

THE STATE
versus
JOB SIKHALA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 3 and 14 FEBRUARY 2020

Criminal Trial – Exception

Assessors

1. Mr Mutomba
2. Mr Gweru

*T. Zvekare with Mrs Muhwandavaka & T. Chikwati, for the state
Ms B. Mtetwa with M.J. Bhamu and B. Nyamaropa, for the accused*

MAWADZE J: At the commencement of the trial the accused who pleaded not guilty to the charge took an exception in terms of s 171(2) of the Criminal Procedure and Evidence Act [*Cap 9.07*]. The relevant provision dealing with exceptions provides as follows:-

“171. Exceptions

- (1) When the accused excepts only and does not plead any plea, the court shall proceed to hear and determine the matter forthwith and if the exception is overruled, he shall be called upon to plead to the indictment, summons or charge.*
- (2) When the accused pleads and excepts together, it shall be in the discretion of the court whether the plea or exception shall be first disposed.”*

In the exercise of my discretion and in view of the nature of the exception taken by the accused I decided to dispose of the exception first. I mention in passing however that it is rather

difficult, in my view, to decide to dispose of the plea first before dealing with the exception as alluded to in s 171(2) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

The 47 year old accused is a legal practitioner with the law firm Koto, Sikhala and Company in Chitungwiza. The accused resides at House No. 569 Mutsanai Street, St Marys, Chitungwiza. The accused is a politician and is the National Vice Chairperson of a political outfit called the Movement for Democratic Alliance (Alliance) hereinafter MDC (Alliance). In addition to that the accused is a member of the House of Assembly for Zengeza West Constituency, Chitungwiza.

The charge against the accused arises from the alleged utterances he made at a political rally for his party the MDC (Alliance) held at Mandadzaka Primary School grounds on 6 July 2019, at Mandadzaka business centre in Bikita, Masvingo.

The accused is being charged for contravening section 22(2) (a) (i) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] which provides as follows:-

“22. Subverting Constitutional Government

(1) Irrelevant

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

(3) Organises or sets up, or advocates, urges or suggests the organisation or setting up of, any group or body with the view to that group or body –

(i) overthrow or attempting to overthrow the government by unconstitutional means or

(ii) irrelevant or

(iii) irrelevant or

(iv) irrelevant

shall be guilty of subverting constitutional government and liable to imprisonment for a period of not exceeding twenty years without the option of a fine.

I note in passing that this is a very serious charge by its nature and that the penalty provided for excludes the option of a fine. Further, the charge, in my view is crafted with such clarity that no ambiguity arises a regards the forbidden conduct which is criminalised and the sanctions thereto for the breach.

From the submissions made by *Mr Zvekare* for the State and the manner the charge against the accused is couched, the charge solely arises from the accused's utterances allegedly made on 6 July 2019 between 1300 hrs and 1600 hrs when he addressed an MDC (Alliance) Ward 31, Bikita East Constituency, the election campaign rally which was attended by several MDC (Alliance) supporters and other members of the public.

In specific terms the charge is framed as follows:-

“That Job Sikhala, a male adult (hereinafter referred to as the accused person) and residing at House No. 569 Mutsanai Street, St Marys, Chitungwiza is guilty of subverting Constitutional Government as defined in section 22(2)(a)(i) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

In that on 6th of July 2019 and at a Movement for Democratic Change Alliance (hereinafter referred to as the MDC Alliance) political party rally at Mandadzaka business centre, Job Sikhala, the National Vice Chairperson of the MDC Alliance political party, advocated, urged or suggested the organisation of his MDC Alliance members and supporters to overthrow, attempt to overthrow the Government of Zimbabwe by unconstitutional means, that is to say, Job Sikhala uttered the following words which are in substance and to the effect that the MDC Alliance political party was seriously going to overthrow President Emmerson Dambudzo Mnangagwa's constitutionally elected government before the next elections, constitutionally scheduled for 2023 by war and fight thereby subverting the Constitutional government of Zimbabwe;

Panyaya dzekuti tisunungure nyika ino. We are a committed leadership that will give ZANU PF headaches and vaChibaya was not lying or joking; the war and the fight. We are going to take to the door steps of Emmerson Mnangagwa. We are going to overthrow him before 2023. That is not a joke. Hatigone kuita hurumende inosunga ichityityidzira vanhu mudzimba dzavo kuti vaite zvido zvavo. Iyezvino ndanzwa, when I ----- translated to mean; “On the issue of liberating this country. We are a committed leadership that will give ZANU PF headaches and Mr Chibaya was not lying or joking; the war the fight. We are going to take to the door steps of Emmerson Mnangagwa. We are going to overthrow him before 2023. That is not a joke. We cannot have a government which arrests and intimidates people in their houses in order to compel them to do its will. Now heard when I -----”

At this juncture it is pertinent to make the following remarks or observations.

Firstly, dissected to its bare bones I understand the charge which is contravening section 22(2)(a)(i) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] (hereinafter the Criminal Code) to mean that the *actus reus* entails the organisation or setting up or advocating or urging or suggesting the organisation or setting up of any group or body within or outside

Zimbabwe (all these acts being disjunctive rather than conjunctive) and the *means rea* entails an intention through unlawful means or outside the provisions of the Constitution to overthrow or to attempt to overthrow a constitutionally elected Government. *In casu*, the State has pinned its colours on the mast of the provisions of s 22(2)(a)(i) of the Criminal Code [*Cap 9:23*] as it were.

Secondly, according to the State the charge or the alleged breach of s 22(2) (a) (i) of the Criminal Code (*Cap 9:23*) as framed or drafted is solely born out of the precise or exact words quoted allegedly uttered by the accused which words are quoted verbatim in the body of the charge in Shona, later put in English translation.

Thirdly, the apparent impression one gets is that the offending words allegedly uttered by the accused as quoted are not contextualised as it were. Besides the poor grammatical construction of the sentence it would also seem that the said utterances or offending words were simply plucked out from some other preceding utterances and that the offending words or utterances are terminated even before the accused had completed the sentence or what he went on to say thereafter.

We now turn to the exception taken by the accused. The importance of an exception was aptly described by CHITAPI J in the case of *Saviour Kasukuwere v Hosea Mujaya and Others* HH 562/19 at page 2 of the cyclostyled judgment in which the Learned Judge said;

“such an application is provided for by law. It is an antecedent to a trial and is no less important than a trial itself inasmuch as it is in fact part and parcel of trial proceedings. An exception to a charge application must be meticulously dealt with by the presiding judicial officer. The application sets the ground for a fair contest between the State as the accuser and the accused person. A fair trial and hearing starts at this stage. An accused who excepts to a charge must not be regarded as a time waster but asserting his or her rights to a fair trial.”

I fully associate myself with the views expressed by CHITAPI J *supra*.

The right of an accused person to a fair trial is enshrined in the Constitution and is a non-derogatory right as provided for in s 86(e) of the Constitution. This is precisely why any person accused of any offence should promptly be informed of the charge in sufficient detail to enable him or her to answer to that charge as provided for in s 70(1) (b) of the Constitution. Needless to say that this enables an accused person to prepare his or her defence as provided in s 70(1)(c) of the Constitution and to enjoy all other rights relating to a fair trial as is provided for in s 70(1) of

the Constitution. As was pointed out in the case of *Rex v Alexander & Ors* 1936 AD 445 in which the learned Judge said;

“the purpose of a charge sheet is to inform the accused in clear and unmistakable language what the charge is or what charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piercing sections of the indictment or portions of Sections to gather what the real charge is on which the Crown intends to lay against him.”

As is stated by the learned author John Reid Rowland in *Criminal Procedure in Zimbabwe* 1997 Edition at 16-15 the common or usual ground of an exception to the charge is that it discloses no offence see also *S v Gabriel* 1970 (1) RLR 188 (G).

I understand the argument advanced by the accused *in casu* in taking the exception to be a simple one. The accused contends that when one juxtaposes the provisions of s 22 (2)(a)(i) of the Criminal Code [*Cap 9:23*] which creates the offence of subverting a Constitutional Government with the alleged transcript of what the accused allegedly said even if it is said he said or uttered such words as quoted no offence is disclosed.

As already said the State in its wisdom or lack thereof decided to nail its colours on the mast of the provisions of section 22(2)(a)(i) of the Criminal Code [*Cap 9:23*]. Mr Zvekare for the State was adamant that the State solely relies on the provisions of section 22(2) (a) (i) of the Criminal Code [*Cap 9:23*] and no other provision and that the contravention of section 22(2) (a) (i) of the Criminal Code [*Cap 9:23*] arises from the said words allegedly uttered by the accused and quoted verbatim in the body of the charge and nothing else.

A proper and sober construction or interpretation of section 22(2)(a)(i) of the Criminal Code [*Cap 9:23*] is that what constitutes the breach of the said provisions is not the overthrowing or attempting to overthrow a constitutionally elected government but it is doing so through unlawful means or unconstitutional means.

In terms of section 22(2) (a) (i) of the Criminal Code [*Cap 9:23*] which *inter alia* defines unconstitutional means it is clear that unconstitutional means entails or “*means any process which is not provided for in the Constitution and the law*”. As was said by CHIGUMBA J in *State v Evan Mawarire* HH 802/17 the definition of what entails “*unconstitutional means*” implies that functions of government can be taken over in terms of the law and that a constitutional government can indeed be overthrown by constitutional means. Put differently,

there would be no breach or contravention of section 22(2)(a)(i) of the Criminal Code [*Cap 9:23*] if the constitutionally elected government of Zimbabwe is removed or overthrown legally or through a process provided for by the Constitution or the law. The key word(s) or buzz word in section 22(2) (a) (i) of the Criminal Code [*Cap 9:23*] therefore is not overthrowing or attempting to overthrow the Government but is “*by unconstitutional means*”. It would therefore have been a different kettle of fish if section 22(2) (a) (i) was worded or drafted as follows:-

“Any person who, whether inside or outside Zimbabwe organises or sets up or advocates or sets up or advocates, urges or suggests the organisation or setting up of any group or body with the view to that group or body to overthrow or attempting to overthrow the Government shall be guilty of an offence” [without the use of the words by unconstitutional means]

Now the question which should exercise one’s mind is whether the accused’s alleged utterances as quoted in the indictment or charge fit within the ambit of s 22(2) (a) (i). Or whether these utterances as quoted refer to the overthrowing or attempting to overthrow the Government through unconstitutional means? In my respectful view the said quoted offending words, taken as they are, firstly do not make sense at all. This is so because the State has simply cherry picked certain words or utterances in the midst of some alleged speech or pronouncements in order to construe some specific narrative.

Be that as it may, even if one tries to ascribe any meaning to such alleged utterances by the accused to imply that the Government or the President will be removed before the expiry of its or his terms of office in 2023 there still remains a problem in that there is no mention of how that would be done and most importantly that it would be by unconstitutional means.

As was correctly submitted by *Ms Mtetwa* for the accused that there is indeed a fairly recent precedent in this country in which a constitutionally elected President and or Government was removed or overthrown before his or its term of office had expired in November 2017. The point was made that the late President Mugabe was forced or elected to leave his office before his term of office had expired and without elections being held at that stage. *Ms Mtetwa* submitted that such a process was found to be perfectly legal or lawful by this court in the case of *Sibanda and Anor v President of Zimbabwe N.O. & Ors* HH 1082/17. Reference was also made to the case of *Liberal Democrats & 4 Ors v President of Zimbabwe N.O.* CCZ 7/18.

Indeed the Constitution provides for the removal of a President constitutionally elected before his or her term expires. This occurs where the Senate and the National Assembly by a joint resolution passed by at least half of their total membership puts into motion impeachment proceedings for the removal of a sitting President on the basis of serious misconduct, or failure to obey, uphold or defend the Constitution or wilful violation of the Constitution or inability to perform the functions of his or her office due to physical or mental incapacity. This procedure is clearly outlined in s 97(2) and 97(3) of the Constitution. This process forces or compels a sitting President against his or her will to vacate office.

In terms of s 109 of the Constitution the Government may also be removed before its term of office expires. This happens when the Senate and the National Assembly kick start such a process through a joint resolution by at least 2/3 of their total membership pass a vote of no confidence in the Government and such process is put in motion in terms of s 109(2) and s 109(3) of the Constitution. Once that process is done the President is enjoined to remove all Ministers if they have not been wise enough to smell the coffee and resign *mero motu* and appoint other persons or simply dissolves Parliament and call for a general election without 90 days. In terms of s 190(5) of the Constitution even if the sitting President remains truant once such resolution of vote of no confidence is properly passed and after 14 days the Parliament is deemed to have been dissolved by the operation of the law.

All these processes have been highlighted in some detail to make the point that indeed a constitutionally elected President can be removed from office before his or her term expires through lawful or Constitutional means. These processes are indeed not done at the pleasure of the sitting President. They are simply constitutional means to remove or force or overthrow a sitting President, whichever word one prefers to use, or the Government before its term of office expires.

The accused being a Member of the House of Assembly is well suited to initiate any of such processes. Whether he succeeds or not is beside the point.

Mr Zvekare for the State in his lengthy submissions did not deal with these specific issues or address the question as to whether the said quoted words allegedly uttered by the accused refer to the removal of the President and/or Government by unconstitutional means, thus contravening

s 22(2)(a)(i) of the Criminal Code [*Cap 9:23*]. Instead *Mr Zvekare* sought to interpret what he perceived the accused allegedly meant in those quoted utterances.

In his submissions *Mr Zvekare* argued that the alleged utterances by the accused advocated for the removal of the President and or Government through non peaceful means. Reliance for this proposition was derived from the words “fight” and “war” which are contained in the said quoted utterances. Further it was argued that the alleged utterances violated s 22 (2) (a) (i) of the Criminal Code [*Cap 9:23*] as the accused in those utterances failed to explain how he would overthrow the President and or the Government before 2023. According to *Mr Zvekare* by failing to do so the accused implied that he would do so by unconstitutional means.

According to *Mr Zvekare* the alleged quoted words are clearly not an exercise of the accused’s right of freedom of expression provided for in s 61 of the Constitution as it is outlawed by the very same Constitution in s 61(5) (a) and (b) which excludes incitement of violence and advocating hatred and hate speech.

In a rather bizarre suggestion *Mr Zvekare* submitted that the alleged utterances by the accused meant that the accused urged the removal of the President and Government through a coup or use of arms of war which are both not Constitutional means. *Mr Zvekare* submitted that the accused’s rights enshrined in the Constitution are indeed not absolute rights save for those provided in s 86 (3) of the Constitution. All in all the thrust of *Mr Zvekare*’s submissions was that the alleged utterances by the accused as quoted in the body of the indictment advocated for the violent or unlawful removal of the President or Government in breach of the provision of s 22 (2) (a) (i) by the Criminal Code [*Cap 9:23*]. As a result he argued that the exception taken by the accused lacks merit and should therefore be dismissed to allow the matter to be resolved on the merits.

I am not persuaded by *Mr Zvekare*’s submissions for a number of reasons which I list hereunder.

- (i) Besides clearly making a serious conflation of the President and Government, the legal distinction between the two is very important as there are distinct constitutional provisions dealing with the removal of the President and that of the Government. While the President is the Head of Government and is vested with executive authority as provided in s 88(2) of the Constitution he or she is not the

government. The process of his removal from office is different from that of the Government in terms of the Constitution. I have already alluded to those processes in sufficient detail.

- (ii) *Mr Zvekare* sought to put a spin to what the alleged utterances as quoted mean. In other words he sought to proffer his subjective interpretation to the said utterances. As already said in terms of s 70 (i) (b) of the Constitution the charge should be clear if the accused is to be guaranteed a fair trial. Clearly there is no reference to use of unconstitutional means in the said utterances.
- (iii) The reference to use of violent and unlawful means to remove either the President and or the Government is not borne out of the said utterances. The mere use of the words “fight” and “war” do not imply unlawful, illegal or unconstitutional means. As per Dictionary and Thesaurus the word “fight” as page 89 and 350 mean the following;
 - (i) As a noun - to contend, to strive for victory, a struggle, a battle OR as a verb – a battle, combat, contend, dispute, oppose, strive, struggle, wrestle, encounter, engage, handle, manoeuvre. Further as a noun is may still refer to affair, affray, action, battle, brush, combat, conflict, contest, duel, encounter, engagement, melee, quarrel, struggle, war, brawl, broil, riot, row, skirmish, fighting, pluck, pugnacity, resistance, spirit, temper etc.
 - (ii) “war” may be used in many context and as a noun – “enmity, contest” and at page 522 as a verb - “battle, campaign, combat, contend, crusade, engage, fight, strive”, or a noun – “hostility , strife, warfare”

An example may be the “fight” against Aids or to wage “war” against poverty. The point is therefore made that it is incorrect that the use of the words “the fight” and the “war” in the alleged words as quoted means that the accused would resort to unlawful or unconstitutional means.

- (iv) The alleged utterances should relate to and offend or violate the provisions of at s 22 (2) (a) (i) of the Criminal Code [*Cap 9:23*]. In other words it should be clear how it is said those alleged utterances amount to organizing or setting up, or advocating, urging or suggesting the organization or setting up of which group or body for purposes of overthrowing or attempting to overthrow the Government by unconstitutional means. I am unable to find the nexus or link or the clarity.

It is clear from the foregoing that the exception taken by the accused cannot be said to be without merit. Indeed politicians should use temperate language and be measured in their utterances without compromising their roles as political animals and enjoying their constitutional rights. However it would be a sad day for our criminal jurisprudence if people are to be tried on the basis of semantics. Our Constitution makes it clear that people should feel free to talk unless they act or threaten to act in an unconstitutional manner. Indeed acting unconstitutionally should go beyond the mere holding of a microphone by an excitable politician at some rally. What is critical and should constitute a criminal offence is the accused's state of mind which should be clear. A casual peep into the provisions of s 20(3)(a) to (d) of the Criminal Code [*Cap 9:23*] though relating to the offence of Treason confirms the position that citizens are guaranteed certain rights. It provides as follows:-

“20. Treason

(1) irrelevant

(2) irrelevant

(3) for the avoidance of doubt, it is declared that nothing in this section shall prevent the doing of anything by lawful constitutional means directed at –

(a) the correction of errors or defects in the system of Government or Constitution of Zimbabwe or the administration of justice in Zimbabwe; or

*(b) **the replacement of the Government or President of Zimbabwe**; or (my emphasis)*

(c) the adoption or abandonment of policies or legislation; or

(d) the alteration of any matter established by law in Zimbabwe.”

Lastly, I should now deal with the effect of the not guilty plea tendered by the accused in light of the findings I have made. I am indebted to both counsel for their written submissions after I had requested to be addressed on that point. It would appear both counsel are agreed as to the effect of the not guilty plea tendered by the accused once an exception has been upheld in terms of s 171(2) of the Criminal Procedure and Evidence, Act [*Cap 9:07*] in circumstances where the charge can not be amended or corrected.

The learned author John Reid Rowland in *Criminal Procedure in Zimbabwe supra* at 16-15 has this to say;

“The practical effect of taking exception to a charge is of little advantage to the accused. If the objection is well taken, the court may, if the accused is not thereby going to be prejudiced in his defence, allow the charge to be amended. In most cases the victory will be Pyrrhic. About the only situation where an exception or motion to quash a charge will have a permanent result satisfactory to the accused is where the charge was ultra-virus or the conduct constituted no offence.”

My finding *in casu* in upholding the exception is that the alleged utterances by the accused even if proved to be true disclose no offence. What compounds the State case is that the charge as it stands cannot be amended. It is fatally flawed. The charge is based on alleged utterances. Indeed the State cannot amend the utterances in the indictment and neither can the accused swallow them as it were. In terms of s 180(6) of the Criminal Procedure and Evidence, Act [Cap 9:7] the accused should be entitled to a verdict. It would be illogical for the not guilty plea to remain hanging in the air once the exception taken in terms of s 171(2) is upheld and the charge cannot be amended or cured. The accused should be entitled to a verdict at law and the court is enjoined to render a verdict.

In the result I make the following order;

It is ordered that,

1. The exception taken by the accused in terms of s 171(2) of the Criminal Procedure and Evidence, Act [Cap 9:07] be and is hereby upheld.
2. In light of the not guilty plea already tendered a verdict of not guilty and acquitted is entered.

*National Prosecuting Authority, counsel for the State
Mtetwa and Nyambirai, accused’s counsel*