REPORTABLE (67)

Judgment No. SC 79/06
Crim. Appeal No. 269/05

LISANI NKOMO v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & NDOU AJA
BULAWAYO, JULY 31, 2006 & MAY 31, 2007

No appearance for the appellant

B Sigauke, for the respondent

CHIDYAUSIKU CJ: The main issue that falls for determination in this case is whether the Zimbabwean court that tried the appellant for a killing that occurred in Botswana had the jurisdiction to do so. The facts of the case that are common cause are as follows –

The appellant is a Zimbabwean national. He lives in the Empandeni area of Plumtree. He once worked in Botswana at a place just on the other side of the border. On 18 January 1996 the appellant set off to go to Botswana. He had in his possession a loaded pistol. Once in Botswana he went to a restaurant in an area where he once worked. The appellant was known to the owner of the restaurant and to other people there. He arrived at the restaurant round about 8 pm, just before the restaurant was due to close. He demanded some money from the wife of the owner of the restaurant. The

owner of the restaurant responded by striking him with a sjambok. The appellant moved backwards towards the door and as he did so he took out the pistol and shot the owner of the restaurant who died a few days later. After the shooting, the appellant took money from the restaurant and returned to Zimbabwe. He was arrested in Zimbabwe with some of the stolen money. The pistol was recovered from a bush area in Zimbabwe where the appellant had hidden it. He was tried in the High Court of Zimbabwe in Bulawayo. He was found guilty of murder with actual intent. The court found no extenuating circumstances and sentenced the appellant to death.

The trial judge *mero motu* raised the issue of jurisdiction and referred the case to this Court in terms of s 25 of the High Court Act [*Cap. 21:29*]. The referral reads as follows:

> "(1) Did the High Court of Zimbabwe have jurisdiction to try the accused for murder?
>
> (2) In the event that it had no jurisdiction, could the Attorney-General charge the accused with some other charge such as robbery or theft since the proceeds of the offence were brought into Zimbabwe?
>
> While there seems to be no difficulty with a charge of theft, which is a continuing offence, would the same apply on the charge of armed robbery in view of the circumstances of this case?
>
> I would advise that I have advised both counsel on this move, although they had not raised this issue either before or after the trial. They both agree with this move."

The two issues referred to this Court for determination are whether the court *a quo* had jurisdiction to try this case and whether the Attorney-General can charge the appellant with robbery or theft.

Before dealing with the legal issues referred for determination, I wish to note that the appellant in this case was found guilty of murder and sentenced to death. His appeal to this Court is automatic. Accordingly, when this matter was heard counsel made submissions in regard to both the merits of the conviction and sentence and the points of law referred to this Court by the court *a quo*.

I will deal first with the issue of jurisdiction as the conclusion I have reached on this issue makes it unnecessary to consider the merits of the conviction and sentence.

The Law

The general principle of the common law that criminal jurisdiction of a court does not extend beyond the borders of a country seems to be losing ground. In this regard the learned authors Lansdown & Campbell, in their book *South African Criminal Law and Procedure* vol 5, had this to say at p 9:

> "The general principle of the common law that jurisdiction does not extend to acts committed abroad appears to be losing ground in the face of a trend indicating that where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any of those elements, or their harmful effect, occurred. This submission draws strength from the novel approach to the question of jurisdiction adopted by the House of Lords in *R v Treacy* ([1971] AC 537), a case in which a blackmailing letter written and posted in England was received by the addressee in Germany."

The Courts in Zimbabwe have accepted the new approach to jurisdiction enunciated in *Treacy's* case *supra*. The case of *S v Mharapara* 1985 (2) ZLR 211 (SC)

was decided on the basis of the approach enunciated in *Treacy's* case *supra*. The facts of *Mharapara's* case were that the appellant was charged with the theft of the equivalent in Belgian francs of Z$30 499.62. The theft occurred in Belgium while the appellant was based in Belgium and attached to the Zimbabwe Representative Mission. The theft was only discovered after the appellant had left Belgium and returned to Zimbabwe. On a charge of theft being put to the appellant on trial before the High Court of Zimbabwe, an exception to the charge was taken on the ground that the Zimbabwean courts had no jurisdiction to deal with the matter. The exception was dismissed and the appellant appealed. This Court dismissed the appeal and concluded that the Zimbabwean Courts had jurisdiction. GUBBAY CJ at p 221F-222C, after citing the above passage from *Lansdown & Campbell*, had this to say:

> "With regard to the law of Zimbabwe, I can see no justification for a rigid adherence to the principle that, with the exception of treason, only those common law crimes perpetrated within our borders are punishable. That principle is becoming decreasingly appropriate to the facts of international life. The facility of communication and of movement from country to country is no longer restricted or difficult. Both may be undertaken expeditiously and at short notice. Past is the era when almost invariably the preparation and completion of a crime and the presence of the criminal would coincide in one place, with that place being the one most harmed by its commission. The inevitable consequence of the development of society along sophisticated lines and the growth of technology have led crimes to become more and more complex and their capacity for harming victims even greater. They are no longer as simple in nature or as limited in their effect as they used to be. Thus a strict interpretation of the principle of territoriality could create injustice where the constituent elements of the crime occur in more than one state or where the *locus commissi* is fortuitous so far as the harm flowing from the crime is concerned. Any reluctance to liberalise the principle and adopt Anglo-American thinking could well result in the negation of the object of criminal law in protecting the public and punishing the wrongdoer. A more flexible and realistic approach based on the place of impact, or of intended impact, of the crime must be favoured.
>
> Accordingly, I am satisfied that although all the constituent elements of the theft occurred in Belgium, in particular the obtaining of the money there, the

> State is nonetheless entitled to proceed upon the present indictment and adduce evidence at the trial, if such is available, to establish the fact that the harmful effect of the appellant's crime was felt by the Zimbabwe Government within this country."

Thus *Mharapara's* case *supra* clearly broadens the basis of assumption of criminal jurisdiction beyond territoriality and introduced the principle of impact as a basis of assuming criminal jurisdiction in Zimbabwe.

The case of *Mharapara supra* was approved of and followed in the case of *S v Kapurira* 1992 (2) ZLR 17 (S). The appellant in that case and another person, who were both Zimbabwean citizens, had crossed into Mozambique in order to attend a beer drink there. The appellant attacked his fellow Zimbabwean and fatally wounded him. The victim was returned to Zimbabwe where he died of bleeding from the wound. When the appellant returned to Zimbabwe he was arrested and charged with murder. The High Court decided that it had jurisdiction to try the case and the appellant appealed against the decision. This Court dismissed the appeal and observed that generally the courts in Zimbabwe favoured the approach of basing jurisdiction upon place of impact or intended impact. The jurisdiction in this case was, however, assumed on the basis that an essential element of the offence occurred in Zimbabwe. McNALLY JA, who delivered the judgment of the Court, had this to say at p 20:

> "I would say there is no simple answer to the question: 'Where was the crime committed?'. One would have to answer: 'The assault was committed in Mocambique, and the consequent death took place in Zimbabwe, so the crime was completed in Zimbabwe'. In the same way, there is no simple answer to the question: 'When was he killed?'. One would have to answer: 'He was assaulted on the one day and he died on the next'.

It seems to me therefore that it is not necessary to go into the question of what would have happened if:

a. The victim had died on the spot;

b. The victim had recovered;

c. The victim had been a Mocambican; or

d. The appellant had remained in Mocambique.

I am content to accept and apply the test laid down by the CHIEF JUSTICE in *Mharapara supra* when he said, at p 217 C-D:

> '… the underlying *ratio* was that a court may exercise jurisdiction where either a substantial element of the offence or the harmful effect thereof occurred within its territorial boundaries.'

This approach is entirely supported by the extracts cited at p 221 from Lansdown & Campbell *South African Criminal Law and Procedure* vol 5 at pp 9 and 11.

Of the two bases set out by the CHIEF JUSTICE, I think it might be straining the bounds of language to say in this case that the harmful effect of the offence was felt in Zimbabwe. I will, however, leave that aspect open, because it seems to me indisputable that a substantial element of the offence (i.e. the death of the victim) took place in this country."

The learned judge also went on to make the following observation at p 21E, which I respectfully agree with:

> "I am wary of attempts to tie down too closely the criteria by which the decision to assume or not to assume jurisdiction is taken. I am satisfied that in our law jurisdiction may be assumed, and in this case was properly assumed, on the ground that an essential element of the crime occurred in Zimbabwe and because of the other supporting factors to which I have referred."

The cases of *Mharapara* and *Kuparira supra* provide useful guidelines or criteria to determine jurisdiction. But the criteria provided are not exhaustive, nor were they intended to be exhaustive.

Applicability of the Law to the Present Appeal

I am satisfied that none of the criteria in *Mharapara's* case *supra* or in *Kapurira's* case *supra* provide a basis for the assumption of jurisdiction in this case. I see no basis for the assumption of jurisdiction on the facts of this case. The connection between the crime and Zimbabwe are by far too tenuous to form a basis for assuming criminal jurisdiction by a Zimbabwean court.

The offence charged in this case was murder. Although the appellant in this case is a Zimbabwean, the victim was not Zimbabwean. The victim died in Botswana. None of the essential elements of the offence were committed on Zimbabwean soil. There was no harmful impact or effect on Zimbabwe.

I accept that the principle of effectiveness is satisfied, given that the appellant is a Zimbabwean and any order given by this Court would be effective. However, that alone, in my view, is not sufficient to found criminal jurisdiction in respect of an offence committed outside Zimbabwe's borders and which offence has no impact in Zimbabwe.

As far as the principle of comity, referred to in *Kapurira's* case *supra* is concerned, that only arises where a Court is assuming jurisdiction, lest that assumption may offend another State. In any event, there is an extradition treaty between Zimbabwe

and Botswana and the Botswana Government would have had no problem in extraditing the appellant to Botswana to stand trial there.

As far as the crime itself is concerned, the only link or connection with Zimbabwe is that the weapon used in the commission of the crime originated in Zimbabwe and was found in Zimbabwe after the offence. I am satisfied that this, either alone or in conjunction with other factors of this case, is not sufficient to found jurisdiction in Zimbabwean Courts for an offence that was committed outside its borders.

In conclusion, I am satisfied that the High Court of Zimbabwe had no jurisdiction to try this murder which was committed outside the borders of Zimbabwe and which had no impact or intended impact on Zimbabwe.

The second issue referred to this Court raised the question of whether the Attorney-General could charge the appellant with robbery or theft. The appellant was not charged with robbery or theft, so there was no basis for the High Court to refer that matter to this Court. Indeed, if the appellant had been charged with those offences, different considerations would have applied. In particular the fact that theft is a continuing offence and that the proceeds of the theft were brought to Zimbabwe would have made a difference.

However, the decision as to which offence to proffer is entirely up to the Attorney-General. It is not the function of this Court to provide legal advice to the Attorney-General.

In the result, the appeal succeeds and the conviction is quashed and the sentence is set aside.

ZIYAMBI JA: I agree

NDOU AJA: I agree

Pro deo