THE STATE

Versus

SIDINGIMUZI NCUBE

And

TYSON RUVANDO

And

GODFREY MAKUVADZE

And

LADISLOUS TAMBOONEYI

And

ADMIRE RUBAYA

And

LADISLOUS TINACHO

And

STANLEY CHINYANGANYA

And

TIMEON TAVENGWA MAKUNDE

HIGH COURT OF ZIMBABWE
MUSAKWA J with Assessors Mr E. Mashingaidze & Mr M. Ndlovu
BULAWAYO, 23, 24 NOVEMBER 2020 & 12 NOVEMBER 2021

Criminal Trial

T. R. *Takuva* and K. *Ndlovu*, for the state
C. *Ndlovu*, for 1st, 2nd, and 3rd accused
M. *Mahaso*, for 4th and 6th accused
T. *Mpofu*, for 5th accused
M. *Moyo*, for 7th accused
B. *Mufadza*, for 8th accused

MUSAKWA J: The accused persons are charged with theft as defined in s113 (1) or alternatively defeating or obstructing the course of justice as defined in s184 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. All the accused persons pleaded not guilty. At the same time, the fifth, seventh and eighth accused also excepted to the charges.

The indictment is framed as follows:

"THEFT" as defined in s113 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

In that on the 10th of August 2018 and at ZRP Plumtree, Bulilimangwe District the accused persons one or all of them unlawfully took property namely 14,710 kilogrammes of gold knowing that ZIMRA the lawful custodian is entitled to possess or control the said property or realising that there is a real risk or possibility that ZIMRA may be so entitled and intending to deprive ZIMRA permanently of possession and control, or realising that there is a real risk or possibility that they may so deprive ZIMRA of its possession or control.

ALTERNATIVELY

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE as defined in s184 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

In that on the period extending from the 7th day of July 2018 to the 10th of August 2018 and at Plumtree, Bulilimangwe District, the accused persons one or all of them unlawfully by an act or omission caused judicial proceedings to be defeated or obstructed, intending to defeat or obstruct the proceedings or realising that there is a real risk or possibility that the proceedings may be defeated or obstructed, that is to say accused persons unlawfully made statements written or oral and facilitated adducing of false evidence in a case of unlawful possession of gold and smuggling of 14,710 kilogrammes of gold against Jefat Chaganda which was pending before Plumtree Magistrate Court, intending to defeat and obstruct the course of justice thereby causing acquittal of Jefat Chaganda and subsequent release of 14, 710 kilogrammes of gold to Lovemore Sibanda proprietor of Qalo Mining Syndicate Gwanda who was not the lawful owner of the said gold."

Summary of Allegations by the State

The summary of state case alleges a conspiracy between the accused persons. Jefat Chaganda was arraigned on a charge of smuggling 14,710kg of gold at Plumtree. The first accused then roped in Vusumuzi Sayi and Kailos Moyo to secure a registered miner (Lovemore Sibanda) who would lay claim to the gold that had been seized by Zimbabwe Revenue Authority officers. The fifth accused was engaged to represent Jefat Chaganda. It is alleged that false evidence was placed before the trial court with the knowledge of the seventh and

eighth accused. The fourth accused gave false evidence when he was cross-examined by the fifth accused. In the process documents were referred to and not made part of the record. The existence of a notice of seizure issued in respect of the gold by ZIMRA was suppressed by the seventh accused. When Lovemore Sibanda was engaged and asked to claim the seized gold as his, he was informed by the third accused not to instruct his lawyer as the fifth accused who is a friend and an ex-class mate of the eighth accused had been engaged. Lovemore Sibanda gave Jefat Chaganda US$3 000 to pay to the fifth accused as deposit for legal fees. On 23 July 2018 he met the fifth accused at Plumtree Magistrates Court where the latter made copies of mining documents.

During trial at Plumtree Magistrates Court, the fourth accused allegedly gave false evidence whilst being cross-examined by the fifth accused. The seventh and eighth accused, who were aware of the false testimony adopted an armchair approach and did not view the documents that were referred to during the cross-examination. The documents were not made part of the record of proceedings.

On 24th July 2018 an agreement between Lovemore Sibanda and Jefat Chaganda was prepared by the fifth accused. An amount of US$170 000 would be paid to the fifth accused after the gold had been sold. On 10th August 2018 when Lovemore Sibanda went to Fidelity Printers and Refiners Bulawayo office where the gold was sold, the fifth accused was in attendance and remained in the front office. After the sale they went to Lovemore Sibanda's home where Jefat Chaganda offered the fifth accused US$60 000. The fifth accused declined the tendered amount, stating that the seventh and eighth accused deserved their shares. The fifth accused contacted the seventh accused whom he promised US$40 000 and also indicated that the eighth accused would get US$60 000. Consequently the fifth accused was given US$122 000 together with sums of US$40 000 and US$60 000 which were said to be for the seventh and eighth accused. Lovemore Sibanda was paid US$30 000.

The state also intends to lead evidence on mobile communication call history. The call history shows communication between Jefat Chaganda, the fifth and seventh accused, among others during the relevant period.

Summary of the Exceptions

The Fifth Accused

The fifth accused contends that the allegation of theft arises from completed proceedings in the Magistrates Court. Such proceedings have not been set aside. As such, no proceedings can be instituted which attack the correctness of the Magistrates Court decision. The present charges are aimed at reviewing the proceedings before the Magistrates Court. The charge and summary of state case do not disclose the essential elements of theft. As such the averments made do not disclose an unlawful taking by the fifth accused. The gold in question was taken pursuant to a lawful order of court. Consequently ZIMRA was not the custodian of the gold as it was not entitled to possess it. The conduct of the fifth accused could not deprive Zimbabwe Revenue Authority of the gold.

Similar averments like those made against the charge of theft in paragraphs 1.1-1.5 are made against the alternative charge as well. Additionally it is contended that the charge amounts to an unwarranted interference with the fifth accused's right to defend his clients and to practice his profession. Thus the fifth accused is under no obligation to account for the manner in which he represented his client. He cannot be liable for articulating his client's defence which defence did not emanate from him. The lawful order made by the court regarding the disposal of gold cannot found a charge against the fifth accused. The charge amounts to abuse of authority on the part of the Prosecutor General. Thus the charge is bad at law as it does not disclose an offence.

The Seventh Accused

Regarding the theft charge, the background is that one Jefat Chaganda was arrested on a charge of smuggling gold which gold was seized by ZIMRA. The seventh accused then prosecuted Jefat Chaganda for the offence at Plumtree Magistrates Court. The eighth accused who presided over the matter discharged Jefat Chaganda and ordered the release of the gold to Lovemore Sibanda. The proceedings in that matter have not been set aside. As such, no criminal charges can be sustained unless those proceedings have been set aside. There can be no valid charge of theft where a court ordered the release of the gold. The essential elements of theft are not present.

In respect of the alternative charge, similar averments are made as in the charge of theft regarding the validity of the order made for the release of the gold. In the prosecution of Jefat

Chaganda, the seventh accused opposed the application for discharge at the close of the state case as he expected Jefat Chaganda to be placed on his defence. That is why the state filed an application for review (HC2397/18) in which is sought the reversal of the eighth accused's decision to discharge Jefat Chaganda at the close of the state case. Thus a charge of defeating or obstructing the course of justice cannot be sustained considering that the Prosecutor General is challenging the acquittal of Jefat Chaganda on the basis that a *prima facie* case had been established against him. Essentially in seeking a review of the eighth accused's decision the state is re-affirming the good job that was done by the seventh accused. Against the backdrop that the review proceedings have not reversed the eighth accused's decision, the charge of defeating or obstructing the course of justice remain invalid. The seventh accused thus seeks that he be acquitted.

The Eighth Accused

The eighth accused contends that since the review proceedings against his decision are still pending, their outcome cannot be predicted. Assuming the application for review does not succeed it would be absurd to subject him to the present charges. In the review application, no allegation of impropriety has been made against him. An error of judgment by a judicial officer is remedied by way of appeal or review.

The eighth accused makes reference to the summary of state case and contends that there is no witness who incriminates him on the charges. Assuming there would be such witnesses their evidence would be pure hearsay. An accused person is entitled to be informed of the charges against him in sufficient detail to enable him to answer to those charges. Thus the accused cannot be expected to answer to charges which are not supported by any evidence. If the allegation is that the trial prosecutor withheld evidence from the court there is no way the eighth accused could have known about that.

Submissions Made

Mr *Mpofu* submitted that the charges arise from the fifth accused's defence of a client that was acquitted. The proceedings in question have not been set aside. Thus there is a rebuttable presumption of the validity of such proceedings. Review proceedings that have been initiated do not allege the proceedings in the Magistrates Court were a charade. Assuming that the state succeeds in the review proceedings, the matter would proceed to the defence stage. In the present matter it would be a juridical impurity that conduct that is in accordance with an

extant order is considered criminal. The High Court cannot interfere with extant proceedings save on appeal or review.

Concerning the theft charge Mr *Mpofu* submitted that the essential elements are not met. This is because the gold was disposed of in terms of a court order. Thus there was no unlawful taking of the gold. Zimbabwe Revenue Authority was not entitled to the gold. Once the accused was acquitted there was no need for a court application for release of the gold. The gold was not capable of being stolen.

Mr *Mpofu* further submitted that the prosecution of the fifth accused is an abuse of authority. This is because a legal practitioner has a duty to represent a client to the best of his ability. In support thereof he cited the case of *Frederick Charles Mutanda v The State and Kudakwashe Jarabini* SC 55-13.

Finally Mr *Mpofu* submitted that once the exception is upheld, the accused should be acquitted. In support of this submission he cited s180 (6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Regarding the first charge, Mr *Moyo* submitted that the gold was released pursuant to an order of court. Therefore the essential element of unlawfulness cannot be sustained. As regards the second count, he submitted that there is a review application in which the State impugns the decision of the eighth accused. In that application there is no allegation of fraud or bias. As such the State is commending the seventh accused for having established a *prima facie* case. Thus it is surprising how it can be alleged that the seventh accused defeated the course of justice if he proved a prima facie case. He also prayed for the acquittal of the seventh accused.

Mr *Mufadza* associated with the submissions made on behalf of the fifth and eighth accused. He further submitted that the framing of the charges does not disclose a case against the eighth accused. It is not enough for the State to make blanket allegations by alleging a conspiracy in its summary of case. In support thereof he referred to *S v Sithole* 1996 (2) ZLR 575. He further contended that there is no single witness who can support the conspiracy. There are only three witnesses whose evidence may be relevant to the eighth accused. Mr *Mufadza* further submitted that it does not follow that where a judicial officer errs he must be charged with a criminal offence. Any evidence regarding corruption amounts to hearsay. Thus the eighth accused is embarrassed in his defence. Mr *Mufadza* further submitted that the charges

against the eighth accused are an attack on judicial independence. In this respect he referred to *Danha v Mudzongachiso and Another* HB 20-18. Mr *Mufadza* also prayed that the eighth accused be acquitted if the exception is upheld.

Mr *Ndlovu* for the State submitted that a charge can be excepted to on two grounds-

(a) That it does not disclose an offence, or
(b) That it lacks sufficient particulars to conform with s146 of the Criminal Procedure and Evidence Act.

Placing reliance on *S v Sithole supra*, Mr *Ndlovu* submitted that in determining whether the charge discloses an offence regard should be had to both the indictment and summary of state case. Thus if the charge and state summary in the present matter are read together, they both speak to a conspiracy relating to pre-trial, during trial and post-trial of Jephat Chaganda.

Mr *Ndlovu* further submitted that both charges are known at law. The roles played by each accused are outlined. The accused are accused of irregularly dealing with an exhibit. Assuming the review proceedings against Jephat Chaganda succeed, that would not resolve the present charges. As such the claim by the excipients to the effect that the proceedings that gave rise to the charges were irregular amounts to a defence. There is nothing defective about the charges. The effect of excepting to the charges is of little advantage to the accused. This is because the charges disclose offences. If a charge is defective the State can be ordered to amend it.

The Law

Arising from these exceptions, two issues arise for consideration. The first issue relates to the requirements of a charge. The second issue relates to the requirements of an exception.

The Requirements of a Charge/Indictment

Section 146 (1) of the Criminal Procedure and Evidence Act prescribes the requirements of a valid charge. The particulars of a charge or indictment are:

(a) Time and place where the offence was committed.
(b) The person against whom the offence was committed.
(c) The property in respect of which the offence was committed.

The above particulars must be set forth with sufficient detail to inform the accused as to the nature of the charge. Additionally, in terms of s146 (2) unless provided elsewhere the offence shall be described in the words of any enactment creating it or in similar words.

Objections to a Charge

An objection to a formal defect that is apparent on a charge is taken by way of exception in terms of s170 Criminal Procedure and Evidence Act. Thus where an accused is not prejudiced in his defence, a court may order that a charge be amended in terms of s170 (3). An accused may except and plead at the same time and the court has discretion on which of the two shall be disposed of first. An exception to a defective charge/indictment can only be taken before pleading to the charge or indictment. In this respect see *R v Menzes* 1957 R & N 307 (SR). As stated by Reid Rowland in Criminal Procedure in Zimbabwe, the usual ground for excepting is that the charge does not disclose an offence. This was one of the grounds of exception in the present matter.

Instead of excepting, an accused may apply to quash the indictment. This is in terms of s178 which provides that-

> "(1) The accused may, before pleading, apply to the court to quash the indictment, summons or charge on the ground that it is calculated to prejudice or embarrass him in his defence.
>
> (2) Upon an application in terms of subsection (1), the court may quash the indictment, summons or charge or may order it to be amended in such manner as the court thinks just or may refuse to make any order on the application.
>
> (3) If the accused alleges that he is wrongly named in the indictment, summons or charge, the court may, on being satisfied by affidavit or otherwise of the error, order it to be amended."

Concerning exception, Reid Rowland states that there is little benefit an accused may derive from such procedure. This is because a court may usually order that the charge/indictment be amended. However, the same author states that the only time a permanent or satisfactory result might be derived is where the charge/indictment is *ultra vires* or the conduct of the accused does not constitute an offence. It can also be noted that even when an application to quash an indictment is made, a court may order that the indictment be amended as opposed to granting the application, depending on the issues at hand.

Analysis

In the present matter, there is no doubt that the two counts constitute valid offences in accordance with the provisions creating them. Although it was argued in some instances that the indictments do not disclose any offences, such contention is untenable. This is because theft and defeating or obstructing the course of justice are valid offences in terms of the Code. There was no argument that the indictments lack material averments as to particularity regarding the conduct complained of. Therefore it was ill-conceived on the part of the accused persons to object to the charges by way of exception. Thus there appears to be no benefit to be derived from the motions taken apart from stalling the proceedings.

On the face of it, it would appear unusual that a legal practitioner, a prosecutor and magistrate can be charged with the theft of an exhibit that was the subject of a trial in which all three featured. This is especially so if one considers that theft entails unlawful taking. One only has to go to the definition of "take" in the Code. Whether the elements of the offence are met are a matter of evidence. In the event of such evidence not proving the essential elements of the offence, the accused's recourse would be to apply for discharge at close of the case for the state. See for example *Attorney-General v Bvuma and Another* 1987 (2) ZLR 96 (S). Notwithstanding that the allegations against the accused persons arise from the performance of duties in their respective professional capacities, they cannot claim immunity from prosecution on that basis. It would be an abdication of responsibility on the part of those tasked with law enforcement and the administration of justice if they were to absolve legal practitioners, prosecutors and judicial officers from criminal prosecution on the basis that whatever they do in the course of their duties cannot be questioned. What matters ultimately is whether the allegations are proved beyond a reasonable doubt.

It may well be that a wrong charge was preferred in the first count, but the prerogative of preferring a charge rests with the Prosecutor General. A wrong charge, as long as it discloses an offence cannot be challenged by way of exception. A wrong charge can only result in an acquittal of the accused person by reason of failure to prove the commission of the offence. A wrong charge cannot prevent an accused person from pleading. In the present matter, it appears that any reservations regarding the viability of the first count were redressed by preferring an alternative charge in the form of the second count.

The real issue appears to be that the accused are embarrassed by the indictment. It is understandable on account of the unique status of the accused persons. Ordinarily a legal

practitioner is not expected to be charged with a crime arising from defending a client. The same applies to a prosecutor-he is not expected to be charged with a crime arising from his prosecution of an accused person. And in the case of a magistrate, he is ordinarily not expected to be prosecuted for making a decision in favour of an accused person. I make these observations subject to the circumstances of each particular matter. Defeating the course of justice and corruption related offences can arise from defending, prosecuting or presiding over a criminal matter though.

But the accused persons adopted the wrong procedure in challenging the indictments. Their recourse was to apply for quashing of the indictments if they felt that they are embarrassed in their defences. This is in terms of s 178 of the Criminal Procedure and Evidence Act.

The exceptions taken do not avail the accused persons because ultimately the intention was to have the indictments quashed. Such motions could only have been taken before pleading to the indictments and through applications to quash the indictments.

Disposition

Accordingly, there being no basis for excepting to the indictments, the exceptions are hereby dismissed.

Gonese and Ndlovu, 1st, 2nd and 3rd accused's legal practitioners
Tanaka Law Chambers, 4th and 6th accused's legal practitioners
Rubaya and Chatambudza, 5th accused's legal practitioners
Mathonsi Ncube Law Chambers, 7th accused's legal practitioners
Mufadza and Associates, 8th accused's legal practitioners