THE STATE
versus
ROY LESLIE BENNNET

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 9th November 2009 and 11th November 2009

ASSESSORS: 1. Mr. Musengezi
2. Mr. Chivanda

Mr. Tomana, for the State
Mrs. Mtetwa, for the Defense.

BHUNU J: The accused is charged with possessing weaponry for insurgency, banditry, sabotage, or terrorism in contravention of s 10 (1) of the Public Order and Security Act [*Cap 11: 17*] Arising from that charge are alternative charges of:

1. Possession of dangerous weapons in contravention of s 11 (1) 0f the Public Order and Security Act [*Cap 11: 17*].or
2. Unlawful possession of prohibited firearms in contravention of s 24 (1) (d) of he firearms Act [*Cap 10:09*] or
3. Unlawful possession of firearms in contravention of s 4 of the firearms Act [*Cap 10: 09*].

In the second count he is charged with incitement to commit insurgency in contravention of s 6 of the Public Order and Security Act [*Cap 11: 17*].

Admittedly these are very serious offences punishable by death or life imprisonment. Not surprisingly the proceedings are mired in controversy and emotions are highly charged There is therefore need to proceed with extreme caution and due diligence

I would at the outset mention in passing that at the beginning of these proceedings we were advised that there were foreign observers who wanted to be introduced to members of the Court. While our courts are open to members of the public, we accord no special treatment to any class of persons regardless of their station or purpose in life.

We operate in an adversarial criminal justice system where a criminal trial is akin to a contest between the state and the accused and the function of the Court is to a large extent that of a referee or umpire.

The Court is therefore keenly aware, that like in any other contest the audience or spectators attend Court for various reasons, some are in support of one side or the other, some are neutral curious observers and yet others pretend to be neutral when in actual fact they are not disinterested curious observers.

Members of the public are nevertheless free to attend our proceedings without let or hindrance not withstanding their purpose for attending Court In the ordinary run of things, the Court does not want to know why any member of the public may be attending Court for fear that their purpose for attending Court might rub onto its shoulders thereby undermining the independence of the judiciary and impartiality.

Impartiality, equality and fairness are the bedrock upon which our criminal justice system firmly rests. Justice and fairness demands that if foreign observers are to be accorded the privilege of being introduced and rubbing shoulders with members of the judiciary the same privilege must be accorded to local observers and audience and vice versa. This is however, unusual if not ridiculous. For instance it is scandalous that members of the accused's family may strive to introduce themselves to the bench. The same applies to state functionaries and foreign observers who are not directly involved in these proceedings. This explains why the Court turned down the request for the introduction to the bench of any observers, foreign or otherwise.

Unfortunately, the presence of a high profile unusual audience appears to have had an unsettling effect on both counsels. The Court has noted a marked tendency to play to the gallery. Counsels appear to have lost their usual composure. They have uncharacteristically resorted to being quarrelsome and argumentative .as they try to outwit each other in the glare of an unusual audience. They have tended to launch vicious personal attacks on each other.

There is no gainsaying this is unacceptable deplorable conduct. Both counsels are very senior respectable members of the profession. They both know what is required of them I can only remind them of the need to conduct these proceedings in a composed, ethical and civilized manner. I am sure counsel will take heed for the good of the due administration of justice.

I now turn to consider the preliminary issues before me on the merits.

While preparing judgment on the preliminary issues I discovered that sections 5 to 13 of the Public Order and Security Act [*Cap 11:17]* which form the bulk of the charges against the accused were repealed by s 282 of 2004. Upon perusing the papers I realized that the alleged offences had been committed between 2002 and 2006 and the proceedings were saved by s 17 of the interpretation Act which provides that:

"**17 Effect of repeal of enactment**

(1) Where an enactment repeals another enactment, the repeal shall not—

(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

(*b*) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or

(*d*) affect any offence committed against the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect thereof; or

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy shall be exercisable, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.

(2) Nothing in subsection (1) shall be taken to authorize the continuance in force, after the repeal of an enactment, of any statutory instrument made under that enactment.

(3) Where an enactment repeals and re-enacts, with or without modification, any provision of any other enactment, all proceedings commenced under any provision so repealed shall be continued under and in conformity with the provision so repealed."

Upon discovery of this occurrence I consulted both counsels in chambers and they both confirmed that the charges were in order.

The state has now applied for the striking out of the accused's defense outline on the basis that it does not comply with s 66 of the Criminal Procedure and Evidence Act [*Cap 9:07*]

On the other hand the defence has countered by applying for the striking out of portions of the summary of State case arguing that they are not in compliance with section 188 of the Criminal Procedure and Evidence Act [*Cap 9:07*].

Despite spirited submissions from both counsels my perusal of the sections relied upon by both parties shows that none of the parties is entitled to the relief sought in their respective applications

Section 66 (6) provides for the parties' respective duties and obligations in respect of the provision of the state outline or defence outline. It reads:

"(6) Where an accused has been committed for trial in terms of subsection (2) there shall be served upon him or her in addition to the indictment and notice of trial—

(*a*) a document containing a list of witnesses it is proposed to call at the trial and a summary of the evidence which each witness will give, sufficient to inform the accused of all the material facts upon which the State relies; and

(*b*) a notice requesting the accused—

(i) to give an outline of his or her defence, if any, to the charge; and

(ii) to supply the names of any witnesses he or she proposes to call in his or her defence together with a summary of the evidence which each witness will give, sufficient to inform the Attorney-General of all the material facts on which he or she relies in his or her defence; and informing the accused of the provisions of s 67(2).

(7) The Attorney-General shall lodge with the registrar of the High Court a copy of the document and notice referred to in subsection (6).

(8) Where the accused is to be represented at his or her trial by a legal practitioner, the legal practitioner shall, at least three days, Saturdays, Sundays and public holidays excluded, before the date for trial determined by the Attorney-General in terms of s 160(1)—

(*a*) send to the Attorney-General; and

(*b*) lodge with the registrar of the High Court; a document containing the information referred to subsection"

It is self evident that the section makes no provision for the striking out of an accused person's defence outline on the basis that it is inadequate or does not address the merits. It simply authorizes the Attorney General to request for a defence outline if any in terms of para (a) of that section.

As can be seen the subsection provides that, if the accused fails to provide a defence outline in conformity with the provisions of s 66 the answer does not lie in striking out the defence outline but the accused deliberately takes a calculated risk in terms of s 67 (2) which reads:

> "(2) If an accused has failed to mention any fact relevant to his or her defence as requested in the notice in terms of s 66(6)(*b*), being a fact which, in the circumstances existing at the time, he or she could reasonably have been expected to have mentioned, the court, in determining whether there is any evidence that the accused committed or whether the accused is guilty of the offence charged or any other offence of which he or she may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.
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> (3) In deciding, in terms of subsection (2), whether in the circumstances existing at the time the accused could reasonably have been expected to mention any fact, the court may have regard to the document referred to in s 66(6)(*a*)."

The mere fact that the defence outline was filed a day or so out of time does not in my view give rise to the striking out of the defence outline but it entitles the Attorney General to an extension of time to consider the defence outline.

I therefore find that there is no merit in the state's application to strike out the defence outline. If the defence outline for any reason is defective the remedy lies in s 67 (2) of the criminal Procedure and Evidence Act [*Cap 9:07*].

I now turn to consider the accused's counter application for the quashing of portions of the state outline on the basis that they are prejudicial to the accused in so far as they seek to rely on the evidence of a witness who has no relevant evidence to give against him.

As I have already stated the application is grounded on the allegation that it does not comply with the requirements of s 188 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. A reading of the section shows that it has no application in the High Court as it relates to the Magistrates Court. It reads:

> "**188 Outline of State and defence cases**
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> In a trial before a magistrate, if the accused pleads not guilty or a plea of not guilty is entered in terms of section *one hundred and eighty-two*—
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> (*a*) the prosecutor shall make a statement outlining the nature of his case and the material facts on which he relies: and
>
> (b) the accused shall be requested by the magistrate to make a statement outlining the nature of and the material facts on which he relies and, if he is not represented by a legal practitioner, provisions of subsection (2) of section *one hundred and eighty-nine* shall be explained to him."

Despite the fact that the defence has sought to rely on a section of the law which is inapplicable in this Court I fail to see how the calling of a witness who is going to say he has no relevant evidence to give against the accused can be prejudicial to the accused. I also fail to see how such evidence can be said to be irrelevant when it directly relates to the accused's guilt or innocence.

The defense's application is to a large extent based on what the witness might have said at different fora outside these proceedings. That much can only affect the weight of evidence. It is however the Court's prerogative to weigh and

assess the probity and sufficiency of evidence. No one can do this on its behalf without usurping the function of the Court.

It is my firm view that this is a case crying out to be determined on the merits rather than technicalities. How can this Court determine the matter on technicalities when the life of a citizen is at stake? On the other hand, how can this court resort to technicalities in determining the matter when the security of the country is at stake?

It is therefore in everyone's interest that this grave matter be determined on the merits rather than technicalities. **It is accordingly ordered that both applications be and are hereby dismissed.**

The Attorney General's Office, the States Legal Practitioners.
Mutetwa and Nyambirai, the Accused's Legal Practitioners.