THE ATTORNEY GENERAL

Versus

DAVID PHIRI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 NOVEMBER 2010 & 14 JULY 2011

T Hove for the applicant
J P Mutizwa for the respondent

Application for leave to appeal

NDOU J: This is an application by the Attorney General for leave to appeal against the respondent's acquittal at the close of the state case. The application is made in terms of section 198(4) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The respondent appeared before a Victoria Falls magistrate facing a total of 833 counts being 32 counts of violating sections of the Exchange Control Act and the exchange Control Regulations [Statutory Instrument 109/96], 72 counts of fraud and 727 counts of theft. During the course of the trial the state withdrew 56 counts. At the close of state case the respondent was acquitted of 32 counts of fraud under the Exchange Control legislation and 2 counts of fraud. The court also acquitted the respondent on 406 charges on account of withdrawal after plea by the prosecutor. The respondent was put on his defence on 337 charges. At the close of the trial the respondent was also acquitted of these charges as well. The applicant seems to me to be seeking for leave in respect of all the charges which the respondent was acquitted by the trial court. This includes verdicts of not guilty returned after the prosecutor withdrew the charges after plea and those where the acquittal was after a full trial – *R* v *Sikumba* 1955(3) SA 125 (E); *S* v *Suliman* 1969(2) SA 385 AD and *S* v *Bopape* 1966(1) SA 145(F). Section 198(4) does not cover the case where the prosecutor has in effect withdrawn the charge. Where the prosecutor withdraws the charge the court is bound to discharge the accused. Because the application is based on section 198(4), *supra*, it can only be directed to the 32 charges under the Exchange Control Regulations and the 2 charges of fraud where the respondent was acquitted at the close of state case. As a result my focus will only be on these latter 34 charges. The issue is whether the applicant has any prospect of success on appeal. The appeal court should be protected from the burden of having to deal with appeals in which there is no prospect of success – *S* v *Rens* 1996(1) SA 1218 (CC) at 1226; J R Rowland, *Criminal Procedure in Zimbabwe,* 1996 at 27-12 and *S* v *Mutasa* 1988(2) ZLR 4(SC). In other words, before the application could

be granted it is necessary for the applicant to show a reasonable prospect of success on appeal. If the applicant has prospects, leave to appeal should be granted, if not, it should be refused. It is not enough to make out a reasonably arguable case. *In casu,* was it competent for the trial to put the respondent in some of the charges and discharge him on others? If the answer is the negative then there is prospect of success on appeal and leave should be granted. The answer is that such an approach was competent – *S* v *Hartlebury & Anor* 1985(1) ZLR 1 (HC).

It is trite that where the court considers that there is no evidence that the accused committed the offence, it has no discretion but to acquit him – *S* v *Kachipare* 1998(2) ZLR 271(S) at 275 and *S* v *Tsvangirai & Ors* 2003(2) ZLR 88(H). In particular, the court shall discharge the accused at the close of the state case for prosecution where:

a) There is no evidence to prove an essential element of the offence: *AG* v *Bvuma & Anor* 1987(2) ZLR 96(S) at 102;
b) There is no evidence on which a reasonable court, acting carefully, might properly convict: *AG* v *Mzizi* 1991(2) ZLR 321(S) at 323B; and
c) The evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act on it: *AG* v *Tarwirei* 1997(1) ZLR 575 (S) at 576.

In casu, the trial magistrate states that he delivered an ex tempore ruling at the close of the state case and indicated that the written full reasons will follow. These reasons are part of the judgment on the outstanding counts delivered at the close of the defendant's case. In my view the full reasons should ideally have been given before the court considered the evidence of the accused on the outstanding charges. Be that as it may, a reading of the magistrate's judgment gives the impression that he relied on the rule in paragraph (C) *supra*, i.e. evidence of the state's star witness Randall Harold Francis is so manifestly unreliable that no reasonable court could safely act on it. This principle must be followed cautiously and in exceptional cases. In *S* v *Tsvangirai & ors, supra* at 90E-G GARWE JP (as he then was) rightly observed –

> "Whilst it is settled that a court shall acquit at the end of the state case where the evidence of the prosecution witness:
>
> > "has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it (Practice Note by Lord Parker cited with approval in *AG* v *Bvuma & Anor supra,* at 102-103.
> >
> > It is clear <u>that such cases will be rare.</u>
> >
> > This would apply:

> ”only in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. (per WILLIAMSON J in *S* v *Mpetwa & Ors* 1983(4) SA 262 at 265, cited with approval by McNALLY JA in *AG* v *Tarwirei (supra*) at 576-577.” (Emphasis added)

Applying this test, the trial court should not have acquitted the accused at the close of the prosecution case on the 34 charges based on the unreliability of witness Randall Harold Francis whilst at the same time placing the accused on his defence in respect of other charges on the basis of the same testimony.

This latter stance evinces that the trial court believed part of his material evidence. The court should not have dealt with the evidence of this witness in such a piecemeal fashion. In the circumstances, it is clear there is a reasonable prospect of success on appeal.

Accordingly, the application for leave to appeal is granted in respect of the above-mentioned 34 charges only.

Criminal Division, Attorney General's Office, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, respondent's legal practitioners