

OWEN MASEKO

v

THE STATE

PISHAI MUCHAURAYA

v

THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC, GARWE JCC,
GOWORA JCC, HLATSHWAYO JCC, PATEL JCC & GUVAVA JCC
HARARE, JANUARY 15, 2014

Z T Chadambuka, for the applicants

C Mutangadura with T Mapfuwa, for the respondents

MALABA DCJ: Both matters were disposed of on the basis of a concession made that the facts in respect of each case did not disclose an offence. What follows are the reasons for the order made on that day striking both matters off the roll.

On 15 September 2010, Owen Maseko appeared before a magistrate in Bulawayo charged with the offence of contravening s 31(a)(i) of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] (the Criminal Law Code). The allegations were that on 25 and 26 March 2010, he exhibited paintings and drawings with legends expressing his thoughts on the social effects of the historical event commonly known as Gukurahundi for public scrutiny at the Bulawayo National

Art Gallery. He was accused of having “published or communicated to any other person a statement which is wholly or materially false with the intention or realizing that there is a real risk or possibility of inciting or promoting public disorder or public violence or endangering public safety”. The alternative charge was of contravening s 33(2)(a)(ii) of the Criminal Code.

The allegation was that in the legends that explained the paintings and drawings exhibited by Owen Maseko at the Bulawayo National Art Gallery he suggested that the President through the Gukurahundi had forced the then ZAPU political party to sign the Unity Accord with ZANU in 1987.

On the basis of the above allegations and other interpretative conclusions by the police and prosecuting authority on the meaning of the works of art displayed and the legends accompanying them, Owen Maseko was accused of having publicly, unlawfully and intentionally made a statement about or concerning the President with the knowledge or realizing that there was a real risk or possibility that the statement is false and that it may cause hatred, contempt or ridicule of the President in person or in respect of the President’s Office.

In the proceedings before the magistrate, Owen Maseko raised the questions of the constitutional validity of ss 31(a)(1) and 33(2)(a)(ii) of the Criminal Law Code. He alleged that the provisions violated the fundamental human rights to freedom of conscience and freedom of expression enshrined in ss 19(1) and 20(1) respectively of the former Constitution (“the Constitution”). He requested the magistrate to refer the questions of the contravention of the fundamental human rights to the Supreme Court for determination in terms of s 24(2) of the

Constitution. Being of the opinion that the raising of the constitutional question in the proceedings before him was not frivolous or vexatious, the learned magistrate referred the question to the Supreme Court for determination.

On 16 June 2010, PISHAI MUCHAURAYA appeared before a magistrate at Murambinda charged with the offence of contravening ss 33(2)(a)(i) or 33(2)(a)(ii) of the Criminal Code. The accused who was a member of the MDC-T political party addressed a public gathering at Makoni Business Center Murambinda in Buhera on 8 October 2006. He was alleged to have told the gathering that the President was aged 82 years and therefore an old person. He was alleged to have uttered words to the effect that because of old age the President was unwell and should not extend his term of office.

As a result of the utterances, Pishai Muchauraya was accused of having publicly, unlawfully and intentionally made a statement about or concerning the President with the knowledge or realizing that there was a real risk or possibility that the statement is false and that it may engender feelings of hostility towards or cause hatred, contempt or ridicule of, the President in person or in respect of the President's office.

Pishai Muchauraya raised the question of the constitutional validity of s 33(2)(a) of the Criminal Code. The allegation was that the provisions of the section contravened the fundamental human right to freedom of expression enshrined in s 20(1) of the former Constitution. The accused requested the magistrate to refer the Constitutional question to the Supreme Court for determination in terms of s 24(2) of the Constitution. The learned magistrate was of the view that

the raising of the constitutional question in the proceedings before him was frivolous. He refused to refer the constitutional question to the Supreme Court.

On 23 March 2011 an application was made to the Supreme Court in terms of s 24(1) of the Constitution. The allegation was that the refusal by the learned magistrate to refer the constitutional question to the Supreme Court for determination was a violation of the accused's right to the protection of the law enshrined in s 18(1) of the Constitution.

At the hearing of the application, the State properly conceded that the learned magistrate erred in holding that the raising of the constitutional question by the accused was frivolous. The Court was then in the position in which it would have been had the constitutional question been referred to it for determination.

Upon hearing argument from counsel in the referral by Owen Maseko, the Court made an Order on 30 October 2013 calling upon the Minister of Justice, Legal and Parliamentary Affairs in terms of s 24(5) of the former Constitution to show cause why ss 31(a)(i) and 33(2)(a)(ii) of the Criminal Law Code should not be declared to be in contravention of ss 19(1) and 20(1) of the Constitution. The return day for the *rule nisi* was 20 November 2013 at 9.30a.m.

On 11 November 2013 an agreement which became an order by consent was entered into by the legal representatives of PISHAI MUCHAURAYA and the State to the effect that the parties would "abide by the decision of the Constitutional Court in respect to the

constitutional validity of s 33(2)(a) of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] as it will be announced in *OWEN MASEKO v THE STATE SC 60/11*”.

On 20 November 2013 the hearing was postponed with the consent of all the parties to 15 January 2014. The *rule nisi* was extended to that date. When the hearing resumed on 15 January 2014, Mr *Mutangadura* indicated that the State had decided not to proceed with the charges against the accused person in each case in the proceedings pending before the magistrates’ court. The reason given for the decision was that the State had realized that the facts on which the charges against each accused were based could not if proved by the available evidence at the trial constitute an offence. See *Williams & Anor v Msipha NO & Ors* 2010(1) ZLR 552(S).

A close examination of the facts on which the charges against the accused in each case were based tends to vindicate the decision taken by the State. Maseko’s contention was that all the paintings and drawings exhibited at the Art Gallery were works of art. As such they could not lend themselves to one conclusive interpretation by viewers. According to him the pictures expressed ideas or thoughts on aspects of the Gukurahundi as a historical event and its social effects developed over time and presented in visual form for public scrutiny.

The paintings and drawings made the statement that the historical event happened; people died and there were social effects on the survivors. There was nothing in the visual images themselves that incited people to violence. The magistrate made a finding that the pictures were works of art. As works of art the pictures were naturally open to diverse interpretations by viewers keen to read their true meaning. The police and prosecuting authority chose to place a particular

interpretation on the paintings and drawings which was that they incited or promoted public violence and were intended by the artist to produce that result.

The problem with the approach adopted by the police and prosecuting authority is that, for the interpretation they placed on the works of art to ground the element of incitement to public violence in the offence, the statement that the historical event happened with negative social effects on the survivors had to be shown to be false. The learned magistrate made the finding that the occurrence of the historical event and its social effects was a fact. It was not possible, in the circumstances, for the purposes of the offence, for police and the prosecuting authority to infer incitement of violence from the paintings and drawings and their legends in the absence of the fact that the statement that the historical event and its social effects happened was false.

Simply stating in the outline of the State case, as the prosecution did, that the visual images and accompanying legends incited or promoted public disorder or public violence or endangered public safety and that they were materially false was to repeat the essential elements of the offence. No facts were set out in the outline of the case for the prosecution on the conduct of the accused which when proved at the trial would entitle the State to a verdict of guilty of the offences charged against him.

The same goes for the conclusion that the pictures and accompanying legends were capable of producing and were intended to produce in the minds of the viewing public the emotions of hatred, contempt or ridicule of the President. These emotions are prohibited as part of the crime

when they would flow directly as effects from a false statement about or concerning the President published or communicated to the public.

It is an essential element of the offence under s 33(2)(a)(ii) of the Criminal Law Code that the false statement be capable of deceiving and intended to deceive the public into believing that it is true. There should be a real risk of the public entertaining the negative and prohibited emotions of hatred, contempt or ridicule of the President as a result of the false statement they would have been deceived to believe is true.

Apart from reference to the occurrence of the historical event which could not be said to be false the paintings and drawings exhibited at the Art Gallery did not on the available evidence express the idea about or concerning the President to the effect that he used the historical event and its social effects to force the then PF-ZAPU political party to sign the Unity Accord with ZANU(PF) in 1987. The police and prosecuting authority allege in the outline of the State case that the pictures suggested the statement about or concerning the President which they said was false and intended to cause hatred, contempt or ridicule of the President.

It is not clear from the facts why the police and prosecuting authority state that the paintings and drawings expressed the idea that the President used the Gukurahundi event to coerce the then PF-ZAPU political party to sign the Unity Accord with ZANU(PF) in 1987. This is particularly the case when regard is had to the fact that the details of the legends which are said to have accompanied the visual images set out as the particulars of the charge preferred against the accused and on which he was placed on remand made no reference to the allegation.

On the second case, it was a fact that the President had attained the age of 82 years on 8 October 2006 when Muchauraya addressed the gathering at Makoni Business Center Murambinda. To then found a criminal charge on the allegation that the statement that the President was 82 years old was false was unfortunate.

Considering the fact that the accused was making a political speech it would require more than merely alleging that he incited the gathering to public violence when he said the President should not extend his term in office because of old age. That is the kind of unsolicited advice a politician in opposition in a democracy would be prone to giving without intending to excite his or her audience to public violence.

The right to freedom of expression would protect Muchauraya when he said what he said as it was not a false statement in the sense that it was deductive reasoning from the true statement on the President's age. It is even more difficult to understand why such a statement could be said to be an incitement to public violence. What is clear is that the criminal offence with which the accused was charged was not intended to cover facts relating to the kind of political speech made by the accused.

The offences under ss 33(2)(a)(i) and 33(2)(a)(ii) of the Criminal Law Code are intended to cover the effects of false statements about or concerning the President in the minds of the audience in changing their positive view of him to a negative view characterized by feelings of hostility or hatred, contempt or ridicule of the President. Such negative emotions or attitudes

towards the President would be unjustified because they would be a result of falsehoods about or concerning him. It would ordinarily not be enough to allege that a false statement was made about or concerning the President without going further to show that the statement in itself was capable of producing the prohibited results in the minds of right thinking people.

Not every false statement about or concerning the President has the potentiality of producing the prohibited consequences even if they are intended. This requirement which is apparent from the provisions of s 33(2)(a) of the Criminal Law Code to the effect that the accused must know or realize that there is a real risk or possibility that the false statement “may” have the prohibited consequences was lost to the prosecuting authority.

With the State no longer pursuing the charges against the accused in each case, the criminal proceedings in the lower courts were terminated. There being no criminal proceedings in which the determination of the constitutional questions referred to this Court was necessary for the resolution of the charges against the accused, the need to give judgment on the question of the constitutionality of the provisions of the Criminal Law Code under which the accused were charged has been obviated. The only course open to the Court is to strike the matters off the roll.

The two constitutional matters referred to the Court in terms of s 24(2) of the former Constitution for determination in cases SC 60/11 and SC 63/11 are struck off the roll with no order as to costs.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

Zimbabwe Lawyers for Human Rights, applicants' legal practitioners

Civil Division of the Attorney-General's Office, the respondents' legal practitioners