted that the accused did not preach violence and that, in none of the four videos does the accused mention taking over the government. There was no evidence led by this witness, of any intention to overthrow a government or of incitement to public violence. Innocent Chipangura told the court that accused urged Zimbabwean citizens through social media to show displeasure with the government policies and the economic situation, and that, this call prompted businesses and other institutions to close, and some people committed offences and the majority of the people stayed home. He mentioned the names of three people who were arrested in Chipinge for stoning a bus. He did not call any of the three to testify. No nexus was established between the accused's utterances and this violence in Chipinge.

Crispen Makedenge told the court that he received information that the accused had made videos in which he urged citizens to shut down Zimbabwe , and that, he received information from Harare, Mutare, and Bulawayo that there were disturbances where roads were barricaded, motor vehicles burnt and people not going to work. He testified that those who tried to go to work were assaulted by a group called Hashtag this Flag led by the accused person. No one was called to substantiate these claims. Reports from Harare, Bulawayo and Manicaland were produced through this witness (exhibits 2, 3 and 4). The Bulawayo Report, Exhibit 3 reads, in its first two paragraphs'-

"Events of disturbances in Bulawayo on the 6th of July 2016 were triggered by a publicized stay away by civil servants due to the change in the dates for their June salaries. The APEX Council for civil servants announced that there will be a stay-away to protest government's decision to push their June salaries into the month of July 2016. From events that followed it is evident that

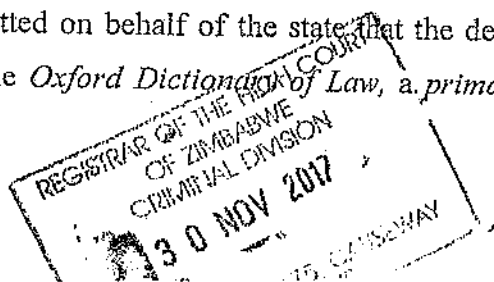


this stay away was hijacked by other civil servants' organisations who had their own agendas of destabilizing the country. Such organisations and individuals include Tajamuka, the controversial Pastor Evan mawarire of the My/Our Flag, YARD, BUPTA, BUYA, Tshiva Mubaiwa, Bulawayo City Transit".

The witness admitted during cross examination that no member of Hashtag This Flag is identified as a perpetrator of violence in any of those reports. Patrick Romeo Moyo told the court that he was asked to assess and monitor the impact of the social media movement Hashtag This Flag. He deployed his officers to gather evidence. It was reported to him that in Bulawayo commuter omnibuses were not operating, a number of supermarkets were not open and schools were closed, that there were incidents of tire burning on Khami road. There was looting and damaging of shops. A police vehicle was damaged when the police tried to contain the violence. There was no independent corroboration of these reports or any other witness called to verify their veracity. The witness did not know whether it was the accused's videos which had caused the people to commit violence. He could not say which of the one hundred and thirty three people arrested wer members of Hash Tag this Flag. He did not bring any of the arrested people to tell the court whether they perpetrated violence at the accused's instigation.

It was submitted on behalf of the accused person that the evidence of the 3rd, 7th and 8th witnesses did not implicate him in the slightest or establish a nexus to the commission of any of the charges brought against him. It was contended that the state failed to prove all the essential elements of the charges against the accused, that there is insufficient evidence on which a reasonable court, acting carefully, might convict. (*AG v Bvuma Supra, S v Tsvangirai supra*). The state is not obliged to prove a *prima facie* case against an accused person. It must adduce evidence to establish its case beyond a reasonable doubt, which has been interpreted to mean; 'beyond a shadow of a doubt'. It was submitted that the accused punctuated his videos with hypocritical messages urging people not to march or commit public violence (p3 par 16 states heads of argument). Does the evidence show that the accused was speaking with a forked tongue? Does the evidence show that the accused said one thing but meant another, that he had a secret code with his followers to misinterpret his message of belief in God, in praying for peace, in criticizing government policies, as a secret message to violently overthrow the government.

It was submitted on behalf of the state that the degree of evidence required is *Prima Facie*. According to the *Oxford Dictionary of Law*, a *prima facie* case is one which has been

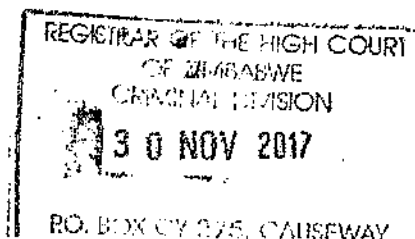


established on the face of things, at first appearance. It is a case which has been supported by sufficient evidence for it to be taken as proved should there be no adequate evidence to the contrary. It is a prosecution case that is strong enough to require the defendant to answer it. Prima facie evidence is defined as evidence of a fact that is of sufficient weight to justify a reasonable inference of its existence but does not amount to conclusive evidence of that fact. The court was referred to the case of *R Mtembu*⁵ as authority for the proposition that prima facie evidence will suffice. In that case, it was said that;-

“But in any event it is not clear to me that the Crown’s obligation to prove the appellant’s guilt beyond a reasonable doubt is required to negative beyond reasonable doubt all pieces of evidence favourable to the appellant. I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected, then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be, beyond a reasonable doubt. Otherwise the verdict could not properly be arrived at. But that does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied. I am not satisfied that the possibilities as to the existence of facts from which inferences may be drawn are not fit material for consideration in a criminal case on the general issue of whether guilt has been established beyond a reasonable doubt, even though the existence of each such fact were to be treated by the test of reasonable doubt, mere probabilities in the Crown’s favor would have to be excluded from consideration and mere probabilities in favor of the accused would have to be assumed to be certainties. Circumstantial evidence, of course rests ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work. But the border-line between proof and probability is largely a matter of degree, as is the line between proof by a balance of probabilities and proof beyond a reasonable doubt. Just as a number of lines of inference, none of them in itself decisive, may in their total effect lead to a moral certainty, (*Rex v De Villiers* 1944 AD 493 at p.508), so, it may fairly be reasoned, a number of probabilities as to the existence of the facts from which inferences are to be drawn may suffice, provided in the result there is no reasonable doubt as to the accused’s guilt. That was the view, I think, which underlay the use of the words **either proved or shown to be probable** in *Rex v Mthlango* 1949 (2).SA 552 (AD) at p. 558, and see Wigmore on evidence, secs, 216 and 2497. Although therefore, I agree with Brother MURRAY in attaching no credence whatsoever to the evidence given by No. 2 accused on the point in question, I do not wish to be taken to be agreeing that the use of those words had to be disproved beyond a reasonable doubt before the appellant could be properly convicted”. [my emphasis].

It seems to be that the State’s reliance on the abovementioned case, and its urging of the court to be persuaded that the degree of proof required is that of ‘proved or probable fact, is a tacit admission that the evidence against the accused in circumstantial, at best. The state referred

⁵ 1950 (1) SA 670 (AD) @ pp679-80



the court to the case of *CR v Njenje & Ors*⁶ as authority for the proposition that if a conspirator incites other conspirators to commit a crime, he may be liable to conviction as a principal offender even though he is not present when the crime is committed, and or if it is proved that he otherwise aided and abetted in the actual commission of the crime. This case is distinguishable from the circumstances before us for the simple reason that, not a single witness was called to testify as a perpetrator of violence , and no evidence was adduced to establish that the perpetrators of violence acted on the strength of any urging to do so by the accused. None of the arrested citizens implicated the accused as having incited them to violence. In fact one of the state witnesses told the court that they all refused to testify against the accused person. It has not therefore been proved or even shown to be probable that the violence started on the accused's instigation.

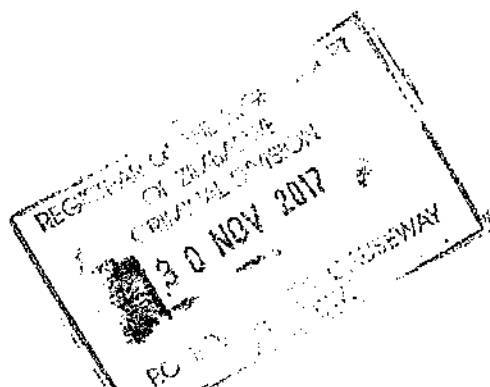
The court was referred to the case of *R v Dick*⁷, as authority for the proposition that the question of whether or not the criminal design was capable of being executed is not an essential element of the offences charged. In this case it was held that in a charge of incitement if the means suggested is also inadequate to accomplish the crime incited, the conviction of incitement is not precluded. The headnote reads as follows;-

"On a charge of inciting a man to murder a woman by the administration of D.D.T., it appeared that the accused had incited the man to procure a certain herb and administer it to the woman in the hope that it would cause her to return to the inciter: if that failed he incited the man to murder her by the administration of a supply of D.D.T which he gave the man. It was held that neither the fact that the incitement to murder was conditional on the prior treatment failing, nor the fact that the quantity of D.D.T supplied inadequate to achieve thus purpose, precluded the court from convicting the accused of incitement to murder".

It is this court's considered view that again, this case is distinguishable from the one before us for the simple reason that in this case there is no one who testified before us that the videos recorded by the accused incited them to commit acts of public violence. Did the accused, in any manner, communicate with other citizens, intending to persuade or induce them to commit a crime, or realizing that there was a risk of the citizens committing a crime? That is the first question which the court is required to answer in order to determine if the accused person is

⁶ 1966 (1) (SRA)

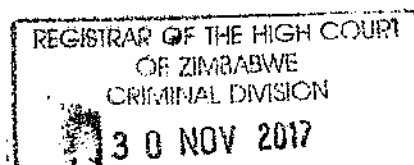
⁷ 1969 (3) SA 267 (R)



guilty of the two main charges. The main charges are overthrowing or attempting to overthrow, and or takeover a government by unconstitutional means, and coercing or attempting to coerce the government. It is this court's view that the state failed to prove the essential element of 'unconstitutional means'. The accused used his Constitutionally guaranteed rights to freedom of assembly and association with others, his right to demonstrate and petition, his right to freedom of expression, to seek, receive and communicate ideas, and his right to participate in gatherings or in a group to influence, challenge and or support the policies of government. These rights are not absolute. The Constitution says that they must be exercised peacefully. Unconstitutional means is defined as any process which is not provided for in the Constitution and the law. In video 1 the accused rebuked violence and urged his fellow citizens to continue to pray for this country. In video 2 accused can be clearly heard saying there shall be no violence, there shall be no marching, there shall be no protesting in the towns or in the roads. In video 3 accused reminded citizens again to keep praying for Zimbabwe. In video 4 he criticised government policies of introduction of bond notes, corruption among ministers, unemployment, and the ban on the importation of goods imposed by SI 64-2016.

We find that, in all four videos which the state seeks to rely on, the accused used constitutionally guaranteed rights, and that, he did not exceed the limitation on those rights, he never advocated that those rights be exercised in anything other than a non-violent way. He urged passive resistance, a stay away. He urged PRAYERS FOR PEACE. How can prayers for peace be considered unconstitutional means of removing a constitutional government? His criticism of government policies is permissible in terms of the Constitution, and there is no evidence that he urged a violent removal of the government. Sure his aim was to cripple government operations, but he very clearly said in his videos that this was a way of getting the government to LISTEN to its citizens, which he accused it of not doing. There is no evidence on which this court might find that the accused has been proved to have used unconstitutional means, or on which the court might find it probable that the accused used unconstitutional means, or that he intended or tried to overthrow a constitutional government.

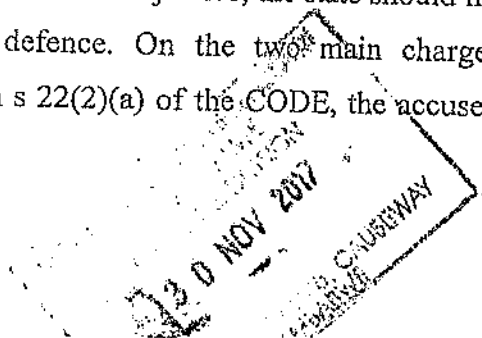
Did the accused, forcibly and to a serious extent, acting in concert with others disturb the peace, security and order of the public and or invade the rights of other people? This is the second question raised by the two alternative charges? The essential elements of the alternative are; charges, disturbing the peace, invading the rights of others, intending such disturbance or



invasion were again in my view not proved by the state. We have found that the accused preached peace and repeatedly told his audience not to resort to violence. This means that the element of intention was not proved, or even recklessness. A look at all the relevant factors set out in s 36 of the CODE, which sets out the offence of public violence, will bear out this conclusion, or finding. The nature and duration of the invasion or disturbance has been outlined above. The motive of the persons involved in the disturbance was not clear from the evidence adduced. Some witnesses attributed the disturbance to a strike over salaries by civil servants. None of those citizens who were arrested pointed a finger at the accused as having incited them. None of the citizens arrested were card carrying members or even suspected members, of Hashtag this Flag, an organization whose existence was attributed to the accused. In fact various other organisations such as Tajamuka were blamed for the disturbances in some provinces.

The disturbances occurred in public places (s 36 (2) (c)). The persons involved were allegedly armed with stones which they used to pelt buses, commuter omnibuses, police vehicles, and to barricade roads with. Bodily injury and damage occurred and there was an attack on the police and on police property which is considered aggravatory. None of these findings in my view make up for the deficiency in the evidence presented before the court, to show or establish a nexus between the four videos made and posted by the accused and the resultant disturbances on the ground in different provinces. I do not accept the submission that the accused's videos created a pervasive environment for violence as a natural probable consequence of urging people to boycott. I say so because in all his videos accused urges prayers for peace. In some videos he expressly advocates against violence. Passive resistance cannot be said to be a precursor to violence. It is the opposite of violence. Resistance to law is a permissible constitutional right, as long as it is done peacefully. That is the only limitation.

In conclusion, we find that the accused did not urge citizens to overthrow the government using violence or unconstitutional means. The state failed to prove all the essential elements of the main and alternative charges. The witnesses testimonies fell short of establishing evidence on which a reasonable court, acting carefully, might properly convict. The evidence appeared in some instances to be purely speculative, and conjecture, rather than fact, even probable fact. In the interests of the administration of justice, the state should not be allowed to bolster its case by putting accused to his defence. On the two main charges of subverting a constitutional government as defined in s 22(2)(a) of the CODE, the accused is discharged at the close of the



state case and found Not Guilty and acquitted. On the two alternative charges of incitement to commit public violence as defined in s 187(1)(a) as read with s 36 (1) (a) of the CODE, the accused is discharged at the close of the state case and found Not Guilty and acquitted.

[Handwritten signature]
29/11/17

*The Prosecutor General's, state's legal practitioners
Messrs Mhishi & Nkomo , accused's legal practitioners*

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