HB 139/16
HCA 344/14

AMINI PHIRI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & TAKUVA JJ
BULAWAYO 23 MAY & 2 JUNE 2016

Criminal Appeal

N. Nyathi for the appellant
N. Ngwenya for the respondent

TAKUVA J: The appellant appeared before a magistrate at Bulawayo on 8 October 2014 charged with criminal insult as defined in section 95 (1) (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23. He was alleged to have unlawfully and seriously impaired the dignity of Jothan Ndiweni by saying to him "Go away, you are mad, your anus and you are sick." These words were allegedly uttered at Highlanders Sports Club where both appellant and complainant were discussing the results of a soccer match between Highlanders Football Club and Dynamos Football Club. Highlanders Football Club had lost the match to Dynamos Football Club. The complainant opined that although Highlanders had lost, at least they had scored a goal. This angered the appellant who then insulted complainant in Ndebele language saying *"fusteke, uyahlanya, mdidi wakho, uyagula"* meaning "Go away, you are mad, your anus, you are sick."

The appellant pleaded not guilty but was convicted and sentenced to pay a fine of $80,00 or in default of payment 20 days imprisonment. He then filed this appeal on the following ground:

> "1. That that the court failed to appreciate that the state had failed to prove its case beyond reasonable doubt as accused gave a probable reasonable explanation of what had happened on date of alleged offence and this cast doubt on the case for the prosecution and was thus entitled to an acquittal."

In his defence the appellant had denied uttering the rest of the words in the charge but accepted uttering the words "you are sick". He called one Sikhumbuzo Moyo as his witness. Sikhumbuzo told the court that complainant and appellant were arguing over soccer results when he heard appellant saying to complainant "you are sick". Complainant then queried why appellant who is not a doctor had said that. There was according to him "hot exchange of words" and complainant was clearly offended. Other patrons restrained complainant while Sikhumbuzo took him outside so that he could calm down. Complainant then said he was going to report the matter to the police since this was not the 1st time that appellant had insulted him.

The state had led evidence from complainant to the effect that on the day in question, he was at Highlanders Sports Club drinking beer and discussing the outcome of a match played that afternoon. Complainant then said although they lost the match, they had done better in that they had managed to score a goal. The appellant then spoke in vernacular words to the effect that; "Go away, you are mad, your anus, you are sick." Appellant repeated the words several times and when requested by complainant to withdraw them, he flatly refused. Complainant felt humiliated and injured in his person resulting in him making a report to the police. He denied that he was so angry that he wanted to fight the appellant. Further he said both appellant and himself are Highlanders supporters who had known each for a long time.

The second state witness was Partmore Ndlovu who was in the bar drinking beer. While discussing football, complainant said at least Highlanders had managed to score and appellant said to the complainant "go away, you are mad, your anus, you are sick." The complainant was restrained and taken outside.

On this evidence alone, the court *a quo* reasoned as follows:

> "If indeed accused had mentioned the words, "you are sick" only as his defence witness would want the court to believe, why then did the complainant get angry to the extent of wanting to fight. I do not believe the version of this witness and the accused. It is clear from the evidence of the complainant and the 2nd state witness that indeed accused mentioned words, "Go away, you are mad, your anus, you are sick" and that angered the complainant to the extent of wanting to fight the accused. I am satisfied that the accused mentioned all those words." (my emphasis)

Later in its judgment, the court *a quo* after examining a number of authorities on *crimen injuria* said that the words, "Go away, you are sick", uttered in Ndebele language well constitute an insult. They have a disparaging meaning to society." This latter reasoning suggests that the court convicted the appellant on the basis that he simply uttered the shorter version of the phrase which version violates the section. In my view, this is confusing in that earlier, the court had made a finding that the appellant uttered the rest of the words. Be that as it may, the court *a quo* did not, after assessment of complainant's evidence and that of complainant's witness conclude that such evidence as the duo gave was credible, and that of appellant and his witness, incredible, improbable and beyond reasonable doubt false.

In *State* v *Van der Merwe* 1990 (1) SACR 447 the court commented on the approach to be adopted in evaluating and weighing the evidence adduced by the state and by the defence as follows:

> "The proper test is that an accused is bound to be convicted if the evidence established his guilt beyond a reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he is innocent. The process of reasoning which is appropriate to the application of the test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion reached (whether to acquit or convict) must account for all the evidence. Some of it may be found to be false, some of it might be found to be unreliable but none of it may simply be ignored".

Further, in *Mtshweni* 1985 (1) SA 593 the court cautioned against drawing conclusions and determination of guilt on the basis of accused's untruthful evidence or denial stating that:-

> "The conclusion that, because an accused is untruthful, he therefore is probably guilty must especially be guarded against. Untruthful evidence or a false statement does not always justify the most extreme conclusion. The weight to be attached there to must be related to circumstances of each case." (my emphasis).

In our jurisdiction, the *locus classicus* is *S* v *Makanyanga* 1996 (2) ZLR 231 H where GILLESPIE J stated that:

> "A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, but the fact that such credence is given to testimony for the state does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeed whenever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence. The administration of justice would otherwise be the hostage of the plausible rogue whose insincere but convincing blandishments must prevail over the stammering protestations of the truth by the diffident, frightened or confused victim of false incrimination." (my emphasis)

In casu, I take the view that since the evidence is equipoised there is a reasonable possibility that appellant's defence might be true. For that reason, the appellant's guilt has not been proven beyond a reasonable doubt.

Accordingly, it is ordered that:

1. The appeal is hereby upheld.
2. The appellant's conviction and sentence are hereby set aside.

Bere J …… I agree

Pulu & Ncube, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners