THE STATE
versus
ROY LESLIE BENNNET

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 28th January 2019 and 5th January 2010 & 10th May 2010

ASSESSORS: 1. Mr. Musengezi

Mr. Tomana, Mrs. Ziyambe and Mr. Mutangadura for the State
Mrs. Mtetwa and MR. Maanda for the Defence.

BHUNU J: This trial commenced with two assessors Mr. Musengezi and Mr. Chivanda. Mr. Chivanda unfortunately got injured during the course of the trial in a road traffic accident such that he was unable to continue with the trial. Both the prosecution and the defence elected to proceed with the trial with only one assessor. That being the case, I directed in terms of s 8 (1) and (2) of the High Court Act [*Cap 7:06*] that the trial may proceed without the injured assessor. The net effect of that direction is that the verdict of the Court must be unanimous otherwise there has to be a retrial in terms of s 8 (3) (b) of the Act.

I now turn to consider the matter on the merits at the close of the state case following an application for discharge at the close of the state case in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Cap* 9:07]. The section provides as follows:

"(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty".

The accused is charged with possession of weaponry for insurgency, banditry, sabotage, or terrorism in contravention of s 10 (1) of the Public Order and Security Act [*Cap 11: 17*] Arising from that charge are alternative charges of:

a) Possession of dangerous weapons in contravention of section 11 (1) of the Public Order and Security Act [*Cap 11: 17*].or
b) Unlawful possession of prohibited firearms in contravention of s 24 (1) (d) of the firearms Act [*Cap 10:09*] or
c) Unlawful possession of firearms in contravention of section 4 of the firearms Act [*Cap 10: 09*].

In the second count he is charged with incitement to commit insurgency in contravention of section 6 of the Public Order and Security Act [*Cap 11*: *17*].

Undoubtedly these are very serious offences which have a bearing on the security of the state and a question of life and death for the accused. In that case, the Court is duty bound to consider the evidence with convenient speed and due diligence.

The state alleges that during the period extending from sometime between 2002 and 2006 the accused acting in common purpose and consort with one Michael Peter Hitschmann a registered car dealer and former police officer connived to unlawfully depose the lawful government of Zimbabwe through acts of insurgence, banditry, sabotage and terrorism. To this end the two allegedly conspired to unlawfully purchase, acquire and possess arms of war and other military equipment. The accused is said to have been the main financier of the whole criminal enterprise whereas Hitschmann doubled up as chief organizer and executioner of the same.

In the prosecution of their criminal enterprise the two are alleged to have targeted a microwave link and police water cannon trucks for destruction as part and parcel of the grant plan to unlawfully depose the lawful government of Zimbabwe.

The facts giving rise to the allegations against the accused are to a large extent common cause. The undisputed facts are that on 6 March 2006 acting on information Chief Superintendent Sipho James Makone and other police officers accompanied by members of the central intelligence organization arrested and searched Michael Peter Hitschmann's person and premises at number 33 Arcadia, Tiger Groove, Mutare on allegations of illegal possession of arms of war.

It is a matter of common cause and an established fact that during the search a large quantity of an assortment of arms of war, ammunition and other military equipment were recovered from Hitschmann's person and premises. These comprised among others AK and FN rifles, MP5 and Uzi submachine guns, grenades, illuminating flares, a tear smoke launcher and canisters,

It is trite in our law that what is not in dispute need not be proved. I shall therefore not waste any time dwelling on the evidence of state witnesses geared towards establishing that Hitschmann was in fact found in possession of the bulk of weapons and ammunition and military gadgets produced in Court as this is a foregone conclusion. I shall therefore dwell mostly on areas of dispute and controversy.

Hitschmann's laptop computer was also recovered from his house on the 9th of March 2006. The state now alleges that incriminating evidence in the form of e-mails was found and downloaded from the computer, a fact which is hotly contested by the defence.

During the course of investigations Hitschmann made statements and indications to the security authorities. There is no direct evidence which links the accused to the commission of any of the offences. The evidence proffered by the state which tends to link the accused to the commission of the alleged offences is to a large extent circumstantial. That evidence comprises:

a) Michael Peter Hitschmann's warned and cautioned statements and indications.

b) Michael Peter Hitschmann's *viva voce* evidence in Court.
c) Michael Peter Hitschmann's bank account in Manica Mozambique.
d) Michael Peter Hitschmann's laptop computer.
e) Michael Peter Hitschmann's illegal possession of military weapons, ammunition and gadgets.

1. Michael Peter Hitschmann's warned and cautioned statements and indications

During the course of the trial I ruled the statements and indications to be inadmissible against the accused in judgment HH-46- 10. I find myself constrained to repeat what I said in that judgment to the effect that:

> "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.
>
> 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**
> > 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."

2. Michael Peter Hitschmann's *Viva Voce* Evidence.

It is needless to say that the state case hinged on Peter Michael Hitschmann's evidence. According to the summary of the state case he was supposed to be the state's star witness. He was supposed to be the only state witness with direct evidence implicating the accused. He was expected to implicate the accused in his capacity as an accomplice witness. This witness was expected to tell the court how he connived with the accused to depose the lawful government of Zimbabwe through force and violence.

This witness however gave his evidence with the greatest reluctance. As a result he was openly hostile to the state case leading to his impeachment

Upon being served with a subpoena to give evidence as a state witness in these proceedings he responded by delivering to the Attorney General an affidavit in November 2009. In that affidavit he absolves the accused of any wrong doing or complicity in the commission of the main charges or any related offences. In paragraph 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-poenaed and unless advised to the contrary, I do not intend to appear in Court on 9 November 2009."

Despite his protests the witness had no option but to attend and 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 unfavourable to the state case which heavily leans in favour of the accused. He denied that the accused had any hand in the commission of the offences as alleged or at all. He steadfastly stuck to the same story he had told the Court at his own trial. He repeated his testimony to the effect that at the material time government was encouraging farmers to surrender their guns to the police. Some farmers were however reluctant to surrender their guns and other military paraphernalia directly to the police. They chose to use him as a conduit for conveying the equipment to the police. This explains how he came to be in possession of the arms of war and related military gadgets.

That explanation earned him an acquittal on the main charge but was convicted on the lesser charge of being found in possession of offensive dangerous weapons as he was and is still admitting possession of the dangerous weapons in contravention of s 13 (1) of POSA

CHITAKUNYE J's verdict was that:

> "From the above, this Court is of the view that the accused (Hitschmann) 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 Section 13 (1) of POSA"

Hitschmann was then sentenced to 4 years imprisonment of which 1 year was suspended on appropriate conditions. He has since completed serving the prison term although he has an appeal pending in the Supreme Court.

Despite being subjected to a through searching and skilful cross examination by state counsel this witness stuck to his guns. He never wavered or altered his evidence. Throughout his evidence in chief and cross-examination he said nothing which may be construed as remotely implicating the accused or helpful to the state case. He admitted ownership of the laptop from which the incriminating evidence was downloaded but denied their authenticity labeling them fraudulent fabrications.

3. Michael Peter Hitschmann's Bank Account in Manica Mozambique.

The back bone and thrust of the state case is that the accused was the chief financier of the unlawful conspiracy to depose the lawful government of Zimbabwe. In its summary of the state case the state alleged that one of its witnesses Chief Superintendent Sipho James Makone had in the course of investigations managed to obtain a bank statement in the name of Peter Michael Hitschmann showing a deposit of US$5000.00 meant to finance the illegal scheme.

The state was however unable to produce the alleged bank statement by the closure of the state case. Chief superintendent Sipho James Makobane in fact contradicted the state case in some material respect when he denied that he had managed to obtain the bank statement as alleged by the state. On the contrary it was his testimony that he had failed to obtain the alleged bank statement. He was still waiting for the bank statement. The witness was in fact surprised that the trial had commenced without the alleged bank statement having been obtained.

Apart from the state's failure to produce the alleged bank statement no other credible evidence whatsoever was led tending to show that the accused may have financed the illegal scheme to unlawfully depose the lawful government of Zimbabwe. Above all its discredited impeached star witness one Michael Peter Hitschmann flatly denied that the accused in any way financed the alleged conspiracy.

4. **Michael Peter Hitschmann's Laptop Computer.**

It is common cause that during the course of investigations the police backed up by other state security agents recovered among other things a laptop computer belonging to Michael Peter Hitschmann. It is the state case that the police with the aid of one Precious Nyasha Matare a typist in the ministry of State for National Security in The President's Office downloaded e-mails from the laptop implicating the accused. Hitschmann admitted in open Court that the laptop belonged to him but disputed the authenticity of the e-mails.

Likewise the defence challenged the authenticity of the e-mails saying that they were fraudulently manufactured by state agents in a bid to falsely implicate the accused. That being the case the state bore the onus of establishing the authenticity of the e-mails. To that end it called Precious Nyasha Matare the typist who downloaded the e-mails and Perekayi Denshard Mutsetse in his capacity as an expert witness as its main witnesses on this vital issue. His status, experience, academic and professional qualifications were however hotly contested by the defence.

Ms Marare's evidence was to the effect that on 6 March 2006 she was summoned to Senior Assistant Commissioner Muderedzwa's office at Murahwa building. When she turned up at the office she was asked to assist with printing documents from a laptop because those present had failed to print the required documents from the machine.

She said that Hitschmann helped her by pointing out information she was required to print. She then printed the e-mails that had been pointed out by Hitschmann. She recognized and identified the e-mails before the Court as the ones she had printed out by their e-mail addresses. All what she did was to print as she had found the laptop already open and connected to the internet.

She could not identify the laptop in Court with certainty as the one she had printed the e-mails from. All what she could say was that it was similar because she was not shown its serial numbers.

Ms Matare appears to be mistaken that she printed the e-mails on the 6th March 2006. No printing took place on that date because the laptop had not yet been recovered. That is the date of Hitschmann's arrest. The laptop was only recovered on 9 March 2006. Although the witness printed the e-mails in March 2006 the police did not record any statement from her until about 3 years later in February 2009. This inordinate delay is extraordinary and only serves to explain her faulty memory.

The defence disputed that Hitschmann helped her by pointing out the e-mails she printed from the laptop. Although she is now adamant that he did, she did not say so in her written statement to the police. Hitschmann denied that he helped her at all. Apart from this blemish or inconsistency this witness' evidence was generally satisfactory and her demeanor beyond reproach.

She testified that she merely printed the e-mails, she did not read them. She denied that she was a computer expert and professed ignorance as to how computer documents may be faked or forged.

Perekayi Denchard Mutsetse professed to be a computer expert. Under cross examination it however turned out that he merely scraped through his 'O' levels before obtaining a few relevant certificates which he was at pains to elevate to the status of diplomas.

It was his testimony that his professional qualifications were as follows:

1. Part one of City and Guilds certificate in telecommunications.
2. A University of Zimbabwe Certificate in Data Communication obtained in 2003
3. An Africa University CCNA certificate obtained in 2006.

He then joined Africom in 1999 as a technician rising to his current post of provincial engineer. His responsibilities as provincial engineer entail giving support and implementing new projects. He once worked as cables technician for PTC.

The defence disputed his qualifications and challenged him to produce the relevant certificates. He was however, unable to produce the relevant certificates by closure of the state case.

His evidence was to the effect that it was virtually impossible to fake e-mail documents or reverse the date and time printed thereon by the mail server. That could only be done by the service provider. It was his evidence that he had examined the disputed e-mails and concluded that they were genuine because:

1. They reflected the name of the service provider which is hashmail. com
2. The bottom beach bore the characteristics https/
3. The e- mails bore the characteristics *"From"* and *"To"* denoting the name of the sender and the receiver.

He then vouched that any e-mail which bore those characteristics was genuine. Apart from the above tests he professed ignorance of any other technical or scientific methods which may be used to verify the authenticity of e-mails. He had never heard of computer fraudsters called hackers or computer forensic experts who use scientific methods to determine the authenticity of documents generated from computers.

The depth of his ignorance concerning these matters as exposed during cross examination was amazing, to say the least considering that he professes himself to be a computer expert. I am constrained to repeat what he said under cross examination.

> "Q. Are you aware of any other tools and software that can be used to track and verify the authenticity of e-mails.?
>
> A. There is no such software used to trace the genuiness or otherwise of e-mails. As you print the website tells you where the e-mail is from.
>
> Q. Do you know what computer forensic experts use to determine the authenticity of an e-mail correspondence?

A. There are no such people like forensic personnel.

Q. You are saying there are no computer forensic experts who check computer faults and check out employee abuse of computers? For instance, in South Africa two years ago they had false e-mails that were tracked by Peter House, you do not know about that?

A May be they are in South Africa as you say but not in Zimbabwe.

Q. You yourself are unable to, despite being an expert, to use that software?

A. This document exhibit 13 came as printed copies and not soft copies and we did not use any software.

Q. You did not use any known computer forensic tools and software to determine the veracity of those e-mails.

A. We handle papers as they come

Q. The question is you did not use any of those tools.

A. If the computer forensic people do exist may be they exist in South Africa not here.

Q. Are you aware of software called EnCase used by computer forensic experts?

A. Where did that originate from? Like I said we are not in the forensic department and we do not know about that and as far as I know we do not have such software in Zimbabwe.

……

Q. You also obviously do not know another software tool called forensic tool kit called FTK do you know about it.

A. I am not into forensic.

Q. So we can safely conclude therefore that you did not do any forensic investigations of where those e-mails might have come from, where they were going, whether they were authentic or not.

A. Like I said I am not in the forensic department may be you are.

Q. Are you aware Mr. Mutsetse the history of the hard drive can actually be determined using those tools.

A. I am not in the forensic department..."

Using his mode of determining the genuiness of e-mails Mr. Mutsetse made a fatal error when he identified a fake e-mail that had been created in Court as being genuine. Having previously steadfastly testified that the date and time inscribed by the mail server could not be altered or reversed Mr. Mutsetse had to eat humble pie when it was demonstrated in open Court that this could be done

He also told the court that he attempted to send an e-mail to the address reflected on the e-mails but it bounced back because the address had been shut down.

Communication is a two way process. In this case it is self evident that there is no evidence tending to show that any of the e-mails in question was either sent or received by the accused. It appears that no timeous investigations were made to trace the source and destination of the e-mails in 2006 when the offences were allegedly committed. It seems no investigations were carried out to ascertain whether the accused owned or possessed a computer to try and establish whether or not he had send or received any of the disputed e-mails.

In his testimony Mr. Mutsetse made it clear that he was only contacted by the police in 2009 about 3 years later when it was now virtually impossible to trace the origins of the e-mails in question. That being the case, he was constrained to make the valid concession under cross examination that he could not establish the source or destination of the disputed e-mails. That concession virtually destroyed any link between the accused and the questioned e-mails.

As previously stated in my earlier ruling the Court's admission of the e-mails was conditional upon the state being able to prove that the questioned e-mails are genuine and authentic. The state's failure to prove the authenticity of the e-mails automatically renders the e-mails inadmissible. For that reason alone the Court is not obliged to consider the contents of the e-mails and the question of interpretation does not arise.

It is needless to say that Mr. Mutsetse was an appalling witness. He was argumentative and arrogant in the witness stand. When he could not stand the heat he asked to be excused saying that he had some business to attend in Mozambique. The Court refused to let him off the hook pointing out that every other witness had some business to attend to.

The witness did not take kindly to that ruling and when eventually excused after exhausting his evidence he had a parting shot for the Court when he retorted, "Thank you my lord for wasting my time." The Court chose to turn a deaf ear to his contemptuous behaviour seeing that he had been badly bruised and traumatized under cross examination.

5. Michael Peter Hitschmann's illegal possession of military weapons, ammunition and gadgets.

It is a proven established fact that Michael Peter Hitschmann was found in possession of a huge arsenal of military weapons, ammunition and gadgets. It is also common cause that he has since been convicted of the illegal possession of the same. No cogent evidence was however led to establish that the accused had either physical or legal possession of the illegal weaponry. He did not have the detention, custody or control of the illegal arms of war and other military paraphernalia.

Conclusion.

In summary it is self evident that the state at the close of its case had failed to link the accused to the commission of any of the offences charged or any competent verdict arising therefrom because:

1.
   a) Its main state witness Michael Peter Hitschmann turned hostile to the state case leading to his impeachment.
   b) His discredited evidence was therefore of no benefit to the state case as he did not implicate the accused at all but supported the defence case.

2. The supposed expert witness Perekayi Denshard Mutsetse turned out to be an unreliable witness whose evidence was proven to be dubious and erroneous. As a result the accused could not scientifically or otherwise be linked to the commission of the offence through the recovered e-mails. There was therefore, no nexus between an the commission of the offences.

3. The accused could not be linked to the commission of any of the offences through the confessions of his alleged co conspirator because:

   a) Of improper investigation tactics and procedures and

   b) By operation of law which prohibits the confession of one accused to be used against the other.

In conclusion I must commend the state for having put up a brave fight under very difficult circumstances in defence and preservation of a constitutionally elected government.

We however operate in an adversarial legal system where a criminal trial is akin to a contest where judges and assessors are mere referees or umpires. One cannot therefore, take a dive at the centre circle and expect the referee to award a penalty.

Like in most contests a team cannot be allowed to advance to the next stage unless it performs well at the preliminary stage. That is the spirit in which s 198 (3) of the Criminal Procedure and Evidence Act [*Cap 9:07*] was crafted.

Having carefully considered the above findings of fact and law, we came to the unanimous conclusion that the state has failed to prove a prima facie case against the accused on a balance of probabilities thereby entitling him to his acquittal at the close of the state case.

The accused is accordingly found not guilty and acquitted at the close of the state case.

The Attorney General's Office, the States legal practitioners.
Mutetwa and Nyambirai, the accused's legal practitioners.