

THE STATE

Versus

GINGER VHIYANO

And

JEFAT CHAGANDA

And

TYSON RUVANDO

And

SIDINGUMUZI NCUBE

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J with Assessors Mr M. Ndlovu & Mr E. Mashingaidze

BULAWAYO 24 JANUARY & 12 MAY 2023

T. M. Nyathi for the State

T. Tavengwa for the 1st accused

T. Runganga for 2nd accused

K. Nxumalo for the 3rd accused

K. Ngwenya for the 4th accused

Ruling on the application for discharge at the close of the State case

TAKUVA J: The four accused persons are charged with theft in that on a date unknown to the prosecutor and during the period from 25 May 2018 to 15 August 2018 and at Zimbabwe Republic Police Plumtree, the accused persons one or all of them took property namely 28,5kg of gold knowing that Zimbabwe Republic Police Plumtree the lawful custodian is entitled to possess or control the said property or realizing that there is a real risk or possibility that ZRP may be so entitled and intending to deprive ZRP permanently of possession and control, or realizing that there is a real risk or possibility that they may so deprive ZRP of its possession or control.

The facts as outlined in the State Summary (Exhibit 1) are as follows:

Accused 1 was an Inspector in the Zimbabwe Republic Police stationed at Plumtree station and occupying the position of Officer-In-Charge Crime at the time the offence was

committed. Accused 3 and 4 are police officers in the employ of the Zimbabwe Republic Police who at the time of the commission of the offence charged also stationed at Zimbabwe Republic Police Plumtree and sharing the same office. Accused 2 is a male adult residing at house number 910 Mathendele, Plumtree and is not gainfully employed.

On the 16th of September 2015 one James Ray Tudhope was arrested for being in unlawful possession of 28.5kg of gold valued at US\$970 007,80 at Plumtree Border Post by police officers from Minerals, Flora and Fauna Unit who recovered the gold, recorded it in Exhibit Book number 8/15 and submitted it for safe keeping in the armoury located at ZRP Plumtree. Accused 3 witnessed the placement of gold into the armoury. On the 19th of March 2018, accused 1 took over Plumtree Police Station as Officer-In-Charge which made him the custodian of the armoury keys and all the property contained therein including the 28.5kg of gold.

On the 25th of May 2018 during an annual inspection, the gold was accounted for. Sometime during the period extending from 25 May 2018 to 15 August 2018 the accused persons conspired to steal the 28.5kg of gold. The armoury keys were given to accused 2 who facilitated the cutting of a duplicate having imprinted the key on a piece of soft green bar laundry soap. Using the duplicate key the accused persons took and stole the said gold from the armoury leaving the duplicate key in the keyhole.

The offence came to light on the 15th of August 2018, when Rosemary Mangena, the incoming officer in charge sought access to the armoury. The stolen gold is valued at US\$970 008,80 and nothing was recovered.

The four accused persons pleaded not guilty to the charge. In his defence outline the 1st accused raised a number of factual averments directed at challenging the allegations by the state. The following are the averments;

1. that he denies stealing any gold as alleged either alone or with any of the accused persons;
2. that prior to the 11th of August 2018 the gold was in the armoury;
3. that when MBCH officers entered the armoury on 10 August to take out the 14kgs booked on 7 July 2018, they never raised an issue concerning the gold which now forms the basis of these charges;

4. that he was not the sole custodian of the armoury keys as at the material time there were two other “senior police officers” namely Rosemary Mangena and Rwisayi Munasireyi who were also custodians of the armoury keys. It was precise that the keys will “circulate amongst the officers” without really following the standard police protocol.
5. that anyone could have had access to the armoury key as the officer in charge’s office remained unlocked at all material times.
6. that between 11-15th August Munasireyi was in possession of the armoury keys which they used to book out rifles for Heroes day commemorations on 13th – 14th August 2018.
7. Finally, he denied knowing the 2nd accused person or having any interactions with him.

There is no need to outline or summarise accused 2’s defence outline as he is not part of this application, suffice to indicate that he denied the charge. He also denied being given the impression of the key or facilitating it being cut or duplicated as alleged.

The 3rd accused denied ever stealing any gold as alleged and acting in concert with any other person to steal the gold. The 4th accused person denied the allegations *in toto*. Specifically, the accused denied stealing any gold as alleged either in his individual capacity or acting in common purpose with his co- accused.

Facts that are common cause

- (a) That accused 1 was the Officer In Charge Crime at Plumtree at the relevant time.
- (b) That the 1st accused knew that there was 28.5kgs of gold in the armoury among other valuables like rifles and ammunition.
- (c) That he had knowledge that the key to the armoury was supposed to be handed over to the incoming officer in charge at a properly constituted handover/takeover supervised by the Quarter Master.
- (d) That the 1st accused left the armoury key with Munasireyi without following the above mentioned proper procedure.
- (e) That the gold disappeared from the armoury.
- (f) That accused 3 was stationed at Plumtree Police Station as a police officer.

- (g) That accused 3 was given US\$30 000,00 by accused 2 on the day the 14kgs were disposed of at Fidelity Printers Bulawayo, and that Lovemore Sibanda described the money as accused 3's share.
- (h) That accused 4 was using the same office with accused 3 at Plumtree Police Station and that on the day of the sale of the gold, he was given US\$30 000,00 by accused 2 in Bulawayo.
- (i) That one Lovemore Sibanda, the alleged owner of the 14kgs of gold was present when accused 2 gave accused 4 the money which Sibanda described as "his share".
- (j) That accused 4 was at Plumtree Railway Station aboard a Botswana bound train wherein the 2nd accused was arrested.
- (k) That accused's passport is stamped 7 Jul 2018 exiting Zimbabwe through Plumtree border post and entering Botswana on the same date.
- (l) That accused 4's passport does not show when he returned to Zimbabwe.

The issue

The sole issue for determination by this court is whether or not at the close of the State Case there is evidence that establishes a *prima facie* case against each accused.

The law

The 1st port of call is section 198 (3) of the Criminal Procedure and Evidence Act (Chapter 9:23) which provides:

"198(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty ..."

In *S v Tsvangirai & Ors* 2000 (2) ZLR 88 (H) the court summarized the circumstances in which discharge will be granted as follows;

"The court shall return a verdict of not guilty at the close of the State Case if the court considers that there is no evidence that the accused committed the offence charged (or any other offence with which he or she could be convicted on that charge). Thus, the court must discharge the accused at the close of the case for the prosecution where (a) there is no evidence to prove an essential element of the offence; (b) there is no evidence on which a reasonable court acting carefully, might properly convict; (c) the evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act on it. Instances of the last such will be rare, it would only be in the most

exceptional case where the credibility of a witness is so utterly discredited that no part of his or her material evidence can possibly be believed.”

It follows that where some evidence has been adduced by the state, the test is whether a reasonable court might convict an accused on the basis of that evidence – see *Hartlebury and Anor* 1985 (1) ZLR (H). Further, the court should not refuse to discharge an accused at the close of the state case because it thinks that if the accused is put to his defence he could possibly provide a missing link in the state case. Onus is on the state and it should provide reliable and sufficient evidence.

See also *AG v Makamba* 2005 (2) ZLR 54 (S); *S v Kachipare* 1998 (2) ZLR 271 (S).

Application of the law to the facts

Accused 1

The 1st accused in making his application for discharge at the close of the case for the prosecution relied on the following grounds:

1. The state failed to prove a *prima facie* case;
2. The state failed to prove common purpose because the state led no evidence to prove that the accused persons worship together. As a result section 196A is inappropriate.
3. There is no evidence that the 1st accused gave the 2nd accused the key to the armoury. Therefore there is no link between accused 1 and 2.
4. The degree of participation between accused 1 and 2 not established.
5. Exhibit number 5 is not the duplicate key because Shumba and Munasireyi said the key could not unlock as it kept turning.
6. There was easy and constant access to the armoury between the 25th May to 10 August 2018.
7. No duplicate key was found on the armoury door's keyhole on the 11th of August 2018 when 14kgs were taken out for court purposes. The duplicate key was discovered on the 15th of August 2018.

8. The evidence shows 2 people were in custody of the armoury key i.e. accused 1 and Munasireyi. Therefore, this casts doubt as to who committed the crime.

Accused 3

The grounds relied upon by the 3rd accused are that;

1. The state has not established a *prima facie* case against the accused.
2. The gold is not the correct subject matter of the charge.

Accused 4

1. It was contended that the state has failed to prove a *prima facie* case against him.
2. The accused is only mentioned by Lovemore Sibanda.
3. Exhibit 4's passport page does not link the 4th accused to the charge.
4. Lovemore Sibanda's evidence relates to 14kgs that were released by a competent court to the 2nd accused.

Evidence led by the state

The State led both direct and circumstantial evidence from its witnesses. Seven state witnesses gave *viva voce* evidence while the evidence of five state witnesses was formally admitted in terms of section 314 of the Criminal Procedure and Evidence Act Chapter 9:07. Further, by way of real and documentary exhibits, the State produced the following:

- (a) Summary of the State case;
- (b) Extract from the MBCH exhibit book;
- (c) Extract from ZRP Plumtree occurrence book;
- (d) Sketch plan of ZRP offices at Plumtree;
- (e) Accused's passport
- (f) Affidavit by the Assayer, one T. Jacha and
- (g) Duplicate key

Rosemary Mangena was the 1st to testify. She is a duly attested member of the Zimbabwe Republic Police based at Plumtree Police Station. At the time of the discovery of the offence she had just been promoted to take over as the Officer-In-Charge Plumtree Police Station. At that time, she was working in the administration office wherein accused 3 was one of her subordinates. Accused 3's duties included compiling charge sheets, banking deposit fines and collecting and dispatching mail which duties allowed him access to the Officer-In-Charge's office. The witness also shared the office with accused 4 who was in the operations section who also by virtue of his duties had access to the Officer-In-Charge's office.

The witness narrated the events of the 15th of August 2018 in detail. This is when Chief Inspector Munasireyi, Sergeant Major Shumba and herself discovered a key inserted into the key lever of the armoury door. Although she did not enter the armoury, she heard Sergeant Major Shumba exclaim that the gold which was being held as exhibit was missing from the bucket in which it was kept and that all that was left was the khakhi cover which had been used to wrap the gold. She was present when Chief Inspector Manasireyi called accused 1 to enquire about the gold. Accused 1 confirmed that indeed there was gold in the armoury. A report was then filed by Chief Inspector Munasireyi.

Under examination by the State Counsel, the following exchange occurred;

- “Q - Which key was used to open the door?
A - The key found there which was different from the original key Munasireyi was holding.
Q - Comment on an allegation that you had access to the armoury?
A - That is not true because I had no keys. The armoury key was kept by one person.
Q - How is the armoury cleaned?
A - The key bearer will be present but during that period I never witnessed it being cleaned.”

Under cross-examination by *Mr Tavengwa* for the 1st accused the witness gave the following responses;

- “Q - Is that the key that was retrieved from the key hole?
A - It has been long. It is similar.
Q - How many people had access to the armoury?
A - The one who had the key and the cleaner.
Q - How were members of the Support Unit deployed?

- A - From Fairbridge
- Q - Were any deployments made before the 14 and 15 August 2018?
- A - Deployments were there.
- Q - They were from ZRP with rifles from your station?
- A - No they were not armed.
- Q - Between 14 – 15 August 2018 any access to the armoury?
- A - I am not aware as I was not in possession of the armoury key.
- Q - During that period how many officers in charge were there?
- A - Only 1, Chef Inspector Munasireyi
- Q - Between 25 May and 15 August 2018, did accused 1 hand over key to Munasireyi?
- A - I was advised by Munasireyi that he had left keys without an official hand over.
- Q - The armoury key would be rotated amongst senior officers at Plumtree Police Station?
- A - It never happened. The handover to Munasireyi was not official.
- Q - You were aware Munasireyi had the armoury key?
- A - No. I knew accused 1 had the key.
- Q - Accused 1 will say he always kept keys on his Liniard on his shoulder.
- A - I cannot say.
- Q - He would say at times he would leave jacket on his chair?
- A - I do not know
- Q - Accused 1 will say he had no access to the Officer-In-Charge's office
- A - It was open all the time
- Q - Was it possible someone could have pulled the key from his jacket on the chair?
- A - I never saw that
- Q - Was there any hand-over takeover between accused 1 and Munasireyi?
- A - No. The handover occurred between accused 1 and myself.”

The next witness was ZIBION SHUMBA a member of the ZRP stationed at ZRP Plumtree. He holds the rank of Sergeant Major. He testified that accused 1 was his Officer-In-Charge before the takeover by Chief Inspector Munasireyi. Accused 3 and 4 were attached to the administration and operations departments respectively. They both worked from the same office. He first came to know about the presence of 28.5kg of gold in the armoury between the 7th and 8th of May 2018. His testimony on the events of the 15th August 2018 is similar to that given by Chief Inspector Mangena. It was his evidence that he is the one who eventually removed the duplicate key which was stuck in the key lever. After a check, he discovered that the 28.5kg of gold that was being held as an exhibit and stored in a bucket was missing with only the khakhi paper that had been used to wrap the gold remaining. Accused 1 confirmed the existence of gold in the armoury.

During examination in chief the State Counsel put the following questions to the witness.

- “Q - It is correct that you used to enter the armoury to remove firearms for armed drills. Also the administration officer who used to clean?
A - Accused 1 would open the door, stands aside while we collect the firearms, he would lock his door. After the drill we would go to him for him to open the door and we return the guns after which he would lock the doors again.
Q - You were in charge of the cleaners?
A - Yes together with accused 3, Constable Moyo and Maseko.
Q - Between May – August 2018 was armoury cleaned?
A - Yes
Q - Who would open it?
A - Accused 1
Q - During cleaning will he be with you?
A - Standing outside armoury watching us
Q - After cleaning?
A - He would lock the door.
Q - Between May – August 2018 who was the custodian of the armoury key to your knowledge?
A - Accused 1.”

Under cross-examination by accused 1’s counsel the witness insisted that between May and August 2018, the 1st accused was the custodian of the key to the armoury. He further indicated that only handcuffs keys would be kept on an officer’s jacket “Liniard”.

- “Q - Was the bucket containing gold there when you collected guns?
A - Yes it was there
Q - What about when you were cleaning?
A - It was present
Q - Did you touch it?
A - Just pushed it and clean the floor
Q - Who is to say you and your colleagues did not open the bucket during cleaning?
A - We did not touch it
Q - Would accused 1 physically search you?
A - No
Q - Would accused 1 enter and inspect?
A - Yes.”

It was this witness’ testimony that accused 3 and 4 were not custodians of the key to the armoury. There was never an occasion that he saw the armoury door open when there was no one there.

Sambo Magutshwa and Simangaliso Mpala gave evidence on events surrounding the cutting of a duplicate key upon accused 2's request. Accused 2 brought an imprint of an original key on a green bar of washing soap. Both narrated in detail their engagements with accused 2. They identified the duplicate key as the one produced by Simangaliso Mpala. Both could not recall the exact date accused 2 visited their shop. However when it was put to them that in their statements to the police they said it was on the 5th of July 2018, they agreed. In my view, it does not serve any useful purpose for the court to recount in detail the evidence of these two witnesses at this stage as it mainly relates to accused 2 who was not part of the application for discharge. This is bolstered by the attitude adopted by counsel for accused 3 and 4 in that there was very little if any cross-examination of these witnesses.

All that comes out of their evidence is that it established a link between the key they cut and the one used at ZRP Plumtree to open the armoury door.

The evidence of Lovemore Sibanda was formerly admitted by consent of all accused persons. It therefore stands uncontroverted. However, the key features of his evidence are;

- (a) Sometime in July he was asked by one Kailos Moyo to bring his documents relating to his mine to Plumtree Court. The documents were to be used to release 14kg gold.
- (b) One Sayi introduced the witness to accused 4 who was shown the documents by Sayi.
- (c) He returned to Plumtree Court on 23 July 2018 where he met accused 2's legal practitioner one Admire Rubaya to whom he handed over his documents. The lawyer told this witness that he should sit outside as he was going to be used as a defence witness.
- (d) The witness was never called to testify.
- (e) On 10 August 2018, the 2nd accused was acquitted and the court ordered that the gold be released to the witness who signed for it in the exhibit book.
- (f) He sold the gold to Fidelity Printers in Bulawayo in the company of accused 2 and his lawyer one Rubaya.

- (g) After sharing the money, accused 2 requested the witness to drop him along 15th Avenue where they met accused 3 and 4 and accused 2 gave them US\$30 000,00 each as their share.

Noleen Nyika, a ZIMRA official who arrested accused 2 and recovered 14kgs of gold from aboard a Botswana bound train gave evidence. The evidence placed the 4th accused at the same place with accused 2 who was carrying gold without a licence. She left the gold at Plumtree Police Station after it had been weighed and placed in a trunk and signed for. She confirmed that she does not know the 4th accused. Her testimony was largely uncontested.

The next state witness was Khulekani Ncube, a Security Investigations Manager employed by Econet Wireless. His duties include *inter alia* analyzing call history records. On the strength of a court order from Bulawayo Magistrates' Court he retrieved a call history for subscriber number 0776344688 registered in the name Jefat Chaganda (accused 2). Upon analyzing the call history he noticed that there had been communication between subscribed number 0776344688 and number 0775545839 registered in the name of Simangaliso Mpala (the locksmith). He produced a detailed subscriber documents record for the two customers as an exhibit. According to the records accused 2 and Simangaliso communicated by phone on the following dates:

1. 5 July 2018 – 5 minutes
2. 11 July 2018 - twice
3. 12 July 2018 – four times
4. 10 August 2018 – once and caller (accused 2) associated with Palace Hotel base station in Bulawayo.

There was no cross-examination from all the defence lawyers. Accordingly, the witness' testimony remains unchallenged.

Rwisayi Munasireyi was the State's next witness. He is a Chief Inspector in the ZRP based at Plumtree Police Station as the Officer-In-Charge. Accused 1, 3 and 4 were his subordinates. In April 2018 he was transferred to Plumtree from Chinhoyi. He took over as Officer-In-Charge in May 2018 and accused 1 was the outgoing Officer-In-Charge. In August 2018 he left for Harare and returned on the 10th of the same month. He had left the key to the

Officer-In-charge's office with accused 1. He did not retrieve the key to the Officer-In-Charge's office on the 10th of August 2018. However, on the 11th August 2018 early in the morning accused 1 came to his room where he gave the witness two keys saying he was off to Harare on time off. On 15th August 2018 he was approached by Sergeant Shumba who had been sent by Chief Inspector Mangena to find out if he had been given the armoury keys. Chief Inspector Mangena was looking for two FN rifles. The witness went to collect one of the two keys left by accused 1 and brought it. He went to the armoury in the company of Sergeant Major Shumba and Chief Inspector Mangena.

When they got to the door the witness discovered that there was another key in the key hole. He unsuccessfully tried to remove it until Sergeant Major Shumba pulled it out with some difficulty. The witness tried to open the door to the armoury and discovered that it was unlocked. They discovered that gold was missing from the armoury and the witness contacted accused 1 who confirmed the existence of gold in the armoury after which the witness immediately informed his superior and completed the Occurrence Book.

During examination in chief the following exchange took place;

Q - Who was supposed to have keys to the armoury?

A - Accused 1. We were supposed to do an official handover of the keys to the armoury, safe keys and keys to the exhibit room.

Q - Who was supposed to have custody of the keys to the armoury?

A - Sitting Officer-In-Charge

Q - Who was the sitting Officer-In-Charge at Plumtree when you reported for duty?

A - Accused 1

Q - Why did you not take the keys?

A - Quarter Master was to be present but he was engaged elsewhere. It is a requirement that he be there. It is part of our standing orders.

Q - Did you witness the taking of guns from the armoury for the Heroes Day celebrations?

A - No

Q - Prior to the 15 August 2018, did you know of the existence of gold in the armoury?

A - No.”

Under cross-examination by *Mr Tavengwa* for accused 1 the witness gave the following answers;

Q - Why did you interfere with the crime scene?

A - We panicked and we tried to unlock

Q - Why were you panicking?

A - Because of the discovery of a key in the key hole.

Q - On 11 August 2018 1st accused gave you two keys?

A - Yes

Q - What were they for?

A - One for the Officer-In-Charge’s office. I did not know what the other one was for. It later turned out to be for the armoury.

Q - Did you ask what they were for?

A - No

Q - Why not?

A - I did not pay particular attention

Q - Why not ask about the 2nd key?

A - I did not think there would be problems.

Q - You knew 2nd key was for the armoury.

A - Not correct

Q - Accused 1 told you what keys he was giving you?

A - Not correct

Q - Aware accused 1 was taking leave?

A - He told me he was going on time off at the time he left the keys.”

It was the witness’ evidence that accused 1 left the keys at around 5am and that between the 11th and 15th August 2018 he did not lose them. He said he did not know if 4th accused had access to the key during the relevant period. The witness denied that there was in existence a practice whereby the key to the armoury would rotate amongst senior officers without carrying out a proper handover takeover.

The State failed to locate Israel Marufu and applied for his evidence to be expunged from the record which application was granted. The evidence of the following witnesses was formally admitted in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07);

1. Lovemore Sibanda
2. Blessing Marwa
3. Cosmos Masepa
4. Godwill Ndlovu and
5. Mgcini Ndlovu

The State closed its case and the 1st, 3rd and 4th accused applied for their discharge.

From the evidence given by the State, it is apparent that its nature is both direct and circumstantial.

P J Schwikkard

S E Van der Merwe *Principles of Evidence* Fourth Edition Juta & Co 2015 and 578 state the following about circumstantial evidence:

“Circumstantial evidence is not necessarily weaker than direct evidence. In some instances, it may even be of more value than direct evidence. Inferences are drawn from circumstantial evidence.”

Analysis

The issue is whether or not the court can reach any of the following conclusions;

1. There is no evidence to prove an essential element of the offence.
2. There is no evidence on which a reasonable court acting carefully might properly convict.
3. The evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.

In order to arrive at any of the conclusions, I must carefully examine the evidence placed before me during the trial. I now consider the application for discharge in so far as it relates to accused 1 first and thereafter accused 3 and 4.

Accused 1 – Ginger Vhiyano

Bearing in mind the above conclusions, I take the view that the 1st aspect does not arise as I take the view that the State evidence touched on all the essential elements of theft. Against the 1st accused is the evidence of Mangena, Munasireyi and Shumba. While it is appreciated that counsel for accused 1 addressed the court at length on the credibility of Munasireyi and Shumba the 2 witnesses' evidence established a *prima facie* case against accused 1 in that it showed that only one person was the custodian of the armoury key and that person was the 1st accused. It also in my view disproved the allegation by accused 1 that there was easy and constant access into the armoury between 25 May and 10 August 2018. Further, their evidence shows that indeed there was a duplicate key in the key hole and that they eventually realized that the door was unlocked. Munasireyi's evidence of the circumstances surrounding the unprocedural handover of the key on the morning of 11th of August 2018 taken together with other pieces of evidence raises a *prima facie* case against the 1st accused.

Again, the court was addressed at length on the possibility that the gold could have been stolen during cleaning sessions and also at the time rifles were inspected and/or removed from the armoury. The evidence of Munasireyi, Shumba and Mangena is to the effect that accused 1 would be present and would grant access to the armoury by unlocking and locking the door after every visit. There is evidence the 1st accused would remain in attendance throughout these exercises.

What the evidence has shown is that accused 1 had the means and opportunity to steal the gold from the armoury since he had possession of the key to the armoury. Further, accused 1 had knowledge of the presence of gold in the armoury. The evidence of three police officers shows that accused 1 deliberately abstained from complying with the laid down procedure of handing over a key to the armoury to the next officer in charge. Surely, this calls for an answer from accused 1. Also surprising is that the gold was sold on 10 August 2018 and accused 3 and 4 are seen in Bulawayo away from their work place on that day. The following morning accused 1 left Plumtree Police Station hurriedly.

In my view this is a case where the court must consider the totality of the evidence. It certainly cannot reasonably be argued that the evidence has been so utterly discredited or destroyed that no material part of it can possibly be believed. The available evidence establishes a *prima facie* case against the 1st accused. Accordingly I am satisfied that there is no basis upon which accused 1 can be acquitted.

Accused 3 – Tyson Ruvando

Prosecution evidence against this accused is that the crime scene is his workplace. According to the sketch plan produced by consent he occupied an office a few metres from the armoury where gold was stolen. It is the evidence of Lovemoe Sibanda which was admitted that accused 3 was given US\$30 000,00 by accused 2 on the day the gold was sold. According to Lovemore Sibanda, this was his share. The question becomes why was he given such a large amount of money by a person who is implicated in duplicating a key to the armoury containing gold? Accused 2 admitted possessing gold but says it was not stolen from the armoury. That this is a falsehood is revealed by Sibanda's testimony that the gold did not belong to him but he was just roped in to pull the wool over the court's eyes. The source of the gold in accused 2's possession at Plumtree railway station remains a mystery. According to the State evidence, it is part of the gold stolen from police custody in the armoury. What was accused 3 doing in Bulawayo on the day accused 2 was selling gold in Bulawayo? Why was it necessary to meet with accused 2 in Bulawayo on that day and be given US\$30 000,00 that Sibanda described as his share?

In my view accused 3's assertion and receipt of a large amount in cash so soon after the disposal of stolen gold amounts to evidence that raises a *prima facie* case against the 3rd accused. I take the view that there can be no argument that Sibanda's evidence had been totally

destroyed in that it is common cause. Accordingly the State has managed to prove a *prima facie* case against accused 3. The State has put sufficient evidence on the table to warrant an answer from the 3rd accused. He certainly has a case to answer. In the result he cannot be acquitted.

Accused 4 – Sidingumuzi Ncube

In respect of this accused, the defence argued that Lovemore Sibanda's evidence is irrelevant as it relates to 14kg of gold which is not part of the 28kg mentioned in the charge. Similarly the fact that Sibanda was present when accused 2 gave accused 4 US\$30 000,00 was said to be irrelevant. In my view, this is a serious misreading of the State case which is that the 14kg is part of the 28kg as it was found in possession of accused 2, a person who unlawfully manufactured a duplicate key to the armoury. The conclusion on the evidence would be that whoever unlawfully entered the armoury using the duplicate key stole the gold that was stored in the same bucket. It would be absurd to argue that the thief was selective.

It was not disputed that accused 4 was given US\$30 000,00 by accused 2 in Bulawayo shortly after the sale of 14kg of gold. Accused 2 had sold this gold at Fidelity in the company of Lovemore Sibanda. After sharing the loot, accused 2 requested L. Sibanda to drop him at a specific place where they found accused 3 and 4 waiting. This shows that there was prior arrangement between accused 4 and accused 2. Sibanda said it was accused 4's share of the loot. Surely accused 4 must answer the question why he was given this money by accused 2 in light of the other evidence showing that the money were proceeds of the stolen gold from an armoury at accused 4's workplace.

The other piece of evidence against accused 4 is that according to Lovemore Sibanda he travelled to Plumtree with one Sayi who upon arrival introduced him to a police officer called Sidingumuzi Ncube who was shown Sibanda's documents. This was shortly after accused 2's arrest. It is common cause that these "documents" were subsequently handed over to accused 2's lawyer who need them to secure accused 2's acquittal. What is crucial at this stage is that this evidence tend to prove an association between accused 2 and accused 4 in relation to the gold.

Finally, the evidence of two State witnesses namely Norleen Nyika and Blessing Maarwa place the 4th accused at Plumtree Railway Station apparently aboard a Botswana bound

train. The evidence which is undisputed is contained in accused 4's passport. Sight should not be lost of the fact that this is the time and place where accused 2 was arrested in possession of the 14kg of gold. More importantly, the evidence of Marwa shows that accused 4 exited Zimbabwe through Plumtree Railway Station on 7 July 2018 and entered Botswana on the same day. However, his passport has no stamp showing when he returned to Zimbabwe. Surprisingly, he is still in Botswana according to his passport.

In my view, this murky and clandestine movement creates evidence sufficient to raise a *prima facie* case against the 4th accused. Surely these facts cry for an answer from accused 4. The argument that the 14kg of gold were released by a court of law after acquitting accused 2 can sufficiently be explained by the evidence of Lovemore Sibanda which was not challenged to the effect that the court was duped into believing a concocted version of events.

Disposition

All in all I am satisfied that the 1st, 3rd and 4th accused must be put to their defences. Each has a case to meet as a *prima facie* case has been made by the State.

Order

The application for discharge at the close of the State case has no merit and is hereby dismissed.

National Prosecuting Authority, state's legal practitioners
Mutuso, Taruvinga & Mhiribidi, 1st accused's legal practitioners
Tanaka Law Chambers, 2nd accused's legal practitioners
Ncube & Partners, 3rd accused's legal practitioner
T. J Mabhikwa & Partners, 4th accused's legal practitioners