Judgment No. 2/2004
Case No. HC 930/2002

THE STATE

Versus

JOHN RAPHAEL MASUKU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 AND 13 JANUARY & 19 FEBRUARY 2004

J James for the applicant
H Ushewokunze for respondent (on behalf of S Musonha)

NDOU J: On 12 January 2004 I made a ruling on the accused person's application for discharge at close of the state case. The application was made pursuant to the provisions of section 198(3) of the Criminal Procedure and Evidence Act [Chapter 9:07]. I exercised my discretion and did not grant the application in all the twenty (20) charges that the accused is currently facing. After my ruling the accused person's counsel, with the agreement of the state counsel, sought clarification on the import of my ruling. In my ruling I had highlighted that on those counts where the state failed to adduce evidence of the complainant there is merit in the accused's submission that theft charges may not be sustainable. The basis for refusing to order discharge at that juncture, I ruled, was that even in the absence of such evidence of the complainant in terms of sections 209(1) and 218 of the Criminal Procedure and Evidence Act (supra) there is a possible conviction on the competent verdicts of contravening section 12(2) and (3) of the Miscellaneous Offences Act [Chapter 9:15]. This position also obtains in those counts where the evidence of the forensic scientists restored, after chemical etching, engine and chassis numbers different from those reflected in the complainants' registration books. In essence, what counsel seeks is that I clarify whether, in light of the foregoing I am putting the accused on his defence

on the original theft charges or only on lesser charges of contravening section 12(2) and (3) (*supra)* as alluded to in my ruling.

As I understand the legal position, I may not discharge the accused on the offence on which he is charged if there is *prima facie* evidence that he has committed an offence of which he might be convicted on that charge. In the circumstances it is not possible, in effect, to invoke a competent verdict at the end of the state case and put the accused on his defence only on a lesser charge. The application for discharge at the close of the state case, if successful, has the effect of terminating the case completely – *R* v *Dzingayi and others* 1965 RLR 171 (G); *Attorney-General* v *Mzizi* 1991(2) ZLR 321 (S) and 323 and *Criminal Procedure in Zimbabwe* by John Reid Rawland at 16-32. In *Attorney-General* v *Mzizi (supra)* at 323 F-H to 324A McNALLY JA stated:

> "Mr Carter submitted that we should not follow *R* v *Dzingayi and Ors* 1965 RLR 171, which is clear authority for the proposition that, where there is evidence upon which the accused might be convicted of a lesser offence, the section is not operative. It is not competent for the court to acquit the accused on the main charge and direct that the trial proceed on the lesser charge. It is all or nothing. …… I can see no reason for departing from the decision in *Dzingayi supra.* It has stood unchallenged in our law reports for 26 years. Moreover, it gives a meaning to the clear words of the section "or any other offence of which he might be convicted of thereon." The section therefore permits a discharge at the end of the state case when, and only when, there is no evidence on which a reasonable man, acting carefully, might properly convict either on the main charge or on any alternative or competent charge."

In *casu,* I found that the conditions for a discharge were not fulfilled on all counts. I cannot therefore, acquit the accused on the theft charges and direct the trial to proceed on lesser possible competent charges. It is not competent for me to do so. The accused is therefore put on his defence on the theft and robbery charges preferred against him.

Criminal Division of the Attorney-General's Office state legal practitioners
James, Moyo-Majwabu & Nyoni accused's legal practitioners