THE STATE
versus
ROY LESLIE BENNNET

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 19 January 2010 and 25 January 2010

ASSESSORS: 1. Mr. Musengezi
2. Mr. Chivanda

J *Tomana* and Mrs *F Ziyambi* and C *Mutangadura,* for the State
Mrs *B Mtetwa* and *T Maanda*, for the defence.

Impeachment Application

BHUNU J: In this case the state is seeking the impeachment of its main witness, one Michael Peter Hitschman in terms of section 316 of the criminal Procedure and evidence Act [*Cap 9:07*] on the grounds that the witness has materially departed from his previous statements. The section provides that:

> **"316 Impeachment and support of witness credibility**
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> It shall be competent for any party in criminal proceedings to impeach or support the credibility of any witness called against or on behalf of that party in any manner and by any evidence in and by which, if the proceedings were before the Supreme Court of Judicature in England, the credibility of such witness might be impeached or supported by such party, and in no other manner and by no other evidence whatever:
>
> > Provided that any such party who has called a witness who has given evidence in any such proceedings, whether that witness is or is not, in the opinion of the judge or judicial officer presiding at such proceedings, adverse to the party calling him, may, after the said party or the said judge or judicial officer has asked the witness whether he has or has not previously made a statement with which his testimony in the said proceedings is inconsistent and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been mentioned to the witness, prove that he previously made a statement with which his said testimony is inconsistent."

It is trite and a matter of elementary law that a party calling a witness may not contradict, discredit or challenge its own witness's evidence unless that witness has been declared a hostile or adverse witness by the court. If however any authority is required for that proposition of law, one need not look further than the case of *S* v *Mazhambe & Ors* 1997 (2) ZLR 587

JW Horn in his article, *Discrediting One's Own Witness* published in the Rhodesia and Nyasaland Law Journal 1961 at p 80 defines an adverse witness in the following terms:

> "An adverse witness is one who shows himself to have a mind hostile to the party calling him, or to the interests of such party. Such hostility may be inferred from one or more of the following: his demeanour in the witness stand, his relationship with either party, his previous conduct or the fact that he has made a previous statement inconsistent with his evidence."

Having said that, the learned author proceeds to say that once a witness has been declared adverse the party calling the witness is free to cross-examine him. Where the witness gives evidence which is inconsistent with a statement made by him previously, the party calling him may prove such statement.

The nature of the previous statement takes many forms. The learned author states that:

5. Such a statement may be oral, or written, and need not have been made to the party calling the witness, or for the object of being used in the proceedings in which the witness is testifying.

6. The witness should be given sufficient particulars of the alleged statement to designate the occasion upon which it was made.

7. The witness should then be asked whether he admits to having made a statement on the occasion specified. If the statement is signed he may be asked to admit or deny his signature.

8. <u>The previous statement must be shown to be inconsistent with the testimony of the witness by the party desiring to produce it. Any statement or part of any statement, which would be inadmissible if led as evidence cannot be relied upon to show such inconsistence.</u>

The facts giving rise to these impeachment proceedings are to a large extent common cause. The brief undisputed facts are that on 6 March 2006 the witness was found in possession of a large quantity of firearms, ammunition and arms of war. He was then arrested and detained together with the recovered weapons and ammunition at Adams Barracks by a

group of State agents comprising the police army and CIO personnel. He was later transferred to police custody on charges of insurgency, terrorism, sabotage and unlawful possession of firearms.

While under detention the witness made certain written statements and indications. On 7 March 2006 he made a hand written statement at Adams Barracks and on 11 March 2006 he made a typewritten affidavit at CID offices. The witness also made indications which were captured on video tape at Adams Barracks. In all those statements and indications he confessed and admitted having committed the offence in collusion with others including the accused. He implicated the accused alleging that he was responsible for financing the whole criminal enterprise to violently effect regime change through force of arms.

The witness admitted in open court that he made the said statements and indications to State authorities. He however placed the admissibility of the statements and indications in issue saying that they were involuntarily extracted from him through torture under unfriendly and hostile circumstances.

It is common cause that when the witness made the said statements and indications he had not been properly warned and cautioned. The handwritten statement was not signed or witnessed by anyone. The witness told the court that his tormentors were drunk and disorderly such that in their drunken state they omitted to make him sign the statement. Having noted the omission, he then deliberately refrained from signing it, signifying his lack of free volition.

The witness was subsequently charged with substantially the same charges as the accused. He appeared before CHITAKUNYE J whose verdict reads as follows;

> "From the above, this court is of the view that the accused cannot be found guilty of the main charge. He (is) found not guilty and acquitted on the main charge. He is instead found guilty of the possession of dangerous weapons in contravention of s 13 (1) of POSA",

He was then sentenced to four years imprisonment of which one year was suspended on appropriate conditions. He has since completed serving the prison term although he has an appeal pending in the Supreme Court.

Upon being served with a subpoena to give evidence as a State witness in these proceedings. The witness responded by delivering to the Attorney General an affidavit in November 2009. In para 12 of that affidavit he absolves the accused of any wrong doing or complicity in the commission of any related charges. In para 12 he had this to say:

> "Consequently therefore, and as the police are fully aware there is no relevant testimony I can give in respect of the charges now being brought against Mr Leslie Roy Bennett who was not involved in my firearms business or in any dealings I had with firearms. In any event I do not believe that I have been validly sub-poened and unless advised to the contrary, I do not intend to appear in court on 9 November 2009."

Despite his protests the witness attended to give evidence as a State witness at the accused's trial. It is also common cause that the Attorney General called the witness to give evidence with the full knowledge that he was likely to give evidence adverse to the State case.

Not surprisingly when he appeared in court, the witness gave evidence which is unavourable to the State case and heavily leans in favour of the accused. It is on that basis that the State put in motion these impeachment procedures.

I now turn to consider the admissibility of the previous inconsistent statements upon which the State relies in its bid to impeach its own witness. It is not in dispute that both statements and indications were made at the instance of State authorities. It is a legal requirement that the police must properly warn and caution an accused person before asking him to make a statement for production in court. It is also common cause that the witness was not properly warned and cautioned according to law before making the statements.

That being the case, the statements were obviously inadmissible against the witness this explains why they were not used at his own trial. It follows as a matter of common sense that if the statements and indications were inadmissible against the witness they were equally inadmissible against his alleged accomplice that is to say the accused.

Having examined the statements and indications in question I have no doubt that they are not ordinary witness' statements. They are in fact confessions made by the witness not in his capacity as a witness but as an accused person pending his own prosecution.

Section 259 of the Criminal Procedure and Evidence Act [*Cap 9:07*] provides that:

> "259 **Confession not admissible against other persons**
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> No confession made by any person shall be admissible as evidence against any other person."

The section is couched in simple clear language such that it needs no further elucidation. It constitutes a prohibition thereby making its provisions peremptory and absolute. I accordingly hold that the statements and indications in question if tendered as evidence will be inadmissible against the accused.

It will be remembered that the learned author J. W. Horn taught us in his article *'Discrediting One's Own Witness'* that an inadmissible statement cannot be used for the purposes of proving the inconsistency.

That being the case I hold that the alleged previous inconsistent statements cannot be used for the purpose of impeaching the witness.

The basis for impeachment is however, not restricted to previous inconsistent statements. In the *Mazhambe* case, *supra* GILLESPIE J traced the history of our law on impeachment to the Supreme Court of Judicature in England as at 1865. The relevant statute provides as follows:

> "A party calling a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge, prove adverse, contradict him by other evidence, or, by the leave of the judge, prove that he has made at other times, a statement inconsistent with his present testimony, but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement".

My understanding of the above English statute, which has been domesticated into our law, is that the basis of impeachment proceedings is adversity or hostility on the party of a witness against a party calling him. There are various ways of proving hostility and proof of previous inconsistent statement is only one of them.

In articulating the law in the *Mazhambe* case *supra*, The learned judge observed that:

> "The word 'adverse,' in this section does not only mean 'unfavourable'. It means hostile. A party may not cross-examine his own witness unless the judge is of the opinion that he is hostile. A witness can only be considered adverse, or hostile, if he is shown to bear a hostile *animus* towards the party calling him and so does not give his evidence fairly and with the desire to tell the truth …
>
> The South African precedents are accordingly persuasive. These show that the mere fact that a witness gives evidence which is unexpected by the party calling him does not render him hostile. Neither is his having made a previous inconsistent statement conclusive of the point, though it may be a factor to be taken into account, the crucial thing is the witness'… demeanor in the witness box"

The above articulation of the law accords with Horn's definition of a hostile witness particularly when he says that:

> "Hostility may be inferred through various considerations which include his demeanour in the witness stand, his relationship with either party, his previous conduct or the fact that he has made a previous statement inconsistent with his evidence."

I now turn to consider the witness' demeanor in the witness box to determine whether or not he can be said to be an adverse or hostile witness. The witness gave his evidence at the instance of the State with the greatest reluctance as expressly stated in his affidavit of November 2009. It is clear that the witness only turned up to give evidence in court as a State witness because he had no option as he is a competent and compellable witness.

In the witness stand he portrayed the demeanor of a deeply aggrieved citizen who has an axe to grind with the State and its functionaries. He presented himself as a melancholic wounded weeping soul who has been gravely brutalized and tortured at the hands of the State, its organs and functionaries.

He views his former colleagues in the police force and the intelligence services as corrupt and incompetent. The witness was at pains to explain that he lost his job in the police force because he was competent and incorruptible. His corrupt colleagues instigated his dismissal because they feared that he would expose their incompetence and corruption.

He was bitter that all the other suspects in related cases had charges dropped against them except for him and the accused that happen to be of a different race.

He considers that he was unjustly prosecuted, convicted and served a prison term at the instance of the State. He still views the State as an adversary because he has a pending appeal case against the State in the Supreme Court on related charges. He thus took the unusual stance of seeking the services of his lawyer to protect his interests against being trampled upon by the State while he was giving evidence in this matter.

When asked how he came to know the accused he said that it was through a video clip in which the accused was assaulting an Honorable Government Minister in Parliament. He openly told this court that he found the video clip amusing and entertaining. One wonders whether he would have found the same episode amusing and entertaining had the facts been the other way round.

The witness engaged in slinging matches with the Attorney General whom he sought to portray in open court as an incompetent State functionary who was wasting the court and

everyone's time by calling him as a witness when he knew that he was not going to implicate the accused.

It is a fact that the witness was found in possession of arms of war. The State is alleging that the accused was involved in the commission of the offence. The witness has however vehemently sought to absolve the accused from any involvement in the commission of the offence. His contact in this case is obviously against the State's interests.

Having seriously considered the matter and carefully weighed the evidence before me, the history of this matter and the witness' performance and demeanor in court, I have no option but to find that the witness Peter Michael Hitschmann is an adverse or hostile witness to the State case. Peter Michael Hitschmann is accordingly declared an adverse or hostile State witness and the State is at large to cross-examine him.

Attorney General's Office, State's legal practitioners.
Mtetwa & Nyambirai, accused's legal practitioners.