THE STATE
versus
HERBERT GOMBA
and
STANLEY NDEMERA
and
EMMANUEL MUTAMBIRWA
and
DANIEL USINGARAHWE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 18, 19,20, 30 October,
7, 16, 17, 29 November 2013 & 10 January 2024

Criminal Trial

W Mabhaudhi with L Masuku & FC Muronda for the State
A Rubaya, for the 2nd accused
TT G Musarurwa, for the 3rd accused
T J Magaya, for the 4th accused

CHIKOWERO J:

1. This is an application by the second, third and fourth accused persons for their discharge at the close of the case for the prosecution.
2. The criterion for a discharge at the close of the state case, in the words of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], is that:

> "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."

3. There are numerous decisions of our courts explaining the meaning of the phrase "no evidence". *S* v *Kachipare* 1998 (2) ZLR 271 (S) refers, with approval, to some of them. They include *Attorney – General* v *Bvuma and Anor* 1987 (2) ZLR 96 (S) at 102 F-G; *Attorney – General* v *Mzizi* 1991 (2) ZL R 321 (S) at 32 3 B and *Attorney- General* v *Tarwirei* 1997 (1) ZLR 575 (S) at 576 G.
4. In a nutshell, the phrase in question means any of these three scenarios:

(a) Where there is no evidence to prove an essential element of the offence;
(b) Where there is no evidence on which a reasonable court, acting carefully, might properly convict,
(c) Where the evidence adduced by the prosecution is so manifestly unreliable that no reasonable Court could safely act on it. Other decisions on the same subject are *S* v *Tsvangirai and Ors* 2003 (1) ZLR 88 (H) and *S* v K*uruneri* HH 59/07.

5. In our courts, the phrase "no evidence" at the close of the case for the prosecution has been referred to as a situation where the state would have failed to establish a prima facie case. Hence, in *S* v *Nyarugwe* HH 42/16, the court said:

> "In all instances, the cardinal guide is that the state would have failed to prove a *prima facie* case. A prima facie case is where one can say there has been shown on evidence led a probable cause to put the accused on his defence. Generally probable cause or *prima facie* case is made where all the essential elements of the offence charged or any other offence on which the accused person may be convicted had been proved on a balance of probabilities."

6. Between them the accused persons are relying on the three grounds each of which, if established, would justify a discharge at the close of the case for the prosecution.
7. They are jointly charged with the crime of criminal abuse of duty as public officers as defined in s 174 (1) (a) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] ("the Criminal Law Code").
8. The second, third and fourth accused were, at the material time, public officers in the employ of the City of Harare as the Acting Finance Director, the City Valuer and Estates Manager and a Valuation Technician respectively. All were deployed to the Department of Finance and were stationed at the Rowan Martin Building in Harare.
9. The allegations are essentially that as co- perpetrators, the accused, in or about 2018 and at Harare, initiated the creation of three commercial stands at the corner of Drummond Chaplin Street and Bishop Gaul Avenue on land owned by the City of Harare but on lease to Old Hararians Sports Club. Having created those stands, they sold them to three sister companies without first of all complying with the mandatory provisions of s 152 of the Urban Councils Act [*Chapter 29:15*] which prescribe the procedure to follow in selling land owned by an urban Council. The allegations are also that there was no compliance with s 49(3) and (4) of the Regional Town and Country Planning Act [*Chapter 29:12*] in that the land was sold without change of reservation. The State alleges that the accused persons thus unlawfully sold the land disfavouring Old Hararians Sports Club and favouring the three sister companies.

10. Despite the vigorous endeavours of the accused persons, through their legal practitioners, the Court is satisfied that there is prima facie evidence that the trio committed the offence charged in the indictment.
11. The Court does not think it necessary to set out all such *prima facie* evidence but will highlight part thereof. This approach suffices to enable the court in determining this application.
12. The court emphasises that even for purposes of determining whether a *prima facie* case has been established it looks at the evidence as a whole. It bears in mind always that its task is to decide whether the evidence, on the face of it, links the accused persons to the alleged commission of the offence. Whether the case against the accused persons has been proven beyond reasonable doubt cannot be the issue at this stage.
13. The Court considers whether there is *prima facie* evidence linking each of the accused to the conduct element of the offence.
14. The combination of oral and documentary evidence moves the court to find that the application for discharge, in respect of each accused, cannot succeed.
15. The procedure for alienation of urban Council land is set out in s 152 of the Urban Councils Act. As for effecting change of use before sale s 49 (3) and (4) of the Regional, Town and Country Planning Act is pertinent.
16. There is oral and documentary evidence that in 2016 and 2017 the three sister companies applied to the City Valuer and Estates Manager, City of Harare, Rowan Martin Building at Harare to purchase land to establish a suburban market garden (fresh farm produce), a fuel service station and for recreational purposes respectively. At this stage of the trial, it matters not whether the third accused was, then, the incumbent City Valuer and Estates Manager for the City of Harare. The evidence discloses that all applications for land are made to the City Valuer and Estates Manager, as the holder of that office is regarded as the custodian of all Council land.
17. There is *prima facie* evidence that at all material times, the three companies shared the same shareholders and directors, hence the reference to them as "sister companies."
18. On 30 September 2019 and 18 October 2019 three documents appear to have been generated from the Finance Department of the City of Harare wherein proposals were made to the Finance and Development Committee that, notwithstanding a 29 September 2005 resolution by the Commission then running the affairs of the City of Harare that land such as is the subject of this trial be sold through a tender process, direct sales of

the three stands be effected to the three sister companies, at certain prices, for the purposes already mentioned.

19. Hosiah Chisango testified that he signed the three documents in his capacity as Town Clerk. He drew the Court's attention to what he said was his signature and the dates that he affixed the same.
20. There is evidence, on the face of it, suggesting that the second accused occupied the office of Acting Finance Director at the time that the three documents (each called "THE TOWN CLERK'S REPORT TO THE FINANCE COMMITTEE") appear to have been generated and signed. Somebody signed that report ostensibly as Acting Finance Director, apparently on the same dates that Chisango then proceeded to do the same.
21. The three reports bear the City of Harare logo as well as the references of the Finance Director and those of the fourth accused.
22. *Prima facie* evidence before this court shows that these reports were initiated by the third accused who in turn forwarded them to the Acting Finance Director (because there was no substantive Finance Director) for further management.
23. Similarly, there are two documents which were produced as the Minutes of the Finance and Development Committee meetings of the City of Harare held on 22 and 30 October 2019. The third accused, who did not resist the production of both exhibits, is reflected as having attended both meetings in his capacity as the City Valuer and Estates Manager. One L Churu is reflected as having attended both meetings the one as a mere official from the Finance Department (where the second accused is designated as having attended as the Acting Finance Director) and the other where he is listed as having attended as the Acting Finance Director. The second accused is not reflected as having attended this other meeting.
24. A reading of these two exhibits appears, at this stage of the trial, to be in line with Luckson Mukunguma's evidence that it was at these meetings that the Finance and Development Committee, acting on what we have conveniently referred to as Town Clerk Reports to the Finance Committee, among other documents, resolved to recommend to the Full Council of the City of Harare that the three stands be sold to the companies in question for the purposes which are now known. The minutes of the Finance and Development Committee, so to speak, gives the court to understand that the committee did not swallow the recommendations received by it hook, line and

sinker. It tinkered with the proposed selling price of the stands and gave reasons. Mukunguma was the chairperson of the Finance and Development Committee at the time material to this application.

25. The last set of exhibits are three letters apparently signed by the holder of the office of Acting Finance Director on 13 November 2019 advising that council had, on 22 and 30 October 2019, approved the sale of the three stands to the three companies at specified prices and that the beneficiaries should pay the same into the given council bank accounts and submit the receipts to the office of the Finance Director at Rowan Martin Building soon thereafter.
26. Allan Mutsitu told the Court that he was the Secretary of the three companies at the material time and that the latter paid the full purchase price of the stands
27. We pause to observe that the three exhibits calling upon the beneficiaries to pay for the stands appear to give the impression that Full Council had sat and decided to sell the land in question to those beneficiaries. At the same time what is referred to therein as the decision of council to approve the sale seem to be the recommendations of the Finance and Development Committee, made on 22 and 30 October 2019, to sell the land. We mention also that the letters of 13 November 2019 implicate the third and fourth accused persons in that they bear the latter's name and reference and, in terms of their coming into being, were spoken to as having been initiated by the custodian of Council land, the third accused.
28. Mukunguma told the court that the conditional subdivision diagram produced as an exhibit was not the one which his committee acted upon to recommend the sale of the stands. His testimony was that the one presented to his committee, together with the Town Clerk Reports, bore no conditions hence the Committee acted on the understanding that nothing stood in the way of making recommendations to Full Council that the stands be sold. The three witnesses from the City of Harare's Planning Division testified that one of their number, Samuel Nyabeze, approved the subdivision of the land into 5 stands with these conditions:

"Notes
1. Zone: open space and recreation – Phase 2,3 and 4.
2. Approval is for lease purposes only pending change of reservation process.
3. No stand shall be disposed before finalisation of change of reservation in terms of s 49 (3) of the RTCP Act"

29. The court is grateful to all three counsel for drawing its attention to the growing body of cases in this jurisdiction speaking to the essential elements of the offence with which the accused persons were charged. These cases were cited in an endeavour to persuade the court to find that no *prima facie case* had been proved against the accused persons because some of the essential elements of the offence were not established on the evidence. These include *S* v T*aranhike & Ors* 2018 (1) ZLR 399 and *S* v *Gomba & Ors* HH 391/23.
30. None of the cases referred to were concerned with an application such as the present.
31. Although it was in reference to the common law offence of misconduct in public office in Hong Kong, we think the following passage by Paul H Cohen and Arthur Marriot QC in their book *INTERNATIONAL CORRUPTION* South Asian Edition 2012 helps in further understanding the crime of Criminal abuse of duty as a public officer as defined in s 174(1) (a) or (b) of our Criminal Law Code. There, at pp 168 -169, the learned authors say:

> "More recently a number of prosecutions have been successfully brought for the common law offence of misconduct in public office. The following examples of the misconduct of public officers illustrate the scope of the offence: civil servants who awarded government contracts to firms with which they were associated in some way; those who by their actions prevented open competition in the government tendering process; an officer who unlawfully awarded his staff pay increases and fraudulently concealed his actions; a Legislative Councillor who compromised his position in the course of carrying out consultancy work for an organisation which was to be affected by new legislation being debated in the Council; civil servants who committed fraud in relation to their housing rental allowance; officers of the Correctional Services Department in their dealings with prisoners and their relatives; and civil officers who falsified records about their attendance at work and the performance of their duties. A decision of the Court of Final *Appeal (Shum Kwok Sher* v *HKSAR [2002] 5 H KCFAR* 381) clarified the elements and scope of the offence. It is committed by a public official who in the course of or in relation to his public office wilfully, intentionally and culpably misconducts himself. The Court made clear that the gravity of the misconduct is an important requirement of the offence and emphasised that it was not every breach of discipline that would amount to the criminal offence. It was described by the trial court as "analogous to corruption" and is punishable by a maximum of seven years imprisonment, the same maximum as for bribery under s 4 of [The Prevention of Bribery Ordinance 1971]"

32. The cites the above passage for the purpose of reinforcing our view that on the face of it the second, third and fourth accused persons, by reason of their public offices, the exhibits which ex facie apparently not only appear to have emanated from those officers but seem to bear connections to their persons in their official capacities and, inter alia, their apparent involvement in the alleged process leading to what seems to

be a sale of the three stands require all three to give their versions. That they can only do in their defence cases. See Attorney *General* v *Tarwirei* 1997 (1) ZLR 575 (S).

33. On the evidence there is probable cause to require explanations from the three accused persons who appear to have favoured the three companies and prejudiced Old Hararians by circumventing the provisions of s 152 of the Urban Councils Act and s 49(3) of the Regional, Town and Country Planning Act in what appears at this stage to have been a sale of the three stands to Silver Habour (Private) Limited; Leanforth Investments (Private) Limited and Optel Enterprises (Private) Limited.
34. In the result the application for the discharge of the second, third and fourth accused persons at the close of the case for the prosecution be and is dismissed.

The National Prosecuting Authority, for the State.
Rubaya & Chatambudza, second accused person's legal practitioners
Sibonile Kampira Attorneys at Law, third accused persons legal practitioners
Magaya Mandizvidza Legal Practitioners, fourth accused persons legal practitioners