REPORTABLE (16)

SHANTEL RUSIKE

v

THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE, JANUARY 28, 2015 & SEPTEMBER 20, 2017

L Uriri, with him *W Chinamora*, for the applicant

I Muchini, for the respondent

MALABA DCJ: This is an application in terms of s 175(4) of the Constitution of Zimbabwe (hereinafter referred to as "the Constitution") wherein the applicant submits that s 33(2)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (hereinafter referred to as "the Criminal Law Code") is invalid, in that it violates the right to freedom of expression enshrined in s 61(1) of the Constitution. The applicant also submits that s 33(2)(a) of the Criminal Law Code violates her right to freedom of conscience enshrined in s 60 of the Constitution.

The applicant seeks the following relief:

"It is hereby declared that section 33(2)(a) is unconstitutional in that:

"It is in violation of section 20(1) of the Lancaster House Constitution of Zimbabwe; alternatively, it is in violation of section 61(1) of the 2013 Constitution of Zimbabwe; and is for that reason null and void;

Further that the court issues any other order it will be pleased to issue in terms of its wide powers under section 85(1) of the current Constitution of Zimbabwe."

The background facts are these. The applicant is a young female who was 20 years old at the time of her arrest. On 25 December 2012 the applicant was arrested and taken to Bulawayo Central Police Station. She was charged with contravening s 33(2)(a) of the Criminal Law Code, which provides:

"33. Undermining authority of or insulting President

(2) Any person who publicly, unlawfully and intentionally —

(a) Makes any statement about or concerning the President or an acting President with the knowledge or realising that there is a real risk or possibility that the statement is false and that it may —

(i) engender feelings of hostility towards; or

(ii) cause hatred, contempt or ridicule of;

the President or an acting President, whether in person or in respect of the President's office; or …

(b) …

shall be guilty of undermining the authority of or insulting the President and liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both."

The facts on which the charge was based were contained in the charge sheet and the Outline of the State Case. The charge sheet reads:

"In that on the 24th of December 2012 and at number 7 Paddonview Flats, Paddonhurst, Bulawayo. Shantel Rusike unlawfully and intentionally dispatched a picture depicting the President of the Republic of Zimbabwe, Cde Robert Gabriel Mugabe, in a nude state to Precious Tshuma realising that there was a real risk or possibility that it causes hatred, contempt or ridicule of the President."

The Outline of the State Case is as follows:

> "1. The complainant in this case is The State.
>
> 2. The Accused resides at house number 226 Higgs Road Sunning Hill, Bulawayo and is employed at Stone Urban as a shop assistant at shop no. 43 Bulawayo Centre.
>
> 3. On 24th of December 2012 at around 2349 hours the accused person sent a picture depicting the president of the Republic of Zimbabwe Robert Mugabe naked on the Social chat platform Whatsapp. The picture was written underneath **Robert Mugabe turning 87 years on 21 February 2011. Happy birthday Matibili operation.**
>
> 4. A report was made to the police leading to the arrest of the accused person.
>
> 5. The accused person had no right to behave in the manner she did."

What is clear is that the State got the facts wrong. The applicant did not have a picture of the President in the state alleged. The parties agree that what she did was to take a picture of a child in the nude and replace the head of the child in the picture with a picture of the President's head. What she then created could not by any stretch of imagination be described as a depiction of the President in the state suggested. Whatever offence could have been committed by the applicant in what she actually did, she was not charged with that offence.

The State would have to prove at the trial not only that the applicant committed the conduct alleged in the State Outline but also that the conduct constituted the offence with which she was charged.

In *Williams and Anor v Msipha and Ors* 2010 (2) ZLR 552 (S) it is stated at p 571B:

> *"*To determine the question whether the conduct committed by the applicants and for which they were charged with the crime of contravening s 37(1)(a)(i) of the Act would, if proved at the trial, constitute the offence they were charged with, the magistrate was required under s 13(2)(e) of the Constitution to take into account the essential elements of the offence and the conduct which, if proved at the trial, would constitute the offence charged. He was required to apply the knowledge of the statute to the conduct actually

committed by the applicants and decide whether it constituted the proscribed conduct." (My emphasis)

The State cannot prove the conduct alleged in the outline of its case against the applicant because that is not the conduct she committed. Even if she had been charged with the conduct she committed, it would constitute the offence if it was proved at the trial that the statement was false. It would have had to be a statement which although false could be believed as true by some members of the public engendering in them feelings of hostility towards the President or causing them to hate the President. No right-thinking person could be deceived into believing the caricature sent by the applicant to be a true statement about the President.

The statement was made on 24 December 2012, to the effect that the President was due to be 87 years old on 21 February 2011. The statement makes no sense. The President had already turned 87 on 21 February 2011.

DISPOSITION

The matter is struck off the roll.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA AJCC: I agree

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

The Prosecutor General's Office, respondent's legal practitioners