REPORTABLE (2)

Judgment No. SC 7/11
Crim. Application No. 116/10

THE ATTORNEY-GENERAL v ROY LESLIE BENNETT

SUPREME COURT OF ZIMBABWE
HARARE, JULY 28, 2010 & MARCH 10, 2011

Before: CHIDYAUSIKU CJ, In Chambers, in terms of s 198(4) of the Criminal Procedure and Evidence Act [*Chapter 7:09*]

The respondent in this case (whom I shall refer to as "the accused" hereafter for convenience) was charged in the High Court firstly with possession of weaponry with the intention to commit an act of insurgency, banditry, sabotage or terrorism in contravention of s 10(1) of the Public Order and Security Act [*Chapter 11:17*]. Arising from that charge were alternative charges of –

(a) possession of dangerous weapons in contravention of s 11(1) of the Public Order and Security Act; or

(b) unlawful possession of prohibited firearms in contravention of s 24(1)(d) of the Firearms Act [*Chapter 10:09*]; or

(c) unlawful possession of firearms in contravention of s 4 of the Firearms Act.

On the second count, the accused was charged with incitement to commit, or conspiracy to commit, an act of insurgency in contravention of s 6 of the Public Order and Security Act.

At the close of the State case, the accused applied for a discharge or acquittal in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (hereinafter referred to as "the Act"), which provides that:

> "(3) 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."

The application found favour with the court *a quo* and the accused was found not guilty and discharged at the close of the State case.

The Attorney-General was dissatisfied with the outcome and now applies for leave to appeal against that finding. He makes this application in terms of s 198(4) of the, which provides in relevant part as follows:

> "(4) If the Attorney-General is dissatisfied with a decision in terms of subsection (3), he may with the leave of a judge of the Supreme Court appeal against such decision to the Supreme Court …".

In determining whether such leave should be granted or refused, the guiding factor is the prospect of success on appeal. Thus, if the appeal has prospects of success the leave to appeal should be granted, but if the appeal has no prospects of success such leave should be refused.

I will now examine the Attorney-General's prospects of success on appeal.

The proposed grounds of appeal are set out in the proposed Notice of Appeal attached to this application. They read:

"1. The learned trial court erred at law when it considered the pieces of evidence in isolation from the other thereby failing to take a holistic assessment of all evidence the totality of which established a *prima facie* case against the accused person. In other words, the existence of a bank account in the name of Peter Michael Hitschmann, the E-mail communication between Hitschmann and Roy Bennett as well as the fact that the said E-mails contain messages pointing to the funding of firearms acquisition all points to a conspiracy between the said Hitschmann and the respondent.

2. The learned trial court misdirected itself when it ruled that the authenticity of the E-mail printouts was solely dependent on the credibility of a computer expert when in fact the circumstances surrounding the discovery of the said E-mails was the most fundamental consideration which the learned trial court did not even bother to consider in its evaluation of evidence. In other words, the court failed to make a finding of fact as to where those E-mails actually originated. In the context of the said E-mails having been found in possession of an alleged co-conspirator Peter Michael Hitschmann, the fact that the latter disputed them called for the court to consider for a fact whether the E-mails were concocted or not. Had the court *a quo* approached the question with a view of making a finding of fact in that respect, the question of forensic evidence would have been a non-issue since the court eventually found Nyasha Matare's evidence generally impressive beyond reproach.

3. The court *a quo* misdirected itself when it reasoned that the police should have investigated whether Roy Bennett had a computer carrying the said E-mail address used in the recovered E-mails, when in fact all the witnesses who testified told the court that Roy Bennett had absconded to South Africa where he obtained asylum for three years. With the full knowledge of that fundamental fact, the learned Judge should not have made that gratuitous finding in favour of the accused who never disputed absconding at the time Hitschmann was arrested in 2006.

4. The learned trial court erred at law when it found the testimony of Mutsetse appalling only because he acknowledged lack of knowledge as to the existence of computer criminals known as hackers without

any tested evidence to the effect that the persons who discovered the E-mails on the person of Hitschmann are criminals known as hackers. By so doing, the learned Judge contradicted his earlier finding of fact that the mere fact that E-mails can be fake does not mean that the E-mails before the court as exhibit 13 are also fake. The ultimate finding that the E-mails are not admissible on the basis that they are capable of being faked was consequently outrageous in its defiance of logic.

5. The learned judge *a quo* made an error of law when he found that the authenticity of E-mails was predicated upon computer forensics and scientific detection, whereas the print-outs (*sic*) just like any other document is admissible on the basis of the credibility of the person who discovered the document. Where in (*sic*) this case the said E-mails were discovered in custody of a co-conspirator and ultimately admitted as executive statements at law, their contents should have been interpreted by the court with a view to find out if they had any link to real facts on the ground pointing at Roy Bennett as a co-conspirator. The failure by the court to read and interpret the contents of the E-mails deprived it of the benefit of meticulously finding the relevance of other pieces of evidence whose totality affirm the link of the respondent to the offence. These are the incitement messages targeting a microwave link at Melfort near Goromonzi, the confirmation of bank deposits in Manica, Mozambique, and the fact that Hitschmann actually possessed a myriad of weaponry ranging from prohibited firearms classified as dangerous by the Legislature to detonators and explosive devices."

The learned Judge in the court *a quo*, in a meticulous and well reasoned judgment, concluded that the accused had no case to answer and discharged him at the close of the State case. I have carefully perused the voluminous record in this case. I am satisfied that on the evidence led up to the close of the State case, the learned Judge could not have come to a different conclusion than he did. After the learned Judge ruled, quite correctly in my view, inadmissible the confessions of Hitschmann and the e-mails, there was literally no evidence linking the accused to the crimes he was charged with. In the circumstances, the prospects of success on appeal are non-existent.

In terms of the Criminal Procedure and Evidence Act, the State is required to serve on the accused a Summary of the State Case, setting out the witnesses that it intends to call and a summary of the evidence that they will give. Similarly, the defence is required to furnish the State with a Defence Outline, in terms of which the accused sets out his defence to the charge and the evidence he intends to lead.

The record reveals that at the close of the State case the State had not led the evidence it alleged in the State Outline it would lead. Some of the evidence not led was critical to the linking of the accused to the offence. This critical evidence for the State was either ruled inadmissible or the State witnesses told a different story from that alleged in the Summary of the State Case. In particular, the *viva voce* evidence of Peter Michael Hitschmann (hereinafter referred to as "Hitschmann") and Sipho James Makone (hereinafter referred to as "Makone") differed from the purported evidence set out in the Summary of the State case. This had the effect of destroying the State case. I shall deal with this aspect of the case later in this judgment.

Before dealing with the evidence in this case, I wish to set out the law.

The Law

Section 188(3) of the Criminal Procedure and Evidence Act [*Chapter 59*] is the predecessor to the present s 198(3) of the Act, in terms of which the court *a quo* discharge the accused. Section 188(3) provided as follows:

> "(3) 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 may return a verdict of not guilty." (the underlining is mine)

Section 198(3) is worded in identical terms, except for the substitution of the underlined word "may" by the word "shall". The Legislature, in substituting the word "may" with the word "shall", evinces the clear intention of the Legislature to remove the discretion from the court of deciding whether or not an accused should be placed on his defence in the circumstances set out in s 198(3) of the Act.

Previous authorities have differed on whether a court has such a discretion or not. The Legislature has spoken and the dispute determined beyond doubt. The law as it stands is that the court is bound to discharge an accused where it is satisfied that there is no evidence that the accused committed the offence charged in the indictment, summons or charge.

What constitutes no evidence that the accused committed the offence charged in the indictment, summons or charge has been the subject of interpretation by this Court in a number of cases. A perusal of those authorities reveals that there is no evidence that the accused has committed the offence charged in the indictment, summons or charge in the following circumstances –

(i) where there is no evidence to prove the essential elements of the offence (see *Attorney-General v Bvuma and Ano* 1987 (2) ZLR 96 (SC) at 110 E-G);

(ii) where there is no evidence on which a reasonable court, acting carefully, might properly convict (see *Attorney-General v Mzizi* 1991(2) ZLR 321 (SC) at 322B); and

(iii) where the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it (see *Attorney-General v Tarwirei* 1997(1) ZLR 575 (S) at 576).

The State agrees with the above proposition. Indeed counsel for the State cited the above authorities. The respondent's stance seems to be that the above circumstances are correct but not exhaustive. However, counsel for the respondent did not cite any authority setting out any other circumstances.

I will now proceed to examine the evidence.

The Evidence

The main thrust of the Attorney-General's case is that the court *a quo* assessed the evidence piecemeal and failed to consider the overall effect of the evidence led. The contention by the Attorney-General is that the overall effect of the existence of a bank account in the name of Hitschmann in Mozambique and the contents of the e-mails established a *prima facie* case against the accused. This is the gist of the first ground of appeal set out in the proposed Notice of Appeal. The contention is enforced in para 4 of the applicant's statement in support of the application. It reads:

"4. It is submitted that the Honourable Court *a quo* misdirected itself by assessing evidence in that matter (manner?) to an extent that the court ultimately assessed pieces of evidence in isolation thereby failing to

> adopt a holistic analysis of circumstantial evidence adduced by the State. The law surrounding assessment of evidence proves that the trial court should not adopt a piecemeal approach in evaluating the weight of evidence. *In casu*, the mere fact that Sipho James Makone went to Mozambique and confirmed the existence of the bank account in the name of Peter Michael Hitschmann, and obtained a bank statement showing deposits confirms that surely a bank account exists in the name of Hitschmann. In his testimony, Hitschmann confirmed that he holds a bank account in Mozambique, although he was at pains to explain why he holds the bank account in Mozambique. Sipho James Makone stated that he went to Mozambique not only to verify what Hitschmann himself had pointed out during interrogation, but to confirm the E-mail communication between Roy Bennett and Peter Michael Hitschmann. Makone's testimony can thus not be faltered (faulted?) because he did not bring the said bank statement from Mozambique."

I do not accept that the court *a quo* misdirected itself by examining different aspects of the evidence separately. In fact, this is how evidence is generally evaluated. It is only after individual assessment of evidence that a court considers the overall effect of that evidence. It is quite clear from a reading of the judgment that the learned Judge analysed the evidence piecemeal, but concluded that the overall effect of the evidence examined piecemeal was that it failed to establish a *prima facie* case or a case for the accused to answer at the close of the State case.

I will now turn to consider the evidence led, or attempted to be led, by the State.

(i) Hitschmann's confession

The State sought to have admitted as evidence a confession by Hitschmann to the police. The law on the admissibility of such a statement is very clear. No confession made by one person shall be evidence against another person. Some authorities suggest that a confession that constitutes an executive statement in a

conspiracy charge is admissible against a co-conspirator. I shall revert to that aspect of the matter later when I deal with the admissibility of the e-mails. It is the e-mails that the State contends are executive statements. It was not the State's contention that Hitschmann's warned and cautioned statement was an executive statement.

Hitschmann allegedly made a confession to the police, in which he stated that the accused was the provider of the finance with which the illegal weapons were purchased in furtherance of the common purpose of committing the offences charged. That statement most probably provided the basis for the allegations in the State Outline that Hitschmann would state in his *viva* voce evidence that the accused provided money for the purchase of the weapons. The record shows that Hitschmann denied that in his *viva voce* evidence.

Hitschmann's confession was ruled inadmissible by the learned Judge. In doing so, the learned Judge relied on s 259 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which provides as follows:

> "**259 Confession not admissible against other persons**
>
> No confession made by any person shall be admissible as evidence against any other person."

Given the unequivocal language of this section, there is no way the learned Judge could have admitted as evidence the confession of Hitschmann. Indeed, it has not been argued in this application that the court erred in holding the statements inadmissible. The probative value of this confession in support of the State case is non-existent. The learned Judge's conclusion that the confession of Hitschmann is of

no value to the State case cannot but be correct. Consequently, the probative value of the confession to the State case is zero.

(ii) Hitschmann's *viva voce* evidence

The next aspect of the evidence of Hitschmann which the learned Judge considered was Hitschmann's *viva voce* evidence. In court Hitschmann denied that the accused was the main financier of the criminal conduct alleged against the accused. In effect he denied any criminal conduct on his part or on the accused's part. Hitschmann was called as a State witness. His evidence, if anything, served to destroy the State case. The fact that Hitschmann was declared a hostile witness does not assist the State case in any way. Hitschmann's *viva voce* evidence adds zero to the State case.

(iii) The e-mails as evidence

The State case was that certain e-mails, Exhibit 13, were downloaded from Hitschmann's computer. Hitschmann denied that Exhibit 13 was downloaded from his computer. To establish that the e-mails were downloaded from Hitschmann's computer the State called a Ms Matare, who testified that she did download some documents from Hitschmann's computer. She did not read the contents of the documents she downloaded. The court found her to be a credible witness. Accepting her evidence to be truthful, its value to the State case is very limited. It only establishes that certain documents were downloaded from Hitschmann's computer. It does not establish that the e-mails, Exhibit 13, were genuine or authentic. The e-mails were accordingly admitted at that stage of the trial on condition that the State would establish through other evidence that Exhibit 13

were genuine e-mails from the accused to Hitschmann. The court simply admitted Exhibit 13 at that stage of the proceedings as documents downloaded from a laptop computer belonging to Hitschmann. The court reserved the finding on whether the e-mails were genuine or not until after the State had led evidence to establish that the e-mails were genuine e-mails from the accused to Hitschmann. I pause here to make the following observation. Whenever the State seeks to produce a statement as evidence, and the production of that statement is challenged, it immediately assumes the *onus* of proving firstly that the statement was made as a matter of fact by the alleged author of the statement and secondly that the legal requirements governing the admissibility of such a statement have been complied with. The former is a question of fact and the latter a question of law. Thus, *in casu*, the State had the *onus* to prove that the e-mails were as a matter of fact sent by the accused. It is only after the State had established that the e-mails were sent by the accused to Hitschmann that the question of their admissibility as executive statements would arise. The State failed to clear the first hurdle of proving as a matter of fact that the accused sent the e-mails. Consequently, the issue of their admissibility as executive statements fell away. As I have already stated, the court *a quo* provisionally admitted the e-mails on condition their genuineness would be proved later.

In this regard the learned Judge had this to say at p 9 of the cyclostyled judgment (Judgment No. HH-79-2010):

> "As previously stated in my earlier ruling, the court's admission of the e-mails was conditional upon the State being able to prove that the questioned e-mails are genuine and authentic. The State's failure to prove the authenticity of the e-mails automatically renders the e-mails inadmissible. For that reason alone the court is not obliged to consider the contents of the e-mails and the question of interpretation does not arise."

This approach by the court *a quo* is supported by authority. See *R v Victor and Anor* 1965 (1) SA 243.

When the State closed its case, the court held that it had not led credible evidence to establish that the accused had as a matter of fact sent the e-mails, Exhibit 13, to Hitschmann. The court accordingly ruled them inadmissible and that they could not be used as evidence for the State. Whether the court was correct in excluding the e-mails as evidence is dependent on whether the court correctly assessed the evidence of Mutsetse and Makone. I will now turn to examine whether the court *a quo* was correct in concluding that the evidence of Mutsetse and Makone did not establish that the accused was the author of the e-mails.

With the exclusion of the e-mails as evidence, the case for the State literally collapsed and the State was left with no leg to stand on.

(iv) The evidence of Mr Mutsetse

Perekayi Denshard Mutsetse ("Mutsetse") was called by the State as an expert witness to establish that the e-mails downloaded form Hitschmann's computer were authentic and represented communication between Hitschmann and the accused. The learned Judge's assessment of Mutsetse as a witness appears on p 9 of the cyclostyled judgment:

> "In his testimony Mr Mutsetse made it clear that he was only contacted by the police in 2009, about three years later, when it was now virtually impossible to trace the origins of the e-mails in question. That being the case, he was constrained to make the valid concession under cross-examination that he could not establish the source or destination of the disputed e-mails. That concession virtually destroyed any link between the accused and the questioned e-mails." (the underlining is mine)

Further down on p 9 of his judgment the learned Judge made the following scathing remarks about this witness:

> "It is needless to say that Mr Mutsetse was an appalling witness. He was argumentative and arrogant in the witness stand. When he could not stand the heat he asked to be excused saying that he had some business to attend to in Mozambique. The Court refused to let him off the hook, pointing out that every other witness had some business to attend to.
>
> The witness did not take kindly to that ruling and when eventually excused after exhausting his evidence he had a parting shot for the Court when he retorted 'Thank you My Lord for wasting my time'. The Court chose to turn a deaf ear to his contemptuous behaviour seeing that he had been badly bruised and traumatised under cross-examination."

A reading of the evidence in the record clearly justifies the learned Judge's assessment of Mutsetse's evidence.

In any event, an appellate court is in no better position to assess the demeanour of a witness. It is only on those rare occasions where the trial court's finding is not supported by the record that an appellate court interferes with such a finding. *In casu* the record supports the conclusion of the court.

Apart from this adverse finding on Mutsetse's credibility, his evidence as an expert witness was demonstrated to be palpably unreliable. When an expert gives evidence, it is critical that the expert's evidence provides the factual basis of his opinion so that the court can decide whether or not to accept the expert's opinion. Apart from his dubious qualifications and experience entitling him to be considered as an expert, the factual basis of Mutsetse's opinion that the e-mails were sent by the accused to Hitschmann was demonstrated to be fallacious.

Mutsetse's evidence was that the e-mails, Exhibit 13, had the following three features –

(1) the e-mails reflected the name of the service provider, which was hashmail.com;

(2) the bottom beach bore the characteristics https/; and

(3) the e-mails bore the characteristics "From" and "To" denoting the names of the sender and the receiver.

Mutsetse's evidence in chief was that once these features are on an e-mail then the e-mail must be genuine and must be concluded as having been sent by the person and to the person indicated on the e-mail. On this basis he concluded that the e-mails were sent by the accused to Hitschmann as reflected on the e-mails. When it was demonstrated in court that an e-mail can bear the above characteristics and still be fake, he made the concession that his opinion was inaccurate. No court could have accepted the opinion of Mutsetse as reliable in the face of a clear demonstration that the basis of such an opinion is fallacious and the expert's own admission that his opinion was based on false premises.

In the result, the court *a quo* was correct in concluding that the evidence of Mutsetse did not establish that the e-mails were genuine and therefore admissible as executive statements. Accordingly, the court was entitled to exclude Exhibit 13 as inadmissible evidence. Once it is accepted that the e-mails were properly excluded as evidence, there is little else to support the State case.

(v) The evidence of Makone

It was also argued for the State that the evidence of Makone, who was the investigating officer in this case, taken together with the contents of the e-mails, confirms that the e-mails were genuine.

I am not persuaded by this submission. If Makone had given his *viva voce* evidence along the lines suggested in the State Outline, and the court *a quo* had found his evidence credible, the court most probably would have held that the e-mails were genuine and admitted them as executive statements. However, the *viva voce* evidence of Makone departed materially from the State Outline. He stated that he had travelled to Mozambique and that all he was able to retrieve from Mozambique was the bank account number of Hitschmann. Hitschmann never disputed that he had an account in a Mozambican bank. Makone never testified that he secured a bank statement showing that money was ever deposited into Hitschmann's account as alleged in the–mails. There was no bank statement of Hitschmann showing that any money was ever deposited into or withdrawn from that account. If the State had established by way of bank statements that $5 000 was deposited into the account of Hitschmann, then that evidence could be regarded as evidence *aliunde* proving that the e-mails were genuine. Simply establishing that Hitschmann had a bank account in Mozambique falls far short as evidence *aliunde* proving that the e-mails were genuine. The difficulties that Makone and the State had in securing such evidence are understandable. Banks, generally speaking, do not disclose information on their clients' accounts to third parties.

So the effect of all this is that the bits and pieces of evidence which the Attorney-General sought to rely on individually amounted to zero in their probative value. When you add zero to zero *ad infinitum* the sum total is always zero. The various pieces of evidence led by the State do not, either separately or cumulatively, constitute evidence on which a reasonable court, acting carefully, might properly convict the accused.

I accept as correct the proposition that the court "must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken", per DAVIS AJA in *R v De Villiers* 1944 AD 493 at 508-509. I also accept that the court:

> "… must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn",

as was stated by DAVIS AJA in *R v de Villiers supra* at 509.

In casu, each of the circumstances relied upon by the State has very little, if any, probative value. Taken together, the various circumstances do not make a case for the accused to answer.

In brief, the Attorney-General was expected to produce evidence to the effect that the accused was the financier of the illegal purchase of weapons. There is no admissible and reliable evidence that he did so. The confessions of Hitschmann to the police which tended to suggest that the accused was the financier of the illegal project were ruled inadmissible and therefore of no value to the State. The e-mails

which implicated the accused were correctly ruled inadmissible because the State failed to establish as a matter of fact that the accused sent the e-mails to Hitschmann. The evidence of Makone did not establish any facts from which any inference implicating the accused or confirming the e-mails as genuine could be drawn. I entertain no doubt that the evidence led does not amount to any evidence upon which a reasonable court, acting carefully, could convict the accused. The court may have had the right accused but the admissible evidence does not add up.

In the result, I agree with the conclusion of the learned Judge in the court *a quo* that this was a proper case in which a discharge in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] was appropriate. I see no prospect of the Supreme Court coming to a conclusion different from that of the court *a quo*.

As there are no prospects of success on appeal, leave to appeal against the decision of the court *a quo* is refused.

Attorney-General's Office, applicant's legal practitioners

Mtetwa & Nyambirai, respondent's legal practitioners