GEOFFREY KELLY MCKINNON
and
MARKHAM MCKINNON
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND WAMAMBO JJ
HARARE, 20 March 2018 & 24 July 2019

Criminal appeal

T. Zhuwarara, for the appellant
T. Mapfuwa, for the respondent

HUNGWE J: This appeal concerns a contravention of s 3 (2) (b) as read with s 3 (3) of the Gazetted Lands (Consequential Provisional) Act, [*Chapter 20:28*] ("the Act"). At their trial the appellants both pleaded not guilty but were convicted and sentenced to pay a fine. As is required upon any such conviction, the appellants were ordered to vacate the farm which they were in occupation of in contravention of the Act. They appeal to this court against conviction only.

The appellants raised four grounds of appeal. In the first ground they state that the court *a quo* erred in fact and in law in finding that Sussexdale Farm had been gazetted in March 2002 and that such gazetting had remained in force.

In the second ground of appeal it is contended that the court erred by failing to consider the subsequent gazetting of the same farm in February 2005 and the effect this had on the charge.

The third ground of appeal impugns the quality of the evidence led by the State. It said that the evidence had been thoroughly discredited during cross-exanimation to the extent that the evidence could not be a basis upon which a sound conviction could be based.

Finally, it was argued that the court *a quo* grossly misdirected itself in effectively transferring the onus of proof to the appellants in that the court required them to prove that they had a legal right to remain in the farm when the State had failed to prove that they did not possess such a right.

In a brief judgment, the learned trial magistrate set out the section under which the appellants were charged. He went on to summarize the agreed facts as being that the farm in issue was gazetted in an Extraordinary Government Gazette dated 22 March 20002. It was subsequently acquired through Constitutional Amendment No. 17 and listed on the Schedule to the Constitutional Amendment No. 17 of 2005. The learned trial magistrate found that the appellants did not hold an offer letter, permit or lease in respect of the land which they remained in occupation of, notwithstanding being served with appropriate notices to vacate by the relevant authorities. The magistrate examined the defence tendered by the appellant. He rejected the defence submission, finding that unless the appellants could produce one of the three documents, it followed that they did not have lawful authority to remain on the acquired land. It did not matter that the land was acquired for some other purpose than for agricultural purposes. He also pointed out that the appellants elected to remain silent when given an opportunity to speak in answer to questions put to them during cross-examination. What led to an adverse inference being drawn against them was their failure to state whether or not they had any lawful authority to remain on gazetted land. Because they did not indicate that they had such authority, the court *a quo* concluded that they in fact had no such authority.

I will deal with the last ground of appeal first. As l understood it, the contention by the appellants was that the court *a quo* unlawfully placed a reverse onus on the appellants when no such onus rested upon them to prove that they had a lawful right to remain on the farm. By so doing the court failed to observe the cardinal rule in criminal procedure that the State bears the onus to prove the offence charged beyond a reasonable doubt. For this submission reliance was placed on *R* v *Difford*[1]. This attack appears to be based on the reasoning in the judgment where the learned magistrate stated:

> "Under cross-examination by the State the accused chose to remain silent in the face of questions which asked them if they had any lawful authority to stay on the land. It is unwise to remain silent in the face of allegations because the court will believe someone who has said something."[2]

This reasoning by the court *a quo*, it was suggested, amounted to casting a reverse onus on the appellants. The court noted that the appellant chose not to answer any questions during

[1] 1937 AD 370
[2] Record page 6

cross-examination. One of the questions asked was whether they had lawful authority to remain on gazetted land. They did not respond. The court reasoned that if they had such lawful authority surely one could naturally have expected them to have confirmed this as a fact.

The procedure at trial is governed by the provisions of section 198 of the Criminal Procedure and Evidence Act.[3] If an accused declines to give evidence, the prosecutor may still question him and where he is legally represented, his legal practitioner may thereafter question him subject to the rules applicable to a party re-examining his own witness.[4] However, where an accused refuses to answer questions from the prosecutor without just cause, then and only then, may a court draw such inferences as appear proper and the refusal may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.[5] This provision appears to fly in the face of the rule against self-incrimination (or the right to remain silent) but a close scrutiny will show that in fact it is a common sense approach to evidence.

Counsel for the appellants advised the court, after the close of the State case, that the appellants elected to exercise their right to remain silent in terms of the Constitution of Zimbabwe, 2013.[6] The learned trial magistrate directed the prosecution to proceed with cross-examination notwithstanding the fact that the appellant's counsel had indicated that the appellants will not give evidence or answer any question. The accused were not asked to justify their refusal to testify, presumably it being held that section 70 met the "just cause" requirement in section 199. The direction to proceed with cross-examination is consistent with s 199 as well. The question that arises is whether, as here, a court is entitled to treat the refusal to answer questions in the exercise of the right to remain silent as evidence corroborating other evidence given against the accused? This question was never addressed by both counsel at the hearing. I raise it *mero motu* as it appears to me relevant in the determination of the question whether the court a quo placed a reverse onus on the accused when it resolved that the failure to say something in answer to questions in cross-examination logically led it to believe the State case rather than the defence case. It is critical to observe that the section does not refer to adverse inferences, but to "such inferences from the refusal as appear proper." It may fairly be argued that only adverse inferences are being referred to, as opposed to other inferences. Further, it is

[3] [Chapter 9:07]
[4] Section 198(9) of the Criminal Procedure and Evidence Act.
[5] Section 199 (1) of the Criminal Procedure and Evidence Act.
[6] Section 70 (1) (i) of the Constitution of Zimbabwe (Amendment) Act 20 of 2013.

used as "evidence corroborating any other evidence given" rather than as being indicative of guilt. Put in another way, the refusal to testify cannot, on its own, be a basis for making an adverse inference, but it may be used, where there was no justification for the refusal to testify, as evidence corroborating other evidence. Therefore, because s 70 of the Constitution protects the right to remain silent, the court may not rely on an exercise of that right to draw adverse inferences against an accused person. I come to that conclusion on the following basis.

Section 70 (1) (i) of the Constitution reads:

"**70 Rights of Accused Persons**

(1) Any person accused of an offence has the following rights:
- (a) to be presumed innocent until proved guilty;
- (b) to be informed properly of the charge , in sufficient detail to enable them to answer it,
- (c) ……..
- (d) …….
- (e) ……
- (f) ……
- (g) ……
- (h) ……
- (i) to remain silent and not to testify or be compelled to give self-incriminating evidence;
- (j) ……..

What is the content of the right to remain silent?

The rights of accused persons are set out in detail in ss 50 and 70 of the Constitution. Section 50 enumerates the rights of arrested and detained persons. An arrested and detained person has a right to remain silent[7] in the same way that an accused person has a right to remain silent at his or her committal or at trial.[8] The content of this right must of necessity imply that if these persons elect to remain silent when being questioned by the Police, or if, at their trial, they refuse to outline their defence or give evidence, adverse inferences cannot be drawn from their election to remain silent since they are exercising a constitutionally enshrined right. The corollary of this right is, however, that should the State manage to establish a *prima facie* case against the accused at trial, then because the *prima facie* case remained uncontroverted, a conviction logically should follow. Therefore, the accused, or his legal practitioner, may be wise to put up a defence or risk being convicted. The conviction follows not as a result of the drawing of adverse inferences from an exercise of the right but from the existence of a *prima*

[7] Section 50(4) of the Constitution of Zimbabwe.
[8] Section 70 (1) (i) of the constitution of Zimbabwe.

facie case proven beyond a reasonable doubt. However, the court cannot, at the end of a trial, or at any stage, regard the accused person's silence as, in itself, indicative of guilt. Whilst, section 199 of the Criminal Procedure and Evidence Act[9] appears to be inconsistent with the right to remain silent enshrined in section 70 (1) of the Constitution, a careful reading of the section will reveal that it does not speak directly to the right to remain silent. It addresses the usual inferences that are drawn as a matter of fact-finding in trial matters. This provision in the Criminal Procedure and Evidence Act, as it presently permits, is clearly consistent with the enjoyment and fulfilment of the rights entrenched in the Constitution of 2013.

The drawing of adverse inferences as an evidentiary tool may expose a suspect or an accused to the dilemma between exercising his right to remain silent or saying something in his defence. An illustration of such instances is appropriate.

Where a suspect refuses to answer questions put to him by the police, adverse inferences can be drawn from such a refusal.[10] Before evidence is led in a criminal trial, the accused must give an outline his or her defence. In doing so, he or she is warned that he or she should mention any relevant fact upon which he or she relies for his or her defence. If he or she fails to do so, adverse inference may be drawn from such failure.[11] If an accused declines to give evidence during a criminal trial, he or she may be questioned by the prosecutor, and the court may draw adverse inferences from the accused's failure to answer the questions satisfactorily.[12]

An unenviable predicament awaits an unsuspecting suspect who is tricked or forced into confessing his guilt and, as a result of the confession, the police find evidence against him or her, for example, he is forced to show the police where he hid ill-gotten property. The suspect's confession cannot be relied upon for a conviction at his or her trial because it was not voluntarily made. However, the Police can tell the court that they found the evidence as a result of what the suspect told them thereby unfairly strengthening the State case.[13]

In any event, these issues were not adequately debated before us therefore no answer to the issues that arise in these instances is being offered in this judgment. The appellants have not asked that this court answers the questions raised by the issues I have identified. I will not attempt an answer.

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[9] Chapter 9:07
[10] Section 41A (7) (d) of the Criminal Procedure and Evidence Act, *[Chapter 9:07]*
[11] Sections 66(6); 67 (2) and 189 of the Criminal Procedure and Evidence Act, [Chapter 9:07].
[12] Section 198 of the Criminal Procedure and Evidence Act, [Chapter 9:07].
[13] Section 258 0f the Criminal Procedure and Evidence Act, [Chapter 9:07].

The appellant did not raise the drawing of adverse inference as constituting a breach of the accused's right to remain silent entrenched in the Constitution. I raise this issue as moot in the present appeal because the procedure adopted during trail puts into focus the tension between this right and the broader right to a fair trial. The broader right to a fair trial entitled the appellant to legal representation. It was through the exercise of that right that they took the precipitous step of electing to remain silent after they had given a defence outline and cross-examined State witnesses. By so doing, it may be argued, they implicitly waived their right to remain silent. This right is not an immutable procedural right.

In *S* v *Maseko*[14] the court said:

> "The correct position is as stated by KENTRIDGE AJ in *S* v *Zuma & Others*[15], where he quotes with approval from a different matter:
>
> > 'Constitutional rights conferred without express limitation should not be cut down by treading implicit restrictions with them, so as to bring them in line with the common law. (*Attorney-General* v *Moagi* 1992 BLR 124 at 184.)"

That caveat is of particular importance in interpreting s 69 of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (n) of s 70 (1). It embraces the concept of substantive fairness which is not to be equated with what might have passed muster in our criminal court before the new constitution.

Mr *Zhuwarara* only argued three legal points, i.e. the effect of the Constitutional Amendment Act on the prior gazetting of the farm; the sufficiency of evidence i.e. whether the threshold of proof beyond doubt was reached; and lack of intent. I have traversed the grounds argued by Mr *Zhuwarara* and I am satisfied that they are unsustainable.

As was pointed out in *S* v *Rudman & Anor* **[16]**the function of a criminal court, it must be recognised, is to enquire

> "whether there has been an irregularity or illegality, that is a departure from formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted."

As such an accused person cannot selectively pick on which rights he will elect to exercise and hope to avoid the usual adverse inference known in other branches of procedural

[14] 1996 (2) SACR 91 (W)
[15] 1995 (2) SA 642 (CC) @ 651
[16] S v Rudman & Another; S v Mthwana 1992 (1) SA 343

law. Where someone elects to give a defence outline, it may, in certain circumstances, become untenable to thereafter elect not to answer questions under the guise of the right to remain silent. It occurs to me that once an accused has elected to speak by tendering a defence outline or putting questions in cross-examination of State witnesses by himself or through counsel, he has effectively waived his right to silence. He cannot claim it mid-trial. If he does so, the court, in all fairness, must invoke the rule in adverse inferences as it is naturally entitled to do.

The Act provides that no person may hold, use or occupy gazetted land without lawful authority.[17] Where a former farm-owner (such as the appellants) does not cease to occupy, hold or use his former land after the expiry of the prescribed period he commits a criminal offence and will be liable to a fine or imprisonment upon conviction.[18] The essential elements of this offence are (a) use, occupation or holding on to; (b) gazetted land; (c) without lawful authority.

Lawful authority is defined as meaning;

"(a) an offer letter;
(b) a permit
(c) a land settlement lease."[19]

In order to mount a successful defence to the charge an accused must show that any one of the essential elements constituting an offence was not proved beyond reasonable doubt. The appellant in their heads of argument submit that:

(a) the charge was not congruent with the facts proved;

(b) that the subsequent gazetting of the same farm had effectively repealed the 2002 gazetting and acquisition;

(c) that they had no requisite intention to act in flagrant disregard of the law;

(e) the fact that the 2005 designation of the farm was for urban expansion meant that the farm was not properly acquired and therefore no offence was committed as it was not subject to due acquisition process for agricultural land.

This argument has no legal foundation for the following reasons. First, where an Act of Parliament is validly passed there is a presumption that it was properly and duly passed and, therefore, for all intents and purposes, valid. The appellants bear the onus to show that the gazetting of their farm was not validly done. They have not discharged that onus. Second, on

[17] Section 3 (1) of the Gazetted Land (Consequential Provisions) Act *[Chapter 20:28].*
[18] Section 3 (3) of the Gazetted Land (Consequential Provisions) Act *[Chapter 20:28].*
[19] Section 2 (1) (b) of the Gazetted Land (Consequential Provisions) Act *[Chapter 20:28].*

a plain reading of the offence-creating provision, it does not require *mens rea* as an element of the offence. It is apparently a strict liability offence wherein proof of the *actus reus* is sufficient for a conviction to be sustained.

I make this observation in light of the fact that the essential elements of the offence do not require proof of intention in any of its forms set out in the Criminal Law (Codification and Reform) Act.[20] All that the prosecution needs to prove is that (a); a former farmer-owner; (b) has not ceased to occupy or use (c) gazetted land (d) and has no lawful authority to continue to use or occupy. The section criminalises the remaining on the farm by the appellants subsequent to the coming into force of Constitutional (Amendment) Act No. 17 of 2005.

Consequently it was up to the appellants to cast a reasonable doubt on one or other of the essential elements aforesaid. As I have already stated, it is common cause that Sussexdale Farm is gazetted land. The Act does not require that gazetting applies only in respect of agricultural land. It applies to all gazetted land therefore the contention that the subsequent reason for gazetting was not the same as the initial one makes no difference. What was required, for the appellants to avoid conviction is set out in the same section i.e. to show that they had lawful authority to use or occupy. Thus where the appellants admit that they were in occupation of Sussexdale Farm, which farm is on gazetted land, unless they occupied it under lawful authority, they were committing an offence.

In light of this therefore I did not find that the procedure adopted during trial prejudiced the appellants' rights to a fair trial.

Consequently in light of the above, l find that there is no merit in this appeal.

It is dismissed in its entirety.

WAMAMBO J authorises me to state that he agrees with this judgment.

Kachere Legal Practitioners, appellants' legal practitioners

[20] Section 11 of the Criminal Law (Codification and Reform) Act, *[Chapter 9:23].*

National Prosecuting Authority, respondent's legal practitioners