

JOB SIKHALA
and
THE STATE

JOB SIKHALA
and
MAREHWANAZVO GOFA
and
NATIONAL PROSECUTING AUTHORITY
and
THE PROSECUTOR –GENERAL

HC 8597/22

HIGHCOURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE; 22 & 28 November 2023

Criminal Appeal and Court Application for Review

H Nkomo with T Mutero and J Bamu, for the appellant in the first matter and the applicant in the second matter

T Mapfuwa with T Kangai, for the respondent in the first matter and the 2nd and 3rd respondents in the second matter

CHIKOWERO J:

1. The first matter is an appeal against the whole judgment of the magistrates court convicting the appellant on a charge of defeating or obstructing the course of justice as defined in s 184(1)(e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
2. The second matter is an application for the review of the trial court's interlocutory decision dismissing the applicant's exception to the same charge. In excepting to the charge, the applicant had argued that it did not disclose an offence.
3. The application for review had been placed before a different judge of this court who, on 4 October 2023, with the consent of the parties, referred the matter to the Court dealing with the criminal appeal.
4. With the consent of the parties we directed that there be no oral argument in respect of the application for review. We proceeded in this manner because we took the view that the

determination of the appeal would also have the effect of disposing of the application for review.

5. As regards the appeal, we did not call upon Mr Nkomo to present argument. Instead, we drew Mr Mapfuwa's attention to certain matters whereupon, on reflection, he effectively conceded the appeal despite him not saying so in so many words.
6. We reserved judgment to consider the propriety of the concession.
7. We are satisfied that the concession is sound.
8. The charge sheet reads:

“.....charged with the crime of:

Defeating or obstructing the course of Justice as defined in section 184(1)(e) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23].

In that on the date unknown to the prosecutor but during the period extending from 25 May 2022 to 16 June 2022, and in Chitungwiza and Nyatsime Job Sikhala knowing that a Police Officer is investigating the commission of a crime or realising that there is a real risk or possibility that a Police Officer may be investigating the commission or suspected commission of a crime and who by an act caused such investigations to be defeated or obstructed intending to defeat or obstruct the investigations, or realising that there is a real risk or possibility that the investigations may be defeated or obstructed that is to say Job Sikhala knowing that a Murder case involving deceased Moreblessing Ali of number 11727Nyatsime Phase 5, Beatrice was being investigated by the Police and that the Police were on a manhunt for the suspect Pias Jamba Mukandi circulated a video clip-on various social media platforms claiming that Moreblessing Ali was kidnapped and murdered by ZANU PF supporters thereby intending to mislead investigations.” (the underlining is for emphasis).

9. Section 184(1)(e) of the Criminal Law Code reads:

“184 Defeating or obstructing the course of justice.

(1) Any person who.....

(e) knowing that a police officer is investigating the commission of a crime, or realising that there is a real risk or possibility that a police officer may be investigating the commission or suspected commission of a crime, and who, by any act or omission, causes such investigation to be defeated or obstructed, intending to defeat or obstruct the investigation or realising that there is a real risk or possibility that the investigation may be defeated or obstructed..... shall be guilty of defeating or obstructing the course of justice and liable to”

10. Section 184(1)(e) is clear that, in so far as the conduct (*actus reus*) ingredient of the offence is concerned, what is contemplated is either an act or an omission on the part of the offender. See also s 10(1) of the Criminal Law Code.
11. We have already set out the charge in the present matter. We accept Mr Mapfuwa's concession that the conduct charged in this matter was an act. The act *in casu* was that the appellant had circulated the video clip in question on various social media platforms.
12. However, the state outline alleged that the offending act was something entirely different. In this respect, para(s) 3 and 4 of the outline of the state case read:
 - “3. On the 25th of May 2022, Accused addressed a gathering of people and told them that ZANU PF supporters had murdered Moreblessing Ali.
 4. When Accused made the speech he knew that the police were investigating the murder of Moreblessing Ali and he intended to mislead police investigations. He intended to divert the attention of the police by causing them to focus on information which he knew to be false thereby obstructing the course of investigations.”
13. The conduct element of the crime as spelt out in the state outline was that the appellant had addressed a gathering of people on 25 May 2022 wherein he told that audience that ZANU PF supporters had murdered Moreblessing Ali well knowing that the police were investigating that murder case. That was not the act alleged in the charge.
14. The state was at liberty to allege, in the charge, the conduct set out in the state outline if it so wished. It did not do so. It did not apply for an amendment of either the charge or the state outline so that the two would speak to each other.
15. The appellant, in outlining his defence and in evidence, denied circulating the video clip in question on the various social media platforms as alleged in the charge sheet.
16. In rendering judgment, the trial court identified what it perceived to be the issue for determination. It said:

“However, it is in dispute as to whether state has proved beyond reasonable doubt that it is accused Job Sikhala who uttered the speech in question. The court is called upon to determine the issue.”

17. Mr Mapfuwa, correctly conceded in our view, that the trial court erred in identifying the issue before it. It was not whether the appellant made the speech in question at all. Instead, it was whether the appellant circulated the video clip of the speech on various social media platforms.
18. Since the state had identified a particular conduct-circulation of the video clip on various social media platforms-the trial court was not called upon to determine whether the appellant had addressed the gathering. That would have been the issue if that had been the conduct alleged in the charge.
19. The offence is contained in the body of the charge. The appellant pleaded not guilty to the offence as set out in the charge. A verdict is rendered on the charge. Indeed, the trial court found the appellant guilty as charged.
20. Initially, Mr Mapfuwa had sought to defend the conviction despite the disparity between the charge and the state outline on the simple basis that at the end of the day, the appellant was convicted for contravening s 184(1)(e) of the Criminal Law Code. Probed to explain that which the appellant had done to constitute the crime counsel stated that it was the making of the speech and the circulation of the video clip in question. That was not the charge. The charge was not amended.
21. Before eventually making the concession, the court had sought to understand from Mr Mapfuwa whether it was competent to convict on that which was not alleged in the charge sheet. Counsel had urged us to take a holistic approach. We asked him to refer us to the relevant provision in the Criminal Procedure and Evidence Act [*Chapter 9:07*] (“The CP&E”). In this regard, we are satisfied that he was correct in abandoning his earlier reliance on s 203 of the CP and E Act. He agreed that the charge was not defective. It did not omit an averment relating to an essential ingredient of the offence. What it did was to aver conduct different from that set out in the state outline.

22. Counsel was unable to refer us to any other section of the CP and E Act to assist us in determining the correctness of the conviction. Our subsequent efforts did not yield any.

23. Mr Mapfuwa conceded that there was no evidence that the appellant circulated the video clip on various social media platforms. Even after making this proper concession, we were surprised that counsel was unwilling to do that which was implicit in the concession itself, that is, to concede to the appeal.

24. Section 9(d) of the Criminal Law Code reads:

“9. Liability for criminal conduct .

A person shall not be guilty of or liable to be punished for a crime unless-.....

(d)the person engaged in the conduct constituting the crime with any of the blameworthy states of mind referred to in section thirteen to sixteen, as this code or any other enactment may require.....”

Since a proper concession was made that there was no evidence that the appellant circulated the video clip in question on various social media platforms, the issue of his state of mind does not arise. Further, since the conduct alleged in the charge was not the making of the speech to the gathering, the trial court erred in traversing that terrain and convicting on findings relating thereto. See *Masinga v Sande N.O and the Acting Prosecutor –General* HH 372/19, *Chifamba v Mapfumo N O and 3 others* HH 317/20.

25. The application for review has ceased to present any live issues requiring determination. Since it was not withdrawn, all we can do at this stage is to remove it from the roll.

26. In the result, IT IS ORDERED THAT:

(A) In respect of case number HACC(A) 12/23:

1. The appeal be and is allowed.

2. The conviction is quashed and the sentence set aside. The following is substituted:

“The accused is found not guilty and is acquitted.”

(B) In respect of case number HC 8597/22:

1. The matter be and is removed from the roll.
2. Each party shall bear its own costs.

CHIKOWERO J:.....

KWENDA J: I agree.....

Mhishi Nkomo Legal Practice, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners
Mhishi Nkomo Legal Practice, applicant's legal practitioners
The National Prosecuting Authority, second and third respondent's legal practitioners