JACOB NGARIVHUME
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA & MAXWELL JJ
HARARE, 14 & 24 November 2023

Criminal Appeal

L *Madhuku,* for the appellant
T *Mapfuwa,* for the respondent

KWENDA J: On 24 November 2023 we allowed this appeal and gave our reasons *ex tempore.* We indicated that detailed written reasons would follow. These are they.

The appellant appeared in the magistrates court facing three alternative charges. The main charge was incitement to commit public violence, as defined in s 187(1)(b) as read with s 36(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The first alternative charge was incitement to commit public violence, a crime defined in s 187(1)(b) as read with s 36(1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The second alternative charge was incitement to participate in a gathering with intent to promote public violence, breeches of peace, bigotry, a crime defined in s 187(1)(b) as read with s 37(1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. According to the charge sheet (summary jurisdiction) the appellant committed the crimes by repeatedly posting an inflammatory message on his twitter handle *@ngarivhume* during the period extending from 01 March 2020 to July 2020. The message was quoted as follows: -

> "This is not politics it is a matter of life and death ……. WE HAVE BEEN PATIENT, TOLERANT & QUITE…THESE CORRUPT CRIMINALS ARE DESTROYING OUR FUTURE…. LETS BRING OUR SUFFERING TO THE GOVERNMENT ATTENTION
>
> LET'S COME TOGETHER AS CITIZENS AND SAY ENOUGH IS ENOUGH……...TAZOJAI RIRWA……. BAYASIJWAYELA……"

By such utterances, the appellant allegedly unlawfully intended or realized the real risk or possibility that other persons would be persuaded or induced to engage in public violence or participate in a gathering that would disturb peace in the country.

According to the State outline the appellant committed the crimes by publishing the inflammatory words quoted above on his twitter handle *@jngarivhume*. The twitter handle is different from the one quoted in the summary jurisdiction. According to the State, the words "TAZOJAIRIRWA……. BAYASIJWAYELA" mean "we have been taken for granted" when translated to English.

The appellant pleaded denying the charges. He denied the allegation that the twitter handles *@ngarivhume* and *@jngarivhume* were his. He denied posting the allegedly inflammatory messages on twitter handles *@ngarivhume* and *@jngarivhume.* He dissociated himself with the messages allegedly posted on twitter handles *@ngarivhume* and *@jngarivhume.* He said that his twitter handle was *@ngarivhumejacob*. He averred that, in any event, even assuming, he had posted the messages, that would not have constituted criminal conduct because he would have been entitled, like any other citizen, to make such political statements without incurring criminal liability. He put the state to the proof of its allegations.

At the conclusion of the trial, the appellant was convicted of the main charge and sentenced to imprisonment for 48 months of which 12 months are suspended for 5 years on condition of good behavior during the period of suspension.

Before us is the appellant's appeal against both the conviction and sentence. As against conviction, he raised seven grounds. In preparing for this appeal we were surprised that the appellant was raising so many grounds of appeal against conviction because his defence outline raised only two issues. The first issue arose from his denial of the allegation that the twitter handles *@ngarivhume* and *@jngarivhume* were his. The second issue arose from his denial that posting such messages constituted conduct punishable as a crime.

The appeal is opposed by the State on the following grounds. The appellant was correctly convicted because the twitter handles belong to him and the trial court cannot be faulted for arriving at that conclusion. It was not necessary for the State to lead evidence to prove that the twitter handles belonged to the appellant because the appellant did not dissociate himself from the twitter handles during Police investigations. The State cited s 257 of the Criminal Procedure and

Evidence Act [*Chapter 9:07*] which the trial court had relied on to convict the appellant. According to the State, the appellant's assertion that he would have been within his rights to make the political statements alleged in the charge was an admission of the criminal conduct committed in a purported exercise of a constitutional right.

At the hearing Mr L *Madhuku* who was the lead counsel for the appellant said he was going to motivate only the third ground of appeal against conviction. Perhaps, out of caution, he indicated that, the appellant was not abandoning the other grounds of appeal against conviction. With respect to those other grounds of appeal against conviction the appellant would stand by his heads of argument. He also did not make any specific oral submissions regarding sentence, opting to abide by the papers. The third ground of appeal against conviction is that the trial court misdirected itself and therefore fell into error when it based the conviction of the appellant on s 257 of the Criminal Procedure and Evidence Act (herein s 257), only. Section 257 did not apply because the State had not led evidence of the circumstances existing at the time of the questioning of the appellant by the Police which triggered the invocation of s 257 of the Criminal Procedure and Evidence Act. Secondly the State did not lead any evidence to satisfy the situation whereby his failure to specifically dissociate himself with the twitter handles would be treated as evidence corroborating other evidence as contemplated in s 257. Mr *Madhuku* argued that the circumstances obtaining at the time of the appellant's questioning by the Police are that in recording a statement from the appellant the Police did not mention twitter handles *@ngarivhume* and *@jngarivhume*. That much is clear from the preamble of the appellant's warned and cautioned statement recorded from the appellant and produced by the State at his trial. Mr *Madhuku* argued that there was no evidence which linked the appellant with the twitter handles and as such his alleged failure to dissociate himself with the twitter handles could not be treated as evidence corroborating any other evidence. Accordingly, there was no reason to expect the appellant to deny the twitter handles. Mr *Madhuku* submitted that the conviction of the appellant based on s 257 of the Criminal Procedure and Evidence Act raises the following legal questions. To what extent should the accused state his defence in his or her warned and cautioned statement? Is the accused required, at law, to give his full defence to the investigation? How much detail does the accused person put in his defence outline? To what extent does the presumption of innocence, which is enshrined in s 70 of the constitution and carries with it the adversarial legal system underpinned by the principle that he

who avers must prove, impact on the legal questions raised above? Did requiring the appellant to go an extra mile to dissociate himself with twitter handles not put to him in the charge preferred in the preamble to his warned and cautioned statement not offend the law on the presumption of innocence? Did the State set out the circumstances existing at the time of the questioning? Even assuming the fact that the appellant did not dissociate himself with the twitter handles when he was legally required to do so is treated as evidence against him, would such evidence constitute proof beyond reasonable doubt?

In terms of s 257 of the Criminal Procedure Act [*Chapter 9:07*], failure of accused to mention certain facts to police may be treated as evidence. I will paraphrase s 257 as follows. Where in any proceedings against a person evidence is given that the accused, on being (*a*) questioned as a suspect by a police officer investigating an offence; or (b) charged by a police officer with an offence; or (c) informed by a police officer that he might be prosecuted for an offence; failed to mention any fact relevant to his or her defence in those proceedings, being a fact which, in the circumstances existing at the time, he or she could reasonably have been expected to have mentioned when so questioned, charged or informed, as the case may be, the court, in determining whether there is any evidence that the accused committed or whether the accused is guilty of the offence charged or any other offence of which he or she may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused. It is clear that the inferences are normally, subject to the constitutional protection offer to a person accused of a crime, treated as corroboration or evidence which tends to confirm evidence adduced by the State. In the absence of formal admissions, it is difficult to see how such inferences would, per se, constitute proof beyond reasonable doubt of the commission of a crime.

In giving effect to s 257 the trial court must be alive to the protection offered to the accused by the constitution in the declaration of rights. Pertinent to the matter before us are the rights of accused persons enshrined in s 70. In terms of s 70(1)(a) of the constitution any person accused of an offence has the right to be presumed innocent until proved guilty. Section 70(1)(a) is operationalised by the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]. In terms of s 9 of the Criminal Law Code, a crime is constituted by acts or commissions accompanied by a blameworthy state of mind defined in the Criminal Code as the constituent elements of the crime

charged. In terms of s 18(1) of the Criminal Code no person shall be held to be guilty of a crime in terms of the Code or any other enactment unless each essential element of the crime is proved beyond a reasonable doubt. In terms of s 18(4), except where this Code or any other enactment expressly imposes the burden of proof of any particular fact or circumstance upon a person charged with a crime, once there is some evidence before the court which raises a defence to the charge, whether or not the evidence has been introduced by the accused, the burden shall rest upon the prosecution to prove beyond a reasonable doubt that the defence does not apply. Section 257 does not excuse the State of the burden imposed on it by s 18(4) of the Criminal Law Code. This is why it is the State's responsibility to adduce facts that link the accused with the crime. The basis upon which the accused is being charged must be put to the accused before he raises a defence. This is stated in so many words in s 70(1)(b) of the constitution which enshrines the accused person's right to be informed promptly of the charge, in sufficient detail to enable them to answer it. I have underlined the words which are pertinent to the matter before us. The accused person may only either give a specific response to a specific fact put to him. In terms of s 70(1)(i) the appellant had the right to remain silent and not to testify or be compelled to give self-incriminating evidence. It is clear, however, that where positive facts which link the accused with the crime are put to him or her, it is in the interests of the accused to deny them if they are not true. The obvious benefit is that the explanation he or she gives may be confirmed through Police investigation. Failure to deny the facts linking him with the crime at the time of questioning may deprive him of the opportunity to controvert them in future or may lead the court to find that the incriminating evidence is not disputed.

In this case, when the incriminating twitter handles were, eventually, put to him in sufficient detail in the State Outline and Charge sheet as *@ngarivhume* and *@jngarivhume,* the appellant answered in more detail disowning them. He dissociated himself with the messages allegedly posted on twitter handles *@ngarivhume* and *@jngarivhume.* He said that his twitter handle was *@ngarivhumejacob*. It is therefore not correct that the appellant did not dissociate himself with the incriminating twitter handles.

The law of evidence on drawing inferences is settled. See LH Hoffmann and DT Zeffert, *The South African Law of Evidence*, Fourth Edition at p 589.

> "All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the court may be mistaken in its reasoning. The inference which it draws may be a *non sequitur*, or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible."

> See also *R* v *Blom* 1939 AD 288 at 202, 203 and *S* v *Sesetse* 1981 (3) SA 353 (A) at 369 - 370.

A *'non sequitur* 'is a Latin phrase which refers to a conclusion that does not necessarily follow from a set of facts or previous argument or that does not sit well on the facts that are either common cause or proven. It is, therefore, clear from the afore going that the State must prove the facts from which the inference is sought to be drawn. In this case, the State should have proved that at the time of questioning, the appellant was told, with sufficient detail, the twitter handle that was used to commit the offence and how he was linked with either the twitter handle(s) or the messages posted thereon. Put simply the court acted illogically when it inferred something (criminal conduct) from nothing. The appellant could only specifically deny a specific set of facts put to him by the Police. It was illogical for the trial court to draw the inference of guilty from the appellant's failure to deny nothing. The conclusion arrived at by the court was therefore sitting on nothing.

The State evidence adduced through Police Officers, Naison Chirape and Edmore Muchineripi Runganga was to the effect that the appellant did not deny the 'twitter handle'. See pages 53, 64, 65, 80, 82, 86 and 89 of the record of proceedings. The evidence was not helpful because the witnesses spoke of a twitter handle, the State case was based on two offending twitter handles. At p 89 the following exchange ensued between the court and State witness, Edmore Muchineripi Runganga: -

> *The Court:*
>
> "Witness can you please clarify to the court can you explain to the court the procedure that is adopted by law enforcement agents to verify any twitter account?"
>
> *Edmore Muchineripi Runganga:*
>
> "Yes, your worship, to start with, there are no servers for Twitter in Zimbabwe. So what is supposed to be done is a government to government agreement where we talk of the USA and Ireland. So the government of Zimbabwe has to originate an e-mail to the respective government and then they have to get the replies through e-mails and then there are some responsible offices that are supposed to originate those emails and not at the Police level, your Worship. In brief, that is put of the procedures, your Worship."

It is clear that the Police knew the procedure to be followed to establish whether any connection existed between the appellant and the offending twitter handles but omitted to do so for reasons best known to themselves.

For some reason the trial court convicted the appellant on the basis that the offending messages were posted on the appellant's twitter handle, *@ngarivhumejacob*. That was neither the state case nor the evidence adduced by the State. The trial court therefore erred when it arrived at a conclusion of fact which could not reasonably be entertained on the evidence placed before it.

For the reasons stated above, the appeal should succeed and the conviction quashed in terms of s 38 of the High Court Act [*Chapter 7:06*].

It is our wish for this judgment to be placed before the Prosecutor General because of what we identify as a training need. In terms of s 198(1) of the Criminal Procedure and Evidence Act [*Chapter 9 :07*] it is the responsibility of the public prosecutor, at any trial before any evidence is given, to address the court for the purpose of explaining the charge and opening the evidence intended to be adduced for the prosecution. It is therefore preferable for the prosecutor to prepare own charge sheet and state outline and not rely on the charge and summary of case prepared by the investigating officer. The technique of "explaining the charge and opening the evidence intended to be adduced for the prosecution' requires specialised training.

In the result the appeal is allowed and the conviction is quashed.

Kwenda J:……..……

Maxwell J:…….……..Agrees

DNM Attorneys, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners