

THE STATE
versus
SIDINGUMUZI NCUBE
and
JEFAT CHAGANDA
and
TYSON RUVANDO
and
GODFREY MAKUVADZE
and
LADISLOUS TAMBOONEI
and
ADMIRE RUBAYA
and
LADISLOUS TINACHO
and
GINGER VHIYANO
and
STANLEY CHINYANGANYA
and
TIMEON TAVENGWA MAKUNDE

HIGH COURT OF ZIMBABWE
MABHIKWA J with Assessors Mr O Dewa and Mr B Ngwenya
BULAWAYO 6, 7, 8 AND 9 NOVEMBER 2018,

Ruling on the *voire dire* point

Mrs T R Takuva, Ms N Ndlovu & C Muhwandavaka for the state
C Ndlovu for the 1st, 2nd, 3rd, 4th & 8th accused persons
S M Hashiti for the 2nd accused
T Muganyi & M Mahaso for the 5th and 7th accused persons
T Mpofu, O Marwa & T Tabana for the 6th accused person
P Butshe for the 9th accused person
B Mufadza for the 10th accused person

MABHIKWA J: After the oral evidence of 2 state witnesses and the admission in terms of section 314 of the Criminal Procedure and Evidence Act of 12 other state witnesses' evidence as summarised in the state outline, the state called a 3rd witness to give oral evidence, one Lovemore Sibanda.

The state then advised the court that the state witness is an accomplice witness in that he is suspected to have participated in the commission of the offence.

The witness was then duly admonished by the court in terms of section 267 of the Criminal Procedure and Evidence Act. After the warning by the court, *Advocate T. Mpopfu* for the 6th accused rose and indicated to the court that he wished to take the witness on what he referred to as a “*voire dire*” point which he briefly described as;

“A preliminary examination of a witness by a judge or counsel in an investigation into the truthfulness or admissibility of his evidence or, a preliminary examination into the competency of a witness.”

In his submissions *Advocate Mpopfu* stated that in this case it is a preliminary examination of a witness made even before he testifies in chief, and it is taken under circumstances where the state tells the court “to be on extra-high alert because the witness it has called has come to lie to it”. Counsel then said he needed about five (5) to ten (10) minutes to put questions to the witness which will show the court that the “witness who has come before it, has sat down and agreed with others, planned and agreed that false evidence will be placed before the court which evidence is contrary to the truth”.

May I point out at this stage that in our jurisdiction and the world over, no witness is said to have come to lie or that he is a liar before he has even testified, otherwise why call him.

In our Criminal Procedure, and Evidence Act, the state does not, and in this case did not say the “witness has come to lie to the court”. Counsel for the state advised the court that the witness is an accomplice witness in that he may have had a hand in the commission of the offence. That, in our law is enough to state. In the warning, the court takes it from the state and advises the witness that he falls under the category of suspect or accomplice witnesses and is warned not to lie to the court. Whether he actually lies or tells the truth in his testimony is for the court to determine and only after he has testified and in assessing the totality of the evidence presented. The court was referred to various foreign authorities which did not support the point being made. The local authorities, including *State vs Mubaiwa* 1980 ZLR 477 relate to the prosecutor’s duty to be honest, fair and act as an officer of the court, by disclosing all crucial

material in a case even if it favours the accused or for instance where a witness starts departing from his statement in a manner which becomes clear to him that the witness is now lying against the accused. It should be remembered though that until the mid or late 1990s, the accused and their counsel would not be privy to witnesses' statements and the courts for that reason would, if later proved that the prosecutor had withheld information in accused's favour, hold that the prosecutor would have acted improperly. There is a plethora of authorities to that effect. Nowadays, that area is covered largely by the fact that the accused or counsel are given state witnesses' statements and would know if a witness has departed from their police record statement for instance. This is different from the scenario in this case.

Advocate S. M. Hashiti for the 2nd accused also took the submission further and like Mpofu he too cited foreign authorities wherein the point was allegedly taken.

The state opposed the application or request and asked the two counsel to state in terms of what section of our criminal procedure or in terms of what law they so wished to take the witness on the said *voire dire* point. The state's position was simply that as far as it is concerned, the procedure is alien to our law and is not provided for in the Criminal Procedure and Evidence Act Chapter 9:07. The state further submitted that the court should not be persuaded to follow foreign judgments whose precise adoption and motive has not been articulated. The state submitted that the two or so Zimbabwean cases cited by the 2 counsel had nothing to do with the *voire dire*.

The two advocates then argued that if there is no provision for a *voire dire* in our law or procedure, then the court should get its recourse from section 137 of the Criminal Procedure and Evidence Act.

It is in fact true, as submitted by counsel for the accused that the High Court has original and inherent jurisdiction to do anything that it has not been barred by the Constitution or other statute from doing. However, it seems to me that the *voire dire* is a legal phrase, originally French, meant to cater for a variety of procedures connected with jury trials. In fact it appears to be a concept which other jurisdictions may have developed into a procedure, hence in some jurisdictions it is an equivalent of a trial within a trial. In our own jurisdiction, we have a trial

within a trial were a witness, be it an accused, or state or defence witness, retracts materially from their earlier recorded/given statement. Even then the terminology is different, when it is an accused, it is usually referred to as a trial within a trial. If it is a witness, it is referred to as impeachment proceedings. There is a plethora of cases relating to these procedures.

The court was also told by the two counsel that in Zimbabwe, the point was taken in the case of *The State vs Tsvangirai* 2004 (2) ZLR 210 (S).

In respect of witnesses such as Lovemore Sibanda, our part XIV, in particular section 267 (1) of the Criminal Procedure and Evidence Act perhaps caters for that *voire dire* scenario. As already stated above, the state advises the court that the witness about to testify is an accomplice witness (not that he will lie to the court). The court then admonishes him. He then takes the oath and testifies like any other witness.

It should be noted that the warning once made, does not bar any counsel to cross-examine the witness in a bid to show that he is not being truthful and the counsel may cross-examine as much as they like in that regard and on any issue that will tend to show or prove dishonesty on the part of the witness.

As already stated above also, the *voire dire* appears to me to be a concept used differently in different countries especially in Commonwealth countries such as the United Kingdom, Cyprus, Hong Kong, Ireland, Austria, New Zealand, and there are some, even in the United Kingdom itself like Scotland, that have not adopted it.

In the absence of a clear case in our jurisdiction where the *voire dire* was adopted, I remain fortified in my finding that our section 267 of the Criminal Procedure and Evidence Act together with the cross-examination thereof combined, will remind and guide the court in assessing the accomplice witness's evidence.

The application is dismissed. The matter proceeds in the normal procedure.

National Prosecuting Authority, the state's legal practitioners
Gonese and Ndlovu, 1st, 3rd, 4th & 8th accused's legal practitioners
Nyikadzino, Simango & Associates, 2nd accused's legal practitioners
Tanaka Law Chambers' 5th & 7th accused's legal practitioners
Rubaya and Chatambudza, 6th accused's legal practitioners
MathonsiNcube Law Chambers, 9th accused's legal practitioners
Mufadza and Associates, 10th accused's legal practitioners