

1982 (2)

THE ZIMBABWE LAW REPORTS 1982

[PART 2]

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S v SIBANDA 1982 (2) ZLR 1 (HC)

Court **High Court, Bulawayo**

Gubbay J

2nd July, 1982

Flynote

Criminal law - housebreaking with intent to steal - unlawfulness of breaking - unlawful breaking can be committed by person who has right to enter but for limited purposes.

Headnote

Where an accused person has an unlimited and unrestricted right to enter and be in premises he is alleged to have unlawfully broken into, he cannot be convicted of unlawfully breaking and entering those premises. If he has no such right, he is properly guilty of unlawfully breaking and entering should he do so with a criminal intent. There is an intermediate situation, where the accused has the right to "break" and enter premises, not for all purposes, but at certain times and in pursuit of a specific duty or function. If he breaks and enters at another time for an improper purpose in no way connected with his lawful duties, he may properly be convicted of house breaking with an unlawful intent.

Cases cited:

R v Willie Ovamboland, 1931 SWA 11;

R v Steyn 1946 OPD 426;

R v Faison, 1952 SR 57, 1952 (2) SA 671 (SR);

R v Coetzee, 1958 (2) SA 8 (T.);

R v Dyantyi, 1958 (2) PH, H 253 (E.).

Judgment

Gubbay J: The accused was arraigned in the Magistrate's Court at Bulawayo on two charges of housebreaking with intent to steal and theft and on a third of receiving stolen property well knowing it to have been stolen. He was convicted in accordance with his pleas of guilty. He was sentenced to six months' imprisonment with labour on each of the two housebreaking

counts, but six months of the total period was suspended for five years on appropriate conditions. On the third count he was sentenced to three months, imprisonment with labour,

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of which two months was ordered to run concurrently with the effective period of six months imposed on the other two counts. Nothing turns on the validity of the conviction on the third count and it is confirmed.

The first charge alleged that on 29th March, 1982, the accused unlawfully broke into an office at the Teachers' Training College, Bulawayo, and stole some clothing material and a pair of scissors. The agreed facts were these: the accused was employed at the College as a night guard and in that capacity was permitted possession of the master key to the offices. On the evening in question, he used the key to unlock the door of an office, which he thereafter entered and removed the property particularised. The second charge alleged that during March 1982, the precise date being unknown, the accused unlawfully broke into the library at the Teachers' Training College and stole a quantity of books therefrom. The agreed facts reveal that as part of his duties, the accused was required to ensure that the doors to the offices and library were locked. If a door was not locked, he was to lock it himself with the master key. In the course of performing this task, the accused tried the door of the library and discovered that it was unlocked. It was then that he thought of stealing the books instead of locking the door.

He entered and took the books.

On these facts the question is whether the accused, who was authorised to enter these and other rooms at the College in the proper performance of his duties, was correctly convicted of the housebreaking element of the offences. It admits of no doubt that he was guilty of the theft of the articles.

In discussing the essential elements of the offence of housebreaking with intent to commit a crime, *Hunt*, in his acclaimed work *South African Criminal Law and Procedure*, Vol. 2 at page 666, remarks that

".... (unlawfulness) must be an element, for it is not housebreaking, for example, for a servant, who is permitted to 'break' and enter, to do this even if he intends to commit a crime."

Further to this he states at page 669:

"Both the breaking and the entering must be unlawful. If X has a legal right to enter premises, his breaking of them cannot be housebreaking even if he effects the breaking with intent to commit a crime."

I respectfully agree with these observations. If an accused has a right to enter and be in the premises, it seems obvious he cannot be found guilty of unlawfully breaking and entering such premises. On the other hand, if he has no such right, then he is properly guilty of unlawfully breaking and entering should he do so with a criminal intent. There

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is, however, an intermediate situation. A person may have the right to break and enter premises not for all purposes but in pursuit of a specific duty or function; the grant of the right being merely conditional and not absolute. A domestic servant, for instance, has a right to enter and be inside his employer's house in furtherance of his day to day activities, but has no right to enter the house at dead of night in order to commit a nefarious act. It is true that thefts by domestic servants of articles from their employers' houses are reasonably commonplace, and that such offenders are almost invariably charged not with housebreaking with intent to steal and theft, but with the lesser offence of theft. But this is because in the overwhelming majority of prosecutions it is impossible to establish that the servant entered the premises solely with a theftuous intent; all that can be proved is that once inside the premises, he conceived the notion of stealing his employer's property, and did so. The case of *R v Willie Ovamboland*, 1931 SWA 11, is one such example. The accused was in the employ of a dairyman and it was his duty to deliver milk daily at the complainant's house. The door of the complainant's kitchen was always kept unlocked during the night and the accused every morning, while the household was still asleep, opened the door and placed the milk on the kitchen table. On the morning in question, he stole cutlery and other articles which had been left by the complainant on the table. BOK, J, held that as the accused had entered the kitchen for a lawful purpose, he should not have been found guilty of housebreaking with intent to steal and theft, but of theft *simpliciter*. See also *R v Steyn*, 1946 OPD 426.

In the present matter, the accused entered the office and library with no intention of performing his duties, but of committing an unlawful act instead. What is the position then?

The cases of *R v Faison*, 1952 SR 57; 1952 (2) SA 671 (SR) and *R v Coetzee*, 1958 (2) SA 8 (T.), both of which were argued on review, are of assistance in the resolution of the problem. In the former, the facts were that the accused shared a hut with the complainant. The door of the hut was secured by a padlock. Both the accused and the complainant had keys which fitted the padlock. On the occasion of the theft the complainant left the hut locked and returned to find the padlock broken, his suit case slit open and certain of his property stolen. The accused subsequently admitted responsibility. In order to allay suspicion against himself he had deliberately broken into the hut. He was convicted of housebreaking with intent to steal and theft. BEADLE, J, with whom TREDGOLD, CJ, and THOMAS, J, concurred, held that the accused should

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only have been convicted of theft. He was not guilty of the added element of housebreaking because he had broken into what was in fact his own hut. The learned judge went on to say at 673H:

".... where there is an *unlimited and unrestricted* right of entry as there was in this case the crime of 'housebreaking' with intent to steal cannot be committed." (My italics.)

The vital factor was that the accused had an unlimited and unrestricted right to enter his own hut. If his right of entry had been limited and restricted, it would seem that different

considerations would have applied.

In *R v Coetzee (supra)*, the accused was employed on the premises, the subject of the housebreaking. He broke into them at night and stole a quantity of goods therefrom. He had no right whatsoever to be on the premises after nightfall and because of this, WILLIAMSON, J, came to the conclusion that he had been properly convicted of housebreaking with intent to steal and theft, rather than simply of theft. He said at 9G:

"The fact that a servant or employee might rightfully be upon certain premises or a portion of premises at certain times for certain lawful purposes can in no way cast a cloak of lawfulness upon his unlicensed forced entry into the premises at another time for an improper purpose in no way connected with his lawful duties."

The right of that accused to enter and be upon the premises, unlike that of *Faison*, was clearly restricted and limited.

In my view the principle that emerges from these two decisions is that an unauthorized and therefore unlawful breaking and entering of premises may be committed by a person even though he has the right to enter and be upon those premises for other purposes in the lawful pursuit of his duties.

To revert to the facts of the present case. The accused undoubtedly had the right to enter any of the offices and library at the Teachers' Training College in the performance of his proper duties. He was a night guard and being in charge of the security of the College premises during the hours of darkness, he was provided with a master key. But he was only entitled to enter in pursuance of his duties. He was not authorized to enter the offices or library for any reason whatsoever. In unlocking the door of the office in order to steal therefrom, the accused was, of course, acting beyond the limit of his authorization. It follows that the breaking and entering were unlawful. His conviction on the first count was therefore justified and is confirmed.

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The position in respect of the second count is not as clear. In pursuance of his duty of ensuring that the door of the library had been locked, the accused discovered that it had not been locked and it was only then that he decided to steal the books. He may, therefore, have opened the door quite innocently and acted upon a guilty impulse only when the door was wide open. It is clearly possible that he had no guilty mind at the moment the breaking was effected. See *R v Dyantyi*, 1958 (2) PH H 253 (E); *R v Willie Ovamboland (supra)*. Technical though it may be, the second count is to be distinguished from the first, where the accused unlocked the door and pushed it open solely for the purpose of stealing. Accordingly, the verdict on the second count must be altered to one of theft.

Notwithstanding the alteration, the sentence on the second count and the overall sentence remain appropriate and are confirmed.

Finally, I wish to express my indebtedness to the Attorney General for his helpful memorandum. It forms the basis of this judgment.

Lloyd AJ: concurs.

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COWAN AND OTHERS v REGISTRAR OF NAMES, UNIFORMS, BADGES AND HERALDIC REPRESENTATIONS 1982 (2) ZLR 6 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Georges JA and Beck JA

13th July, 1982

Flynote

Statutes - Armorial Bearings, Names, Uniforms, Badges and Heraldic Representations Act [Chapter 2] - section 9 (3) - application for registration of individual coat of arms - section 18 (1) (b) - discretion of Registrar to refuse application for any good and sufficient reason - applicants neither resident nor domiciled in Zimbabwe - necessary to show some connexion with the country.

Headnote

In terms of section 18 (1) (b) of the Armorial Bearings, Names, Uniforms, Badges and Heraldic Representations Act [Chapter 2], the Registrar of Names, Uniforms, Badges and Heraldic Representations has a discretion to refuse an application for registration of a personal coat of arms for any good and sufficient reason. This gives him a very wide discretion, and principles of chivalry derived from elsewhere can have no application in this country in deciding whether his discretion was correctly exercised. Where the applicants had no connexion with Zimbabwe at all, whether by way of domicile, residence, interest or descent, the Registrar was clearly entitled in terms of his general discretion to rely on this lack of connexion as grounds for refusing the applications. However, looking at the legislative history of the legislation and at the legislation itself as a whole, it is clear that an applicant must show some connexion with this country and no interest in having arms registered in this country was shown in the present case.

Case cited:

Manchester Corporation v Manchester Palace of Varieties [1955] 1 All ER 387 (Ct. of Chivalry).

Judgment

Fieldsend CJ: These are appeals, in terms of section 22H of the Armorial Bearings, Names, Uniforms, Badges and Heraldic Representations Act [Chapter 2], as substituted by section 14 of the amending Act (No. 40 of 1977), from the decision of the President of the Patents Tribunal sitting on appeal against a decision of the Registrar of Names, Uniforms, Badges and Heraldic Representations.

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Three separate and unconnected persons applied at the same time under section 9 (3) of the amended Act for the registration of individual heraldic representations-in effect for the registration of personal coats of arms. It was common cause that these heraldic representations were in conformity with the principles and rules of heraldry as required by section 18 (1) (b). The Registrar ruled, however, in each case that as the applicant was not domiciled in Zimbabwe and had not been granted arms in the country of his domicile he should not be granted registration in Zimbabwe. The President of the Patents Tribunal upheld the Registrar's refusal and it is against that decision that the applicants now appeal.

The applicants and the Registrar have indicated that they do not wish to present oral argument and are content for the Court to deal with the appeal on the papers.

The Registrar's refusal and the judgment appealed from turned on the point of whether registration of arms should be granted to a person not domiciled in Zimbabwe when he had not been granted arms in the country of his domicile. The Registrar did, however, raise before the Patents Tribunal whether the Act conferred rights on a person who was not domiciled in Zimbabwe, referring to the statement in Maxwell, *Interpretation of Statutes* 11th Edition page 148 that there is generally a presumption that the Legislature confines its enactments to those over whom it has authority. The learned President held that, having regard to the subject matter of the Act dealing with heraldic representations, it was desirable that the presumption should not apply and that a person domiciled in any part of the world could apply under section 9 (3) of the Act.

I deal first with the main ground for the Registrar's refusal of registration. His powers are to be found in section 10 of the Act which reads as follows:

"10. The Registrar may, subject to the provisions of this Act-

- (a) accept an application; or
- (b) accept an application, subject to such amendments, modifications, conditions or limitations as he may deem fit to impose; or
- (c) refuse an application."

Section 18 (1) (b) provides that the Registrar shall refuse to accept an application for the registration of-

"any heraldic representation-

- (i) which is not in conformity with the principles and rules of heraldry;

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or

- (ii) if, for any other good and sufficient reason, he considers the application for registration should be refused".

He has therefore a very wide discretion once there is no bar to registration as provided in

section 18.

The difficulty is to discern any basis of law upon which the Registrar must proceed or upon which his decision can be attached.

Even in a monarchy with a long tradition of matters of chivalry and armorial bearings and the right to bear them these questions are not governed by the common law. In *Halsbury's Laws of England*, 3rd ed., vol. 29 p. 268 it is said:

"552. The use of arms, crests, supporters and other armorial insignia is governed by the law of arms. The law of arms is not part of the common law, though it is part of the law of England and is noticed as such by the common law courts. The substance of the law of arms is to be found in the customs and usages of the Court of Chivalry.

553. Arms may only be borne by virtue of ancestral right or of a grant made under lawful authority. Ancestral right is normally provided from the record of the College of Arms, especially those relating to the heralds' visitations.

554. The right to grant and regulate armorial bearings has from earliest times been inherent in the office of a King of Arms within his province, as representative of the Sovereign, and since the sixteenth century express words delegating this royal prerogative have been inserted in the letters patent of their appointments . . . A grant to a natural person is made by Garter and the King of Arms of the province in which the grantee resides."

The complexities are further shown by note (k) on page 243, which reads:

"The provinces and jurisdictions of Clarenceux and of Norrey and Ulster in England are south and north of the river Trent respectively. The jurisdiction of Garter in England is not restricted, and he has also an Imperial jurisdiction over persons not domiciled in the United Kingdom. Lyon King of Arms has jurisdiction in Scotland, and Norrey and Ulster King of Arms in Northern Ireland."

So far as the Court of Chivalry is concerned it seems to have sat only once since 1737, in *Manchester Corporation v Manchester Palace of Varieties* [1955] 1 All ER 387 (Ct. of Chivalry).

What principles of chivalry or the grant of arms could have been contemplated in 1977 when for the first time a person was able to apply in this country for the registration of an heraldic representation it is difficult to imagine. At that time this country had been a republic since 1969, and an unrecognised republic at that. Principles of Chivalry derived from elsewhere can have had no application

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It follows that the discretion given to the Registrar whether or not to register an heraldic representation must be a very wide one. There is no basis for saying that he was wrong in refusing to register in the instant cases where none of the applicants had shown any connection with Zimbabwe at all, whether by way of domicile, residence, interest or descent. He may not have been right to base his decision on the applicants' domicile because if any principles of chivalry and the grant of arms are involved it does not seem as if domicile is the relevant issue but rather the residence of the grantee. But the Registrar was clearly entitled to rely on the total lack of connection between the appellants and Zimbabwe. For these reasons alone I would dismiss the appeal.

But I think that the matter goes further than that. I have grave doubts whether the Act gives

persons such as the applicants a right to apply for registration unless they can show some connection with the country.

The history of the legislation shows that until 1977 it was concerned only with the use of the Royal Cipher or the Armorial Bearings of the Colony for commercial purposes (section 64 of the Trade Marks Act, 1950) and the protection of the names, uniforms and badges of sporting and similar associations (Act 4 of 1950). See too the Armorial Bearings, Names, Uniforms and Badges Act, No. 12 of 1971, the immediate predecessor of the present Act. It was only in 1977 that a person could apply for registration of an heraldic representation under section 9 (3), and this forms a very small part of the Act.

The whole character of the legislation is to control the use of symbols by persons who are not entitled to them and to control that use only within the country. This follows from the fact that the Act creates a criminal offence for such use (section 23 (1)) and grants a civil remedy only where a contravention of that section has been established (section 23 (3)).

The 1977 amendment allowing registration of heraldic representations must be read in the context of the legislation as a whole. It cannot have been intended to do more than allow a person with an interest in this country in having such a representation registered to apply for registration. No such interest was shown in any of the cases before us, and on that ground, too, I think that the appeals must be dismissed. No question of costs arises.

The appeals are dismissed.

Georges JA: I agree.

Beck JA: I agree.

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S v NEMAPARE 1982 (2) ZLR 10 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Baron JA and Georges JA

28th June and 13th July, 1982

Flynote

Criminal law - obstructing or interfering with course of justice - what is - magistrate disposing of criminal case informally and in absence of prosecutor because he considered matter trivial - record written to show an apparently proper trial - too evidence of corrupt motive but at least was doing accused a favour - appropriate sentence.

Headnote

The appellant was, at the time of the offence, a provincial magistrate of some two and a half years' standing.

The complainant, a prison wardress, had laid a complaint of assault against two fellow wardresses, who were placed on remand on charge of assault with intent to do grievous bodily harm. They were remanded out of custody, because the magistrate who remanded them considered the matter petty. Thereafter, before the police investigations were complete and without consulting the public prosecutor, the appellant subpoenaed the complainant and the two accused wardresses to appear in his court. There the appellant questioned the parties and later in the day, in court, gave what purported to be a judgment in the matter, in which he stated that the two accused had been convicted of common assault. He cautioned and discharged them. The public prosecutor had at no time been consulted about the matter and had not agreed to a reduction of the charge to common assault. The record of the "trial" gave the appearance of being that of a properly conducted trial.

There was no evidence of a corrupt motive on the appellant's part nor that the case would have had a different result if it had proceeded regularly. The magistrate trying the appellant found that, whatever the appellant's motive, his intention must have been to deal with the case so that it would not be tried in the ordinary way before a properly constituted court. He sentenced the appellant to nine months' imprisonment, of which six months were conditionally suspended. The appellant appealed against conviction and sentence.

Held, dismissing the appeal against conviction, that there had clearly been an interference, procedurally at least, with the course of justice. Whether this amounted to the offence of obstructing the course of justice depended on the appellant's state of mind. On the evidence, this was not merely a case

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of the appellant helping expedite matters with a quick plea; the least inference that could be drawn was that he was doing the two accused women a favour, possibly by ensuring that they were only cautioned and discharged, possibly by ensuring that their trial was conducted in private and with no publicity.

Held, further, that, as there was nothing to show that the accused had received anything but just treatment for their offence, the balance could just be tilted in the appellant's favour, despite the general consideration that the integrity of judicial officers must be above reproach. A fine of \$500, coupled with a suspended term of imprisonment, should be substituted.

Case cited:

R v Borron (1820) 3 B and Ald 432; 106 ER 721; [1814-23] All BR Rep. 775 (KB)

I A Donovan, for the appellant.

H A Eleftheriades, for the respondent.

Judgment

Fieldsend CJ: The appellant, a provincial magistrate in Bulawayo, was convicted of attempting to pervert or obstruct the course of justice and sentenced to nine months' imprisonment of

which six months were suspended for five years. He now appeals against conviction and sentence.

The substance of the charge was that:-

"[the appellant], well knowing that the said Charity Madanhi and Angella Muzanarwo were on remand until the 9th September, 1981, at the said Court, and that the case had not been adjudged did, upon the 3rd September, 1981, and at the Magistrate's Court, Bulawayo in the said Province, wrong fully, unlawfully, falsely and with intent to defeat or obstruct the course of justice and to prevent the said Charity Madanhi and Angella Muzanarwo from being tried according to law, hold out to James Vaughan Llewellyn Bowen, a Public Prosecutor and the Attorney-General's representative, that a trial had already been commenced or held in respect of the charges against the said Charity Madanhi and Angella Muzanarwo, when he well knew that no such trial had been commenced or held, and did proceed to deliver what purported to be the judgment and sentence in the matter, and thus did attempt to prevent, obstruct or hinder the said James Vaughan Llewellyn Bowen from prosecuting the said matter according to the due process of the law . . . ".

The facts are somewhat involved and it is necessary to set them out in some detail.

On Wednesday, 25th August, 1981, Plaxedes Matswanga (hereafter called the complainant), a wardress at Khami Prison, complained at the Western Commonage police station that she had been assaulted on 23rd August by Charity Madanhi and Angella Muzanarwo (hereafter called the two accused), fellow wardresses at the Prison. The two accused were

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brought before the Western Commonage Magistrates Court by the prosecutor, Mr Sithole, on a charge of assault intent to do grievous bodily harm. They were not called upon to plead and the presiding magistrate, Mr Bagshawe, remanded the two accused to appear in the same court on 9th September.

On Friday 28th or Monday, 31st August, the appellant telephoned Mr Bagshawe telling him that the Superintendent of Khami Prison had complained that the two accused had been remanded out of custody. Mr Bagshawe replied that he considered the matter to be petty, and that the Prison authorities had sufficient jurisdiction to deal with it.

On 1st September, the appellant personally issued a subpoena calling upon the complainant to appear at Court No. 2, Bulawayo at 8.30 a.m. on 3rd September. This was received by the complainant on 2 September and she reported this to the Prison Superintendent. Queries by the Superintendent of the prosecutor in charge of letdowns at the Magistrate's Court and of Mr Sithole at Western Commonage elicited that neither had any knowledge of the fact that the case was to be heard on 3rd September.

On 3rd September, the appellant telephoned Mr Sithole. He asked if he knew who the investigating officer was and whether the docket was complete. Mr Sithole told him that the officer was Sergeant Dube but that he did not know if the docket was complete. Mr Sithole agreed to ask Sergeant Dube to contact the appellant, but was unable to contact him before 8th September.

The two accused and the complainant, who had gone to the Magistrate's Court on 3rd

September, were called in to the appellant's office at about 9 a.m. He questioned them about the facts relating to the alleged assault and examined the injuries the complainant said she had received. The appellant told them to return at 11.30 that morning.

At 11.30 a.m. the parties were again called into the appellant's office with the complainant's parents and brother. The appellant enquired why the complainant's father had not taken steps to ascertain the cause of the trouble and to settle it. The parties were then told to appear in court at 2 p.m.

The appellant then arranged with Mr Pringle, the presiding magistrate in No. 2 Court, and Mr Bowen, the prosecutor, that he wanted to finalise a matter in that court that afternoon. Mr Bowen had no papers relating to the case and the appellant told him that Western Commonage would be forwarding the docket upon which he could endorse the sentence he would be passing. Mr Bowen had no knowledge of the case at all.

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The transcript of what occurred in court shows that the two accused appeared charged with assault with intent to do grievous bodily harm before the appellant, with J Bowed Esquire for the State and the defence in person. The judgment starts:

"The two Accused are charged with assault with intent to do grievous bodily harm, but were convicted on common assault."

There was then a very brief recital of some facts concluding with:

"Those briefly are the facts; and I have accordingly found them guilty of common assault. The offence itself is so minor that it only merits a caution and discharge; which is the sentence the Court is giving."

The appellant then drew attention to time wasted by opening a docket in such a trivial matter which could easily have been dealt with by the Prison Superintendent as a disciplinary case within the prison.

The matter came to light because the complainant was dissatisfied with the discharge of the two accused and complained to the Senior Public Prosecutor in Bulawayo, who called for an investigation.

It is clear that the whole procedure from beginning to end was quite irregular. The appellant had no right to take the initiative in having the two accused brought before him, he had no right to question them and the complainant in his office, he had no right to conduct criminal proceedings otherwise than in open court or in the absence of a representative of the Attorney-General, and he had no right to accept a plea to a lesser offence than that charged without the agreement of the State (section 255 of the Criminal Procedure and Evidence Act [Chapter 59]). In any event, although the formal charge sheet shows that the two accused pleaded guilty to common assault and were so convicted, not even the appellant says when this verdict was actually pronounced.

On the face of things there has therefore clearly been an interference procedurally at least with the course of justice. Whether this amounts to the offence of obstructing or interfering with the

course of justice depends on the state of mind of the appellant. *R v Borron* (1820) 3 B and Aid. 432, 106 ER 721.

The appellant's case was that he was all along acting in good faith in an effort to expedite justice in what he believed was a trivial case. It is common cause that he was told by Mr Bagshawe on either 28th or 31st August that Mr Bagshawe thought the matter a trivial one though this arose only in regard to the two accused being remanded out of

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custody. The question of the nature of the offence was not discussed in detail. The appellant said that between then and 1st September he was telephoned by someone at Western Commonage, whom he did not, identify but whom he believed must have been the investigating police officer. This person, he says, told him that the two accused wanted to be dealt with quickly and were going to plead guilty to common assault. The appellant says he agreed to deal with the matter and he put in train the course of events I have already detailed.

There was no evidence of any connection between the appellant and the two accused or their families, and there was no evidence that the result of the case against the two accused would or should have been any different had their trial proceeded in the regular way.

The learned trial magistrate considered all the circumstances in some detail and concluded that the appellant's actions went beyond those of a magistrate helping out in a quick plea. He said that there was no evidence to show why he acted as he did, but that, whatever his motive, his intention must have been to deal with the case so that it would not be tried in the ordinary way before a properly constituted criminal court.

Mrs. *Eleftheriades*, who appeared for the State, did not on appeal contend that the accumulation of circumstances led to the inevitable inference that the appellant had any corrupt motive or even any intention to do a favour to the two accused. She was content to base her case on the fact that the appellant knowingly dealt with the trial irregularly, but that his state of mind was no more sinister than that he was demonstrating his authority and showing that he had the power to deal with the trial as he did.

Whilst paying due regard to this important concession I do not consider myself to be necessarily bound by it. It was a concession made during the course of argument in reply to questions by the Court, and seems to have been related to Mrs. *Eleftheriades* submission that a procedural irregularity, albeit without any corrupt or improper motive, was sufficient to constitute the offence if at the same time the irregularity was unlawful in the sense of contravening a statutory provision. There was, of course, no direct evidence of a corrupt motive on the part of the appellant, nor any direct evidence to show why he might have wanted to do a favour to either of the two accused. That is a factor to be given proper weight in deciding what inference must be drawn from the proved facts, including the negative fact that with the resources available to it the prosecution was unable to present any such direct evidence.

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FIELDSEND CJ

But the magistrate having the conclusion that he did, as an inference from the proved facts, I consider that it is the duty of this Court to consider those facts in deciding for itself, subject to the usual considerations on appeal, whether or not the inference was justified.

The appellant at the time of the offence was a magistrate of over two-and-a-half years' standing. Before that he had been a prosecutor for two years. He knows therefore that it is the prosecutor who controls the bringing and setting down of cases, frequently after consultation with the magistrate concerned. He did not know of any case, apart from this one, where a magistrate had taken such an initiative as he took here, nor of any case where a trial had been held in private or in the absence of a prosecutor with a knowledge of the facts of the case. The appellant was at the time the magistrate dealing primarily with civil matters, though it was accepted that he was the duty magistrate and on occasions such a magistrate would help out with short uncontested criminal cases, indeed the appellant gave a specific instance where he was asked by a prosecutor to deal with a case carrying a mandatory sentence in which the accused had pleaded guilty.

In view of the irregularities there was, therefore, some obligation on the appellant to offer for the actions which he took. The reason was, he said, the telephone call from Western Commonage which must have been sometime on 28th or 31st August or on 1st September, the date he personally issued the subpoena. Had he acted upon representations from the Superintendent of the prison his actions would have been more readily explicable; but that cannot have been the position because the superintendent was concerned not about the triviality of the case but with the fact that the two accused had not been kept in custody. The appellant's evidence that he thought it was the investigating officer is most improbable. It is highly unlikely, and certainly irregular, for the police to deal directly with a magistrate in such a way, their contact with the court is through the prosecutor. In any event it was part of the agreed facts that at that stage the police docket was nothing like complete, and that as late as 2nd September was endorsed by a Chief Inspector for certain points to be further investigated. The appellant's explanation, even standing on its own, is hardly tenable.

But it is made quite unacceptable by his subsequent conversation with Mr Sithole, whether this was on 3rd September, as Mr Sithole said and the magistrate found, or possibly on 2nd September. It must, on the appellant's sequence of events, have been after the alleged conversation with the anonymous caller. In that event it is astonishing that the gist of this conversation was not relayed to Mr Sithole by the appellant. Instead

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FIELDSEND CJ

the evidence is that the appellant asked who was the investigating officer, whether the docket was complete, and requested Mr Sithole to have Sergeant Dube contact him. Mr Sithole was positive that he was not asked to send the docket to the main court. This, too, is very strange if the matter was to be dealt with in a regular way. It is true that the appellant said that he mentioned Mr Bagshawe's view of the triviality of the offence to Sithole and that Sithole did not disagree with it. Sithole did not really dispute this when cross-examined. But it is clear even on

the appellant's evidence that he was not seeking Sithole's view nor did he tell him of the action he was taking which was then already in train.

In the light of these circumstances the irregular conduct of the appellant on 3rd September in seeing and questioning the parties in his office, in making his own examination of the complainant and in discussing the matter with the complainant's father assumes a serious complexion, particularly as there is nothing which purports to be a record of these proceedings.

The form of the judgment that was recorded on 3rd September is also somewhat misleading, and apparently designed to show that there had already been a regular plea and a finding of guilt which there had not been. Even what appear to be the notes for judgment attached to the record do not accord with the facts. There it is stated: "P.P. thinks minor assault" though this was not said in the judgment delivered. I do not think that any adverse inference should be drawn from this note which does not really form part of the official record. Had the words been incorporated in the judgment the position might have been different.

Taking the accumulation of circumstances, as the magistrate properly did, I can come to no other conclusion but that the appellant was doing more than helping out with a quick plea, and doing more than merely demonstrating his authority. This was not an inexperienced judicial officer overlooking some technical procedural requirements of the law in order to expedite proceedings. It would not be right to assume that the appellant received any benefit for what he did, but the least inference that can be drawn is that he was doing the two accused a favour, possibly by ensuring that they were only cautioned and discharged, possibly by ensuring that their trial was conducted in private and with no publicity. This makes it unnecessary to decide finally upon Mrs. *Eleftheriades*' submission that a procedural irregularity that was unlawful could constitute the offence even without a corrupt or improper motive.

1982 (2) ZLR p17

FIELDSEND CJ

The importance to the administration of justice of not allowing this type of thing to occur is shown by the immediate reaction of the complainant who at once went to the senior public prosecutor in Bulawayo.

In my judgment the conclusion reached by the learned magistrate is unimpeachable (subject to a later qualification) and the appeal against conviction must be dismissed.

The appeal against sentence I find very difficult *Eleftheriades* has rightly stressed that the integrity of judicial officers must be above reproach, and pointed out the serious consequences to the whole system if it is thought that the record of judicial proceedings cannot be relied upon as accurate.

Mr *Donovan* has drawn attention to the disastrous consequences of this conviction to the appellant and the humiliation he will suffer as an educated and cultured man. Imprisonment is hardly needed in order to deter him from other offences of this nature. The only justification for imprisonment here can be the interests of society in seeing firstly a fitting punishment for a serious offence and secondly the deterring of any other judicial officers who might be similarly

tempted. The balance is a delicate one.

What may tilt it just in the appellant's favour is that there was nothing to show-save for the complainant's attitude-that the two accused received anything but just treatment for the offence they committed. Had this not been so the prosecution would undoubtedly have made a point of leading evidence of what would have been appropriate. I do not think that a finding more adverse to the appellant can be made than that he was motivated either to ensure that there was no danger of the two accused suffering a greater punishment at the hands of another magistrate, or to ensure that their case was dealt with swiftly and with a minimum of publicity. I am satisfied that one or other of these inferences must be drawn, and that the appellant was, for some undisclosed reason, seeking to do the two accused a favour.

This is, however, different from acting from a corrupt motive in the more accepted meaning of that term, and is not so serious. That the magistrate thought the appellant had acted from such a corrupt motive is apparent, I think, from the second condition on which he suspended. So months of the sentence: namely that the appellant was not convicted of any contravention of section 3 of the Prevention of Corruption Act. I do not think he was entitled to conclude beyond reasonable doubt that the appellant had been corrupt in this worst sense and to sentence him on that basis.

1982 (2) ZLR p18

FIELDSEND CJ

I would impose a fine of \$500 or three months, together with imprisonment for six months, suspended for five years on condition that the appellant does not commit any offence against the administration of justice during that period.

Baron JA: I agree.

Georges JA: I agree.

Lazarus and Sarif, appellant's legal representatives.

1982 (2) ZLR p19

S v CHIRARA 1982 (2) ZLR 19 (HC)

Court High Court, Bulawayo

Gubbay J

16th July, 1982

Flynote

Criminal law - housebreaking with intent - can only be charged in sane indictment as substantive offence where original intent was to commit that offence.

Headnote

It is not competent to charge, in the same indictment, housebreaking with intent to commit an offence and a different substantive offence. It is only where the two offences-the housebreaking and the substantive offence form one continuous transaction and the housebreaking is merely a matter of aggravation that what are in fact two offences are charged in the same indictment. Here, where the accused broke and entered the complainants' house with intent to assault him but, finding him absent, stole some of his goods, the two offences-housebreaking with intent to assault and theft-should have been charged separately.

Cases cited:

S v Buthelezi, 1961 (4) SA 376 (N.).

S v Sosera, HC-H-144 82 (not reported);

R v Vail (1905) 19 EDC 273;

R v Impey and Another, 1960 (4) SA 556 (E.).

Judgment

Gubbay J: The accused was charged with housebreaking with intent to steal and theft. It was accepted by the prosecutor, however, that the accused had broken and entered into the complainant's house with the intention of assaulting him. Once inside he found the complainant to be absent, and only then decided to steal three blankets and a radio. The magistrate convicted the accused of housebreaking with intent to commit assault and theft. That composite verdict was, in my opinion, incompetent.

Housebreaking with intent to assault and theft are two unconnected offences and should not be charged in one count but prosecuted separately. A distinction exists between housebreaking with intent to steal and theft and the purported offence of which the accused was convicted. Although housebreaking with intent to steal is a substantive offence, when it

1982 (2) ZLR p20

GUBBAY J

forms one continuous transaction with the theft following upon it, it is the invariable practice to charge the two separate offences as one. See *S v Buthelezi*, 1961 (4) SA 376 (N.), *S v Sosera*, HC-H-144 82. This is because the *real* crime is that of theft and the housebreaking merely a matter of aggravation. See *R v Vail*, (1905) 19 EDC 273 at 279; *R v Impey and Another*, 1960 (4) SA 556 (E) at 566G-H.

The situation in the present case is quite different. There is no common intention which welds the two separate offences inextricably together. The accused broke into the house with one intent which he thereupon abandoned and committed an offence totally unrelated to his erstwhile intent. Clearly two separate offences were committed. I agree entirely with the learned author *Hunt* that

"It is only where the crime for the purpose of committing which the breaking takes place is actually perpetrated, the two crimes, viz. housebreaking with intent to commit the crime in question and that crime, are chargeable in one count of an indictment . . ."

(See *South African Criminal Law and Procedure*, Vol. 2 at page 683.) It follows that the conviction must be altered by the elimination of one of the two offences. Undoubtedly the commission of the theft was the more serious and therefore the conviction must relate to it.

The verdict is altered to guilty of theft. The sentence imposed by the magistrate remains appropriate and is confirmed.

Lloyd AJ: concurs.

1982 (2) ZLR p21

S v FRANCIS 1982 (2) ZLR 21 (HC)

Court **High Court, Bulawayo**

Gubbay J

16th July, 1982

Flynote

Criminal law - Road Traffic 1976 - section 56 (3) - rectification by trial Court of omission to prohibit accused from driving where prohibition mandatory - procedure applies where prohibition omitted altogether but not where prohibition imposed for less than minimum period.

Headnote

If, when convicting a person of an offence under the Road Traffic Act, 1976, which entails mandatory prohibition from driving or cancellation of his driving licence, a trial magistrate inadvertently omits to order such prohibition or cancellation, this omission can be corrected by the procedure under section 56 (3) of the Act. This section allows the court to summon the accused to show cause why the prohibition or cancellation should not be imposed. Where, however, prohibition is imposed but for less than the mandatory minimum period, the procedure under section 56 (3) is not applicable, and it is necessary for a judge, on review, to rectify matters.

Cases cited:

S v Sithole, 1979 RLR 412 (G.D.);

S v Hove, 1981 ZLR 610; 1982 (1) SA 922 (Z);

S v Mushonga, HC-H-181-82 (not reported);

R v Takawira & Others, 1965 RLR 163 (A.D.);

S v Takeendesa, 1972 (1) RLR 325 (A.D.).

Judgment

Gubbay J: The accused was convicted of contravening section 46 (1) of the Road Traffic Act, 1976, in that he drove a motor-vehicle while under the influence of alcohol to such an extent as to be incapable of exercising proper control of it. He was sentenced to a fine of \$175 or, in default of payment, one month's imprisonment with labour.

Having convicted the accused and having found that no special circumstances existed, the magistrate was obliged to prohibit the accused, who had not previously been convicted of a similar offence,

1982 (2) ZLR p22

GUBBAY J

from driving for a period of not less than six months. Unfortunately she prohibited him from driving class 4 motor-vehicles for only six weeks and omitted to cancel his driving licence in respect of that class, of vehicle.

Failures to prohibit persons from driving and to cancel their driving licences occur from time to time, usually because of oversight. Such errors are rectified by the trial court resorting to the procedure laid down in section 56 (3) of the Act which reads-

".... if a court omits, when convicting a person of an offence in respect of which-

- (a) prohibition from driving is required to be imposed, to prohibit the person concerned from driving; or
- (b) cancellation of a licence is required to be imposed, to cancel the licence of the person concerned; the court shall, as soon as the omission is discovered, cause notice to be served on the person concerned directing him to appear before the court at a time and place to be specified in the notice to show cause why the prohibition or cancellation should not be so imposed."

In *S v Sithole*, 1979 RLR 412 (GD) at 416B-C, WADDINGTON, J, expressed the view, with which I respectfully agree, that the omission contemplated in section 56 (3) is one inadvertent in character, and that a deliberate decision of the court reached after a correct assessment of the evidence before it not to cancel the licence when sentencing a convicted person could not be rectified by the court invoking the section.

In casu the magistrate's omission to cancel the accused's driving licence in respect of class 4 motor-vehicles was due solely to inadvertence. She is directed, therefore, to proceed forthwith in terms of section 56 (3) (b) to remedy the defect.

The crucial point to be decided is whether it is open to the magistrate to rectify the order of prohibition by applying the provisions of section 56 (3) (a), or whether it is necessary for me to intervene on review by having recourse to section 29 (2) (b) (iii) of the High Court of Zimbabwe Act, 1981. See *S v Hove*, 1981 ZLR 610; 1982 (1) SA 922 (Z) at 924H; *S v Mushonga*, HC-H-181-82 (not reported).

The Magistrate *did* prohibit the accused from driving. It is true that she did not prohibit him for

the required period, but that, I consider, is a different matter altogether. The clear and unequivocal language of the subsection does not allow of its application to the facts of this case unless there be read into it the concluding words "for the required period". Since it cannot be said that insistence upon the literal meaning

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GUBBAY J

would lead to a glaring absurdity, the necessary interpolation is not permissible. See *R v Takawira and Others*, 1965 RLR 163 (AD) at 166C-D; *S v Takaendesa*, 1972 (1) RLR 325 (AD) at 334G-H. One is thrown back upon the plain grammatical words of the subsection, and they simply do not embrace the error in question.

Accordingly, I must now do what the magistrate ought to have done in the first place, and that is to prohibit the accused from driving class 4 motor-vehicles for a period of six months. It is so ordered. For the rest the conviction and sentence are confirmed.

Lloyd AJ: concurs.

1982 (2) ZLR p24

KUNZ v PRETORIUS 1982 (2) ZLR 24 (HC)

Court High Court, Harare

McNally J

16th June and 21st July, 1982

Flynote

Parent and child - custody - awarded to mother following divorce - child then by order of Juvenile Court placed in a home as a child in need of care - subsequent application to High Court for custody to be awarded to father - not proper for High Court to make order in conflict with that of Juvenile Court - custody awarded to father, subject to provisions of order of Juvenile Court.

Headnote

The plaintiff and defendant were formerly husband and wife and parents of a child. On their divorce the custody of the child was awarded to the defendant, the child's mother. Because of her subsequent mental and emotional problems, the child (and two other children of hers by a previous marriage) were by order of the Juvenile Court placed in a home, as children in need of care. The plaintiff wished custody to be awarded to him, the evidence clearly supporting his claim, and the question arose as to what the correct procedure should be, there being in effect an order of the Juvenile Court placing the child in the custody of the person in charge of the home.

Held, that the question was not one of which Court was the senior, but which course was more

conducive to stability of administration. It was undesirable, indeed wrong, to interfere with an order of the Juvenile Court and the best course would be to award custody to the plaintiff father, subject to the Juvenile Court order presently in force.

Cases cited:

Raath v Carikas, 1966 (1) SA 756 (W)

Lochenbergh v Lochenbergh, 1949 (2) SA 197 (E);

Forbes v Forbes, 1960 (1) SA 875 (D);

Walkinshaw v Walkinshaw, 1971 (1) SA 148 (NC);

de Klerk v de Klerk, G-S-180-80.

Judgment

McNally J: Plaintiff sued defendant claiming sole custody of their son Fourie Banks Kunz (born on me 31st January, 1975) and costs. The matter came before the Court by way of an unopposed application

1982 (2) ZLR p25

McNALLY J

for judgment in default of plea. The defendant is now apparently living in South Africa. She originally instructed legal practitioners in Harare but they renounced agency in May 1982, having entered appearance to defend in April.

The facts of the matter are these. The parties were divorced on the 1st August, 1975 and in terms of a consent paper dated the 30th July, 1975 the child (who is called and whom I will call Jannie) was placed in the custody of his mother. He was of course then a mere six months old.

The defendant apparently has mental/emotional problems arising from a combination of alcoholism and bouts of depression. I was advised that she might well have opposed this application but for the fact that she is, or was shortly before the hearing, in a psychiatric ward in South Africa.

Jannie and two older children who are the children of defendant's earlier marriage to Mr Pretorius (whom she remarried after being divorced by plaintiff) were placed voluntarily in Emerald Hill Children's Home in 1979. In October 1981 defendant wanted to take the children permanently to South Africa and made an application to the Juvenile Court, Harare. That Court however made an order confirming that the children should remain in the custody of the Sister-in - Charge of Emerald Hill Children's Home. The matter was to be reviewed in early 1982 after Mr and Mrs. Pretorius had settled down in South Africa.

At the review hearing in February, 1982 defendant was not present, having returned to this country for the hearing but having fallen ill again and being in the psychiatric ward of the local hospital. plaintiff sought an order granting him custody but legal point was taken that it was not

for the Juvenile Court to reverse an order of the High Court. whose award of custody to defendant was still in force, albeit in suspense.

In the light of the decision in *Raath v Carikas*, 1966 (1) SA 756 (W) this would seem to have been a proper decision. Accordingly, the Juvenile Court ordered that Jannie remain in the custody of the Sister-in Charge, Emerald Hill. This order was in terms of section 22(1) of the Children's Protection and Adoption Act [Chapter 337], Jannie being treated as a child in need of care. The order was confirmed by me in Chambers in March. Jannie was subsequently taken illegally to South Africa and recovered only with the co-operation of the authorities in that country, in June.

1982 (2) ZLR p26

McNALLY J

The evidence given before me was that of Mrs. Hove, a Probation Officer with the Department of Social Services, and of plaintiff himself. The evidence overwhelmingly suggested that plaintiff rather than defendant should now be the custodian parent. However, there was agreement between the witnesses that at this particular stage it would be desirable for Jannie to remain at the Children's Home.

Two reasons were given for this. First Jannie needs to settle down, and he is doing so at present, attending Avondale Junior School. It would be a pity to disturb him until the end of the school year. Secondly, plaintiff is Stationmaster at Lion's Den but is expecting a transfer to Bulawayo later this year. There are no facilities for schooling at Lion's Den, so Jannie would have to go to boarding-school. He would thus have to be moved from one boarding establishment, with which he is familiar, to another.

This is all simple enough. The problem which concerns me is a procedural one. What is the proper relationship between the High Court and the Juvenile Court in matters of this nature, both having jurisdiction in custody matters?

In *Lochenberg v Lochenbergh*, 1949 (2) SA 197 (E) a child had been committed to an institution in terms of the Children's Act. Thereafter the mother claimed a divorce and custody of the child. The Court awarded her custody but subject to the order under the Children's Act, so that on the discharge of that order the child would go to the mother's custody. Again in *Forbes v Forbes*, 1960 (1) SA 875 (a.) a child was put into the custody of the plaintiff mother but subject to a pre-existing order under the Children's Act. The Court in both cases considered that it could not and should not interfere with the pre-existing order of the lower Court.

It was pointed out in *Raath's* case (*supra*) that these cases were distinguishable on the grounds that there was no existing order of the Supreme Court at the time the Magistrate's order was made. In *Raath* there was such an order, and of course the same applies in the present case. But the point made by VIEYRA, J, in *Raath's* case was that since the Supreme Court was already seized with the matter, there could be no question of its not having jurisdiction. He did not go further and suggest that he would therefore override the decision of the Children's Court.

1982 (2) ZLR p27

McNALLY J

It seems to me that the question here is not which Court is the senior, but which course is more conducive to stability of administration. It is clearly undesirable that I should interfere with an order made by the Juvenile Court. Indeed, since I have no power to intervene by way of appeal, and since I have already confirmed the order by way of review, it would be quite wrong in my view for this Court now to make an order in conflict with the existing order of the Juvenile Court.

This is the view that was taken by VAN DEN HEEVER, J, in *Walkinshaw v Walkinshaw*, 1971 (1) SA 148 (NC) and, with respect, it is a sensible and practical approach.

It is true that in *de Klerk v de Klerk*, G-S-180-80 a judgment of this Court dated the 30th July, 1980, SQUIRES, J, made an order of custody when there was already an order of the Juvenile Court in operation. But he did not override the Juvenile Court order. Moreover, both parties agreed to accept his decision. His order awarded custody of the children to the father who already had custody in terms of the Juvenile Court order. At the divorce in 1978 the mother had been given custody, and it was that order which SQUIRES, J, varied. Accordingly there is no conflict between the approach I propose to adopt and that of SQUIRES, J Nor is his judgment a precedent for my overriding the decision of the Juvenile Court.

I propose to make an order varying the order as to custody made in the High Court at Bulawayo on the 1st August, 1975, by awarding the custody of the child Fourie Banks Kunz (Jannie) to his father, but that order will be subject to the Juvenile Court order presently in force. In effect therefore the custodial rights of plaintiff will be suspended until the Juvenile Court sees fit to discharge its present order.

I do not consider this an appropriate case in which to make an order of costs against defendant.

Accordingly I make the following order:-

1. The order of the General Division of the High Court, Bulawayo, dated the 1st August, 1975, awarding custody of the minor child Fourie Banks Kunz to defendant in terms of the consent paper Exhibit 2 in that matter, is hereby varied, and custody of the said child is hereby awarded to plaintiff, Louis Fourie Kunz.
2. The above order is subject to the order of the Juvenile Court, Harare, under reference JC 214/79, and dated the 26th February, 1982, in terms of which the said child is to remain as a child in

1982 (2) ZLR p28

McNALLY J

need of care in the custody of Sister Ferreira in her capacity as Principal of Emerald Hill Children's Home, until such order is discharged.

3. It is declared that the provisions of paragraphs 1, 2 and 3 of the consent paper Exhibit 2 aforesaid are from the date of this order to be no force and effect.

4. There will be no order as to costs.

Granger & Archer, legal practitioners for the applicant.

1982 (2) ZLR p29

HOLLAND v COMMISSIONER OF THE ZIMBABWE REPUBLIC POLICE 1982 (2) ZLR 29 (HC)

Court High Court, Harare

Pittman J

20th and 21st July, 1982

Flynote

Statute - Emergency Powers (Maintenance of Law and Order) Regulations, 1980 - section 21 (1) - detention by a police officer of person in respect of whom he has reason to believe there are grounds justifying such detention - necessary for a police officer personally to have such belief - not enough merely to act on orders of a superior officer - Constitution of Zimbabwe - paragraph 2 (1)(a) of Schedule 2 - requirement that detained person be informed within seven days of reasons for his detention - essential to make it clear to detainee that there were grounds for a belief that detention expedient in interests of public safety or public security.

Headnote

The applicant, a young man of 18 years, was taken into custody by the police after he had been seen at night peeping over a two-metre wall at or near the Prime Minister's residence in Harare. This occurred a few days after an incident in which dissident members of the army had fired shots at the Prime Minister's residence. He was taken before a detective superintendent, who issued a detention order and told him that he had received instructions from his superior that the applicant be detained in terms of the Emergency Powers (Maintenance of Law and Order) Regulations, pending investigations into why he was found looking at the guest house of the Prime Minister's residence late at night. In answer to a plea from the applicant that the incident did not warrant detention, the superintendent said -

"I am sorry, there is nothing I can do about it, these are my instructions from my superiors".

The applicant was then detained in the maximum security section of Chikurubi Prison.

The applicant sought the setting aside of the detention order, two of the grounds being -

- (1) that the fact that the superintendent had not applied his own mind to the question whether he should issue the detention order but had simply obeyed the instruction of his superior rendered the order invalid;

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PITTMAN J

- (2) that the failure of the police to comply with paragraph 2 (1) (a) of Schedule 2 to the

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Constitution rendered the detention illegal.

Held, allowing the application with costs, that the superintendent had no right to issue the detention order personally in terms of section 21 (1) of the Emergency Powers (Maintenance of Law and Order) Regulations unless he had himself come to the conclusion that he had reason to believe that there were grounds which would justify the Minister of Home Affairs in detaining the applicant under section 17 of the Regulations. He could not say he had that belief simply because some superior had told him to issue the detention order.

Held, further, that the grounds for detention given to the applicant did not comply with paragraph 2 (1) (a) of Schedule 2 to the Constitution; it had to be made clear to him that there were grounds for a belief that it was expedient in the interests of public safety or public security to detain him.

Such expedience would not exist if the police believed that the applicant had been studying the area in order to commit a simple housebreaking there.

Case cited:

Minister of Home Affairs v Dabengwa and Another, 1982 (1) ZLR 236.

AP de Bourbon, for the applicant.

S Muchechetere, for the respondent.

Judgment

Pittman J: This is an application for the setting aside of a detention order issued against the applicant.

The applicant is a young man aged 18 years. In the middle of the night of the 6th July, he was taken into custody by the police after security guards had seen him standing near the Prime Minister's residence in Chancellor Avenue and looking over a security wall on the pavement. He alleges that the wall was that of a vacant plot on the corner of North Avenue, thus some distance from the Prime Minister's residence. He was waiting there to get a lift towards his home in Ballantyne Park. However, the police say the wall was that of the Prime Minister's guest house. He was questioned by the guards and by the police when they arrived, and was then taken to the Central Police Station, where he stayed until an order for his detention in terms of section 21 (1) of the Emergency Powers (Maintenance of Law and Order) Regulations, 1980, was made by Superintendent Oberholzer on the 8th July. He was then taken to Chikurubi Maximum Security Prison and has remained there ever since.

On the 16th July he caused to be filed the notice of motion in the present proceedings, with an affidavit dated the 14th July in which he alleged that on the day of his detention Superintendent Oberholzer had said to him, "Gary, I am sorry about this. I was speaking to the Minister of Home Affairs and he says that you must be detained for 30 days". The applicant protested, but Superintendent Oberholzer added, "Sorry, my hands are tied, this is a ministerial order."

PITTMAN J

Section 21 (1) of the Emergency Regulations reads as follows:

"21. (1) Any police officer may without warrant arrest and detain, pending inquires, any person in respect of whom he has reason to believe there are grounds which would justify his detention under section 17."

The relevant portion of section 17 reads:

"17. (1) If it appears to the Minister that it is expedient in the interests of public safety or public order that -

(a) any person . . .

should be detained, he may, by order under his hand direct that such person . . . may be detained-

(i) by being kept in such prison or other place . . .

as the Minister may direct and in accordance with instructions issued. by the Minister."

It was clear that the main ground to be relied upon by the applicant at that stage was that the order issued by Superintendent Oberholzer was invalid, because he had not directed his own mind to determine whether it should be issued. He also made allegations such as that he had never been near any part of the Prime Minister's buildings and that he had provided to the investigating police sufficient facts to make it clear to them that he was only in the area to attempt to hitch a lift to his home. On the 19th July, the applicant filed a second affidavit in which he said, "Since I have been detained I have not been informed by the Police of the reasons for my detention." This affidavit was intended to be the basis of another ground for setting aside the order. That other ground refers to section 2 (1) (a) of Schedule 2 of the Constitution of Zimbabwe, Act No. 44 of 1979, which reads as follows:

"2. (1) Where a person is detained under any law providing for preventive detention-

(a) he shall be informed as soon as reasonably practicable after the commencement of the detention, and in any case not later than seven days thereafter, in a language that he understands of the reasons for his detention . . .".

The application was brought before this Court yesterday morning. Immediately before it began, three affidavits were filed on behalf of the respondent by three policemen, namely Senior Assistant Commissioner Mkunu, Senior Assistant Commissioner Mhora and Assistant Commissioner Murevorwi, while affidavits by Superintendent Oberholzer and Detective Inspector Mangobe were filed after the argument had began.

1982 (2) ZLR p32

PITTMAN J

In these five affidavits, the police alleged, as already stated, that the applicant had aroused the interest of the Prime Minister's guards because he was seen to be peeping over the wall of the guest house. They also alleged that he had failed to give a satisfactory explanation for this conduct, and that he had been detained because of that failure, and because they believed that there was some ulterior motive behind his actions, especially in view of the recent shooting attack on the Prime Minister's residence, which required further investigation.

It was also denied that the Minister of Home Affairs had ordered Superintendent Oberholzer to issue the detention order. He had done so in compliance with an order to that effect from Senior Assistant Commissioner Mkunu.

The applicant did not seek to file an answering affidavit, and as there was no blatant untruth or unacceptable improbability in the police affidavits, the Court is obliged to act upon these affidavits where they are not contradicted by those of the applicant. His legal representative, Mr Elliott, had also filed an affidavit, but it only established what became common cause, namely, that Superintendent Oberholzer had signed the order.

Mr *de Bourbon*, who appeared for the applicant, argued on the papers before the Court that there were three reasons why the detention order should be set aside. First, there were really no substantial grounds for it, and it must have been issued *mala fide*. Secondly, failure of the police to comply with section 2 (1) (a) of Schedule 2 of the Constitution rendered the detention illegal. Thirdly, the fact that Superintendent Oberholzer had not applied his own mind to the question whether he should issue the detention order, but had simply obeyed Senior Assistant Commissioner Mkunu's instruction, rendered the order invalid. Mr *Muchechetere* appeared for the respondent to oppose these grounds.

As regards the allegation of bad faith, Mr *de Bourbon* pointed out that in his affidavit, the applicant had clearly alleged that he had not been close to the Prime Minister's residence when the guards approached and apprehended him. I would add that he had given a detailed explanation of why he had been in the area at the time, and he had said in effect that that explanation had been checked and confirmed by a policeman. As regards the allegation that the applicant had been close to the Prime Minister's residence, Mr *de Bourbon* pointed out that none of the deponents of the affidavits for the police had been able to give a first-hand account of the applicant's movements and that none of the guards had given to the Court a description of their encounter with the applicant.

1982 (2) ZLR p33

PITTMAN J

He maintained that the vagueness of the police case and their failure to set out in detail why they regarded the applicant as giving an unconvincing explanation for his presence in the area entitled the court to hold that they were *mala fide* in detaining the applicant.

I have studied the five police affidavits, and I am unable to accept that these do not contain credible allegations by the police which justified them in detaining the applicant. See Senior Assistant Commissioner Mkunu's affidavit, paragraphs 2 to 6, which reads as follows:

"2. On the 7th July, 1982, I received a report of the arrest of Gary Robert Holland, when he was seen suspiciously peeping over a two-metre wall by the guards of the Prime Minister's residence. When questioned by the guards to explain his actions, he replied that they (the guards) had nothing to do with what he was doing. Holland was then arrested by the guards and later questioned by the Law and Order Section of the Criminal Investigation Department. He again failed to give any satisfactory reply as to his intentions and a report was later submitted to the Officer Commanding, Criminal Investigation Department regarding the arrest and questioning of Holland.

3. Because of Holland's reluctance to give a satisfactory explanation for his presence at the Prime Minister's residence, he was then ordered to be detained at Chikurubi Maximum Security Prison in terms of section 21, sub

section 1, of the Emergency Powers (Maintenance of Law and Order) Regulations pending further investigations.

4. It was necessary to detain Holland pending further questioning in view of the recent shooting at the Prime Minister's residence.

5. Holland is an ex - Police cadet and should be aware of places of a security nature.

6. When Holland was questioned, he categorically told the Detectives that he would not answer their questions in the absence of his lawyer.

7. Although Holland has not altered his original story i.e. that his actions were merely of a curiosity nature, I am convinced that there is an ulterior motive which warrants his further detention."

See also paragraphs 2, 3, 5 and 7 of AC Mureverwi's affidavit, and paragraphs 2 and 3 of Superintendent Oberholzer's, which also allege that in their opinions the applicant had failed to give satisfactory reasons for his suspicious conduct at the guest house. It may or may not be that the guards deliberately misinformed the police about the details of the applicant's conduct, but I see nothing in the papers to justify a positive finding that the police, even if misinformed, have acted in bad faith in detaining the applicant. Mr *de Bourbon*'s criticism of the vagueness of the police allegations might have had more force if the point of bad faith

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had been specifically raised in the applicant's affidavits. However, that was not done, and I consider that the police allegations as to why the applicant has been detained cannot be criticized and certainly cannot be held to show bad faith on their part.

As regards the second point made for the applicant, the alleged failure to comply with section 2 (1) (a) of Schedule 2 of the Constitution, it must be noted that paragraph 7 of Superintendent Oberholzer's affidavit contains the following description of an event on the 8th July:

"7. The Applicant together with Detective Mangobe came in my office. He looked nervous at the time and was on the point of crying. He asked me the reason of his detention and I told him that I had received instructions from my superior that he was to be detained pending investigations into the reasons why he was found looking at the guest house of the Prime Minister's residence over the surrounding security wall late at night. The Applicant pleaded with me again and again saying that it was only a minor incident and that it should not warrant detention. I then said to him "I am sorry there is nothing I can do about it, these are my instructions from my superiors'. Thereafter the Applicant was taken to Chikurubi Maximum Security Prison.

8. At no time during the interview with the Applicant, during which interview Detective Inspector Mangobe was present all the time, did I state that I spoke to the Minister. This is something I cannot do as I cannot on my own initiative have access to my Minister. I had received and usually receive my instructions from Senior Commissioner Mkunu. He did not mention anything about the Minister or a Ministerial Order."

Likewise DI Mangobe said in paragraph 9 of his affidavit:

"9. I took the Applicant to Superintendent Oberholzer and he asked the Superintendent why he had been detained. Superintendent Oberholzer told him that he had received instructions from his Superiors that he, the Applicant, should be detained pending the conclusion of the reasons why he was found at the Prime Minister's house at that time of the night peeping. He told him that it appeared his story had not been considered satisfactory. The Applicant who was agitated and on the point of crying kept on saying that the incident was trivial and that he should not be detained for it. Finally Superintendent Oberholzer said that he was sorry and that those

were instructions from his Superiors and that he could not do anything about it. I thereafter took the Applicant to Chikurubi.

10. During the interview Mr Oberholzer did not mention anything about speaking to the Minister neither did he say anything about a Ministerial Order."

Mr *de Bourbon* argues that these statements do not comply adequately with section 2 (1) (a) in that they made no mention of the fact that the applicant had been detained in terms of section 21, which required the detainer to have reason to believe that there were grounds which would justify his detention under section 17. The latter kind of detention could

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only be effected if the Minister considered that it was expedient in the interests of public safety or public order that that should be done. Consequently, to comply with section 2 (1) (a), Superintendent Oberholzer had to make it clear to the applicant that there were grounds for a belief that it was expedient in the interests of public safety or public order to detain the applicant. Obviously, such expediency would not exist if the police believed that the applicant had merely been studying the lay-out of the area with the intention of committing a simple housebreaking and theft there. The information given to him, according to Superintendent Oberholzer and DI Mangobe, must have left him completely unaware that he was suspected of conduct which would affect public safety or public order, and so it failed to equip him with the knowledge necessary for him to have when he went to the review tribunal in terms of section 2 (2) of the Second Schedule.

Mr *Muchechete* replied that as a former police cadet the applicant must have been aware of the previous shooting-raid on the Prime Minister's buildings and that he must have been aware that that was the reason why the police were treating the area as a very delicate or sensitive one as regards public safety or order. Consequently, the applicant must have realized, when he was given the reasons for his detention by Superintendent Oberholzer, that he was being investigated to determine whether he had any part in the previous raid, or was planning a part in a future one, and thus knew that the interests of public safety or public order were in the minds of the police.

I am unable to accept this argument. I think that on the information described in the papers the applicant was not sufficiently clearly informed of why he was being detained, and hence I conclude that section 2 (1) (a) of Schedule 2 was not adequately complied with. In accordance with the Supreme Court decision in *Minister of Home Affairs & Ors v Dabengwa and Another*, Judgment No. SC 94/82 *(1), I must therefore rule that this non-compliance with section 2 (1) (a) renders the detention order invalid.

Finally, I think it is beyond question that Superintendent Oberholzer had no right to issue the detention order in terms of section 21 (1), unless he had himself come to the conclusion that he had reason to believe that there were grounds which would justify the Minister in detaining the applicant under section 17. The express language of section 21 (1) excludes any possibility that Superintendent Oberholzer could say that he had reason to believe that there were grounds justifying the applicant's detention, simply because some superior had told him to issue the

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tion. In such a case, he would be acting not upon a reason that he had for such a belief, but upon a reason for such a belief that his superior had. Mr *Muchechetere* was unable to argue that there was anything in the papers to establish that Superintendent Oberholzer had had reason to believe and had in fact believed that there were grounds justifying the applicant's detention under section 17. On the contrary, it was quite clear that he simply obeyed SAC Mkunu's instruction that he must issue the detention order. Consequently, I hold that the order was issued illegally. I have given consideration to the question whether the point about Superintendent Oberholzer's disqualification to issue the detention order in terms of section 21 (1) was perhaps inadequately raised in the applicant's affidavits, and that if Superintendent Oberholzer had been induced to direct his mind to it, when drafting his affidavit, he may have been able to say that although he regarded himself as carrying out SAC Mkunu's instruction in issuing the order, he was himself aware of all the latter had. However, I think there is nothing in the papers to suggest facts known to SAC Mkunu and had come to the same conclusion as the that Superintendent Oberholzer applied his mind at all to the interests of public safety or public order. For example, he said in paragraph 7 of his affidavit, "The applicant pleaded with me again and again saying that it was only a minor incident and that it should not warrant detention. I then said to him 'I am sorry there is nothing I can do about it, these are my instructions from my superiors'".

The tenor of this passage is a clear indication that Superintendent Oberholzer issued the order without considering the implications of section 21 (1), and I think it would be unnecessary and unfair to the applicant to give Superintendent Oberholzer in effect an opportunity to re-write the passage, by declaring that he had so considered section 21 (1) when issuing the order.

Consequently, I make the following order:

1. It is hereby declared that the detention order served on the applicant on the 8th July, 1982, is void and of no force or effect.
2. It is ordered that the applicant be released forthwith from custody.
3. It is ordered that the respondent pay the applicant's costs.

Scanlen & Holderness, legal practitioners for the applicant.

State Attorney, legal practitioner for the respondent.

EXP BURNETT 1982 (2) ZLR 37 (HC)

Court **High Court, Harare**

Squires J

2nd June and 28th July, 1982

Flynote

Insolvency - Insolvency Act [Chapter 303] - petition for rehabilitation - averments necessary in petition - failure by petitioner during insolvency to disclose to trustee increase in income - effect of.

Headnote

It is not sufficient, in a petition for rehabilitation, merely to make the barest possible allegations in conformity with section 143 of the Insolvency Act [*Chapter 303*]. To do that does not give the Court the information necessary for it properly to form a conclusion or exercise its discretion to grant the application sought. It is incumbent on the petitioner to make the fullest disclosure of the whole of the income accruing to himself and his household, not only because that information bears directly on what he can afford towards further payments (particularly if he is earning and the household is partly supported by a spouse) but also since the amendments to the Act extend the estate vesting in the trustee to that of the spouse as well.

Furthermore - and particularly where the dividend paid to the creditors is non-existent or minuscule - if the petitioner's income has increased from the level it was when his contributions were fixed, an explanation as to why more was not paid to the creditors ought to be provided in the founding affidavit and not left to an answering affidavit. Failure to pay more when able will gravely imperil the petitioner's chances of rehabilitation.

Cases cited:

Ex p Palmer & Palmer, 1981 (1) SA 602 (W);

Ex p Pedersen, 1909 TS 678;

Ex p Demos, 1963 (3) SA 74 (FSC).

J M d'Enis, for the petitioner.

Judgment

Squires J: The petitioner in this matter surrendered his estate as insolvent on the 22nd August, 1979. According to the statement of affairs which he lodged in those proceedings, he alleged that his liabilities were \$12193, but the total value of the claims proved against him turned out to be \$95482,86, although the overwhelming bulk of this

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consisted of one creditor, the Agricultural Finance Corporation. Why there should be such a material and considerable difference is not explained, but at least it says little for the petitioner's

reliability. Then among the assorted papers which have somehow come to be included in the present application for rehabilitation are also two letters written to the petitioner by the original trustee in his insolvent estate. The first requests such documentary proof as the petitioner and his then spouse had which might resolve the question as to which property belonged to the spouse and therefore did not fall into the insolvent estate; and the second, dated the 7th February, 1980, advises the petitioner of his responsibility in submitting a monthly income and expenditure statement. This letter enclosed forms for him to do this, and furthermore sought respectively the provision of various items of information relevant to the source and total of the income of the petitioner and his wife, and the expenditure on his immediate dependents. It concluded with the statement that, although the applicant was required to contribute \$50 per month to the trustee for payment to his creditors, that figure could alter once the income and expenditure submissions were received by the Master.

By March of 1980, the petitioner seems to have been in employment earning \$800 per month, and from the Master's Office came the directive that the applicant continue to pay the sum of \$50 per month to the trustee for the benefit of his creditors. This he has apparently done, though it seems not always on time, but the net result is that he has paid some \$1 250, to his creditors since February, 1980.

Another annexure, this one to the petition itself, indicates that at least for a ten-month period from April, 1981, to January 1982, the petitioner received a total income - albeit on an irregular basis since he worked on commission - of \$14518, or \$1450 odd on an average per month, and that this was in fact from a different employer to that of March, 1980, and from whom he received only \$800 per month.

The application for rehabilitation has attracted objections, though no opposition was actually argued in Court. One of these comes from a creditor who protests that over a spell of two years and three months it has received only \$376 of its claim against the applicant of \$2381. Another and more serious objection comes from the trustee, who is not the trustee first appointed and who was substituted as such when the originally appointed trustee left the country in 1980. The present trustee complains that the applicant has not complied with the duty of advising his trustee of changes in his place or address of employment in contravention of section 37 (17) of the Insolvency Act; has not complied with

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the monthly requirements of producing documentary proof of income and expenditure as required by section 37 (6), and that he could, on the papers, have afforded to pay more to his creditors than the \$50 per month that he has been paying.

In rebuttal of these complaints the petitioner denies that he was ever made aware by the Master or his trustee of any need to notify them of any alteration in his income. Furthermore, after providing statements of income and expenditure for the first few months of sequestration, the petitioner says that he was advised by his then trustee that he could discontinue the process. He now claims that had he known he was required to advise the trustee of improved financial circumstances he would have done so and would have made a greater contribution to his

creditors wherever this had been possible. There are other explanations tendered by the insolvent such as the precise nature of his matrimonial status and the alimentary demands on him during the relevant period of insolvency, but these do not seem to me to select materially the main problems in issue in the application. Even on his version of the question of dependents, the petitioner accepts that his circumstances improved during his insolvency from the \$800 per month he was earning in March, 1980.

To complete the background sketch, it should also be said that the applicant apparently lost his employment on commission in or about March of this year, and since then has been unemployed. He is apparently being supported by his present wife whom he married in November, 1981; and he allegedly advised the trustee, when this officer inquired into the matter, that although unemployed he "helped out" in his father-in-law's business, though he received no remuneration for this.

He was looking for employment, but up to the time of signing the supplementary affidavit has been unable to find any. If he was successful in his rehabilitation, he thought he might launch an agency business of his own.

Before dealing with the merits of the application, the present petition seems to afford an opportune situation to discuss a point of practice in the contents of such a petition. The original petition filed in these proceedings contains the barest possible allegations in conformity with section 143 of the Insolvency Act, and merely recites, with changes to make the statement intelligible, the provisions of subsections (a) and (b) of section 143 of the Act. Merely to do that is not the best way of putting before the Court the information necessary for it properly to form a conclusion, or exercise its discretion to grant any application for rehabilitation that is being sought.

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It seems to me, for example, to be incumbent upon a petitioner for rehabilitation to make the fullest disclosure of the whole of the income accruing to himself and his household - not only because such information bears directly on what a petitioner can afford, if anything, towards further payments to his creditors - particularly if he is earning and the household is partly supported by a spouse: but also since the amend^{ed} to our Insolvency Act extend the relevant estate that vests in the trustee on insolvency to that of the spouse as well. The rationale behind these amendments was recognition of the changed social circumstances that now accepts working spouses, in the enhanced definition of that word, and consequent joint estates or pooling of resources as the prevailing rule of domestic establishments. What is relevant at the time of sequestration seems to me no less relevant for purposes of rehabilitation. As was said by DE WET, J (as he then was), in *Ex parte Palmer and Palmer*, 1961 (1) SA 602 (W) at 603E-F:

"It seems to me that a Court considering an application for rehabilitation will usually consider whether the means of the applicant are such that he should be ordered to make a further payment for the benefit of his creditors. In considering this question it is clearly relevant to consider the whole of the income accruing to the household. To take a simple example, if the wife and the children are self-supporting, the husband's income is required only for his own support, and it follows that if some income accrues to other members of the family the drain on the

husband's income is *pro tanto* reduced."

Accordingly, if a petitioner's wife - or other persons he is living with - is in receipt of an income, this should be disclosed, as should the number, nature and extent of the dependents for whose support he may be liable. In short, an application for rehabilitation should contain full details regarding the applicant's overall financial position, and it is not sufficient merely to state, as was said in the present petition, what was earned over a 10- month period in the past or that the petitioner is being supported by his wife, in purported compliance with this requirement.

Furthermore, and particularly where the dividend paid to creditors is non-existent or is miniscule as in this case, and the petitioner has earned money or increased his earnings during insolvency, from the level at which any contribution was fixed, an explanation as to why more was not paid to creditors ought to be provided in the founding affidavit and not left to an answering affidavit. It is part of the petitioner's duty, in presenting a petition for rehabilitation, to include information as to the dividend paid, amongst other things. And if the dividend is exiguous or absent, a mere statement 'to that effect is of no assistance since the Master, the creditors and the Court will want to know why.

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A more serious impediment to rehabilitation are the trustee's and creditors' complaints of the applicant's performance during his sequestration. While it is not possible in the first place to resolve completely the truth of the petitioner's claim that he was told he could discontinue submitting a monthly return of income and expenditure, I am still not impressed with the explanation offered by the applicant. It is the Insolvency Act itself which imposes the duty on an insolvent to keep monthly records of all assets, income and disbursements, and the duty to comply with this is not one that can be dispensed with by the trustee. These records have to be made and have to be kept by the insolvent and produced to the trustee if he wishes to see them. The fact that the trustee does not wish to see them each month does not mean that they need be no longer kept at all, for the obligation persists and continues regardless of whether the trustee wants to examine the result.

Similarly, I consider the applicant's explanation as to the advising of his change of employment - and consequently of his increased remuneration - to be threadbare and unconvincing. His claim that he sent an envelope with a new address typed on it to the trustee does not convey any more than that the applicant had a new postal whereabouts. He does not at any point say that it was the result of, or addressed to the care of a new employer, and one wonders why he manifested such a reticence to state specifically that he had found new employment unless it was to avoid an inquiry into any possibly enhanced earning capacity. The name or identity of the insolvent's employer was clearly of importance to the trustee, as appears from the letter to the petitioner from the trustee of February 1980. In the light of a requirement spelled out at the beginning of the insolvency to know the identity of the insolvent's employer, the petitioner here must have realized that any change of employment subsequently would be equally of interest to the trustee.

The most serious aspect of the matter, however, is the failure by the applicant to pay more to

his creditors than the contribution he has in fact so paid, particularly bearing in mind the enormous excess of his liabilities over his assets. Even allowing that he was ordered to pay only \$50 of a salary of \$800 per month initially, it is unarguably clear that by the time he left that employment he was earning \$875 a month and for the next ten months of his subsequent job was earning an average of \$1 450 per month.

While it is true that there is no statutory duty on an insolvent to pay his creditors, there is certainly a requirement that in considering a petition for rehabilitation a Court should look at all the facts.

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SQUIRES J

In the present case, after paying creditors a sum which in my view can only be called derisory, a very substantial unpaid balance remains. Nor can it be said that any creditor or the trustee knew of the improvement in the applicant's earnings and did nothing to ask for an increase in contribution from the insolvent, since the question of additional income did not become apparent to the Court or anyone else until the trustee raised the matter in his report. And despite paying only \$50 per month from an income of \$800, when that income increased no attempt was made by the applicant to increase the amount of payments to his creditors. Adopting the approach of WESSELS, J (as he then was), in *Ex parte Pedersen*, 1909 TS 678, as approved in *Ex parte Demos*, 1963 (3) SA 74 at 79 (FC) in the judgment of QUENET, F J, if an insolvent can afford to pay more to his creditors from his earnings in insolvency, but elects not to do so, then such a person will gravely imperil his chances of rehabilitation.

In the present case the petitioner could quite clearly have paid more. He now accepts this, and the annexure to his supplementary affidavit which contains this information substantiates his admission. According to this annexure, there are many months when he had a comfortably large surplus of income over expenditure. But he says he was to pay \$50 a month and assumed that that was all that was required of him. This seems to me to be a transparently thin excuse and not one that I am prepared to accept, for whatever reason his contribution was fixed at \$50 a month, it was fixed on a monthly income of \$800. Without knowing why it was fixed in that figure, it was not possible to say that it seems a generously low amount to have to contribute out of a total of \$800, but when the income of \$800 increased the applicant ought to have realized that the surplus should at least have been reported to his trustee and some of it offered or paid over for the benefit of his creditors-particularly when regard is had to the very substantial excess of liabilities over assets in his estate.

In short, I do not think that the applicant has made the necessary effort to try and pay his creditors what he could reasonably have afforded. On that basis, mainly, I do not think rehabilitation should be ordered, but I am also influenced by the extent to which the applicant has not kept his trustee nor the Master aware of his change of fortunes. Standing by themselves, these latter shortcomings in conduct would not have prevented rehabilitation if the applicant had made any effort to increase his payments to his creditors, but in my view of the larger short-

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coming, these other factors constitute a makeweight which satisfies me abundantly in the result that I should not accede to the petition in this case.

In coming to this conclusion, I have not overlooked the fact, stressed by Mr *d'Enis*, that the Master did not oppose the application. Such lack of objection is not a matter that will be lightly ignored by a Court, and this attitude has been taken into account in the present case. But against that it should be borne in mind that in his further report the Master subscribes to the observation of the trustee that the applicant's conduct has been less than exemplary in his failure to inform the trustee or the Master of his changes in remuneration.

Taking all the facts past and present into account, and because the main burden of his default is a lack of application in trying to pay more to his creditors, I am not refusing the application outright, but will give the petitioner an opportunity to apply again when he has done something more for his creditors, or can satisfy the Court that he is wholly unable to do so.

For these reasons the application is refused but leave is given to the applicant to re-apply for his rehabilitation after the lapse of one year from to-day's date.

Byron Venturas & Travlos, legal practitioners for the petitioner.

S v MADONDO 1982 (2) ZLR 44 (SC)

Court Supreme Court, Harare

Fieldsend CJ and Georges JA

15th and 29th July 1982

Flynote

Criminal Law - Traditional Beer Act, No. 39 of 1974 - section 3 (4) - possession of traditional beer not for consumption at the place or within the area for consumption in respect of which beer lawfully sold or supplied - Criminal Procedure and Evidence Act [Chapter 59] - section 133 (2) (b) - exceptions, excuses or qualifications - prosecution need not prove more than possession of traditional beer.

Headnote

In a prosecution under section 3 (4) of the Traditional Beer Act, No. 39 of 1974, it is necessary for the prosecution to show only that the accused possessed the traditional beer in question. In view of the wording of the subsection, it is an offence to possess traditional beer unless one can bring oneself within one of the exceptions provided. In terms of section 133 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 59], the onus lies on the accused to do this; all the prosecution need do is establish possession of the beer.

Semble: in the case of possession of small amounts of beer and in the absence of other aggravating or incriminating circumstances, a prosecution, while technically feasible, might be oppressive.

D. M. Foroma, for the appellant.

H. A. Eleftheriades, for the respondent.

Judgment

Fieldsend J: The appellant was convicted of a number of offences including contraventions of the African Beer Act, 39 of 1974 (since the beginning of this year the Traditional Beer Act) and of the Liquor Act [Chapter 289]. Of these counts three (counts 1, 2 and 4) were contraventions of section 3 (4) of the African Beer Act.

That subsection reads:

"3 (4) No person shall possess African beer except for consumption at the place or within the area for consumption in respect of which such beer was lawfully sold or supplied to him:

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Provided that a person who is authorized or permitted in terms of this Act to brew, sell or supply African Beer may possess that beer, subject to any conditions that may be prescribed for or imposed upon that authority or permit."

Court 1 alleged the wrongful and unlawful possession of 800 litres of African beer on 14th November, 1980, at the Emerald Hill shopping centre "being outside an area where the said African beer had been lawfully sold or supplied to him". Court 2 made the same allegations of 960 litres of beer on 21st November, 1980, and Court 4 of 10 litres on 29th December, 1980.

In the Court below the legal point was taken that the charges disclosed no offence because it was impossible to say in what areas it was unlawful to possess African beer. This was in effect an attack on section 3 (4) itself. It was rejected by the magistrate.

Thereafter the appellant pleaded guilty to these and all other counts.

He was convicted and sentenced.

He now appeals, basing his argument on the vagueness of the words "area for consumption in respect of which such beer was lawfully sold or supplied to him". One has some sympathy with this argument because it would seem that it can under certain circumstances be an offence for a person to be in possession of a litre of African beer for consumption in his own home. If he buys a litre of beer at a bottle store authorized to sell it under section 12 (1) (c) of the Act, and takes it with him to his home which is not in an area for which a provincial authority is established he may be committing an offence. This result may flow from the change in underlying purpose of the legislation over the years which is not adequately reflected in some of the sections which are still in force. It can undoubtedly be oppressive if strictly applied.

But in this Court we have to administer the law as it stands, provided the legislation is

sufficiently clear to enable us to do so. It is therefore necessary to look at the Act as a whole and at its underlying purpose.

As it now stands it is apparent that the main purpose of the legislation is to give to local authorities as defined in section 2 (1) control of and an effective monopoly in the sales of traditional beer within their areas. The reason for this is that in terms of section 16 of the Act all moneys received from the supply of traditional beer have to be dealt with in a prescribed way and used only for prescribed purposes. The various provisions of the Act must be construed against this general background.

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FIELDSEND CJ

For example-

- (i) a local authority may normally sell traditional beer only for consumption within its own area (section 4 (3));
- (ii) beer hall permits shall allow the holder to sell beer only for consumption on the beer hall premises and at such other places or within such areas as may be specified (section 14 (3));
- (iii) the Police, the Prisons and the services may sell beer to their members for consumption within the precincts of their establishments (section 7 (1));
- (iv) licensed hotels and restaurants may sell beer only for consumption on the premises (sections 6 and 12);
- (v) bottle stores in certain areas may sell beer but only for consumption within their provincial authority area (section 12 (1) (c)).

Despite the need for these controls it seems a harsh way of enforcing them to penalise the customer who has purchased beer if he happens to take it out of the place or area in which it was sold to him. But that is just what section 3 (4) does.

This is one of those sections to which section 133 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 59*] applies. This reads:

"(2) Subject to the provisions of this Act and any other enactment, the following provisions shall apply to criminal proceedings in any Court, that is to say-

- (a) ...
- (b) any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negated in the indictment, summons or charge, and, if so specified or negated, no proof in relation to the matter so specified or negated shall be required on the part of the prosecution."

In short it is an offence to possess African beer unless one can bring oneself within the exception provided. This means that the accused must show (a) that he possessed the beer for

consumption (b) at the place or within the area where it was sold to him for consumption. This may be regarded as an unwarranted limitation upon a person's right to have a litre of beer in his house, which is certainly not a limitation placed upon his right to have a bottle of wine or clear beer. But if it is to be an offence it makes sense for it to be in this form. After all it is only the possessor of the beer who knows where he bought it. It would be impossible to enforce the provision if the prosecution had to prove in every case where a person had bought his beer.

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FIELDSEND CJ

In the case now before us, however, there is no oppressive conduct shown in the bringing of the prosecution. On Court 1 the appellant was admittedly in possession of 800 litres of African beer in his motor vehicle at Emerald Hill shopping centre where he has a shop. Wherever he bought this beer he cannot have possessed it for consumption. The same applies to the 960 litres found in his car at the same place as in Court 2. The appellant admits that at the same time and place he had sold beer, and these sales were the subject of count 3.

Had Court 4 - the possession of 10 litres of beer - stood alone it might have been considered an oppressive prosecution. But it does not stand alone. It was accepted that the beer was hidden in a cardboard box in the store-room of the appellant's shop from which beer was being illegally sold on the same day. These sales were the subject of count 6.

The prosecution has established on each count all that it needed to establish, namely possession of the beer. The appellant has not attempted to bring himself within the exception provided in the section, and on the admitted facts he could not have done so. In my view he was rightly convicted on counts 1, 2 and 4 and the appeal against conviction must be dismissed.

It would probably have been better to have charged the appellant on each of these counts with selling beer and only with selling beer. "Sell" is defined in section 2 (1) as including "keeping, exposing, offering or possessing for sale", and this the appellant clearly did. But in the case of the overlapping counts, namely counts 2 and 3, and counts 4 and 6 the magistrate very properly treated each pair as one for the purposes of sentence. The admitted facts show a deliberate course of conduct on the appellant's part of selling beer illegally. This in itself makes his offences serious, but in addition the appellant has two previous convictions for illegal sales of liquor in contravention of the Liquor Act-one in October 1979 and another in March 1980.

I see no reason to interfere with the sentences of fines of \$250 on Court 1, of \$250 on Courts 2 and 3 together, and of \$150 on Courts 3 and 6 together. The appeal against sentence is also dismissed.

Georges JA: I agree.

Sawyer & Mkushi, appellant's legal representatives.

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MINISTER OF HOME AFFAIRS AND ANOTHER v YORK AND ANOTHER 1982 (2) ZLR 48 (SC)

Court Supreme Court, Harare

Fieldsend CJ, Baron JA and Georges JA

22nd and 29th July, 1982

Flynote

Statutes - Constitution of Zimbabwe, 1980 - paragraph 2 (1) (b) of Schedule 2 - detainee's case to be submitted within 30 days to tribunal - detention order purportedly made in terms of section 17 of Emergency Powers (Maintenance of Law and Order) Regulations but invalid due to various procedural defects - effect of order which is void *ab initio* - whether submission of case to tribunal within 30 days still necessary - effect of failure to submit case - whether failure can be cured by fresh detention order.

Headnote

The respondents, who were brothers, had been detained in January, 1982 on allegations of possession of arms of war. On 5th May, 1982 they appeared in court and were acquitted. On the 6th May they were rearrested and detained under a detention order issued by the appellant in terms of section 17 of the Emergency Powers (Maintenance of Law and Order) Regulations. The order was admittedly defective in a number of respects.

In terms of paragraph 2 (1) (b) of Schedule 2 to the Constitution, a detainee's case shall be submitted within 30 days to a tribunal established in terms of subparagraph (4), and shall be reviewed forthwith by that tribunal. No such tribunal was appointed in respect of the respondents, who remained in detention until the 1st July, when the appellant issued a fresh detention order that complied with the formalities required under the 'Regulations'. The respondents launched proceedings in the High Court, claiming that their detention was unlawful, their release from custody, and costs. DUMBUTSHENA, J, upheld their application, holding that as the respondents had been held continuously in detention since 6th May, the fresh order made on the 1st July, though on the face of it valid, did not cure the defects in the detention. In particular, he held that the failure to submit the cases to the review tribunal within 30 days was an omission that went to the root of the detention.

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On appeal, the *Attorney-General* argued that since the detention order of 6th May was a nullity, detention under it was not detention under a law providing for preventive detention and accordingly was not covered by the provisions of paragraph 2 of Schedule 2.

Held, that the whole purpose of the provisions of paragraph 2 would be defeated if the chapeau of the paragraph were to be confined to cases where a person is lawfully detained under a law providing for preventive detention. The paragraph provides what safeguards there are for a person detained under such a law. These include the requirement to submit the case to a

review tribunal. To say that if he is denied these safeguards he cannot secure them because his detention order is a nullity is to turn the law upside down. The detaining authority purported to act under the law providing for preventive detention, but failed to act properly. The detention which followed, though illegal, was certainly not a factual nullity.

Held, further, that when the orders of the 1st July were served, the period of 30 days within which the respondents' cases had to be submitted to a tribunal had already elapsed. Accordingly, they could not lawfully be detained by virtue of those orders.

Cases cited:

Minister of Home Affairs and Others v Dabengwa and Another, 1982 (1) ZLR 236;

Nathwan and Others v State of Punjab [1952] SCR 395;

Attorney-General v Chipango [1971] ZLR 1;

In re Puta [1973] ZR 133;

Union Government v Schierhout, 1925 AD 322;

Calvin v Carr and Others [1979] 2 All ER 440 (PC);

Hoffman-La Roche and Co. v Secretary of State for Trade and Industry [1975] AC 295; [1974] 2 All ER 1128 (HL);

Bensor v Musicians' Union [1954] Ch. 479; [1954] 1 All ER 822 (CA).

G Chidyausiku, Attorney-General, and RGLD Acton, for the appellants.

R R Horn, SC, for the respondents.

Judgment

Fieldsend CJ: This appeal concerns the legality of the detention of the two respondents (the York brothers) under section 17 of the Emergency Powers (Maintenance of Law and Order) Regulations, SI 441 of 1980.

The brief history of the matter is as follows: One brother was arrested on 27th January, 1982 and the other on 29th January, 1982, following the finding of a cache of arms of war on Fairview Farm of which one brother is the manager. The brothers were detained, presumably under section 21

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of the Regulations, until they were formally charged on 25th February with possession of arms in contravention of section 37 (1) of the Law and Order (Maintenance) Act [*Chapter 65*]. During the period of this detention they were held incommunicado.

On 5th May, 1982 one brother was acquitted at the close of the prosecution case in the

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Regional Magistrate's Court, the prosecution not having established the admissibility of a statement he Canada to the police which was the only evidence implicating him. The other brother was acquitted after he had given evidence that he had and could have had no knowledge of the presence of the arms buried on a remote part of one of the farms he managed.

On 6th May, 1982 the brothers were re-arrested, being told that it was on the instructions of then Chief Superintendent Zakeyo (the investigating officer of the offence) who had obtained a ministerial order for their arrest and re-detention. The order on the face of it purported to be made under section 17 of the Regulations which authorizes detention on a Ministerial order. It was admittedly defective in that it was undated and did not contain a statement as required by section 53 (1) (b) of the Regulations, informing the brothers of their rights to object and to make representations in writing to the Minister within seven days. Nor, on the affidavits, was it delivered or tendered to the detained persons. They were, however, informed by the Superintendent of Khami Prison of their rights to object and make representations to the Minister. This they did writing in terms of section 53 (1) (b) of the Regulations. Alley had no acknowledgement of their objections and there is nothing to show that they were considered or that the Minister refused to revoke his order, save that there was no revocation. After detention the brothers were denied access to any legal representative until after the judgment in *Minister of Home Affairs and others v Dabengwa Masuku*, Supreme Court Judgment No. 94/82, on 19th June* (2). This case decided that the provisions of paragraph 2 of Schedule 2 to the Constitution of Zimbabwe applied to persons subjected to detention under a proclaimed state of emergency. The Schedule also provides in paragraph 2 (1) (b) that a detainee's case shall be submitted within 30 days to a tribunal established under subparagraph (4) and shall be reviewed by that tribunal forthwith. It is common cause that this was not done and indeed that by the date of the hearing of this appeal no such tribunal had been appointed.

On these facts the detained persons launched proceedings by notice of motion on 29th June which was served on that day, claiming that their detention was unlawful, their release from custody, and costs.

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The Minister of Home Affairs in his opposing affidavit of 4th July admitted that the detained persons were entitled to an order declaring their detention from 6th May to 1st July to have been unlawful. The reasons he give for his concession were:

- "(c) I am advised that the mere reading and exhibition of the order does not constitute delivery and accordingly non-service is admitted.
- (d) I am advised and therefore accept that the order was not in proper form having particular regard to section 53 (1) (b) of the Regulations;
- (e) I admit that reasons as contemplated by paragraph 2 (1) (a) of Schedule 2 to the Constitution had not prior to the delivery of the orders of the 1st July, 1982 been given to the First and Second Applicants;
- (f) I admit that the detention of the First and Second Applicants has not been submitted for review by a Review Tribunal, but in respect of the orders issued on the 1st July the intention to submit their cases to

such review is set out in paragraph (b) of the orders and the process is in hand for the establishment of the Review Tribunal to give effect to this."

He denied, however, that the respondents were entitled to their release because on 1st July he had made a proper and valid order in respect of each respondent which was served on him on 2nd July.

The learned trial judge (DUMBUTSHENA, J) held that as the respondents had been held continuously in detention since 6th May the fresh orders made on 1st July, although valid on their face, did not cure the defects in detention. In particular he held that the failure to submit the cases to the review tribunal within 30 days of 6th May was an omission which went to the root of the detention. He ordered the release of the respondents from detention, and it is against that order that the Minister now appeals.

It was common cause that the exercise of powers under section 17 of the Regulations was subject to the provisions of paragraph 2 of Schedule 2 to the Constitution. This was decided as a matter of principle in the case of *Dabengwa* and *Masuku* (*supra*) and fully accepted by the *Attorney-General*. It was therefore accepted that non-compliance with paragraph 2 (1) (b) of the Schedule after 30 days from the date of detention would make unlawful the continued detention of a person detained under section 17 of the Regulations.

Paragraph 2 (1) (b) of Schedule 2 reads:

"(1) Where a person is detained under any law providing for preventive detention-

(a)

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(b) his case shall be submitted not later than . . . thirty days after the commencement of the detention for review by a tribunal established under subparagraph (4) and shall be reviewed by such tribunal forth-with".

Subparagraph (6) is also relevant. It reads:

"(6) The reference in subparagraph (1) (b) to a period of ...thirty days in relation to a first review includes a reference to any lesser periods that amount in the aggregate to ...thirty days...;

Provided that no two such lesser periods shall be aggregated for this purpose if the period between the expiration of the first and the commencement of the second is more than . . . thirty days . . .".

Mr *Horn*'s contention for the respondents was that the respondents' detention started on Pith May, 1982 and that the Minister's orders of 1st July could not start afresh the period of 30 days within which the detaining authority was obliged by section 2 (1) (b) to submit the respondents' cases to a tribunal. Since 30 days had already elapsed from the respondents' detention on 6th May, the failure to submit their cases to a tribunal made this detention unlawful and they were entitled to their release. The fresh order could not cure the failure to submit the cases to a tribunal within 30 days of the detention on 6th May.

In the Court below the *Attorney-General* had contended, as I understand it, in the alternative,

that the remedy open to the respondents was not an order for their release but a *mandamus* requiring compliance with the provisions of paragraph 2 of the Schedule. This submission he did not make on appeal as he contended that any failure to comply with the Schedule nullified the order. He adopted as his main argument the contention that the respondents' detention from 6 May until 2 July was not detention "under any law providing for preventive detention" because there had never been a valid order. Therefore, he said, the provisions of Schedule 2 of the Constitution did not apply to that detention. The original order being a nullity, there was nothing to prevent the Minister making a valid order as he had done, and the 30 days within which their cases had to be submitted to a tribunal ran only from 2 July.

The *Attorney-General* did seek to argue that he could succeed even if he failed on this point on the basis that the detaining authority can always issue a fresh order which is free of defects and which complies with the requirements of the law. He relied on such cases as *Nathwan and Ors v State of Punjab* [1952] SCR 395 (India), *Attorney-General v Chipango* [1971] ZR 1 (Zambia), and *in re Puta* [1973] ZR 133 (Zambia). But the legislation in those cases had no equivalent provision

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to that of our paragraph 2 (6). Indeed in the Indian legislation it was expressly provided that a detention order could at any time be revoked or modified and that such a revocation was no bar to the making of a fresh detention order against the same person - *Nathwan's case* (*supra*), page 401.

The *Attorney-General's* argument, therefore, must stand or fall on his first contention. If the detention from 6th May to 2nd July was detention "under any law providing for preventive detention" the detention was continuous from 6th May, as the learned judge below held, and nothing done on 2nd July could remedy the failure to submit the cases to the tribunal within 30 days of 6th May.

The crux of this appeal is accordingly whether the detention which started on 6 May and continued to 2 July was detention under any law providing for preventive detention.

The underlying reasoning of the *Attorney-General's* argument is that a person unlawfully detained has a full right to obtain his release by an application to Court by way of an order *de homine libero exhibendo*, the Roman-Dutch remedy being perhaps more sanguinely named than the English writ of *habeas corpus*, as well, of course, as a right to damages entrenched by section 13 (5) of the Constitution. If for example a person was unlawfully arrested by an agency for which the Minister of Home Affairs was not responsible - the military or the Central Intelligence Organisation - and held by them in unlawful custody his remedy is not to be found in Schedule 2 to the Constitution. His remedy then is nothing more nor less than an order for his immediate release and damages. Whilst he is in such custody or on his immediate release from it the Minister of Home Affairs can issue a detention order under section 17 of the Regulations. And this he can do regardless of the time the person has been in unlawful custody, because that period is irrelevant for the purposes of determining the period of 30 days within which his;

case must be submitted to a tribunal as required by paragraph 2 (1) (b).

Thus far I am with the *Attorney-General*.

The next step in the argument is his contention that any purported detention under section 17 which does not comply with the provisions of the Regulations and with the provisions of Schedule 2 to the Constitution is a nullity and that the detention following it is not under a law providing for preventive detention. Reliance is placed on *Union Government v Schierhout*, 1925 AD 322. That was a very different type of case. It dealt with the way in which Government servants could be

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treated when "removed from the public service". It was held that the provisions could be invoked by the Government only if such a person had been "rightly or duly removed". It has, therefore, little or no relevance to the present problem.

We are then thrown back on the wording of the chapeau of paragraph 2 of the Schedule in the context in which it appears.

There are many ways in which the detaining authority may fail to comply with the requirements of the Regulations and of paragraph 2 of Schedule 2, for instance -

- (i) there may be a failure to deliver or tender the order when taking a detainee into custody - section 53 (1) (a) of the Regulations;
- (ii) there may be a failure to give reasons within seven days-para graph 2 (1) (a) of the Schedule;
- (iii) there may be a failure by the Minister to consider representations made to him within seven days - section 53 (2) of the Regulations;
- (iv) there may be a failure to allow a detainee access to his legal representative - paragraph 2 (1) (c) of the Schedule;
- (v) there may be failure to submit the detainee's case to a tribunal within thirty days-paragraph 2 (1) (is) of the Schedule;

and there may well be others.

The *Attorney-General* (contrary to his argument in the Court below) submits that any one of these failures automatically nullifies the detention order and entitles the detainee to his immediate release because there is no longer a detention order in force under a law providing for preventive detention.

It is here that there lies the fallacy in his argument. The fact that a person is entitled to his release from custody because certain requirements of the law have not been complied with does not mean that he is not detained under a law providing for preventive detention. He is

entitled to his release because those requirements of the law under which he was detained were not complied with. That failure by the detaining authority does not necessarily result in the order being a nullity, it means merely that if the detainee relies on that failure for relief he is entitled to relief. It means too that the detaining authority cannot rely on the order to justify further detention under a law providing for preventive detention.

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For example in *Dabengwa and Masuku (supra)* the applicants established that paragraph 2 (1) (c) of the Schedule was being breached because they were not allowed access to their legal advisers. They did not seek release because of that breach; they sought and obtained access to their legal advisers. Whether or not they could have obtained release for that breach at that stage is not a question which it was or is necessary to decide. It would only say that it may not have been a breach which went to the root of their detention. But even if it did I can see no reason why they should not be entitled to claim, as they did, lesser relief.

To take another illustration: assume a person served with a detention order who was not provided with reasons for his detention within seven days as required by paragraph 2 (1) (a), and who wants those reasons to prepare his case for the tribunal which he knows will be heard shortly. He is confident that he will succeed before the tribunal. He seeks an order that he be provided with reasons rather than release, because if he is successful and is released as a result of the tribunal's recommendation he knows that by virtue of paragraph 2 (3) of the Schedule he cannot be re-detained on the same grounds until after 180 days from his release. The detaining authority could not be heard to say "you are not entitled to reasons because our failure to give them within seven days has nullified the original order". It is true that, if that were the detaining authority's stance, the detainee would be entitled to his immediate release, and to damages for the period from when the failure to give reasons commenced, but he would on the *Attorney-General's* argument if he were re-detained suffer other prejudice. This would be so, because if he were redetained within thirty days, the contention is that his case would have to be submitted to a tribunal within 30 days of the second order, and there would not be subtracted from that period the time during which the detention was illegal. Thus the provisions of paragraph 2 (6) of the Schedule set out earlier would be avoided.

Such an example reinforces the conclusion that the argument must be fallacious.

Looked at another way, the detaining authority is seeking to rely on its own non-compliance with the requirements of the law to ensure a fresh start to the period of 30 days within which to submit the case to the tribunal and to avoid the consequences of paragraph 2 (6) of Schedule 2. This is just what in a different context the Government was held not entitled to do in *Schierhout's case (supra)*.

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The whole purpose of the provisions of paragraph 2 of Schedule 2 would be defeated if the chapeau of the paragraph were to be read as "where a person is *lawfully* detained under any

law providing for preventive detention". The paragraph provides what safeguards there are for a person detained under any law providing for preventive detention. To say that if he is denied those safeguards he cannot secure them because his detention order is a nullity is to turn the law upside down.

In any event, the order was not a nullity in the sense that it had no consequences. It resulted in the respondents' arrest by the police, and it resulted in the gaoler receiving them into his custody and keeping them in custody. The fact that the order could be successfully challenged does not mean that it was not made under a law providing for preventive detention as it purported to be, or that the detention was not under that law. It means only that it was not properly made under such a law and so could be challenged along with the detention on that ground.

The position is analogous to that considered by the Privy Council in *Calvin v Carr and Ors.* [1979] 2 All ER 440 (P.C.). In that case the stewards of the Australian Jockey Club had disqualified a racehorse owner from membership of the Jockey Club. They had reached that decision without observing the rules of natural justice. The racehorse owner appealed to the Committee of the Jockey Club. The first issue that arose on the eventual appeal to the Privy Council was whether the committee had any jurisdiction to enter on the appeal. The appellant's proposition was that it had not, for the reason that the stewards' "decision" was, on the assumption stated, void. A condition precedent, it was said, of an appeal was the existence of a real, even though voidable, decision. *Lord Wilberforce* dealt with the question at pp. 445-6:

"This argument led necessarily into the difficult area of what is void and what is voidable, as to which some confusion exists in the authorities. Their Lordships' opinion would be, if it became necessary to fix on one or other of these expressions, that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or Court, it may have some effect, or existence, in law. This condition might be better expressed by saying that the decision is invalid or vitiated. In the present context, where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent. So to hold would be wholly unreal. The decision of the stewards resulted in disqualification, an effect with immediate and serious consequences for the appellant. This was a fact: the appellant's horses could not run in, or be entered for, any race; the appellant lost his membership of the Australian Jockey Club and could be excluded from their premises. These consequences remained in effect unless and until the steward's decision was challenged and if so, had sufficient existence in law to justify an appeal. An analogous

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situation in the law exists with regard to criminal proceedings. In *Crane v Director of Public Prosecutions* [1921] 2 AC 299, there were irregularities at the trial which had the effect that the trial was 'a nullity'. Nevertheless an appeal was held to lie to the Court of Criminal Appeal. LORD ATKINSON said:

'The fact that the trial . . . was rightly held to be . . . a nullity does not disentitle him, under section 3 of the Criminal Appeal Act, 1907, to appeal against it. He is still a person convicted on an indictment within the meaning of that section, since those words cannot mean validly convicted, otherwise the statute would be futile and unworkable.'

and LORD SUMMER said: 'It was a mis-trial, and in truth no trial at all. All the same convicted Crane was and to all appearance convicted on an indictment.' He could appeal to the Court of Criminal Appeal. 'Were it otherwise Crane, who has never had a legal trial at all though imprisoned under sentence on the strength of it, would have to serve his time and apparently be without remedy.' This case was applied by the High Court of Australia in *Russell*

v Bates (1927) 40 CAR. 209."

I would respectfully adopt this reasoning and apply it to the present case.

There is yet another way in which the argument can be tested. It may be that an order is made which can be challenged on the grounds that it is *ultra vires* or unconstitutional. If the challenge is successful and the order struck down the result would be that there was no valid order or detention under any law. But when it was made it would have been made under a law and the time spent in detention would certainly count for the purpose of paragraph 2 (1) (is) of the Schedule.

Support for this conclusion is to be found in Wade, *Administrative Law*, 4th Ed., page 295 in his chapter headed "Problems of Invalidity", in the following passage:

"Is there a presumption of validity in favour of a disputed order during the time that must elapse before the Court can decide the question? The House of Lords has held that this is so; and even where temporary obedience to the disputed order would cause the irreparable loss of a large sum of money, the House refused to impose terms which would protect the person affected."

The case relied upon is *Hoffman-La Roche & Co. v Secretary of State for Trade and Industry* [1975] AC 295. There a price fixing order made by the Monopolies Commission was being attacked, and the House of Lords held that the order was presumed to be valid and had to be obeyed until it was declared invalid.

Reliance for this conclusion is also placed on *Bonsor v Musicians' Union* [1954] Ch. 479. LORD DENNING, L J said at page 513:

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"It was said that the action of the secretary (in expelling the plaintiff) was unauthorized, and, therefore a nullity. The Court, indeed, has now declared that he is still a member. How can he sue then, it is said, for damages for exclusion from membership when he has in law been a member all the time? This argument bears no relation to the facts. The exclusion may have been a nullity in law, but it was far from being a nullity in fact. The plaintiff could not ignore it; nor could anyone else in the musical profession ignore it, neither employers nor workmen. It deprived him of his livelihood and caused him great damage It is no answer for [the trade unions to say that the secretary was not authorized to commit the breach. They have put him in his place to do acts of this class, and they must be answerable for the way he conducts himself therein."

Again I would respectfully adopt this reasoning and apply it to the present case.

It is clear that the detaining authority purported to act under the law providing for preventive detention, but failed to act properly. The detention which followed, though illegal, was certainly not a factual nullity.

In the result I am satisfied that the Attorney-General's main argument, ingenious though it was, must fail. The respondents' detention on 6th May, 1982 was detention under an order which purported to be made under the Regulations - a law providing for preventive detention. Though there were serious defects in the order and its delivery, and serious non-compliance with paragraph 2 of Schedule 2, the respondents remained in detention by virtue of that order until 2nd July, 1982. The effect of this is that when the orders of 1st July were delivered on 2nd July

the period of 30 days within which the respondents' cases had to be submitted to a tribunal had already elapsed. Accordingly the respondents cannot be lawfully detained by virtue of those orders, for the *Attorney-General* concedes, indeed contends, that the failure to submit the cases to a tribunal within the required time would destroy the validity of an order. The respondents are, as found by the learned judge below, entitled to their release. The appeal must be dismissed with costs.

There are two things I should like to say. First the Court is grateful for the thorough and careful arguments of those who appeared before us, and for the extensive research into the decisions in other jurisdictions.

Secondly it is important to draw lessons from what has occurred in this case. It is vitally important that the greatest care be taken in the exercise of powers of detention in times of emergency. It has been stressed in every jurisdiction that has similar provisions how much power they give to the executive; that is why they are carefully hedged about to

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ensure that the freedom of the individual is preserved so far as is consistent with the national good. The other reason why great care is required is that a failure to observe the requirements of the law may result in the Courts having to order the release of persons who may be a danger to the State. For both of these reasons it is unfortunate that the original order was prepared apparently in great haste by the police officer investigating the case and not by, or at least under the direct supervision of the Secretary for Home Affairs upon whom the Minister should primarily rely.

Baron JA: I agree.

Georges JA: I agree.

State Attorney, appellants' legal representative.

Atherstone & Cook, respondents' legal representatives.

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F v COMMISSIONER OF TAXES 1982 (2) ZLR 60 (SC)

Court Supreme Court, Harare

Baron, Georges and Beck JJA

7th April and 2nd August, 1982

Flynote

Sales Tax Act [Chapter 184] - section 4 (1) (a) - value of sales subsequently reduced by reason of

cancellation of sales - refund by Commissioner of excess tax paid - section 23 - scope of - whether entitlement to refund falls under section or under general law.

Headnote

In early 1976 the appellant corporation claimed refunds of sales tax allegedly due to it by reason of the cancellation of certain sales. The Commissioner considered that the appellant was not entitled to them. The appellant selected two claims and appealed. The Fiscal Appeal Court, on the 2nd January, 1980, ruled in favour of the appellant, which then submitted further similar claims. Some of these the Commissioner met but others were rejected on the grounds that the claims were prescribed by section 23 of the Sales Tax Act [*Chapter 184*], having been brought more than three years after the tax was paid. The Fiscal Appeal Court upheld this ruling and the corporation appealed.

The appellants' contention was that section 23 did not apply to refunds of the type claimed, which, it said, fell under section 4 (1) (a) of the Act and could be claimed under the general law. In particular, it was argued, if section 23 did apply, one could have the anomalous position of a claim being prescribed before it arose, as where cancellation took place more than three years after the sale.

The Commissioner argued that section 23 provided the only method of claiming refunds of tax, the Act providing a complete scheme for the imposition, collection and refund of sales tax. This was a situation where, to make the Legislature's intention clear, words should be read into the section.

Held, allowing the appeal with costs, that no aid could be sought for the interpretation of section 23 outside the section itself, which applied to any person who has paid tax for which he was not and never had been liable. It did not apply to the circumstances of this case, where the appellant was liable to pay sales tax determined by the original sale value but events occurred thereafter giving rise to a permissible deduction in terms of section 4 (1) (a).

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GEORGES JA

Held, further, that the method of recovery of excess tax paid available under the general law remains unless the statute provides a method. As no method was provided, recovery was available under the general law and no prescription period operated.

Cases cited

Bhyat v Commissioner for Immigration, 1932 AD 125;

Seluka v Suskin & Salkow, 1912 TPD 258;

Jaga v Dönges, NO and Another; Bhama v Dödinges, NO, and Another, 1950 (4) SA 653 (AD);

Codron v MacIntyre, NO, and Another, 1961 (3), SA 355 (SR).

I. A. Donovan, for the appellant.

J. C Andersen, S C., for the respondent.

Judgment

Georges JA: Early in 1976 the appellant corporation claimed refunds of sales tax allegedly due by reason of the cancellation of sales as provided for in section 4 (1a) and (c) of the Sales Tax Act [*Chapter 184*] (the Act) as amended by section 28 (b) of the Finance Act, No. 32 of 1975. The respondent, the Commissioner of Taxes, decided that the appellant was not entitled to these refunds. The appellant selected what it considered to be two typical claims and appealed against the Commissioner's decision. On 2nd January, 1980 the Fiscal Appeal Court ruled in favour of the appellant. Thereupon the appellant submitted to the Commissioner a number of claims of the same nature as those which had been the subject matter of the ruling of the Fiscal Appeal Court. The Commissioner agreed to make refunds in some of the claims and rejected others on the ground that they had not been made within the period prescribed in section 23 of the Act. The appellant challenged this ruling. The Fiscal Appeal Court (SQUIRES, J, PRESIDENT) decided in favour of the Commissioner and from this ruling the appellant now appeals.

The relevant parts of section 23 of the Act as amended by section 37A of the Finance Act, No. 32 of 1975 read:

- "(1) Subject to the provisions of this section, if the Controlling officer is satisfied that any person has paid any tax which he was not liable to pay in terms of this Act, he shall authorize a refund of such tax to be made to any such person.
- (2) . . .
- (3) No refund shall be granted in uterus of As section unless an application therefor is received by a revenue Officer wit hen three years from the date when such tax was paid."

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GEORGES JA

Prior to the enactment of Act 32 of 1975 the period prescribed in section 23 (3) had been one year.

The appellants contention was that section 23 did not apply to refunds of the type which it claimed, namely refunds on cancellation of sales, but only to refunds of tax which the taxpayer "was not liable to pay" at the time payment was made. Where refunds became payable because of a recalculation of the sales price as a consequence of the cancellation of a sale, the sales tax paid at the date of the sale was due at the time of payment and the taxpayer was liable to pay it. Subsequent events may have altered that liability but it could not be said that the taxpayer was receiving a refund because he had paid tax which he was not liable to pay.

Since section 23 (1) of the Act did not apply to the refunds being claimed, then the period of prescription for applying for refunds was also not applicable. It followed that the normal statutory period for prescription had to be applied - that is, three years from the date on which the refund became due, which could be taken as the date of the cancellation of the sale on which the claim for adjustment could be made.

To buttress the soundness of that approach it was urged that if the period of three years provided in section 23 (3) was held applicable to claims arising from adjustment on cancellation of sales or otherwise, then a claim right might well be barred before it arose since a cancellation could take place or a defect be discovered which would justify a recalculation of the value of the goods for purposes of sales tax more than three years after the sale.

On behalf of the Commissioner it was contended that the Act provided a complete scheme for the imposition, collection and refund of sales tax. Refunds could therefore be claimed only by virtue of section 23. Although the past tense was used in the phrase "any person has paid tax which he was not liable to pay in terms of this Act" a literal interpretation of that phrase would lead to a result inconsistent with the intention of the Legislature-namely to provide a complete scheme for the operation of sales tax. If I understood Mr *Andersen* correctly, he contended that this was an appropriate situation in which words could be added to make effective the clear intention of the Legislature. Indeed he stated in his heads of argument that the literal meaning should not be given to the words. When pressed to state precisely what words should be added he proposed the formulation "was or *has become* not liable".

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GEORGES JA

The President of the Fiscal Appeal Court ruled in favour of the Commissioner and, as I understand his judgment, he did not find it necessary to add any words to the section. Although he agreed that the language may not have been the most apt to express what was intended he concluded that it could be so interpreted. He stated:

"It is true that the use of the past tense, 'was not liable', may not be the best word or words to choose to make this clear; but it seems to me that the words are flexible enough to include the situation that has arisen here. For, to say that the operator was not liable to pay tax, would be the situation that eventually prevails in respect of the refundable surplus when an *ex post facto* adjustment to the sales value has been made. The operator would not, in the end result and by the time the refund is claimed, have been liable for that balance. It is not the best way of saying so, but, bearing in mind the intention to give a refund in such circumstances, the words can, in my view, be read to achieve the end.....".

The learned President did not consider it an absurd result that such an interpretation could lead to a claim for a refund being barred before it had arisen. At worst it could be described as an anomaly. He contended that the seller could, in such an eventuality, have made arrangements not to be out of pocket and the Legislature could have intended to leave the burden of such sales tax where it happened to fall.

It was contended by the respondent that the Legislature intended the provisions of the Act and not the common law to govern the basis on which and the circumstances in which refunds of sales tax might be made. In the Court *a quo* the learned President referred to sections 26 and 27 of the Act as showing an intention to include and contain all refunds and their payment within the Act itself. With respect, the sections do not appear to me to support that contention. Section 27 provides that any refund made in terms of the Act shall be regarded as a drawback and shall be made from monies received in terms of the Act. This is a matter of Internal accounting quite unconnected with the regulation of the rights of persons claiming refunds. Section 26 provides that every application for a refund in terms of the Act shall be made on such

form as may be prescribed. A perusal of the Regulations reveals that forms have been prescribed in relation to refunds of tax paid on goods of a capital nature which have been used in the erection or improvement of vehicles and on public service vehicles under sections 24 and 28 of the Act. In relation to refunds on re-exported goods forms specified under the Customs Act are to be used. No form has, however, been prescribed for claiming a refund under section 23 where a person has paid tax for which he was not liable. In the course of argument before

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us it was not urged that any other section of the Act supported the inference that there was an intention to legislate a complete code requiring no supplementation from sources outside the legislation.

It follows accordingly that no aid can be sought in the interpretation of section 23 outside of the provisions of the section itself.

It may indeed be cynically asserted that a canon of interpretation may be found to support any particular result which may be desired in the construction of the words of a statute. The cardinal principle, however, is that expressed by STRATFORD JA, *Bhyat v. Commissioner for Immigration*, 1932 AD 125 at page 129:

"The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment. That is a trite statement of the law, but does not assist us to ascertain the intention when the language has made it obscure. Hence there has been evolved a number of subsidiary rules of construction, which are enunciated and applied in the decisions of our own Courts and in those of Great Britain. Sometimes perhaps one finds one of these rules over-emphasized and sometimes another, but all must yield in the last resort to the intention of the Act to be gathered from a consideration of its provisions in their entirety.

As I have indicated, the provisions of the Act in their entirety, apart from the words of the section under consideration, do not help in the interpretation of that section. One is left, therefore, with the words of the section itself. It has never been suggested by the respondent that the words of section 23 in their ordinary signification express the intention for which it contends. Indeed Mr Andersen's submission was that words should be added. The intention of the Legislature must, however, be gathered from the words it employs. What the Legislature meant to say neither the Court nor anyone can tell: see WESSELS, J, in *Seluka v Suskin and Salkow*, 1912 TPD 258 at page 265.

The consequence of this approach is aptly expressed by SCHREINER, JA, in *Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another*, 1950 (4) SA 653 (AD) at page 664:

"Ultimately, when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences and even despite the interpreter's firm belief, not supportable by factors within the limits of interpretation, that the legislator had some other intention. So too, if, when interpretation is complete, it is clear that the legislator has failed to deal with a class of case that in all probability would have been dealt with if it had not been overlooked, there is a *casus omissus* which the courts cannot fill."

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In *Codron v Macintyre, NO, and Another*, 1961 (3) SA 355 (SR) at page 357 MacDONALD J, stated:

"Courts of law are reluctant to add words to a provision and as a general rule will refuse to do so. I agree with respect with the *dictum* of EVERSHED, MR, in *Tintham v Perry* [1955] 1 TLR 91 at page 92, that

'words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context.'

The language of section 23 needs no addition of words by implication to give it sense or meaning. It applies to any person who has paid tax for which he was not liable. I see no compelling reason why the words "or has become" should be added to extend it to that class of case.

As I have indicated, the approach of the learned President was different. In his view the words were flexible enough to include the situation under consideration here, where the tax was payable when the sale was originally made, so that the taxpayer was liable to pay, but subsequent events necessitated an adjustment which reduced that liability. While it was not the best method of expression the words could be read to achieve what was a clear intention that a refund should be given in those circumstances. There may have been the need to stretch the meaning as the learned President has done if the clear intention said to exist could be deduced from other parts of the Act. Since this is not the case, the intention cannot be attributed to the Legislature from the words of section 23 which do not express it, and, having been thus attributed, used as the reason for altering the plain meaning of the words.

Sales tax is imposed by section 4 (1) of the Act.. The method of calculation is set out in section 4 (1) (a) which reads:

"In calculating, for the purposes of subsection (1), the sale value of goods referred to in that subsection there shall be deducted any amounts allowed by the seller in respect of -

- (a) cash or settlement discounts relating to such goods; or
- (b) defects in such goods; or
- (c) any such goods on the cancellation of the sale thereof unless the seller, by reason of a contract of insurance, sustains no loss on such cancellation; or
- (d) the return of containers."

There is a proviso which is immaterial.

Section 14 provides for the payment of tax falling due under Part I which includes section 4. Every registered operator must submit a statement on or before the last day of every month to an officer authorized

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by the Commissioner relating to sales transacted during the previous month. Every statement

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must be accompanied by the amount of tax payable under Part I

An authorized officer may grant an extension to enable an operator to comply with the provisions of this section but he can only do this on payment by the operator of tax which the authorized officer considers would be shown to be due. The effect of these provisions is that the tax becomes payable at the end of the month following that in which the sale was erected.

At that stage it may well be that the events enumerated in section 4 (1) (a) which give rise to deductions may have already occurred. In such cases the sale value for the purposes of the tax can be finally calculated. If they may occur but have not yet done so the registered operator is clearly liable to pay tax on the sale value as then ascertained. If an event occurs thereafter giving rise to a permissible deduction the registered operator is plainly entitled to a recalculation of the sale value. This will result in an adjustment of the tax. The registered operator will have paid more than was exigible on a final calculation of the sale value as prescribed under the Act.

The difficulties in interpretation which have led to the dispute in this case arise largely from the method chosen by the draughtsman in the calculation of sale value. There would seem to be no logical reason why the sale value should not have been defined as the price at which the goods are in fact sold leaving the deductions enumerated in section 4 (1) (a) to be dealt with by way of remission or refund. The issues of recalculation of sale value and adjustment of tax could not then arise.

Mr *Andersen* argued that If section 23 did not provide the entitlement for a refund in the circumstances of this case then it could be argued that section 4 did not do that either, so that there would be no entitlement whatever to a refund. The argument was pressed in support of his contention that the respondent's interpretation of section 23 was correct and was not intended, as I understood it, to suggest that that was indeed the position.

I find it difficult to accept that proposition. By creating the likelihood of a downward adjustment of the tax after payment had been made, section 4 (1) (a) created a situation in which the Commissioner would have received more money than would be due on a final recalculation. By necessary implication there would be an entitlement to a refund. The right to the refund would therefore arise under the Act.

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Mr *Andersen* went on to argue that it was only if the method of recovery could not be found or properly implied in the Act that a method of recovery available under the general law could be used. The presumption appears to me to be the other way - namely that the method of recovery available under the general law remains available unless the statute provides a method of recovery - see Halsbury, 4th Ed., Vol. II, paragraph 1411, particularly note 13. The State Liabilities Act [*Chapter 54*] provides that any claim against the State which would, if that claim had arisen against a subject, be a ground of action in any competent court shall be cognizable by any court. As I have indicated, the mechanism provided under section 4 (1) (a) for the calculation of the value on which the tax was based created by necessary implication an entitlement to a refund and this is enforceable under the State Liabilities Act.

Section 23 does not provide a method of recovery in that situation. It deals with the case in which there was never any liability to tax but tax was nonetheless paid.

The payment may have been voluntary and it may have been made under mistake of law and thus in circumstances in which it would not have been recoverable unless the statute provided an entitlement. Section 23 provides both the entitlement and the method of recovery. It does not apply to the circumstances of this case.

It should also be noted that this is not the only instance in which a period is not prescribed for the claiming of refunds even where the claim is made possible only by the explicit language of the Act. Section 19 (2) provides that the Controller shall refund or remit the whole of the tax paid or payable in terms of this Act in respect of goods on which a rebate, refund or remission of customs duty as may be prescribed has been granted, on such goods which have been admitted free of duty and on abandoned goods. No period is provided for the making of the claim. Section 28, as first enacted in 1972, provided that the Minister might by notice in the *Gazette* specify persons to whom refunds calculated in terms of section 29 should be made and could also grant refunds of such amounts as he deemed fit to certain named types of enterprises. No prescription period for the making of such claims was provided. An amendment section - section 39 of the Finance Act, No. 32 of 1975 - added a subsection stating that no refund should be made in terms of that section unless the Commissioner received the application not more than three years after the date on which the tax was paid. Such indications as there are would, in my view, lend support to the contention that whatever may have been the intention the Act did not in fact consider and provide for all eventualities.

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GEORGES JA

In my view the appeal should be allowed. The order disallowing the appellant's claim for refunds of sales tax in the sum of \$5 359,99 is set aside and the respondent is ordered to pay the said sum to the appellant with costs.

Baron JA: I agree.

Beck JA: I agree.

Calderwood, Bryce Hendrie & Partners, appellant's legal representatives.

State Attorney, respondent's legal representatives.

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S v PASIPANODYA 1982 (2) ZLR 69 (HC)

Court High Court, Harare

Dumbutshena J

4th August, 1982

Flynote

Criminal procedure - sentence - theft - shoplifting - factors to consider - theft of items of trivial value - severe sentence not justified on basis of accused's bad record.

Headnote

When assessing sentence in cases of "shoplifting", courts should take into account all the circumstances, such as the temptation offered by placing enticing goods within easy reach of customers. The offence is not serious because it is one of shoplifting. The value of the goods is also of importance; if the value is trivial, a severe custodial sentence is not justified on the ground that the accused has a bad criminal record.

Cases cited:

S v Zungu, 1981 (1) SA 904 (TPD);

S v Gross, 1982 (1) SA 593 (AD);

S v Chakanetsa, 1980 ZLR 457; 1981 (1) SA 876 (ZAD);

S v Nyabiri; AD 87/81.

Judgment

Dumbutshena J: The accused denied theft of two silver tablespoons. He was, however, convicted. Nothing turns on his conviction. I therefore confirmed it. The accused was sentenced to 6 months' IWL. 3 months of that sentence was suspended on conditions.

The Facts of this case are that on the 14th June 1982 the accused went to the Farmer's Co-op Supermarket in Chinhoyi. He wanted to buy a rubber for his child. He failed to get one. Before he left the supermarket he had a look at some more shelves. In the process he came across a shelf packed with spoons. He took two silver tablespoons and placed them in his jacket pocket and then walked out. He was arrested outside by a security guard who had observed him picking up the silver spoons. The value of the two silver spoons is 70c. The accused denied stealing these items. He testified to paying 35c for each spoon. He said he paid in all \$1,14 for the two spoons together with sales tax.

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DUMBUTSHENA J

In his plea in mitigation of sentence the accused asked for an option of a fine and for time to pay. He informed the Court that he had savings in the sum of \$350. In his judgment on sentence the magistrate, commenting on the ability of the accused to pay a fine, said:

"I do not believe that the accused has the means he says he has. If he had there would be no need for him to steal. Because of the accused's long record and his doubtful means the only appropriate sentence is one of imprisonment."

The magistrate erred when he adopted that attitude. The accused indicated that he had \$350 in savings. He also asked for time to pay the fine. The public prosecutor did not challenge accused's assertion that he had savings neither did the Court question him as to his ability or inability to pay the fine. In any case, section 323 (1) of the Criminal Procedure & Evidence Act [Chapter 59] provides for a sentence of imprisonment in default of payment of a fine. It is in these words:

"323. (1) Whenever a court has convicted an offender of any offence punishable by a fine (whether with or without any other direct or alternative punishment) it may, in imposing a sentence of a fine upon the offender, impose, as a punishment alternative to such a fine, a sentence of imprisonment with or without labour, of any duration within the limits of its punitive jurisdiction:

Provided that, subject to the provisions of subsection (3), the period of such alternative sentence of imprisonment shall not, either alone or together with any period of imprisonment imposed as a direct punishment, exceed the longest period of imprisonment prescribed by any enactment as a punishment (whether direct or alternative) for such offence."

The magistrate misdirected himself in this respect, and thus failed to give weight to the many mitigatory factors favourable to the accused or to sentence the accused to a fine instead of imprisonment.

While it is true that the accused has a bad record of relevant previous convictions, Courts must not lose sight of the nature of the offence for which an accused is being punished. In the instant case the trivial nature of the offence is an important factor to be considered when assessing sentence because the accused is not being punished for his past misdeeds but for the present one. The relevance of his previous convictions disentitles him to leniency but the punishment must, in my view, be within the confines and bounds of the offence committed.

Courts have always also taken into account the factor of temptation. In the instant case there is an element of temptation. The accused went to the Farmers' Chop Supermarket in Chinhoyi because he wanted to buy a rubber for his child. He failed to get one. He then came across

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DUMBUTSHENA J

shelves in which spoons were stacked. He might have succumbed to temptation when he saw those spoons which are always displayed, like all other items in a supermarket in order to entice customers to buy them. The magistrate failed to give weight or to appreciate properly the extent to which owners of supermarkets display their goods and allow self-service, a method intended to allure customers into purchasing the displayed wares but which also induces customers to commit thefts by shoplifting. In *S v Zungu*, 1981 (1) SA 904 (NDP) DIDCOTT, J, said at 905-906H in respect of the matters I have alluded to above:

"There is, however, more to the story. Merchandising of the sort in question is based on the theory, unfortunately proved by experience, that once a customer has physical contact with a commodity, once he handles it and gets infected with the excitement of its actual possession, he is much likelier to buy it than had he merely seen it on some remote shelf, a thing apart with none of the seductive allure intimacy brings. Whether the commodity is within his means, whether he really needs it, is beside the point. The object of the exercise is to overcome such scruples. Temptation, in short, is the deliberate aim. Those who engage in such trading know very well what they are about. They can hardly feel surprised if they succeed on occasions in tempting the public not just to take

what cannot be afforded and is unwanted, but also, and for those very reasons, to avoid paying for it. I have no doubt whatsoever that they realise this fully, treat it as a business risk, and find the price worthwhile because of the enhanced profits their techniques engender. Where this not the case, after all, they could substantially reduce the thefts in their premises, and their subsequent losses, by reverting to traditional methods. While they are entitled to the law's protection, like everyone else, I am therefore not deeply moved by elegies on their special vulnerability to and exceptional tribulations from such pilfering. When all is said and done, they are largely the victims of their own system."

I agree with what DIDCOTT, J, said in that judgment. It does not mean nor should it be construed to mean that Courts condone thefts from supermarkets. All it means, in my judgment, is that the system introduces the element of temptation which should be considered by the Court when assessing sentence, just as Courts consider more leniently thefts from cars which are left unlocked and unattended. The accused in the instant case was a victim to that temptation. The theft was in any event a trivial one which does not deserve the imposition of a custodial sentence.

There is no doubt that the accused has a very bad record of previous convictions involving crimes of dishonesty. His record reveals that he was first sentenced to 6 cuts with a cane on the 11th November 1958. From then onwards he frequently appeared in Court. His last conviction on the record was on 21st May, 1976. On that occasion he was sentenced to a

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DUMBUTSHENA J

fine of \$50 or, in default of payment, 50 days' IWL. That sentence seems to have had sufficient deterrent effect because the accused seemed to have kept away from crime for a good 6 years.

In my view the magistrate erred when he refused to sentence the accused to a fine because of his long record of previous convictions. When assessing sentence the court has to take into account the serious nature or otherwise of the offence committed by the accused. In this respect the magistrate was wrong when he said in his judgement:

"Although the value involved is small shoplifting is a serious offence."

In *S v Gross*, 1982 (1) SA 593 (AD) JOUBERT, JA, held, at 594 (English headnote):

"... that there was no rule that shoplifting ought to be punished more severely than theft in another form; the seriousness with which the magistrate approached shoplifting and the high incidence thereof in the district had weighed too heavily with him and had overshadowed the particular circumstances of the appellant as an individual."

In the instant case this is what the magistrate failed to do.

In any case a sentence of 6 months' IWL for theft of two spoons valued at 70c raises a sense of shock. The Supreme Court has emphasized in a number of judgments that a severe sentence for a trivial offence cannot be justified on the ground that an accused person has many previous convictions. See *S v Chakanetsa*, 1981 (1) SA 876 (ZAD); 1980 ZLR 457, *S v Myofibril*, AD 87/81.

Taking into account what I have said above and the fact that the accused was arrested on 14th June 1982 and had spent a little more than one month in prison before he was sentenced on

19th July 1982, I would set aside the sentence imposed by the magistrate and substitute the following:

"\$40, in default of payment, 20 days' IWL."

McNally J: agrees.

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MANUFACTURERS LIFE INSURANCE CO v ADDISON, NO 1982 (2) ZLR 73 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Georges JA and Beck JA

13th July and 5th August, 1982

Flynote

Insurance - "loans" under policies of insurance - whether in reality advances against sum payable under policy - determined by normal principles of construction of contracts - Insurance Act [Chapter 196] - section 41(1) - effect of.

Headnote

In deciding whether a "loan" made under a life insurance policy is in truth a loan, creating an indebtedness on the part of the insured to the insurer, or whether it is an advance against the sum payable when a claim arose under the policy, the Court must construe the policy according to the ordinary principles of construction, giving the language its ordinary, normal meaning unless the context otherwise requires. Where a policy described the transaction as a loan and referred to an indebtedness on the part of the insured, there is a clear indication that the transaction is a loan and an obligation on the part of the insured to the insurer.

Section 41 (1) of the Insurance Act [*Chapter 196*] is designed to protect surviving dependents in the event of an insured person's creditors seeking to attach a life policy he has effected on life which has endured for three years. It excludes from his assets any life policy, not exceeding \$20 000 in value. If a person has lent money to an insured on the security of the policy, he has a claim against the insured's deceased's estate.

Cases cited:

Board of Assessors of the Parish of New Orleans v New York Life Insurance Company (1910) 216 US 517 (54 Law. Ed. 597);

Equitable Life Assurance Society v Larocque [1942] 2 DLR 273;

Inland Revenue Commissioners v Wesleyan and General Assurance Society [1946] 2 All ER 749 (C.A.); [1948] 1 All ER 555 (HL).

R.R. Horn, SC, for the appellant.

I.A. Donovan, for the respondent.

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FIELDSEND CJ

Judgment

Fieldsend CJ: The appellant is a life insurance company. In 1963 and 1964 it issued three life insurance policies on the life of Raymond Meyer to Meyer. Meyer, hereafter referred to as the deceased, died on 18 June 1980, survived by three children whom he had appointed his heirs. The executor and administrator of his estate is the respondent.

The named beneficiary of each of the policies was the deceased's executor, and the gross total sum due in respect of the three policies on the deceased's death was some \$15 000. During his lifetime the deceased had availed himself of his rights under clause 6 of the policies to obtain loans from the appellant. At the time of his death the total of these sums together with interest was some \$5 300, and the appellant contends that it is liable to pay to the executor only the difference between \$15 000 and this sum.

On his death the deceased's liabilities exceeded his assets, leaving out of account the value of the life policies. This brought into play section 4 (1) of the Insurance Act [*Chapter 196*] which provides that in that event:

"any moneys payable to his estate under any such policy shall be paid to his estate and such moneys, not exceeding twenty thousand dollars in the aggregate, shall devolve upon such surviving spouse, child or parent in accordance with the provisions of any valid testamentary disposition of such person or, if there is no valid testamentary disposition, by right of succession *ab intestato*, and shall not be liable to be attached at the instance of any creditor or other person."

The respondent contended that he was entitled by virtue of section 4 (1) to the total gross value of the policies. His contention was upheld in the Court below (PITTMAN, J) and it is against this decision that the appellant now appeals.

Mr *Horn* puts the appellant's case on two bases. First he says that on a proper interpretation of section 41 (1) of the Insurance Act the words "moneys payable to [the deceased's] estate under any such policy" mean the net amount referred to in clause 10 of the policy. This clause reads:

"10. PAYMENT OF CLAIM. When this policy becomes a claim it must be delivered to the Company with a discharge therefor. The amount of any lien or indebtedness on the policy will be deducted from the amount payable."

Secondly, and in any event, the appellant contends that the sums of money received by the deceased under clause 6 of the policy were not loans properly so called, but advances against the amounts payable once the claims arose under the policies. This was the appellant's main argument in the Court below and I find it more convenient to deal with this aspect first.

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The relevant clauses of the policies are 6 and 8 which read:

"6. LOANS. After this policy has a cash value, the Company will loan, upon the sole security of this policy, an amount not greater than the cash value less all indebtedness. The loan will be granted upon completion of the Company's loan agreement and the policy will be returned to the borrower after endorsement.

8. LOAN CONDITIONS. Interest at the rate of six per cent per annum compounded annually will be charged on all loans made under the preceding provisions. All amounts so loaned, and interest thereon shall be a first lien on this policy in the Company's favour in priority to the claim of any assignee or any other person. If at any time the total indebtedness shall exceed the cash value, all liability of the Company on this policy shall immediately terminate.

Wherever the word indebtedness is used in this policy it shall include interest accrued to date."

In the case of each loan a Policy Loan Agreement, so headed, was signed by the deceased. This starts with a request to the Company "to advance by way of a loan in accordance with the terms" of the policy a named sum, and in consideration thereof the deceased agreed:

"1. The said Policy is hereby assigned to the Company as security for the said loan and interest under the terms of this agreement.

2. Interest at the rate stated in the Policy, or at such lesser rate or rates as the Company may determine from time to time, shall be due and payable on the said loan upon the day of next, and annually thereafter until the loan has been fully repaid. Any overdue interest shall be added to the loan and bear interest at the same rate as the loan.

3. If the loan and interest thereon, together with all other indebtedness tenth respect to the said Policy, at any time exceed the cash value thereof, all liability of the Company in respect to the said Policy shall immediately terminate, subject to any right of reinstatement provided for in the Policy."

At the bottom are space left for signatures of the insured, the beneficiary and witnesses occupying five lines. Printed vertically on each side of these lines in capital letters is the word "LOAN".

On the face of the Policy Loan Agreement as read with the Policy itself what is advanced by the insurer is advanced by way of loan. There is coincidence between the words "loan and interest thereon, together with all other indebtedness with respect to the said Policy" in the Policy Loan Agreement and the words "The amount of any lien or indebtedness on the Policy will be deducted from the amount payable" in clause 10 of the Policy. It is clear that the amount taken by way of loan is treated by the insurer as indebtedness. The insurer also purports to take some

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security for the loan by way of assignment in clause 1 of the Policy Loan Agreement, and by way of a "first lien" on the Policy in clause 8 of the Policy itself. The effectiveness of this security was not a matter which was argued or which has to be considered.

The appellant contends that there was no loan by the insurer to the insured constituted by these documents. It contends that the moneys paid were merely an advance payment of what would

eventually become due under the Policy and that the interest for which the insured became liable was not interest on a loan, but compensation for the insurer having made an advance payment. In support of this contention it was argued that the advances could not be said to be loans because there was no obligation for their repayment and on general principle an obligation to pay was an essential requisite of a loan: Wille, *Principles of South African Law*, 7th Ed. page 441. In the Court below virtually no authority was referred to in argument, save for a general statement in Gordon, *South African Law of Insurance*, 2nd Ed. page 336, and an exposition of the different results which flow depending on whether such payments are loans or advance payments in Meyerowitz, *The Law and Practice of Administration of Estates*, 5th Ed. pages 402-3. In Gordon it is said:

"The surrender of land the obtaining of loans upon policies are invariably provided for in the contract.... Although usually referred to as a 'loan provision', the normal clause in a life policy entitling the insured to obtain money from the insurer provides, not for a loan, but for an advance. Generally there is no promise to repay and repayment is voluntary."

and Meyerowitz concludes by saying:

"Whether the transaction is in truth a loan or to payment by the insurer in advance of maturity depends on the terms of the insurance contract."

We were referred to three cases, one from America, one from Canada and one from England, in which similar advances or loans under policies were considered.

The American case is *Board of Assessors of the Parish of New Orleans v New York Life Insurance Company* (1910) 216 US 517 (54 Law. Ed. 597). This was a taxation case, and the headnote reads:

"Loans made by a foreign life insurance company to its policy holders, which, though represented by notes, are in fact charged against the reserve value of the borrowers' policies, under an agreement for the extinguishment of the debt by deducting the amount of the loans, with interest, from the amount of any claim under the policies, cannot be subjected to taxation by the state in which the borrowing policy holders reside."

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FIELDSEND CJ

It is not, I think, necessary to set out the effect of what there was also called a loan. The nub of the case is to be found in the judgment of HOLMES, J, at page 601 in these terms:

"This is called a loan. It is represented by what is called a note, which contains a promise to pay the money. But as the plaintiff never advances more than it already is absolutely bound for under the policy, it has no interest in creating a personal liability, and therefore the contract on the face of the note goes on to provide that if the note is not paid when due, it shall be extinguished automatically by the counter credits for what we have called the reserve value of the policy. In short, the claim of the policy holder on the one side and of the company on the other are brought into an account current by the very act that creates the latter. The so-called liability of the policy holder never mists as a personal liability, it never is a debt, but is merely a deduction in account from the sum that the plaintiff ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have mentioned; but the item never could be sued for, any more than any other single item at a mutual account that always shows a balance against the would-be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. In substance it is extinct from the beginning, because, as was said by the judge below, it is a payment, not a loan."

The Canadian case is *Equitable Life Assurance Society v Larocque* [1942] DLR 273 and is somewhat more complex. There a husband had insured his life and named his wife as beneficiary under the policy. During the currency of the policy the wife had obtained advances based on the cash value of the policy which she had paid over to her husband. On her husband's death the insurance company declined to pay the beneficiary more than the gross amount under the policy less the advances made.

The wife contended that the advance she had received was within the provisions of art. 1301 of the Canadian Civil Code which prohibited a wife binding herself "either with or for her husband, otherwise, than as being common as to property". She maintained that the cash advance was in effect a loan to her husband for which the article prevented her binding herself.

The Supreme Court held that, upon the construction of the contract of insurance and the special contract covering the advance, the cash advance was not a loan. The pith of the reasoning is at page 300 where RINFRET, J said:

"In the present case, the Society, when it made the cash advance, was merely carried out the contract which it had made long before with the insured and with the beneficiary. It was bound to carry it out. It could have

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FIELDSEND CJ

been compelled to carry it out at the suit of the beneficiary. Therefore, it was merely fulfilling its contract. It was not making to the respondent a loan in any sense of the word. It could not have successfully contended that it could refuse the cash advance to the respondent beneficiary. How then can it be said to have participated in a transaction whereby the respondent was binding herself with or for her husband?".

The English case is *Inland Revenue Commissioners v Wesleyan and General Assurance Society* [1946] 2 All ER 749 (C.A.), upheld on appeal in [1948] 1 All ER 555 (H.L.). That case concerned a single premium life insurance policy with additional provisions for a small annuity and monthly interest free loans on the security of the policy. The Revenue contended that the monthly loans were in substance monthly instalments of an annuity and as such liable to assessment. The taxpayer contended that the monthly loans were in fact loans as they were stated to be.

The Court of Appeal held that on a proper construction of the policy the sums paid by the Society were loans and not monthly instalments of an annuity. The judgment was that of LORD GREENE, MR It was approved by the House of Lords as having dealt with the matter quite conclusively; see the speech of VISCOUNT SIMON at page 557 E

LORD GREENE said at page 750 of the Court of Appeal report:

"It is, perhaps, convenient to call to mind some of the elementary principles which govern cases of this kind. The function of the court in dealing with contractual documents is to construe those documents according to the Ordinary principles of construction, giving to the language used its normal, ordinary meaning save in so far as the context requires some different meaning to be attributed to it. Effect must be given to every word in the contract save in so far as the context otherwise requires.";

and at page 753:

"On considering the language of that contract, I see no reason why what it says should not be accepted. If full

effect is given to the language the parties have used, the obligation of the society is to provide a sum at death, and the right of the assured is to borrow such sums as he thinks fit month by month, subject to the limitation, against the sum to be paid at death. He is not to pay interest on such advances, and he is not to be bound to repay them save out of the sum payable at death. That seems to me to be a perfectly intelligible and ordinary type of operation. Why the legal relationship which the parties have in terms created of lender and borrower in respect of those sums should not be given effect to, I fail to understand, unless it be that, by giving effect to what the parties have said, the transaction would avoid tax. I cannot think so, if it had not been for the existence of the Income Tax Acts, anyone would have dreamt of suggesting that this contract means any thing else than what it sets forth.";

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and at page 754:

"Putting it shortly, I find that the parties to this contract express in clear language the nature of the legal relationship into which they are entering. I find them using language properly adapted to create that legal relationship. I cannot see any reason for rewriting their contract and construing the language they have used in some unnatural and strained sense."

The issue is, then, in the final event what meaning is to be given to the Policy and the Policy Loan Agreement before us. No evidence was led as to how the parties regarded the Policy and the agreement. None of the cases is precisely on all fours with the present documents. In the American case it seems that the contract on the face of it provided that if the premium lien note was not paid when due it should be automatically extinguished by the counter credit for the reserve value of the policy (p. 601 of the report). In the Canadian case there was apparently reference to "a cash advance" (p. 277 of the report), and stress was laid on the fact that there was no obligation on the respondent to repay the money received (p. 296 of the report). In the English case a clause provided that the amount lent "shall not be recoverable by the society otherwise than on death and out of the sum then payable". This last provision may have made it easier for the Court of Appeal to have held that the amounts were loans than if there had been no such express provision.

The proper course is to follow the approach of LORD GREENE in the *Wesleyan Assurance Society* case (*supra*) at p. 750 and to determine what the agreement between the insurer and the insured really is.

As I have said earlier the Policy and the Policy Loan Agreement refer quite clearly to the granting of loans which create an indebtedness on the part of the insured when made, and for which some security is provided. On the face of the agreement there is therefore every reason to treat any payments made by the insurer as loans. It is true that the insurer has no expressed right to claim repayment during the insured's lifetime. But the fact that there is said to be an indebtedness is a clear indication that the insured is under an obligation to the insurer. As LORD GREENE said at p. 752A there is nothing unusual in limiting the insurer's right to repayment on death and from a specific sum of money.

On a proper interpretation of the contract before us I am satisfied, despite some of its unusual features, that the payments made by the insurer to the insured during his lifetime were loans.

This clears the way for consideration of the next problem, namely: what is it that is protected by

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the gross amount payable under the Policy, or is it the net amount after the amount of any indebtedness on the Policy has been deducted from the amount payable?

The overall purpose of the Act is to protect both insured persons (sections 40) and surviving dependents (sections 41 and 42) in the event of an insured's creditors seeking to attach a life policy he has effected on his life which has endured for three years.

Section 40 prevents creditors attaching such a policy, and excludes it from an insured's estate in insolvency. The protection is limited to the realizable value of the policies up to \$20 000, but proviso (ii) to subsection (2) provides:

- "(ii) where any such policy is pledged, the realizable value thereof which tones the security for the liability in respect of which such policy was pledged shall not be included as part of the maximum twenty thousand dollars protected by subsection (1)."

Section 41, in giving a similar protection to surviving dependents after an insured's death, speaks of "any moneys payable to his estate under any such policy" not exceeding \$20 000.

In section 40 one cannot help noticing that specific provision is made to protect only the "realizable value" of a policy less any liability for which the policy was pledged by the insured. This is obviously fair. The realizable value of a life policy is a ready asset of an insured on the security of which he may have borrowed money. To allow a creditor to attach the policy to the extent of the pledge seems right. For the rest the policy which is for the benefit of the insured's dependents on his death will continue to fulfil that purpose. The insured may well be able to continue the premiums on that policy to provide the security for his dependents which was its primary object.

On his death, however, which is the position with which we have to deal, he can no longer make any further provision for his dependents' security. It is not overstating the purpose behind the legislation to say that it is designed to protect dependents against the negligence, extravagance or even the prodigality of the insured who has responsibility for them. On this basis there is nothing inequitable in protecting the whole of the amount for which the insurance policy is to provide up to \$20 000; leaving a person who has lent money on the security of the policy tenth a claim against the Insolvent estate. This would be the position if the money had been borrowed from, say, a bank on the security of the policy.

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This, in my view, is what section 41 does, by using the words "moneys payable to his estate under" the policy. The wording of subsection (2) provides support for this conclusion. It deals with how it is to be determined whether the liabilities of the deceased insured exceed his assets. It provides that there shall be excluded from his assets "any life policy" not exceeding \$20 000.

It does not speak of a life policy the net proceeds of which, less any pledge or other indebtedness, does not exceed \$20 000. It is also of some significance that clause 10 of the Policy speaks of deducting the amount of any lien or indebtedness "from the amount payable". One must perhaps be careful about attaching too much significance to the coincidence of the words. This is a policy almost certainly drawn in Canada and probably not with the precise wording of our Insurance Act in mind. The only use that can perhaps be made of the coincidence is that there is nothing inconsistent between the Policy and the legislation.

In my view the decision of the learned judge below was correct. The respondent is entitled to the whole of the sum of \$15 000 odd in terms of the policies.

The appeal is dismissed. I understand that no question of costs arises.

Georges JA: I agree.

Beck JA: I agree.

Atherstone and Cook, appellant's legal representatives.

Coghlan, Welsh and Guest, respondent's legal representatives.

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PATEL v CONTROLLER OF CUSTOMS AND EXCISE 1982 (2) ZLR 82 (HC)

Court High Court, Bulawayo

Annotations [Link to Case Annotations](#)

Gubbay J

16th July and 6th August, 1982

Flynote

Customs and Excise Act [Chapter 177] - sections 176 and 178 - seizure and subsequent forfeiture of goods - period of prescription of action by person from whom goods seized - where cause of action arises - waiver by Controller of prescription - proof of.

Headnote

An officer of the Department of Customs and Excise had in August 1979 seized from the plaintiff eight diamonds, five ring settings and two Krugerrands. In January, 1981, the plaintiff was brought to trial on an allegation of having smuggled the goods. On the 2nd June, 1981 he was acquitted. The next day his legal practitioners requested the Controller to release the articles seized. This request was refused. On the 1st September the Controller declared the articles to be forfeited to the State. The plaintiff brought an action for the recovery of his goods.

The Controller entered a special plea in bar, averring that the plaintiff's action was prescribed, not having been brought within three months after the cause of action arose. His contention was

that the plaintiff's cause of action arose when the articles were seized, in August, 1979, not when they were declared forfeit, in September 1981.

It was argued for the plaintiff that even if the action were prescribed, the Controller had, in a letter written in July 1981, waived or extended the period of prescription. In this letter, the Controller had said that although it was competent for him to declare all the goods forfeit, he would not do so until the 21st August, in order to give the plaintiff another opportunity to show cause why the goods should not be forfeited.

Held, upholding the special plea with costs, that the plaintiff's cause of action arose when the goods were seized. Forfeiture is a different procedure; at the moment of forfeiture ownership of the goods vests in the President and the period of prescription allowed to an affected person cannot be reconciled with such immediate vesting. An analysis of the relevant provisions of the Act shows that a clear distinction is made between seizure and a declaration of forfeiture.

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Held, further, that in order to establish waiver on the part of the defendant, the plaintiff must prove knowledge by the defendant of his rights under section 178 of the Act and a deliberate surrender of those rights, whether expressly or by conduct plainly inconsistent with an intention to persevere with their exercise. The letter from the Controller could not be so construed.

Cases cited:

Controller of Customs v Guiffre, 1971 (1) RLR 91; 1971 (2) SA 81 (R);

Read v Brown (1888) 22 QBD 131;

McKenzie v Farmers' Co-operative Meat Industries Ltd., 1922 AD 16;

Quintas v Controller of Customs and Excise, 1976 (2) RLR 251; 1977 (1) SA 845 (R.A.D.);

Quintas v Controller of Customs and Excise, 1976 (1) RLR 208,

Sutter v Scheepers, 1932 AD 165;

Bezuidenhout v AA Mutual Insurance Association Ltd., 1978 (1) SA 703 (A.D.);

Laws v Rutherford, 1924 AD 261;

Hepner v Roodepoort - Maraisburg Town Council, 1962 (4) SA 772 (AD);

Netlon Ltd. and Another v Pacnet (Pty.) Ltd., 1977 (3) SA 840 (AD);

Alberts v Bryson, 1976 (2) RLR 193, 1977 (1) SA 857 (RAD);

Bay loan Investment (Pty.) Ltd. v Bay View (Pty.) Ltd., 1971 (4) SA 538 (C).

C.W. Jordaan for the plaintiff.

H.I. Bisset for the defendant.

Judgment

Gubbay J: This judgment deals with a special plea of prescription.

On 5 November, 1981 the plaintiff issued a summons against the defendant claiming the return of eight diamonds, five ring settings and two Krugerrands, seized in terms of section 176 (1) of the Customs and Excise Act [*Chapter 177*]. The declaration which followed alleges that on 2 August 1979 and under Notice of Seizure No. 15859, an officer of the Department of Customs and Excise, acting in his capacity as such, seized seven diamonds and five ring settings, the property of the plaintiff. On 6th August, 1979, and under Notice of Seizure No. 15860, the said officer seized a further diamond and two Krugerrands belonging to the plaintiff. On the same day criminal proceedings were instituted against the plaintiff in respect of the articles seized. He was brought to trial on 6th January, 1981 on a charge of smuggling the eight diamonds in contravention of section 165 of the Customs and Excise Act. On 2 June, 1981 the court acquitted him of the charge. The next day the plaintiff's legal practitioners requested the defendant to release the articles seized. Their request was refused. Thereafter on 1st September, 1981 the defendant declared all the articles to be forfeited. These facts are not disputed.

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The defendant's special plea, as amended, reads:

- "1. The defendant avers that the plaintiff has not complied with the provisions of section 176 (9) and subsections (1) and (4) of section 178 of the Customs and Excise Act, Chapter 177, in that this action was not brought within three months after the cause thereof arose.
2. In the premises, and having regard to the aforesaid provisions of the said Act, the plaintiff's action against the defendant is prescribed."

No evidence was led at the hearing but there was placed before me the relevant correspondence which had passed between the parties. The two notices of seizure were also produced. At the bottom of each the following information is contained:

"In terms of section 176 (6) of the Act, the Controller of Customs and Excise may-

- (a) release these goods from seizure; or
- (b) declare them to be forfeited; or
- (c) in the case of dangerous or perishable goods, dispose of them out of hand.

If you wish, you may, within three months from the date of this notice, make representations to the Controller of Customs and Excise, Private Bag 7715, Causeway, Salisbury, for the release of the goods. Additionally or alternatively you may, within three months from the date of this notice and subject to the provisions of section 178 of the Act, institute proceedings for the recovery of the goods from the Controller or for the payment of compensation in respect of any

dangerous or perishable goods which have been disposed of by the Controller.

If the Controller does not release the goods following representations made by you or if you do not institute proceedings within the period specified any goods declared to be forfeited will become the property of the State without compensation."

Sections 178 (1) and (A) provide that:

"(1) No writ or summons shall be issued against nor a copy of any process served upon the (controller or any officer for anything done by him under this Act or any other law relating to customs or excise until one month after notice in writing has been delivered to him or left at his usual place of abode by the person who intends to issue such writ, summons or process, or by a legal practitioner representing that person."

"(4) Every such action shall, subject to the provisions of subsection (9) of section *one hundred and seventy-six*, be brought within three months after the cause thereof arose, and if the plaintiff discontinues the action or if judgment is given against him, the defendant shall receive as costs full indemnity for all expenses incurred by him in or in respect of the action and shall have such remedy for the same as any defendant has in other cases where costs are given by law."

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And sections 176 (9) and (10) that:

"(9) Subject to the provisions of section *one hundred and seventy-eight*, the person from whom the articles have been seized or the owner thereof may institute proceedings for-

- (a) the recovery of any articles which have not been released from seizure by the Controller in terms of paragraph (a) of subsection (6); or
- (b) the payment of compensation by the Controller in respect of any articles which have been dealt with in terms of the proviso to subsection (6); within three months of the notice being given or published in terms of subsection (8).

"(10) If proceedings are not instituted in terms of subsection (9), any articles declared to be forfeited shall without compensation vest in the President and may, by direction of the Controller, be sold or destroyed or appropriated to the State."

It will be observed that two periods are prescribed, firstly, the requirement of giving the Controller one month's notice before the issue of summons against him; secondly the requirement that the action be brought within three months after the cause thereof arose.

It was accepted by counsel that if the cause of the plaintiff's action arose in consequence of the *seizure* of the articles on 2 and 6 August 1979, he had failed to comply with the requirements of either section. If, on the other hand, the cause arose on 1st September, 1981, when the defendant declared the articles to be forfeited, then the two prescribed periods involved were met. Written notice of the plaintiff's intention to institute proceedings for the recovery of the articles had been given the defendant on 28th September, 1981, being more than one month before summons was issued on 5th November, 1981, which date was within three months of 1st September, 1981.

Mr *Jordaan*, who appeared for the plaintiff, submitted that although the person from whom articles have been seized, or the owner, is clearly entitled to institute proceedings within three

months of the notice of seizure being deemed to have been given and before the Controller declares the articles to be forfeited, he is not obliged to do so. He may, if he considers it advisable, merely make representations to the Controller for the release of the articles and await the latter's decision on whether they should be forfeited. In such a situation it is the declaration of forfeiture, and not the seizure of the articles, which gives rise to the cause of action, and the stipulated periods will then run from the date of the

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GUBBAY J

declaration. A contrary construction, so said Mr *Jordaan*, would lead to an unjust interference with the elementary rights of the individual which the Legislature is presumed not to have intended.

In *Controller of Customs v Guiffre*, 1971 (2) SA 81 (R) at 84A, BECK, J, (as he then was) discussed the meaning of the phrase "the cause of the action" and adopted the definition of LORD ESHER, MR, in *Read v Brown*, (1888) 22 QBD 131, as being

"every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

See also *McKenzie v Farmers' Co-operative Meat Industries Ltd*, 1922 AD 16 at 23. That is the meaning to be attributed to the words "the cause thereof" (of such action) in section 178 (4) of the Act. The cause arises with the first material fact which has to be proved to entitle the aggrieved party to succeed. An application of this approach convinces me that the cause of the plaintiffs action, which is expressed to be for the return of the articles seized, arose on 2nd and 6th August, 1979, the dates; upon which the seizures were effected. Clearly in order to support his right to the judgment of the Court, the plaintiff will have to prove that the officer who seized the articles on the days aforementioned had no reasonable grounds for believing that they were liable to seizure. Indeed this seems to me to have been recognised by the plaintiff's legal practitioners in their notice to the defendant of 28 September 1981. In pursuance of the obligation under section 178 (2) of the Act to set out clearly and explicitly the cause of the action, they wrote:

"It will be claimed that in the first place the seizure of these goods was not justified as there were no reasonable grounds at the time of the issue of the notices for believing that the goods were liable for seizure and more particularly so, because of the explanation given by our client to the Customs Officer..

It will be contended that in any event the diamonds and ring settings were lawfully acquired by our client and were legitimately brought into Zimbabwe in 1960 when our client emigrated to this country.

It will be contended that the Krugerrands were legitimately purchased in South Africa during the years 1976 and 1977, brought into this country and properly declared to the Customs officials."

What is being challenged is the justification for the seizures. In essence, their validity. And the plaintiff is, of course, bound by the notice; he may only adduce evidence at the trial of the action upon the causes stated therein (see section 178 (3)).

GUBBAY J

My conclusion that the plaintiff's cause of action did not arise at the moment of forfeiture is, I consider, borne out by the following features. Firstly, an individual who is affected by the seizure of articles is able to protect his rights against the possibility of their subsequently being declared to be forfeited, by instituting proceedings for their release from seizure. A declaration of forfeiture must be preceded by the seizure of the articles. This correlation between seizure and forfeiture is evident in the first definition of "liable to seizure" in section 176 (2) of the Act, namely, "articles which are liable to forfeiture under the provisions of this Act or any other law relating to customs and excise". Secondly, it is clear from the provisions of section 176 (10) that the intention of the lawmaker was that finality should attach to a declaration of forfeiture by the Controller of articles which have been seized. Once the articles are forfeited they vest in the President and may, by the direction of the Controller, be sold or destroyed or appropriated to the State. There is no period of grace between the making of the declaration and the passing of ownership. The prescriptive period allowed to an affected person cannot be reconciled with such immediate vesting. Consistent with this is the specific power granted to the Controller under section 176 (6) (a) to order the release of articles from seizure either unconditionally or subject to conditions, there is no equivalent power where articles have been declared to be forfeited. Similarly, under section 176 (6c), the Controller is restrained from exercising his power to declare articles to be forfeited while proceedings may be instituted for the recovery of articles which have not been released from seizure, or if such proceedings have been instituted, until they have been concluded in his favour. There is no comparable provision which suspends the Controller's power under section 176 (10) to direct that the articles forfeited be sold or destroyed or appropriated to the State. Thirdly, in terms of section 180 of the Act, a plaintiff who has been awarded judgment in an action "for or on account of any seizure" (my emphasis), may be deprived of his costs if it is found that there was reasonable cause for seizure. I think it significant that the provision omits reference to an action relating to forfeiture. Finally, as Mr *Bisset*, for the defendant, pointed out, Mr *Jordaan's* interpretation would afford the person affected by the seizure of articles the proverbial To bites at the cherry. He would be entitled to bring an action claiming the release of the articles seized, and if that failed and the articles were declared to be forfeited, sue the defendant within an additional period of three months to have the forfeiture order set aside. The grant of such an additional right is inherently illogical.

It follows that in my opinion the plaintiff failed to comply with the time limitations as to the giving of notice and the institution of the action.

GUBBAY J

Mr *Jordaan's* alternative argument was that it is legally permissible for the defendant to waive or extend (which is the same thing) the periods of one month and three months specified in section 178 (1) and (4) of the Act; and that they were in fact waived by him in his letter of 30 July 1981. I Unprepared to assume, as did MACDONALD, A C.J., in *Quintas v Controller of Customs and Excise*, 1976 (2) RLR 251, 1977 (1) SA 845 (R., A D.) at 846H, the first contention to be correct. Mr Bisset referred me to the contrary but obiter view of GOLDIN, J, in the Court below (reported

in 1976 (1) RLR 208 (GD) at 212E-213B). He found it difficult to contend, and understandably so, that the requirements of the section, though undoubtedly peremptory in form-as to which see *Sutter v Scheepers*, 1932 AD 165 at 173-174 - had been introduced for the public benefit and not entirely for the benefit and convenience off the Controller. The opposite rule is expressed by the maxim "*quilibet potest renuntiare juri pro se introducto*" and was restated recently by KOTZE, J., in *Bezuidenhout v AA Mutual Insurance Association Ltd.*, 1978 (1) SA 703 (AD) at 710A-B.

The principles which govern the determination of the question of whether the defendant waived the benefit of the statutory rights conferred upon him in the letter of 30th July, 1981, were enunciated by INNES, CJ, in *Laws v Rutherford*, 1924 AD 261 at 263:

"The *onus* is strictly on the appellant. He must show that the respondent with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances. It is always difficult, and in this case specially difficult to establish."

See also *Hepner v Roodepoort - Maraisburg Town Council*, 1962 (4) SA

772 (AD) at 778E-H; *Netlon Ltd. and Another v Pacnet (Pty.) Ltd.*, 1977 (3) SA 840 (AD) at 872H. Thus in order to succeed in establishing a waiver by the defendant, the plaintiff must prove knowledge by the defendant of his rights under section 178 of the Act and a deliberate surrender of those rights, whether expressly or by conduct plainly inconsistent with an intention to persevere with their exercise. No stronger proof than a preponderance of probability is required. See *Alberts v Bryson*, 1976 (2) RLR 193; 1977 (1) SA 857 (RAD) at 859F; but a Court does not lightly assume that a party has abandoned or renounced his right. See *Bay Low Investment (Pty.) Ltd. v Bow View (Pty.) Ltd.*, 1971 (4) SA 538 (C) at 540W - G

On the basis of these legal principles, I turn to the defendant's letter of 30 July, 1981, in which he wrote:

"further, no notice of action for recovery of these goods, or of the diamonds, was given within the period prescribed in terms of section 178

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GUBBAY J

of the Customs and Excise Act (Chapter 177). Despite this lack of notice, and the fact that it is competent for me to declare all the goods forfeit with out further consideration in terms of section 176 (63 of the Customs and Excise Act (Chapter 177), I shall not make such a declaration until 21st August, 1981, in order to give your client yet another opportunity to discharge the onus placed upon him in teens of section 186 of the Customs and Excise Act."

I am quite unable to accept that these paragraphs are capable of being construed as a waiver of the peremptory procedural provisions. The defendant was merely advising that although the plaintiff had lost the right to sue for the recovery of the goods, he was willing nonetheless to entertain representations - if made before 21st August, 1981 - as to why they should not be declared to be forfeited. The indulgence granted was the withholding of an immediate declaration of forfeiture, and nothing more. It was not said by the defendant, and cannot be so inferred, that he consented to an action being brought against him out of time, nor that he was

prepared to permit such action to be instituted without due notice being given. Moreover, it is not to be overlooked that the letter was written with the appreciation that by then the plaintiff was almost two years out of time. The inordinate extent of such delay in itself, so it seems to me, makes it improbable that the defendant would condone it.

I think this really ends the enquiry, but Mr *Jordaan* sought to derive support from two further letters of the defendant. He contended it was implicit in the letter of 9 October, 1981 that the defendant's view of the matter was that he had waived the plaintiff's failure to comply with the prescriptive periods without being empowered to do so. I do not agree. The letter reads:

"I refer to your letter dated 28th September, 1981, and would advise that I do not accept that letter as being notice of action because the terms of section 178 of the Customs and Excise Act [Chapter 177] have not been met.

Also I wish to draw your attention particularly to the terms of sections 178 (1) and 178 (4) of that Act as read with section 176 (9).

In this connection I would draw your attention to case number G-S-55-76 in the matter between Carlos Francisco Inez Quintas and the Controller of Customs and Excise in the General Division of the High Court of Rhodesia in 1976; "

It seems to me that the defendant was saying simply: "Even if I had been disposed to waive my rights, I am not permitted to do so." He was intimating that a second string had been fitted to his bow.

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GUBBAY J

Nor does the letter of 29th October, 1981 assist the plaintiff. In it the defendant reiterated that he had afforded the plaintiff the opportunity to make further representations (a reference to the letter of 30 July, 1981), then emphasized that the intended action was time barred and the plaintiff's purported notice thereof dated 28th September, 1981 consequently invalid.

I am unable to find, therefore, that the defendant waived his right to insist upon strict observance by the plaintiff of the periods specified in sections 178 (1) and (4) and section 176 (9) of the Act.

In the result the special plea is upheld. The plaintiff's action is dismissed with costs.

Plaintiff's legal practitioners: Lazarus & Sarif.

Defendant's legal practitioners: Coghlan & Welsh.

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S v CHITSINDE 1982 (2) ZLR 91 (SC)

Court **Supreme Court, Harare**

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Fieldsend CJ and Georges JA

15th July and 17th August 1982

Flynote

Criminal law - theft - recent possession - nature of articles stolen Electing what is meant by recent - evidence - what evidence satisfactory to show possession - Miscellaneous Offences Act [Chapter 68] - section 14 (1) (b) - evidence necessary - application of section - does not apply to cases where goods are proved to have been stolen.

Headnote

Where the prosecution relies on the doctrine of recent possession in proving an allegation of theft, the nature of the articles stolen affects what is meant by "recent". If the article is one which would easily pass from one person to another in a short time, it may not be possible to draw the inference that the accused person was the thief. Thus, possession of a pair of trousers some ten and a half months after they were stolen would not allow the doctrine to be invoked, but possession of a television set three and a half months after it was stolen would.

If the prosecution intends to rely on evidence of possession by the accused of the articles, evidence should be brought before the court in as complete a manner as possible. Investigating officers on the spot may see a mass of evidence which convinces them of the guilt of an accused person, but they should remember that unless that evidence is accurately observed, properly recorded and clearly presented to the court, the court may well be left in doubt.

On a charge of contravening section 14 (1) (b) of the Miscellaneous Offences Act [Chapter 68], there must be evidence of circumstances giving rise to a suspicion that the articles were stolen. Unless that evidence exists, there is no obligation on the accused to give a reasonable explanation for his possession.

Section 14 (1) (b) does not apply to a case where the accused was found in possession of goods which were in fact stolen goods. Were it to do so, it would be tantamount to an assertion that one can reasonably suspect that goods were stolen because one knows that they have been stolen, which cannot be so. The section applies only where it is not proved that the goods were stolen but where it is proved that the circumstances in which the accused person was found in possession were such that as to give rise to a reasonable suspicion that the goods were stolen.

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GEORGES JA

Cases cited:

R v Mandele, 1929 CPD 96;

R v Ndou, 1959 (1) SA 504 (TPD)

E W W Morris, for the appellant.

H A Eleftheriades, for the respondent.

Judgment

Georges JA: The appellant appeared to answer nine counts - seven of theft, one of housebreaking and one of contravening section 14 (1) (is) of the Miscellaneous Offences Act [Chapter 68]. He was discharged on two of the counts of theft Counts 3 and 6, convicted on all the other counts and sentenced to consecutive terms of imprisonment which totalled 24 months and a suspended term of three months' imprisonment imposed on him on 20th June, 1980, was brought into effect.

The appellant was taken into custody on 14th August, 1981. He was stopped while driving a Volkswagen motor car and asked for his registration book and insurance certificate. He did not have these documents and was taken to the police station. He was later taken to his house to get these documents but though the house was open his bedroom was locked. His brother, who lived with him, had the key. The appellant was taken back to the police station. His brother came there to visit him and brought the key. The brother was arrested. The police got the key to the bedroom which he had passed on to the appellant.

Having got the key a police party returned to the appellant's house. They did not take the appellant with them. Present were the appellant's gardener, his former wife from whom he had parted after a quarrel and his father. It would appear that all the property in the house was removed. The father says that though on the scene he was not allowed into the house and he had no idea what property was taken away. The prosecutor did not produce any inventory of the property removed nor was there any detailed account of precisely where in the house each item was found.

The property was taken to Beit House and an advertisement placed in the newspaper asking persons who had had property stolen to come there to see whether they could identify any items.

Among those attending was Mrs. Cornelia Geerdes. She identified a pair of denim jeans which had been stolen from her son's car on 30th September, 1980. She showed her son's name written in his handwriting on the inside pockets of the trousers. Also stolen at the same time

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as the jeans were a computer, a calculator, a blazer, a towel and three shirts. The theft of these items was the subject matter of count 1 on which the appellant was convicted and sentenced to six months' imprisonment with labour. Apart from the trousers none of the other items were recovered. The basis of the conviction must clearly have been that the appellant had been found in possession of property recently stolen. The items had been stolen on 30th September, 1980. He had been found in possession only of the pair of jeans shortly after 14th August, 1981, some ten-and-a-half months later. The period appears to me to be too long especially having regard to the nature of the goods in his possession to allow the inference safely to be

drawn that the appellant was the thief.

In *R v Manacle*, 1929 CPD 96 GARDINER, JP, stated at paragraph 98:

"... everything depends on what is recent, and recent possession must vary very much with the nature of the articles stolen. Possession nine months afterwards may be recent in the case of one kind of article, and possession nine days afterwards may not be recent in the case of another. In fixing what is recent one has to depend upon the nature of the article. The question the Court has to put to itself is, is the article one which would easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief."

In that case the articles in question were a jacket and a pair of trousers.

The judge said:

"One sees many cases in this Court of selling to second-hand dealers, and the second-hand dealer has probably also very little difficulty in disposing of a suit of clothes. It may be sold to the class of person who would buy a suit from a second-hand dealer, and this man in turn will probably find no difficulty in passing it on to one of his acquaintances, so that, in the course of nine months, an article like a suit of clothes would pass easily from hand to hand."

He held the period to be too long. Circumstances in Harare seem no different from those described by GARDINER, JP, and I would hold that ten-and-a-half months was too long a period to allow the doctrine of recent possession to be invoked in respect of a pair of jeans. Mrs. *Eleftheriades* did not contest this position. The conviction for theft on count 1 must therefore be set aside. Mrs. *Eleftheriades* submitted that a conviction under section 14 (1) (b) of the Miscellaneous Offences Act should be substituted. I shall discuss this submission later.

Among the items identified were two check shirts. They were identified by Mr Ratcliffe-Smith as belonging to his son. The shirts had been stolen from his house on 7 August, 1981 along with a tape recorder and a digital

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watch. These items formed the subject matter of count 7. Mrs. *Eleftheriades* conceded that the evidence of identification could not be described as in any way conclusive. I agree that this concession was properly made. The appeal on that count must also be allowed.

Court 2 related to a television set stolen on 19th April, 1981 from Prunella Searle. It was a daylight theft, the set having been stolen from the bedroom while Mrs. Searle was working in the sewing room. She attended at Beit House and identified the set by its appearance and its serial number. The set had not been recovered from the appellant's house. It was removed from the appellant's father's house and he had removed it from the appellant's house for safekeeping. The period of three-and-a-half months in relation to a television set is certainly, on the principles set out in *R v Mandele*, (*supra*), short enough to permit of the application of the doctrine of recent possession.

The appellant's case was that he had purchased it from a second-hand shop called Paraphernalia. He produced a receipt dated 1st January, 1981 to support his story. Not only did the receipt pre-date the theft by three months but it was common cause that that day was a

holiday when shops would be closed. The owner of Paraphernalia, Mr O'Donnell, was called. He testified that he did issue receipts when he sold more expensive items such as a television set. He denied that the receipt produced by the appellant was from his shop. His receipts were always stamped with a rubber stamp marked "Paraphernalia (Pvt.) Ltd". The receipt purported to be signed by "M. Bennet". Mr O'Donnell stated that he had never employed anyone by that name. He remembered the appellant as an occasional visitor to his shop and he would say that he had never personally sold him a television set. He did not, however, always work in the shop himself.

The magistrate rejected the appellant's defence and convicted him. Mr *Morris*, on his behalf, urged that there may have been two television sets in the house. This was never suggested in cross-examination nor did the appellant testify that there was more than one television set in the house. The appeal on count 2 must therefore be dismissed.

The article alleged in count 4 to have been stolen - a calculator - was not found in the appellant's possession. The evidence sought to establish his presence on the premises of Mr John Deudney at 14 Lewisham Avenue, Chisipite shortly before the calculator was missed.

Muzembe Wide testified that on 15th June, 1981 he was in the kitchen of his employer's house making tea. His employer, Mrs. Deudney, was in the studio. He went there to take her the tea and on coming back he saw

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as a person in what he called the study room which was inside the sitting room. He closed the door of the sitting room and the person who had entered the study came out. He said he was the one who was there and that he had knocked but no-one had replied. Muzembe stated that this person was the appellant. He told the appellant that he had no right to enter the house and the appellant agreed that he had made a mistake in doing this. Muzembe asked him what he wanted and his reply was that he wanted to see the employer because he wanted to interview the workers. Muzembe took him to Mrs. Deudney and when she asked what she could do for him he replied that he was looking for an embassy house. There was such a house on Kent Road and Mrs. Deudney gave him directions. The appellant thanked her and then asked Muzembe to accompany him to the gate as he was afraid of the dogs. Muzembe did this and then returned to Mrs. Deudney to whom he expressed his suspicions and related what he had seen. They went to the study and Mrs. Deudney noted that a tape recorder had been unplugged and was on top of a chair where it should not have been. Mr Deudney, who had been out of Harare on business that day, returned in the evening and after a check he found that his calculator was missing. Muzembe later attended an identification parade and picked out the appellant as the man he had seen in the study from which the calculator had been removed.

The appellant's defence on this count was to deny altogether that he had been on the premises. He denied also that Muzembe had picked him out at the identification parade. He said he did not know Muzembe.

He cross-examined to show that Muzembe had not raised immediately in the presence of

himself and the employer the fact of the suspicious entry into the study. Muzembe explained that he failed to do this because the appellant had been insisting on being accompanied to the gate because of fear of the dogs.

The evidence on this count is adequate to support the conviction. Muzembe had adequate opportunity to see and remember the appellant. The incident was unusual which would help to impress it on his mind. It was urged that there may have been another intruder who may have stolen the calculator. This is far-fetched.

The appeal against conviction on count 4 should, in my view, be dismissed.

Courts 5, 8 and 9 remain to be dealt with, as well as the submission for recording a conviction on an alternative count on count 1.

In count 5 it was alleged that the appellant had stolen a digital watch from Lance Hart on 1st August, 1981. In count 8 it was alleged that on or about 24th March, 1981 he had broken into and entered the premises of

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Elisabeth Pavier at 10 Fountain Gardens, Avondale, and had stolen one television set, one iron, one electric kettle and \$55 in cash, the property of Elisabeth Pavier. In count 9 it was alleged that he had contravened section 14 (1) (b) of the Miscellaneous Offences Act in that on 20th August, 1981 he had wrongfully and unlawfully been in possession of a chair, 12 knives and 12 forks in circumstances which gave rise either at the time of the possession or at any time thereafter to a reasonable suspicion that at the time of such possession the goods were stolen and that he had been unable at any time to give a satisfactory account for his possession.

The digital watch was identified as his property by Mr Lance Hart. It had been stolen from his home at Chamberlain Road, Greendale, on 1st August, 1981. Also stolen at the same time were a pair of sunglasses, a tape recorder and a wallet. He identified the watch among the property on display at Beit House from scratch marks at the back. The marks had been made while he was opening the back to replace the battery.

Elisabeth Pavier identified an electric iron from the property on display as her iron. It had been stolen from her home on the night of 24th March, 1981. Before going to sleep she had locked all her doors and windows. Other items had also been stolen but she identified only the iron which did not work properly. There was no plug attached and the gauge on the top for adjusting the heat was broken.

Generally the appellant did not admit that any of the items alleged to have been found in his home was in fact his property. His attitude was that he knew nothing about them. It was not clear whether he meant by that that they were not found at his house at all or whether, assuming they had been found there, they belonged to one or other of his brothers who lived there with him. As I have mentioned he complained that he was absent when the house was searched. Though his father was present he had been kept out of the room while his wife with whom he was on bad terms was present during the search. His brothers were also detained in

connection with the property which the police took. It is not clear whether charges were laid against them and, if so, in respect of what items, but they did not appear as defendants. The appellant expressed the wish to have one of them called as a witness but did not press the application seriously.

Against that background Mr *Morris* contended that it could not be held beyond a reasonable doubt that the property had been found in the appellant's possession.

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Although there is some merit in the argument I do not think it should succeed. The magistrate who heard the case accepted that the police had not planted property on the appellant and this finding is supported by the evidence. The appellant was the owner of the house and if articles were found there of which he knew nothing he could find the explanation for this from one or other of the brothers who lived with him.

It is well, however, for the investigating officer to bear in mind that as far as possible evidence should be brought before the court in as complete a manner as possible. In that way accused persons will have greater difficulty in advancing arguments such as have been raised in this case. The appellant could have been taken to the scene when the search and removal were in process. An inventory could have been taken of the property stating where each item had been found. After proper caution the appellant could have been invited to sign the inventory. If he wished to give an explanation in regard to any item this could have been noted. The aim is to achieve as high a degree of precision as is possible. Investigating officers on the spot may see a mass of evidence which convinces them of the guilt of an accused person. They should remember, however, that unless that evidence is accurately observed, properly recorded and clearly presented to the court, the Court may well be left in doubt.

Holding as I do that the appellant's possession of the items in count 5 has been established it follows that the appellant was found in possession of a digital watch which had been recently stolen. From this it can be inferred that he stole it and the conviction on that count should be upheld.

Court 8 was a charge of housebreaking. Mrs. *Eleftheriades* was prepared to concede that there was no evidence of a breaking and that the conviction should be for theft. With respect, there is sufficient evidence on the record to establish a breaking. Mrs. Pavier testified that she went to bed at about midnight on 24th March 1981, locking all her doors and closing all her windows. She woke up on the morning of 25th March to find some of her property missing. Someone had clearly entered the closed and locked flat. She assumed a duplicate key had been used and that would clearly constitute a breaking. In *Hunt*, South African Criminal Law and Procedure, Volume II, page 666, it is stated that opening a closed door or window, whether or not it is locked, is a breaking. Accordingly the conviction for housebreaking and theft is supported by the evidence and the appeal on that count should be dismissed.

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I now turn to consider count 9 and also the submission that a conviction under section 14 (1) (b) of the Miscellaneous Offences Act should be substituted for the conviction for theft which has been quashed.

Section 14 (1) (b) of the Miscellaneous Offences Act [*Chapter 68*] as amended by section 4 of the Miscellaneous Offences Amendment Act, No.

29 of 1975 reads:

"(1) Any person who-

- (a) is found or possession of; or
- (b) has been in possession of;

any goods of any description in circumstances which give rise, either at the time of the possession or at any time thereafter, to a reasonable suspicion that at the time of such possession the goods were stolen and who is unable at any time to give a satisfactory account of his possession shall be guilty of an offence . .".

The record is woefully short with regard to evidence of the circumstances which could give rise to a reasonable suspicion that the chair and cutlery were stolen. There is no description of the cutlery and no evidence of its value. It is accordingly not possible to hold that it was the type of cutlery which one would not expect a person in the appellant's circumstances to own. The same applies to the chair. It may be contended that other stolen property had been found in the appellant's house and because of that there was reasonable ground for suspicion that the chair and cutlery were stolen. This seems unacceptable. A great deal of property was taken from the appellant's house. A lorry was used to move it but comparatively few items formed the subject matter of the charges laid against him and no special reason has been given for picking out that particular chair and the items of cutlery.

There was no evidence either of the circumstances, in which the items had been found - whether they seemed in any way concealed or whether they were where they would normally be expected. There was no evidence of reports of loss of cutlery of a similar description.

Unless there is evidence which establishes a reasonable ground for suspicion that the items were stolen the obligation to give a reasonable explanation does not arise.

In his judgment the magistrate dealt with the count in these words:

"On Count 9, the police found you with a chair, twelve knives and twelve forks. asked for an explanation you did not give a satisfactory explanation and even in this Court you did not give any explanation at all, save to say you did not know them and they did not come from your house."

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Clearly he did not advert to the evidence of circumstances giving rise to a reasonable suspicion that the articles were stolen. If there does not exist such reasonable suspicion then the *onus to explain* does not arise. This approach is supported by the remarks of ROPER, AJ, in *R. v. Ndou*,

1959 (1) SA 504 (TPD) at paragraphs 505-6:

"The only reason advanced by the police sergeant for his suspicion that the goods were stolen was his opinion that they were more than the average native was likely to possess. It does not appear to me that a suspicion based upon that consideration and nothing more can be regarded as reasonable . . . There must, in my view, be something in the features or the circumstances of the possession which is calculated to excite suspicion, before it can be said that the suspicion entertained against the accused is reasonable.

If the mere opinion of a policeman that a person's possessions are greater than is usual among people of his station in life is sufficient to create a reasonable suspicion that they or some of them have been stolen, so as to cast an onus upon the possessor, a most alarming inroad will have been made into the principle of our law that the Crown must prove the guilt of the accused and that it is not for him to prove his innocence. The provisions of section 36 were rightly described in *Hassen's* case *supra* as drastic, and the Courts should in my view, interpret them strictly and be on their guard against allowing them to be extended beyond legitimate bounds."

The trial magistrate made no findings as to what were the circumstances which lead to a reasonable suspicion and in my view the record fails to disclose any in relation to these items. Accordingly the appeal in respect of count 9 must be allowed and the conviction set aside.

Finally there is the question of the alternative conviction for an offence against the Miscellaneous Offences Act [*Chapter 68*], section 14 (1) (b), in respect of count 1.

It appears to me as a matter of interpretation that the terms of the section cannot apply where the property found in the possession of the accused person is proved to have been stolen. It is difficult to assert in the words of the section that a person has been in possession "of goods of any description in circumstances which give rise, either at the time of the possession or at any time thereafter, to a reasonable suspicion that at the time of such possession the goods were stolen" when it is known that shortly after the person has been found in possession of the goods that they were in fact stolen goods. It is tantamount to an assertion that one can reasonably suspect that goods were stolen because one knows that they have been stolen. The certain knowledge that the goods are stolen replaces reasonable suspicion which, as has been said, is a basis for the application of the section. A person found in possession of stolen goods can be convicted of theft or of receiving the goods knowing them to have

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been stolen if the evidence necessary to prove these offences has been established. Such a person would also face the possibility of a conviction if he fails to give a satisfactory explanation. Where, as here, an accused person is found in possession of stolen goods so long after the theft that the presumption which may normally be drawn from the fact of possession of property which was recently stolen cannot safely be drawn, such a person cannot be called to account under section 14 (1) (b) of the Miscellaneous Offences Act.

This does not, of course, mean that a person charged with theft may not, as is provided by law, be convicted of that statutory offence though originally charged with theft. On trial for theft it may well be that the prosecution may fail to prove beyond a reasonable doubt that the property was stolen. Identification may not be adequate. On the other hand circumstances in which the accused person was found in possession might give rise to a reasonable suspicion that the goods were stolen. The prerequisites of the section would then have been satisfied and a

conviction on that alternative offence would be possible. The accused person should, however, always be warned of that likelihood so that he can direct his mind to that possibility.

In my view, therefore, it is not open to substitute a conviction for a contravention of section 14 (1) (b) of the Miscellaneous Offences Act under count 1 and the conviction must merely be quashed.

In the result the appeals in respect of counts 1, 7 and 9 are allowed; the connections set aside and the sentences quashed.

The appeals in respect of counts 2, 4, 5 and 8 are dismissed and the sentences in respect of those counts are affirmed.. The appellant will accordingly serve a sentence of 17 months made up as follows: count 2 - four months' imprisonment with labour; count 4 - one month's imprisonment with labour; count 5 - one month's imprisonment with labour, and count Tonight months' imprisonment with labour; plus the three months suspended sentence imposed on 20 June 1980 which the magistrate properly brought into effect.

Two other matters remain for comment. Mr *Morris*, for the appellant, contended that the magistrate persisted throughout in hindering the appellant in the conduct of his case. I am satisfied that the record does not support this contention. This appellant persisted in conducting his case in English. The record discloses that his facility in that language was not adequate to the task. The sense of his questions was often difficult to grasp. The magistrate's interruptions were geared to clarifying what he meant to say. It was his duty, indeed, to do that.

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Mr *Morris* also complains that the magistrate descended into the arena and in support cites song 16 pages of examination of the appellant by the magistrate at the close of his cross-examination by the prosecutor. Six of the 16 pages were concerned with the possible appearance of the appellant's brother as a witness and the reasons why he had not made arrangements for him to attend. The examination took place after the appellant had testified in chip and had been cross-examined. It did not amount, in my view, to descending into the arena.

Mr *Morris* also complained that the case was poorly investigated and tried. The criticism is to some extent justified. I have already mentioned the absence of method in recording the property taken from the appellant's house. There was also lack of professionalism in the evidence dealing with the conduct of the identification parade. It is important that proper news be made at the time of what happened on the parade and the officer testifying used these notes to refresh his memory as to details. Wherever possible a photograph of the line-up should be taken to confirm that the participants were all of approximately the same height and size and similarly dressed. The difficulties at the trial arose largely from these inadequacies and the appellant's insistence on conducting his defence in a language in which he was unable to express himself clearly. Giving due weight to these criticisms, however, I am satisfied that the appellant did put forward his defence, that it was considered and that there was evidence to establish the charges in respect of which he remains convicted.

Fieldsend CJ: I agree.

Morris, Beale and Collins, appellant's legal representatives.

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BRYCE HENDRIE NO v ASSISTANT MASTER 1982 (2) ZLR 102 (HC)

Court **High Court, Bulawayo**

Gubbay J

8th July & 20th August, 1982

Flynote

Estate Duty Act [Chapter 178] - liability for estate duty - section 5 (h) (i) - deductions for amounts accruing to person or public institution with - hip Zimbabwe under conditions requiring them to be devoted to educations purposes of a public nature within Zimbabwe - education purpose must be within Zimbabwe - place of residence of recipient of financial award irrelevant - wills - construction of.

Headnote

Section 5 (h) (i) of the Estate Duty Act [*Chapter 178*] excludes from the dutiable amount of a deceased estate

"any amount which, in terms of the will of the deceased . . . accrues or accrued to . . . any person or public institution within Zimbabwe under conditions requiring such amount to be devoted wholly to charitable, educational or ecclesiastical purposes of a public nature within Zimbabwe."

The section is concerned that the educational purpose, and therefore the institution or body fulfilling that purpose, should be within Zimbabwe. It is not concerned with the question as to the place of residence of the recipient of the financial assistance which enables him to obtain the education. Financial assistance to a non-resident of Zimbabwe for the purpose of attending an educational institution would be within the section. Where, however, on a proper construction of the will, a will limits the financial assistance to residents of Zimbabwe without also stipulating that the recipients must attend a Zimbabwean institution, the case does not fall under the section. To bring the situation within the statute, there must be a clear intention, manifest on the face of the will, that the purpose is to be effectuated here.

Cases cited:

Ex p. Henderson and Another, NNO, 1971 (4) SA 549 (D);

Provincial Secretary - Treasurer of New Brunswick v Robinson and Bartlett (1919) 49 DLR 361.

CW Jordaan, for the appellant.

SM Muchecheitere, for the respondent.

GUBBAY J

Judgment

Gubbay J: This is an appeal brought by the executor testamentary in the estate of the late Dr. Jack (commonly known as John) Wakeford pursuant to section 28 (1) of the Estate Duty Act [Chapter 178]. He seeks an order setting aside the decision of the Assistant Master of this Court that the award of the residue of the estate to the Trust created under the will of the deceased does not qualify as a deduction for the purposes of estate duty.

John Wakeford died at Bulawayo on 9th March, 1981. He executed a will on 30th October, 1980, which records that his primary object was to make provision for those less fortunate than himself. Under clause 5 (a) he bequeathed the residue of his estate to a trust company to hold and administer in trust for The John Wakeford Scholarship Trust. By clause 5 (e) the available income for the Scholarship Trust, after payment of the trust company's remuneration and administrative expenses, is to be employed for the purposes described in part II of the annexure incorporated into the will. Any income not immediately required for such purposes is to be temporarily invested by the trust company for subsequent use for such purpose.

Part I of the annexure is headed "The Scholarships and Awards Committee". It appoints four named persons as the Committee's first members, all of whom are stated to be living in Zimbabwe. If a vacancy occurs it is to be filled by the remaining members appointing a person who is ordinarily resident in Zimbabwe. The Committee may co-opt the services within or outside Zimbabwe of such other persons as they may deem fit for the better performance of their task.

Part II of the annexure, "The Scholarship Rules", is divided into three sections. The important clauses in each read:

"1. Financial arrangements

- (4) Upon making any awards in terms of these Scholarship Rules, the Committee shall give all requisite particulars to (the trust company) who shall then disburse the amount of each award, in such manner as it may deem appropriate, either to the beneficiary or to the educational institution concerned so that the Committee shall not be concerned with the handling of such funds but only with the selection of beneficiaries and the determination of the amount and period of each award.

2. Scope of educational assistance:

- (1) Assistance shall take the form of Scholarships, bursaries, grants, loans or other aid to enable persons who have already

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obtained university degrees or other post-school technical, scientific or occupational training of any kind, to engage in post-graduate studies, research or other useful similar pursuits not necessarily at a university.

- (2) particularly enjoin the Committee to bear in mind the desirability of assisting young women already

qualified as trained nurses to receive advanced training in the various specialised branches of that profession and I hope that it will be found practicable to make occasional awards in this field.

- (3) I further enjoin the Committee to favour candidates seeking advanced technical training or studying the sciences rather than those studying the arts because, although I do not expect them to exclude the arts altogether, I believe that sufficient scholarships and other forms of assistance already exist in respect of the arts and that assistance in respect of technical training and the study of the sciences is more widely needed.

3. *Conditions of eligibility and criteria for selection:*

- (1) Only persons who have been ordinarily resident in Zimbabwe for at least three years immediately preceding their applications to the Committee shall be eligible to receive assistance. In cases where candidates are, in the opinion of the Committee, of equal merit, preference is to be given to those who are ordinarily resident in the area that is at present known as Matabeleland. A person shall be deemed to be ordinarily resident at the place where his home is situate, notwithstanding that he may be attending a school, university or other educational institution elsewhere either within or outside Zimbabwe.
- (2) Persons of either sex shall be equally eligible.
- (3) Whilst no-one shall be absolutely disqualified on the grounds of his race, the Committee is enjoined to examine and consider with the greatest care the home background and mode of life of every candidate so as to be reasonably satisfied -
 - (a) that the candidate is likely to fit properly into the environment at the university or other institution at which he proposes to study; and
 - (b) that the candidate intends to, and is likely to, make full and proper use of the additional education that he will gain.

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- (4) Persons who can afford, or whose parents can afford, the further education envisaged shall not necessarily be disqualified from receiving assistance but preference should be given to those who are in need of the assistance; regard should also be had to the scope, purpose and availability from time to time of financial assistance from other funds, institutions and commercial and industrial organizations so that assistance from the Scholarship Trust may be directed where it is most needed or will do most good."

It is not in dispute that the very substantial amount of the residue only avoids liability for estate duty if the conditions of the bequest conform with the requirements of section 5 (h) (i) of the Estate Duty Act, which provide that:

"The dutiable amount of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section *four*, that is to say -

- (h) any amount which, in terms of the will of the deceased, or the value of any property included in the estate which, or the value of any fiduciary, usufructuary or other like interest where the benefit arising by reason of the cessation of such interest upon the death of the deceased, accrues or accrued to -
 - (i) any person or public institution within Zimbabwe under conditions requiring such amount or value to be devoted wholly to charitable, educational or ecclesiastical purposes of a public nature within Zimbabwe;"

Counsel were agreed that under the will the residue of the estate accrues to (i) a person (ii) within Zimbabwe under conditions requiring that it be (iii) devoted wholly to (iv) educational purposes of (v) a public nature. The residue is bequeathed to a trust company incorporated in this country, which is a person within Zimbabwe. Clause 5 (e) of the will requires the income to be devoted wholly to the purposes of the Scholarship Trust as specified in part II of the annexure. Those purposes are educational in that the awards must be for post-graduate study or to enable persons with a tertiary qualification in the technical, scientific or occupational fields to engage in research or other similar advanced training or learning. Only an individual may receive an award; no award may be made to an institution. The educational purposes provided for are of a public nature as no Zimbabwean resident, as defined, is excluded from eligibility. Thus the purpose is calculated to serve the public interest in the sense of being beneficial to the public at large or a defined portion of it. See *Ex parte Henderson and Another*, NN.O., 1971 (4) SA 549 (D) at 557H-558A; Meyerowitz, *The Law and Practice of Administration of Estates*, 5th Ed., at page 436, paragraph 28.19.

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But is the final requirement of section 5 (h) (i) - that the educational purposes of a public nature be (vi) *within Zimbabwe* - fulfilled by the terms of the will? Certainly there is no express condition to that effect. It is sufficient, however, if the requirement can be gathered as a matter of inevitable inference from the existing conditions imposed by the will. See Meyerowitz, *loc. cit.*, at page 435, paragraph 28.16.

On behalf of the executor, Mr *Jordaan* submitted that although the testator contemplated that the resident beneficiary would be free to pursue his advanced education at an institution of his choice, whether within or outside Zimbabwe, it is nonetheless implicit that the amount of the award is devoted to educational purposes *within Zimbabwe*. He stressed that every provision in the will relating to the grant of an award has a basis in Zimbabwe. The trust is administered by a Zimbabwean company. The members of the Scholarship Committee must reside in Zimbabwe. Only a person who is ordinarily resident in Zimbabwe may apply for an award, thereby satisfying the testator's object to assist individual residents who may be unable to obtain financial aid from any other source, to further their education to the ultimate benefit of themselves and the community at large. The applications are considered and if successful, the extent and duration of the awards determined, in Zimbabwe. Payments to resident recipients are made here. The power given to the trust company to disburse awards either to the beneficiary or to the educational institution does not alter the nature of the award which remains personal for educational purposes to an individual resident in Zimbabwe - any such payment would be merely a matter of convenience between the trust company and the individual beneficiary whereby the former pays a debt incurred by the beneficiary in respect of his education. In the result, so it was urged, the fact that the resident beneficiary may in his discretion decide to utilize the amount of the award at an educational institution outside Zimbabwe was of no consequence. In short, the submission was that under the will the amount of the award is devoted to educational purposes *within Zimbabwe* because it is a condition that the beneficiary be ordinarily resident in Zimbabwe, and that every progressive action up to the

payment of the award be performed within Zimbabwe.

The argument does not attract me. The formidable obstacle in its way is that the will provides that financial assistance, for the purpose of furthering the recipient's education, is to be given to persons resident in Zimbabwe, but that the institution where the education is to be

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undertaken need not necessarily be within Zimbabwe. I am disposed to agree with *Mr Muchechedere* that the residential status of the student beneficiary is irrelevant.

It seems to me that section 5 (h) (i) of the Estate Duty Act is concerned that the educational purpose, and therefore the institution or body fulfilling that purpose, should be within Zimbabwe and not with the question as to the residence of the recipient of financial assistance which enables him to obtain the education. On this approach financial assistance to a non-resident of Zimbabwe for the purpose of attending a school, university or other educational institution, in Zimbabwe, would be within the section. I do not see how it can be otherwise. It is here that the argument for the executor falls down. It equates financial assistance to the student with the educational purpose. It is the latter which has to be within Zimbabwe.

Mr *Muchechedere* relied upon a passage in Meyerowitz, *loc. cit.*, at page 435, paragraph 28.16, which appears to accord with this view. Commenting on the equivalent section in the South African Estate Duty Act, 1955, the learned author expresses the opinion that -

"... if a bequest were left to A to be devoted by him to charitable purposes, the beneficiaries to be selected by him in his discretion, the provisions of the section (4 (h) (i)) would not be met, since it would not appear from the terms of the bequest that the charities must be of a public nature or that they must be within the Republic. On the other hand, a bequest for the purpose of educating deserving students at a named public school or university within the Republic would contain in itself the required limitations. Would-be testators and donors would be well advised, if that is their object, to provide specifically that their charitable, educational or ecclesiastical bequest should conform to the provisions of the section, and where the selection of the objects of their generosity is to be left to the discretion of a person, his discretion should be limited to the choice of purposes of a public nature within the Republic."

The requirement that the institution or body fulfilling the charitable, educational or ecclesiastical purposes must be situate within Zimbabwe is, I think, underscored by contrasting section 4 (h) (ii) of the South African Act with its local counterpart section 5 (h) (ii). The former provision reads: "... any public institution within the Republic for the advancement of science or art, or of a charitable, educational or ecclesiastical nature."

Meyerowitz, *loc. cit.*, at page 437, paragraph 28.20, remarks that:

"Although to qualify for the deduction the public institution must be within the Republic, it is not a requirement that the amount, property or benefit must be *used* in the Republic, and it seems that if the public institution

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is within the Republic and has the objects contemplated by the section, a bequest to it will be an allowable deduction

although the bequest may be used outside the Republic."

Section 5 (h) (ii) of the Zimbabwean Act is worded identically to section 4 (h) (ii), save for the additional words: ". . . if such public institution devotes such amount or value to purposes of such a nature within Zimbabwe;" The effect of the proviso is to make a bequest deductible *only* if devoted to purposes within Zimbabwe, thereby bringing section 5 (h) (ii) in line with section 5 (h) (i) and section 4 (h) (i) of the South African Act.

My attention was not drawn to any judicial authority of this country or South Africa that is in point, and my own research has proved fruitless. But further support, albeit persuasive, is afforded by the Canadian case of *Provincial Secretary-Treasurer of New Brunswick v Robinson and Bartlett* (1919) 49 DLR 361. There the testator under a residuary clause in his will bequeathed the residue of his estate in trust "for the benefit, advantage, assistance or the founding of such charitable, religious, educational or sanitary institutions as my said executors and trustees may from time to time see fit and deem desirable." The Court was called upon to decide whether the plaintiff was entitled to succession duty on all monies passing to the trustees under the residuary clause. HAVEN, CJ, had little difficulty in reaching an affirmative conclusion. He said at page 364:

"Such a contention does not give any effect to the words 'to be carried out in New Brunswick' the meaning of which I think is clear and plain. Under the language of the residuary clause in the will it would not, I think, be disputed that the executors and trustees are not limited in any way as to the place in which the moneys to be used and employed by them are to be so used and employed, and they could if they saw fit give contribution for the purpose of such institutions as are described in any province of Canada or anywhere else, or could if they chose found institutions of a like character in any place either in New Brunswick or outside the same. Under the Succession Duty Act, 1915, which I have cited the distinct provision is that no duty shall be computed with reference to any property given, devised or bequeathed for religious, charitable or educational purposes to be carried out in (New Brunswick), and the language on this point being clear, definite and free from any ambiguity whatever, I entirely fail to see how the contention of the defendant can succeed."

I intense my view that in their context the words "educational purposes *to be carried out in New Brunswick*" are not materially distinguishable

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from "educational purposes . . . *within Zimbabwe*." After approving two decisions of the Irish Courts, the learned CHIEF JUSTICE continued at page 366:

"I base my Judgment upon the fact that upon a true construction of the will there is no obligation on the part of the trustees to carry out the intention of the testator in this Province, and that the bequest is not a bequest to be carried out in New Brunswick. To bring the case within the statute the legacy must be given to be carried out in New Brunswick, and there must be a clear intention manifest upon the face of the will that the purpose is to be effectuated here. In the language of PALLES, CB, *mutatis mutandis* it is not sufficient that an application of money in New Brunswick would satisfy the bequest."

By a parity of reasoning there is no clear intention manifest upon the face of the Wakeford will that the educational purpose should be effectuated *within Zimbabwe*, and there is no obligation upon the trust company to ensure that the monies are applied *within Zimbabwe*.

Accordingly the ruling of the Assistant Master is upheld and the appeal dismissed. The costs

incurred by both parties are to be paid out of the estate of the late John Wakeford.

Appellant's legal practitioners: Calderwood, Bryce Hendrie and Partners.

Respondent's legal practitioners: State Attorney.

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S v APPLETON 1982 (2) ZLR 110 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Baron JA and Beck JA

19th July and 30th August, 1982

Flynote

Criminal law-Firearms Act [Chapter 308]-section 5 (1)-possession of firearms without holding firearms certificate-mens rea-bona fide belief that action not unlawful-whether such belief reasonable-when ignorance of the law can excuse.

Headnote

The appellant was convicted of contravening section 5 (1) of the Firearms Act [*Chapter 308*]. He was the owner of a firearm for which he held a valid certificate and which he kept in a secure place. A good friend of his died and the friend's widow brought her late husband's shotgun to the appellant for safe-keeping. The appellant kept the shotgun in the secure place where he kept his own firearm. The shotgun was discovered during a search by the police and the appellant was charged with having it in his possession without the necessary firearms certificate. He had made no enquiries of any official as to whether his possession was lawful; he believed that the law did not penalise what he did.

It was argued that the offence was one of those in which the accused could escape liability by showing that he did not have the mental element requisite for the offence; that the appellant could escape liability by showing that he believed that what he did was not an offence; and that it was not necessary for him to establish that his mistake of law was reasonable, as long as he showed it was *bona fide*, but that in any event he had shown that his mistake was reasonable.

Held, per FIELDSEND, CJ, that assuming that it was a defence for the appellant to show that he was ignorant of the fact that what he did was an offence, it was still necessary for him to show that his ignorance was reasonable;

Held, further, that on the facts it was not reasonable to have taken another's firearm into his possession merely in the belief that to do so was not contrary to the law, without making any enquiry.

Quaere, whether *S v de Blom*, 1977 (3) SA 513 (AD) represents the law in Zimbabwe.

Held, per BARON, JA, that ignorance of the law in circumstances such as the present is not a

defence in Zimbabwe as the law now stands, and the question of the reasonableness of the appellant's belief that what he did was lawful

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FIELDSEND CJ

did not arise. Ignorance of the law was held to be a defence in the very special circumstance of *S v Zemura*, 1973 (2) RLR 357; 1974 (1) SA 584 (RAD); but that case should be seen as an exception to the general rule.

Held, further, that, if a mistake of law is available as a defence, there is no basis as the law now stands for qualifying the defence by a requirement of reasonableness. Furthermore, such a test would be very difficult to apply and to limit and would be likely to give rise to far more problems than it would solve.

Held, per BECK, JA, that while the statutory prohibition in question is of a kind that requires *mens rea* and is not one of strict liability, there is no authority in Zimbabwe for the proposition that one who, being under no misapprehension as to any material fact, proceeds to do what such a statute criminally prohibits can escape liability simply because he was unaware of the prohibition.

Cases cited:

S v Zemura, 1974 (1) SA 584 (RAD); 1973 (2) RLR 357;

S v de Blom, 1977 (3) SA 513 (AD);

S v Banet, 1973 (4) SA 430 (RAD), 1973 (1) RLR 335;

R v Nagappan, 1926 TPD 299;

Grant v Borg [1982] 2 All ER 257 (HL);

S v Johnson, 1977 (4) SA 116 (RAD); 1977 (2) RLT 3;

S v Randen, AD Judgment 165/80;

S v Rabson, 1972 (4) SA 574 (T);

D.P.P. v Morgan [1972] 2 All ER 347 (HL);

R v Stainer, 1956 (3) SA 498 (FSC); 1956 R & N 199 (FSC).

M. T. O'Meara, for the appellant.

F.G. Smith, for the respondent.

Judgment

Fieldsend, CJ: The appellant was convicted of contravening section 5 (1) of the Firearms Act [Chapter 308] in that he had in his possession a Beretta shotgun when not the holder of a

firearm certificate for the weapon. He was sentenced to a fine of \$40, the whole of which was suspended on appropriate conditions.

The facts were common cause. The appellant, a responsible and mature citizen, who for 17 years had been a member of the Police Reserve, was the owner of a firearm for which he held a valid firearm certificate, and which he kept in a secure place. A neighbour and good friend had died and his widow brought his shotgun to the appellant for safe-keeping as she had no secure place for it. He locked the shotgun in the secure place in which he kept his own firearm and there the police found it on a search on 15th March, 1982. The record is not explicit on the point,

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but the case was argued before us on the basis that the widow at first went to live in the appellant's house, but was not living there on 15th March. In passing I may say that it may not have made any difference had she been living in the appellant's house at the time because it seems from subsection (11c) of section 8 that it is only the firearm in respect of which a spouse holds a certificate which can lawfully be possessed by person who has no certificate for it. But this point is not for decision in this appeal.

The appellant's case is that he should have been found not guilty since he *bona fide* believed that he was not committing an offence by keeping the gun in his gun cabinet because the owner who entrusted it to him was entitled to possess it. The magistrate convicted him because he found that on the facts that the mistaken belief was not reasonable. -

Mr O'Meara put his case in the following way -

- (i) that the offence in section 5 (1) of the Firearms Act was one of those "intermediate group" of offences in which the defendant could escape liability by showing that he did not have the mental element requisite for the offence - *S v Zemura*, 1974 (1) SA 584 at page 586 (RAD);
- (ii) that the defendant could escape liability by showing that he believed that what he did was not an offence - *S v de Blom*, 1977 (3) SA 513 (AD), and that it was accepted that his belief was *bona fide*;
- (iii) that it was not necessary for the defendant to establish that his mistake of law was reasonable, provided he showed it was *bona fide* - *S v Banet*, 1973 (4) SA 430 (RAD); but that in any event he had shown that his mistake was reasonable.

In the alternative, Mr O'Meara argued, though not with great conviction, that appellant's mistake was a mistake of fact he did not think that he had "possession" of the shotgun. Mr O'Meara's initial difficulty on this alternative argument lay in the fact that this was not the mistake relied upon by the appellant. He put his case squarely on his belief that the law did not penalise what he had done. For this reason it is not necessary to consider this argument further.

The cornerstone of the appellant's argument is *S v de Blom* (*supra*). That case decides that in

certain circumstances a prosecution may fail if it is not shown that the accused knew that the unlawful act that he did was unlawful. The facts in *de Blom's* case (*supra*) were very special, and, with due respect to the five judges who sat, it may be thought that insufficient consideration was given to the far-reaching effects of that

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decision. This Court has already expressed its doubts about adopting this view of the law; see *S v Lorenz*, Appellate Division Judgment No. 47/81.

Mr *Smith*, who appeared for the State in the present appeal, did not argue that we should not follow *de Blom's* case (*supra*), but, having regard to the traditional approach reflected in the judgment of GREENBERG, J, in *R v Nagappan*, 1926 TPD 299, and, so far as English law is concerned, in Smith and Hogan, *Criminal Law*, 4th Ed. page 64, I should be reluctant to hold without full argument that *de Blom's* case (*supra*) correctly states the law in this country. See, too, *Grant v Borg* [1982] 2 All ER 257 (H.L.). But in the view I take of the appeal it is not necessary to consider this point.

Mr O'Meara argued the appeal on the basis that it was for the appellant to show that he had a *bone fide* belief that what he was doing was lawful, and, if he was wrong in his submission that the reasonableness of his belief was irrelevant, that it was for him to show that his belief was reasonable and this he had done.

I deal first with his submission that it was unnecessary for the appellant to show that this mistake was reasonable.

This submission was based mainly upon *S v Banet*, (*supra*). *Banet's* case concerned the question of the defence of claim of right to a charge of theft. This was a case where a travelling salesman was sent by his employer to the Victoria Falls to fit a carpet sold to a customer and try to obtain further orders for carpets. He was told to stay at the Victoria Falls for five days and was given \$100 for his expenses. He was given no precise instructions as to how this \$100 could be spent. The salesman lost \$80 of this money gambling on the first night away. He returned to Bulawayo to get further funds from his own bank amount but was seen there by his employer. He said that he *bona fide* believed that he could spend the money given to him as he pleased provided he eventually accounted for it, and reimbursed his employer for any sums not spent on his employer's business. His evidence on this was accepted but the magistrate found his belief was irresponsible and unreasonable.

On appeal, BEADLE, C J said that it was necessary to resolve the controversy which had raged for years, namely whether the belief had to be not only *bona fide* but also reasonable. After considering a number of cases and authorities he concluded that *mens rea* had to be "proved subjectively and that the objective approach was of value only as evidence proving what the actual belief was".

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It is important not to lose sight the fact that this being a theft case, the issue really was whether the salesman was acting under a *bona fide* claim of right. This he could have established by showing that he genuinely believed his employer would not have minded him dealing with the expenses money as he did, provided he accounted for it in due course. BEADLE, C J, however, seemed to deal with the case as if the issue was whether the salesman believed that the law entitle him to deal with the money as he did. It is this approach which has given rise to the criticism of this decision in *S v Johnson*, 1977 (4) SA 116 (RAD) at page 123. The problem is not an easy one: see Hunt, *op. cit.*, Vol. 1, page 132 and page 260, Glanville Williams, *Criminal Law*, 2nd ed., page 321 *et seq.*, Smith and Hogan, *Criminal Law*, 4th ed., page 518. The defence of claim of right can certainly be based upon a mistaken but *bona fide* belief of the civil law.

But the present appeal is concerned with a different matter, namely, ignorance of the fact that the law penalized particular conduct. The authorities upon which Mr O'Meara relied do not establish that a belief that is not reasonable can be a defence in that type of case. Even *de Blom's* case, (*supra*), at page 532 requires that a person must act "with the necessary circumspection to inform himself of what is required of him" before embarking on a course of conduct.

Without considering the magistrate's basis for finding that the appellant's belief was not reasonable, I am satisfied that on the facts it was not reasonable for the appellant in the circumstances to have thought that the law permitted him to act as he did. Where a person takes another's firearm into his custody, knowing that the possession of firearms is strictly controlled - as it is in this and in most other countries - he is at fault and acts unreasonably if he does not find out in what circumstances he is entitled to have the firearm in his custody. The appellant made no enquiries: he merely relied on what he thought the law allowed him to do. This is insufficient to show that he was reasonable in his belief, however *bona fide* he may have been. The issue is not whether a person would think that the law relating to the possession of firearms allowed particular conduct but whether a belief that it did can be reasonable where the person has made no enquiry as to what the law is. The appellant in this case made no enquiry.

For these reasons I would dismiss the appeal.

Baron JA: I have had the advantage of reading the judgment of the learned CHIEF JUSTICE. I agree that the appeal should be dismissed but for very different reasons. It should, in my view, be dismissed because

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ignorance of the law in circumstances such as the present is not a defence in Zimbabwe as the law now stands; consequently, the question of the reasonableness of the appellant's belief that what he did was lawful does not arise. I would not be prepared to make new law in this very controversial area without much fuller argument.

Mr O'Meara submitted that the trend of the Roman-Dutch law was towards the subjective

approach to *mens rea*, and he drew attention particularly to *S v Banet*, 1973 (4) SA 430 (RAD), *S v Zemura*, 1974 (1) SA 584 (RAD) and *S v de Blom*, 1977 (3) SA 513 (AD); he referred to other cases also but an analysis of these three is sufficient for the present purpose.

In *Banet's* case (*supra*) the appellant was a travelling salesman: he was sent by his employer to the Victoria Falls to lay a carpet sold by his employer to a customer and also to try to obtain further orders for carpets. He was instructed to remain five days at Victoria Falls and was given \$100 for his expenses; he was given no precise instructions as to how this \$100 could be spent. He lost most of it at the casino. BEADLE, CJ, after having recited these and other facts, then recited the evidence of the appellant in the following terms:

"The appellant stated that he *bona fide* believed that this particular \$100 could be mixed with his own funds and spent for any purpose he wished and provided eventually he accounted fully to his employers as to how the money was spent he considered he could do with it as he pleased. He never suggested that the money was his to do what he liked with, but what he did suggest was that he could spend this money for his own purposes provided he reimbursed the company on his return, which he said was what he intended to do so far as this particular \$80 he lost in gambling was concerned."

The magistrate accepted that the appellant truly believed that he could use the money with which he had been provided as he pleased, and the Appellate Division proceeded on the basis that this finding was justified on the evidence. The magistrate, however, held that the belief was "an irresponsible one and an unreasonable one", and the decision in the case turned on whether the *bona fides* of the appellant's belief was sufficient or whether it must also be reasonable. BEADLE, CJ, having considered a number of cases and opinions expressed by text writers, concluded that the weight of authority supported the view that in most common law crimes the *mens rea* of the accused must be subjective and the objective approach is of value only as evidence proving what his actual belief was; he then continued at page 433 C:

"I emphasise, however, that I am dealing now with a common law crime of theft and not with statutory offences or with other offences in which an element of negligence may be a factor. I should perhaps also emphasise that

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a *bona fide* claim of right does not mean that the accused *bona fide* believed that he is morally right in doing what he did. His *bona fide* belief must be that the law of the land permits him to do what he did."

If this case correctly states the law of Zimbabwe it is certainly support for Mr O'Meara's submission. However, it has been disapproved by this Court in *S v Johnson*, 1977 (4) SA 116 (RAD) at pages 123-4, and again in *S v Randen & Anor.*, Appellate Division Judgment No. 165/80.

The other Zimbabwean case which at first blush is support for Mr O'Meara's proposition is *S v Zemura*, (*supra*). In that case the appellant had sought the advice of a cadet officer in the office of the District Commissioner, Filabusi, concerning the issuing of permits for the removal of cattle; the appellant was duly issued by this official with a permit to remove the cattle in question. It later transpired that the advice was wrong and that the permit should not have been issued, and the appellant was convicted in the magistrate's court on the basis that the offence was one of strict liability. On appeal the State submitted that, as a matter strict law, the

appellant was correctly convicted but that in the circumstances he should never have been prosecuted, and that the only proper sentence should have been a caution and discharge. The Appellate Division held, however, that the matter went further, and that the appellant's *bona fide* belief that he was legally entitled to do what he did was a good defence. The judgement of BEADLE, CJ, contains a comprehensive and valuable review of the authorities on the question of a mistake of law, and warrants close examination. At page 592 he said this:

"I do not propose to consider here whether ignorance of the law, in the widest sense of the term, is a good defence. Burchell, *loc. cit.*, (see pages 135 and 262), holds it is not, while De Wet and Swanepoel, *Die Suid - Afrikaanse Strafrecht*, 2nd ed., pages 136-137, think that, if it is not, it certainly ought to be. There can be no doubt, however, that the great weight of authority supports the view that what is often called 'naked ignorance' of the law is no defence. For South Africa authority see Burchell, (*supra*); for English authority see Glanville Williams, *Criminal Law*, 2nd ed., page 289; for American authority see Hall, *General Principles of Criminal Law*, 2nd ed., pages 382-384. This case, however, is not concerned with 'naked ignorance' of the law, that is, ignorance which is not given some semblance of respectability by being clothed in some vestment of fact."

It is clear that BEADLE, CJ, did not regard 'naked ignorance', as a defence; in discussing *S v Rabson*, 1972 (4) SA 574 (T.), where the

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accused acted on advice he had been given by the secretaries of two reputable societies concerning the protection of wild plants, he said:

"In as far as the secretaries who gave the advice in the case were not public officials this case goes very far, perhaps too far, but it is strong authority in favour of the appellant."

The learned former CHIEF JUSTICE then proceeded to examine the English law and commented that there the decision in *Rabson*, (*supra*), would certainly not have been supported. He expressed the view however, that in relation to statutory offences the reasons for the maxim "ignorance of the law is no defence" did not carry a great deal of conviction, and he drew attention to criticism of the maxim in the work of De Wet and Swanepoel, *loc. cit.*, page 136; he then continued:

"There may, however, be sound practical considerations for not accepting naked ignorance of the law as a defence, and, as I have said, this case is not concerned with this problem, but only with the problem of how far a claim of right based on acting on wrong legal advice given by a public official is a defence."

It is thus clear that, far from *Zemura's* case (*supra*) being authority for the general proposition that ignorance of the law is a defence, in fact it is to the contrary effect. It held that ignorance was a defence in the very special circumstances of that case, but so far as the facts of the present case are concerned, which clearly fall within the category of naked ignorance, it suggests strongly that ignorance of the law is no defence even in respect of statutory offences.

The case which is certainly support for Mr O'Meara's proposition is *de Blom* (*supra*). I do not propose to deal with that case at any length on this point; I associate myself with the reservations expressed by the learned CHIEF JUSTICE. This is not the time to consider what the law in this country ought to be. It is therefore unnecessary to make a finding as to whether the appellant's belief that what he did was lawful was or was not reasonable. However, the

introduction of the test of reasonableness is a matter of principle of some importance, and I feel I must express my views on that matter.

As I understand the judgment of the learned CHIEF JUSTICE, he is saying that he is not prepared without fuller argument to decide that ignorance of the law in circumstances such as the present is or is not a defence, but that even if it were, the ignorance would have to be reasonable, and the appellant's ignorance here was not. His unreasonableness is said to consist in his failure to acquaint himself with the law relating

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to the possession of firearms, the whole subject of firearms being closely controlled. To examine the validity of the test of reasonableness we must therefore assume that *Banet (supra)* is correct and that *de Blom (supra)* will be followed here.

Banet (supra) was treated as a claim of right defence to a charge of theft. I must say in passing that I have difficulty in so regarding it. Be that as it may, it is important to remember that the charge was theft, and that the *absence* of a *bona fide* claim of right is by definition an ingredient of the offence. The definition does not require the absence a *bona fide and reasonable* claim of right; this is why reasonableness is irrelevant save to the extent that it is a consideration in the decision as to *bona fides*. And it is for the same reason that, once the question of a *bona fide* claim of right has been sufficiently raised, the *onus* is on the prosecution to negative it. An analogous position arises on a charge of rape where the defence is consent; lack of consent, or indifference as to whether or not the woman consented, is an ingredient of the offence, and it was consequently held in *Director of Public Prosecutions v Morgan* [1975] 2 All ER 347 (HL) that if an accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape.

Thus if *Banet, (supra)*, is correct, as I am assuming for the present purpose, reasonableness is relevant only as to *bona fides*; this proposition is so well established as now to be trite (see for instance *Johnson's case (supra)*, and *Bannet (supra)* is unquestionably right on that point. It would be quite untenable to accept *Banet* to the extent that it says that a *bona fide* mistake of law is a defence and reject it to the extent that it says that the reasonableness of the belief goes only to *bona fides* the - issue which was central to the decision.

De Blom (supra) is on a different footing. There the offence alleged was simply the commission of a prohibited act; there was nothing in the definition of the offence to exclude a requirement of reasonableness. But the point does not appear to have been argued, and emerged only tangentially in the passage at page 532 in which RUMPF, C J, was dealing specifically with the State's submission that once evidence had been adduced bringing her conduct within the framework of the offence there was an *onus* on the appellant to prove the absence of *mens rea* rejecting this submission, RUMPF, C J, said:

"If the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful; and further, when *culpa* only, and not

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dolus alone, is required as *mens rea*, that there is also a reasonable possibility that juridically she could not be blamed, i.e. that, having regard to all the circumstances, it is reasonably possible that she acted with the necessary circumspection in order to inform herself of what was required of her . . .".

I do not think the passing reference to "necessary circumspection", in a passage dealing with the *onus*, is sufficient authority - and I know of no other - to introduce a requirement of reasonableness into the area of mistake of law. *Zemura* (*supra*) does not do so. There, BEADLE, CJ, at page 591 assumed, without so holding, that the offence fell within the "intermediate group", and held, as I read the judgment, that even if this were so and that the rule in *R v Stainer*, 1956 (3) SA 498 (FC) applied (that the accused had to show that his mistake was both honest and reasonable), he had on the facts certainly discharged that *onus*. But he then went on to point out at page 591H that there are *dicta* in *Stainer's* case (*supra*) which indicate that the principle there laid down is limited to mistakes of fact of the sort there under consideration, and that the appellant's mistake in the case before him was one of law.

I am therefore of the view that if a mistake of law is available as a defence there is no basis as the law now stands for qualifying the defence by a requirement of reasonableness. For this reason, just as I would not be prepared without full argument to hold that ignorance of the law may be a defence, equally I would not be prepared without full argument to attach a requirement of reasonableness to such a defence.

However, my reservations are not based simply on the present state of the law and the lack of authority for a reasonableness test: they are based also on a belief that such a test would be very difficult to apply and to limit, and would be likely to give rise to far more problems than it would solve - if indeed it would solve any. In *de Blom* (*Supra*) RUMPFF, CJ, at page 531 H cited with approval a passage from an article by DA Botha in THR - HR volume 38 (1975) at page 41 where the author, in the course of discussing guidelines for determining *culpa*, suggests that it is reasonable to expect a person engaged in a specific field of activity to ascertain what the law is in that field. The author suggests that a man "may justly be blamed if he fails to obtain legal advice and consequently acts unlawfully". But what if he *does* obtain legal advice on which he acts, and which proves to be wrong? The authorities are clear that the fact that he acted in good faith on bad legal advice is no defence. But if reasonableness is to become the test, logic would seem to me to require that incorrect legal advice must in appropriate circumstances be a defence. There are areas, such as firearms and cattle, where there are Government agencies, so to speak, to whom the public can go for guidance, and whose

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incorrect advice would lead to a *Zemura* type situation. But there are other areas, equally strictly controlled, in which the public cannot obtain guidance from the Government; for instance, the Reserve Bank will deal only with the commercial banks, and not direct with the public. But in any event I would regard it as eminently reasonable for a man about to engage in transactions involving imports and exports to obtain legal advice on the currency, exchange control and

customs questions which could arise, and to act on that advice.

Again, let us consider the position of a farmer who is visited unexpectedly in the evening by a friend who is carrying his rifle in his car and to whom he offers hospitality for the night. I think a man may be excused if it does not even occur to him that he might be contravening the law if he locks his friend's rifle in his secure place, and therefore not unreasonable if he does not even consider the necessity to telephone the local police station to enquire whether to do so would be lawful.

In my view it is both safer and simpler to have a universal rule, leaving questions of reasonableness to be considered for the purpose of sentence. In saying this I do not wish to be understood as disapproving the result in *Zemura's* case (*supra*). That was a decision based on very special facts, and on those facts was obviously just; to prosecute in such circumstances was at best absurd and at worst oppressive. It is arguable that justice would have been done by upholding the conviction and substituting a caution and discharge, but I can see the force of the argument that such a solution does not go far enough, and that where the State itself has led a man, who has in good faith sought guidance, into a contravention of the law, as a matter of public policy he should be entitled to his acquittal. But I think *Zemura* (*supra*) should be seen as an exception to the general rule that ignorance of the law is no excuse.

I must refer finally to Mr O'Meara's concession that, if reasonableness was a requirement, the *onus* was on the appellant to establish it. This concession, made in the course of oral argument in response to a question by the Court, is directly contrary to *de Blom* (*supra*), and in my view is not a concession on which the Court should proceed.

Beck JA: I agree that the appeal must be dismissed, I am of that view because, while accepting that the statutory prohibition in question is of a kind that requires *mens rea* and is not one of strict liability, I do not understand any decision of this Court to be authority for the proposition that one who, being under no misapprehension as to any material act, proceeds to do what such a statute criminally prohibits, can escape liability simply because he was unaware of the prohibition.

1982 (2) ZLR p121

BECK JA

Banet's case (*supra*) ought not, in my view, to be regarded as having any application to the present matter which is not concerned with an offence of which a special intention is a necessary ingredient. Nor is that part of the decision in *Zemura's* case (*supra*) which dealt with the appellant's ignorance of the law of application to this matter in which the present appellant's ignorance of the relevant provision of the Firearms Act was not an ignorance that was induced by a responsible official charged with administering the provisions of the statute, so that the considerations of public policy that were decisive in *Zemura's* case (*supra*) do not arise here.

With regard to *De Blom's* case (*supra*) I share the view of my brethren that the extent to which that decision should be followed is a matter that ought not to be decided without the benefit of argument.

WILLIAMS v THE TAXING MASTER 1982 (2) ZLR 122 (HC)

Court High Court, Harare

Squires J

25th August and 8th September, 1982

Flynote

Practice end procedure - High Court Rules - Rule 311 - engagement of a second legal practitioner in a relatively straightforward matter - not precluded by Rules and indeed may be desirable - discretion of Taxing Master in taxation of bill of costs - Court's power of review.

Headnote

The applicant had brought proceedings to sequester the estate of a debtor. The legal practitioners who acted for the applicant framed the petition for sequestration on the basis that another legal practitioner would be instructed to appear when the proceedings were heard in court. In the event the proceedings were unopposed.

When the bill of costs was presented for taxation, the Taxing Master disallowed the amount which he considered reflected the further cost of instructing a second legal practitioner. His grounds for so doing were that there was no justification in this case for a second practitioner to be instructed.

Held, remitting the matter to Taxing Master to tax the bill of costs afresh, that the normal basis for review of an official's decision is very much wider when it comes to review by a Court of its own officers; it may reverse his ruling, not only on the grounds of failure to exercise a proper discretion, but also if it is clearly of the view that he is wrong.

Held, further, that the Taxing Master had taken a wrong view of Rule 311 (a) of the High Court Rules, the proviso to which was clearly designed to disallow the fees of second counsel in an unopposed matter. This did not mean that one instructing legal practitioner may no longer employ another when the matter is unopposed. He is still required to allow the fee of one counsel, that is, a practitioner instructed by another practitioner.

Held, further, that as a matter of practice, the Taxing Master was not justified in his ruling. In the first place, fusion of the legal profession was a recent event, and many former attorneys would feel, justifiably, that they were unfamiliar with and inexperienced in certain fields, so the interests of their clients would be better served by briefing a practitioner who was familiar. Secondly, an experienced practitioner might be unable, through pressure of work, to leave

SQUIRES J

his office on a particular day and could brief another practitioner who is so able. Thirdly, until 1985, at least, some practitioners will be admitted who have little knowledge of local law and procedure and it would be desirable that they should be able to brief practitioners who have that knowledge.

Cases cited:

Legal and General Assurance Society Ltd v Lieberum, NO, and Another, 1968 (1) SA 473 (AD);

Wellworths Bazaar Ltd v Chandlers Ltd and Others, 1947 (4) SA 543 (T);

Joss v Joss and The Taxing Master, HC-S-359-81.

C.S. Grossman, for the applicant.

No appearance for the respondent.

Judgment

Squires J: On the 31st March, 1982 the applicant in the present matter brought proceedings in the High Court to sequester the estate of a debtor. A rule *nisi* in the usual form was eventually issued ordering the provisional sequestration of the debtor's estate, and on the return day (the 28th April), there being no opposition, that rule *nisi* was confirmed and the provisional order of sequestration made final.

On the 8th July, the applicant's bill of costs in the sequestration proceedings was presented for taxation, and it is clear from the description of the various items included in the bill for which charges and disbursements were made, that the legal practitioners who acted for the applicant framed the petition for sequestration on the basis that another legal practitioner would be instructed to appear for the applicant when the proceedings for sequestration were heard in Court. When the bill costs was taxed, however, the taxing officer took the view, on the basis of Rule 311 of the High Court Rules, that the engagement of a second legal practitioner in proceedings of this sort - that is, a straightforward sequestration matter in which no one appeared for the respondent debtor - was "completely unjustified". Since a competent legal practitioner was acting for the applicant, he disallowed, in the exercise of his discretion, the fees incurred by reason of the engagement of a second legal practitioner. He accordingly taxed off the bill the amount which, in his view, reflected the further cost of instructing a second legal practitioner - some \$29,00, \$19,00 being fees and \$10,00 being disbursements, in a total bill of some \$341 odd.

The applicant now seeks to have this decision reviewed and claims that the taxing officer has misdirected himself in taking the approach he did. He points out that, although the Legal Practitioners Regulations now recognize and contemplate that one legal practitioner may conduct cases

SQUIRES J

or proceedings without engaging another, they equally clearly do not preclude such a course. Further, the High Court Rules, as amended by the creation of only one category of legal practitioner, equally do not prevent the instructing of one legal practitioner by another to undertake particular work. Such instructions may therefore properly be given, he claims, and be charged for in the consequent bill of party and party costs. He points out, furthermore, that if a legal practitioner from the firm that acted for him had appeared in Court, such legal practitioner would have been entitled to charge for the time spent waiting for the hearing to be heard - in the present case about three-quarters of an hour - which would have cost the unsuccessful respondent a further \$22,50.

While the first observation as to the effect of the respective regulations and rules is true, it really seems to beg the question; for the taxing officer, in the report he filed, does not take the view that one legal practitioner may never instruct another. He merely says, as I understand it, that in a case of this sort it was unjustified. The same may really be said of Mr *Grossman's* argument in support of the application for review. It is undoubtedly correct that section 7 of the Second Schedule to the High Court Rules contemplates that a legal practitioner instructed by another is not bound by the prescribed tariff and may charge a reasonable fee. But the taxing officer in the present dispute does not appear to me to be unmindful of the fact that what used to be called counsel can be engaged by what used to be called attorneys, and that the former's fees may be more than the tariff prescribed. In fact, in this case the taxing officer has not disputed the reasonableness of the fee charged for the engagement of the second legal practitioner; he is saying that the second legal practitioner should not have been engaged at all, nor the petition for sequestration launched with such briefing in mind.

And save for the argument that the bill of costs could have been \$22,50 higher, the effect of the second observation made by the applicant is not easy to divine. As an ascertainable matter of fact, which appears from the papers in the file of proceedings, a single legal practitioner from the firm consulted by the applicant did appear at the first stage of the sequestration proceedings, and he would have had to wait for approximately three quarters of an hour for the matter to be called and dealt with when applying for the rule *nisi*. So not only could such a charge have been included but was not, but its relevance to the question of whether the taxing officer was wrong in his approach to the engagement of a second practitioner is obscure.

1982 (2) ZLR p125

SQUIRES J

Now, the general rule of approach to a review of a taxation of a bill of costs where the Taxing Master has exercised his discretion in a matter that is substantially left him, such as the quantum of a fee, is that a Court is very reluctant to interfere. It will only do so in certain well recognized circumstances such as disregard of some fact or principle that was proper to consider, the converse regard of some improper consideration, a failure properly to apply his mind to the matter, or the acting upon some wrong principle or rule of law; in short, in any situation which shows that he has not, for whatever basic reason, properly approached and exercised the discretion vested in him. But the matter goes further than that, for this basis of review which the Court has over the acts of any public official or tribunal is very much wider

when it comes to the review by a Court of its own officers in the exercise of their functions: see *Legal and General Assurance Society Ltd v Lieberum NO and Anor*, 1968 (1) SA 473 (AD) at 478. The practical effect of this additional situation is that the Court's power of interference with a taxing officer's decision is not in all cases limited to the grounds of failure to exercise a proper discretion. It may also reverse his ruling in certain cases if it is clearly of the view that he is wrong. It is this which MILLIN, J, described in *Wellworths Bazaar Ltd v Chandlers Ltd. and Ors*, 1947 (4) SA 453 (T), as "a graft on the main principle" and it embraces those situations in which the Court is at least as well able as the Taxing Master - and *a fortiori* if it is better placed - to form an opinion on the point in issue. If, in such cases, the Court takes a different view, then the rule that the Taxing Master's discretion should be respected does not enjoy its ordinary strength.

Does the mere fact that a matter is likely to be unopposed mean that one legal practitioner should never give thought to instructing another legal practitioner to conduct the necessary Court proceedings, or translate that thought into fact? However much I consider the matter, I cannot think or accept that the answer must invariably be in the negative.

At the outset of considering this problem, it may not be out of place to state that I think the Taxing Officer has taken a wrong view of Rule 311 of the High Court Rules. The proviso to Rule 311 (a), which the taxing officer obviously had in mind, was clearly designed to disallow fees of a second counsel where more than one counsel appeared in an unopposed matter. In the circumstances of the legal profession under which that rule was framed, the proviso afforded a basis for discouraging the extravagance that could result from employing three heads when two could have sufficed.

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SQUIRES J

The general amendment as to the word "counsel" that is introduced as Rule 4B of the High Court Rules by section 2(b) of Statutory Instrument 277 of 1981 does not seem to me to have changed that situation. The Rule still only applies to the use of two legal practitioners in addition to the instructing legal practitioner. It does not mean, as the taxing officer seems to think, that one instructing legal practitioner may no longer employ another when the matter is an unopposed one. Indeed, the provisions of Rule 311(a) state positively that the taxing officer shall allow as party and party costs a reasonable fee where two counsel are involved unless the Court orders otherwise. If the proceedings in which they are engaged are unopposed then he may disallow the fee of one of those counsel. But he is still required to allow the fee of one counsel, that is, a practitioner instructed by another practitioner for the case. He may decide what is a reasonable fee, but he cannot disallow it altogether. There is nothing, furthermore, in any of the amending provisions to the Rules that are consequential upon the Legal Practitioners Act, 1981, that modifies the effect of this Rule. On the contrary, the whole tenor of such amendments is to the effect that one practitioner may quite properly instruct another to do work for a client. See *Joss v Joss and The Taxing Master*, HC-S-359-81.

But of more importance is the inquiry whether, even disregarding the taxing officer's reliance upon Rule 311, he was justified as a matter of practice in the decision to which he came.

In the first place, it seems an appropriate situation to say that while it is one thing for the laudable objective of reducing the costs of litigation to provide that one legal practitioner can now undertake all the necessary steps to obtain a judgment of the Court, it is entirely another thing to realize that situation in fact and almost overnight.

The changed situation under which the generally more experienced, if not necessarily more competent, forensic services of the former advocate no longer have to be employed in proceedings before this Court has, even now, only been in operation for just on a year. At the time these sequestration proceedings were launched, it had been in operation for only some 7 months. In those circumstances, it is not unlikely, nor unreasonable in my view, that at least some legal practitioners who were previously attorneys, did not feel - and still do not feel - that they had or have the experience, or even the knowledge in some unfamiliar fields, and without spending some additional period of qualifying which they are unable to undertake, to appear in Court and obtain an order in proceedings that were hitherto exclusively the presence of advocates. If

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such a legal practitioner felt that the interests of his client would be better served by instructing another practitioner to undertake the presentation of the proceedings in Court, with the necessary concomitant examination of or even correction, where required, of the allegations in a petition or affidavit, or the relief in a draft order, then I think it would be wrong to insist that he cannot do so. Indeed, such an insistence might very well end up causing more costs than the other procedure because even in apparently simple proceedings experience is a most important qualification in obtaining the desired result, particularly if unsuspected flaws are revealed in the course of debate. Such experience, in the nature of things, was not enjoyed by every legal practitioner who can now appear in the High Court.

The instant sequestration proceedings are in fact a good illustrative example of the point that is being made. The petition filed, and the second and third attempts to frame a draft order, proceeded upon the erroneous belief that it was necessary to take action against, and serve the rule *nisi* on, the woman with whom the debtor was then living, to show cause on the return day why she should not be declared to be the spouse - for purposes of the Insolvency Act - of the insolvent debtor. Apart from the fact that there was no dispute in this regard, or at least not one that was alleged, and therefore no need to apply for such relief, nor indeed any basis on which the Court could give it in the absence of a dispute, such a conception of the requirements on an applicant creditor reflect a more or less substantial misunderstanding of the relevant provisions of the Insolvency Act. The provisions of the Act that deal with the vesting in the trustee of the property of the spouse of an insolvent - in the extended definition of the word "spouse" - and particularly the requirements of section 21 (1) as to service of any final order of sequestration on such spouse and his or her rights relating to such vesting make it clear that the status of the insolvent spouse and service of a rule *nisi* on her or him are not matters which are normally raised in the average unopposed petition for compulsory sequestration. Either the legal practitioner who framed the petition and launched the proceedings did not know this, or there was some evidence, albeit not alleged, which led him to conclude that the application for

sequestration and the subsequent vesting of the spouse's property in the trustee might well be disputed. In either event, he seems to have acted prudently in deciding to instruct another practitioner to act.

In the second place, and as a general observation that does not apply in the present case, even where the first legal practitioner, in the shape of a former attorney, is as experienced and competent as any former

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advocate, his situation may be that he can more productively spend his time by not going to Court where the needs of a client require this. He may be unable, through pressure of work, for example, to leave his office on a particular day or days, and the instructing of another practitioner is quite unavoidable. To insist by pressure of taxation that such a practitioner does not instruct another practitioner, even in unopposed matters, is to put him in an untenable position and to fly in the face of the obvious intention of the Rules - that one legal practitioner should be at liberty to instruct another to undertake work where the circumstances suggest that such a course is desirable.

And in the third place, and having further regard to the Legislature's intention, one should not overlook the fact that until 1985 at least some legal practitioners will be admitted to practise in this jurisdiction who have no knowledge whatever of local law and procedures - when they are first admitted, at any rate. It enacted these provisions, one assumes, on the basis and in the expectation that there were other practitioners who were available and sufficiently qualified who could, if necessary, be instructed to undertake work of a particular kind, such as the conduct of proceedings in Court, if and while such former practitioner felt unable to do so.

In the light of considerations such as these, it seems to me that it would be a wrong approach in principle to hold that, merely because one competent legal practitioner ought to be able to undertake an unopposed application to Court, he ought to be refused without further ado the costs of instructing another to do so.

Futhermore, in that sort of field the Court's own experience is as good, if not better than, that of the taxing officer, and such experience amply establishes, in my view, that as matters presently stand, at any rate, and for at least some time in the future, such additional costs as may be incurred by instructing another legal practitioner with specialized skills to conduct proceedings in Court would seldom be money wasted, and ought not to be disallowed simply for the reason that a single legal practitioner could have done so. As has already been referred to in discussing these particular sequestration proceedings, it seems reasonably clear that if what was previously called an advocate had appeared in the first instance, as was originally intended, the various amendments to the draft order at least would not have been necessary.

Nor do I think on the facts of this particular case that it was one in which it could safely be said that the instructing legal practitioner was at fault in thinking that the employment of another practitioner was

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desirable. With the gift of hindsight, the matter did turn out to be one which could have been conducted without the instruction of a specialist in Court proceedings or in the field of insolvency, but it might well not have so appeared to the instructing petitioner at the beginning or even after the rule *nisi* was issued, for opposition may properly be expected at that stage if it is going to occur at all. And while excessive caution on the part of a party's legal practitioner can and should properly be disallowed in costs, there does not appear to have been any investigation to that end in the present taxation, the taxing officer simply taking the view that because it was unopposed in the event, and because a competent legal practitioner was already acting for the petitioning creditors, therefore another practitioner ought not to have been instructed.

In the result, I am satisfied that the taxing officer in this case approached the taxation on an incorrect basis. The application for review must therefore succeed, and the decision of the taxing officer not to allow the charges relating to the employment of a second legal practitioner is set aside. On the other hand, there are other charges such as the fees for the amended draft orders for which, as presently advised, I can see no justification for charging, since the original draft order was substantially sufficient with the amendments made by the Registrar.

There will therefore be an order in terms of the draft and the matter is remitted to the taxing officer to tax the bill of costs afresh in the light of this judgment.

I may add that since this conclusion impinges on a frequent, and possibly important, question of practice, I have consulted as many of the judges of this Court as possible during a vacation. They authorize me to say that they all agree with the conclusion reached.

Coghlan, Welsh & Guest, legal practitioners for the applicant.

S v MUSARURWA 1982 (2) ZLR 130 (HC)

Court High Court, Bulawayo

Gubbay J

10th September, 1982

Flynote

Criminal Procedure - suspended sentences - Customs and Excise Act [Chapter 177] - s. 190 (1) (a) - summary judgment in favour of Controller - not competent to make payment to Controller a condition of suspension of sentence of imprisonment.

Headnote

Where a compensatory award in the form of a civil judgment is granted under section 190 (1) (a) of the Customs and Excise Act [*Chapter 177*], this is simply to obviate the need for the Controller of Customs and Excise to institute a civil action for the recovery of the amount of unpaid duty on the goods, or the duty paid value thereof, when the issue of the lawfulness of the accused's conduct has already been decided at his trial. There is no provision in the Act for the imposition of a sentence of imprisonment if payment is not made. It is therefore irregular to impose a sentence of imprisonment in default of payment of the award.

Cases cited:

S v de Wet, 1979 RLR 147 (AD); 1979 (2) SA 1183 (RAD);

S v Mofokeng, 1970 (4) SA 670 (O);

S v Kwakoseb, 1973 (4) SA 179 (SWA);

S v Gombarume, 1975 (1) RLR 300 (GD); 1975 (3) SA 439 (R)

Judgment

Gubbay J: The accused was charged with smuggling eighteen wristwatches into Zimbabwe in contravention of section 165 of the Customs and Excise Act [*Chapter 177*]. She pleaded guilty and was convicted. Following upon verdict the prosecutor made application to the magistrate for the grant of summary judgment in favour of the Controller of Customs and Excise in the sum of \$65,40 representing the unpaid duty on the smuggled articles, and for an order declaring them to be forfeited to the State. The magistrate sentenced the accused to a fine of \$100 or, in default of payment, two months' imprisonment with labour

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and to two months' imprisonment with labour conditionally suspended for five years. In addition, he imposed a further two months' imprisonment with labour all of which he suspended on the following condition:

"... that the accused pays \$65,40 duty to the Controller of Customs and Excise via the Bulawayo Clerk of Court forthwith, such being an order for summary judgment in terms of the Act; any serving of imprisonment for failure to pay not derogating from the Controller's civil rights to the payment in full".

Finally he ordered the wristwatches to be forfeited to the State.

The only point of concern is whether it was competent for the magistrate to attach a penal sanction to the award of summary judgment. His reason for doing so was because he had been advised by a Customs officer that payment under such an award is rarely, if at all, tendered voluntarily and in the result the Controller is put to the inconvenience and delay of having to levy execution upon the property of the debtor in order to satisfy his judgment. In the opinion of the magistrate the Legislature could never have intended such a situation to obtain. He thus deemed it his duty to fulfil the intent of the lawmakers by resorting to the imposition of a conditional custodial punishment so as to induce the accused to expeditiously pay the duty she

owed the Controller. It is apparent that his *in terrorem* condition of suspension differs from that which may properly be made under section 337 (1) (b) of the Criminal Procedure and Evidence Act [Chapter 59] in that it does not give the accused the option of serving the suspended sentence as an alternative to payment.

However laudable the magistrate's motive was in throwing his full weight behind the Controller, I have no doubt he acted beyond his powers. Section 190 (1) (a) of the Customs and Excise Act, under which a court convicting an accused person of an offence under the Act is permitted to grant summary judgment, makes no provision for the imposition of a sentence of imprisonment to be brought into effect if payment is not made. The intention was simply to obviate the need for the Controller to institute a civil action for the recovery of the amount of unpaid duty on the goods, or the duty paid value thereof, when the issue of the lawfulness of the accused's conduct had been already decided at his trial. Moreover, it is specifically provided in section 190 (5) that such a judgment has the same force and effect and may be executed in the same manner as if it had been given in a civil action. Where it is given in the court of the regional magistrate a copy must be forwarded to the court of the provincial magistrate to be recorded and it thereafter has

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the effect of civil judgment in the court of that provincial magistrate. It is therefore to be regarded exactly as if pronounced by a civil court. See *S v De Wet*, 1979 RLR 147 (AD) at 153E - G

There is ample authority in support of the proposition that where a compensatory award in the form of a civil judgment is granted, the imposition of imprisonment in default of payment of the award is irregular. See for instance, *S v Mofokeng*, 1970 (4) SA 670 (O); *S v Kwakoseb*, 1973 (4) SA 179 (SWA); *S v Gombarume*, 1975 (1) RLR 300 (GD).

Accordingly the order relating to the grant of summary judgment cannot be allowed to stand in its present form. With the concurrence of my brother SQUIRES it is set aside and the following substituted:

"Summary judgment in the sum of \$65,40 is granted in favour of the Controller".

For the rest the proceedings are confirmed.

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S v PANDEHUNI 1982 (2) ZLR 133 (SC)

Court **Supreme Court, Harare**

Baron & Beck JJA

14th September, 1982

Flynote

Criminal procedure - Criminal Procedure and Evidence Act [Chapter 59] - sections 163 and 163A - unrepresented accused adhering to outline of his defence instead of giving detailed evidence - new matter emerging in cross - examination - when court justified in drawing adverse inference - necessity for court to observe procedures under section 163 (4a) (b).

Headnote

It is important for trial courts carefully to observe the provisions of section 163 (4a) (b) of the Criminal Procedure and Evidence Act [Chapter 59], which require them to explain to an unrepresented accused the provisions of section 163A (2) of the Act. If that safeguard is observed, the trial court has greater justification for drawing an inference adverse to the accused for his failure to mention in his outline an important averment that he makes later in evidence. Even then, however, the trial court must bear in mind that the accused who is required to give an *ex tempore* précis of the features of his defence may very easily fail so to marshal his thoughts as to include in the outline everything that should be included. The device of asking the accused, when he gives evidence, merely to adhere to that outline before cross-examination begins largely removes the opportunity for the accused to mention what he ought to mention and leads to assertions that are first made when under cross-examination being regarded with a scepticism that might be unjustified.

Prosecutors should therefore ensure that magistrates do not inadvertently omit to comply with the section and, wherever necessary, should draw to the attention of the trial court the need to do so and the need to record that it has been done.

M J Gillespie, for the appellant.

A R Chigovera, for the respondent.

Judgment

Beck JA: The appellant was convicted of assault with intent to do grievous bodily harm. Mr *Chigovera*, for the State, did not support the conviction, conceding that the prosecution failed to prove the

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required intention to do grievous bodily harm. He contended, however, that the evidence established that the appellant committed a common assault.

The State called two witnesses, the complainant and his uncle. For the defence, evidence was given by the appellant and by his brother. It was common cause that the trouble began when the appellant trod on the foot of the complainant's uncle. The appellant claimed that he at once apologized to the complainant's uncle for having accidentally trodden on his foot, but his apology was not accepted and an argument ensued in which the appellant's younger brother intervened. The appellant and his brother were met with belligerence and a fight started in which the complainant and some of his friends were ranged against the appellant and his brother. The appellant conceded that in the course of this affray he struck the complainant a hard karate-type blow to the base of the neck. This blow caused severe damage which has

unhappily resulted in a partial and perhaps permanent, paralysis of the complainant's right arm and leg.

The complainant and his uncle on the other hand claimed that there was no fight at all. The complainant's uncle said that when he asked the appellant why he had trodden on his foot he immediately received, instead of an apology, a blow and kick which rendered him unconscious. The complainant himself, however, made no mention of this, and said that an argument developed between his uncle and the appellant, and when he went to calm his uncle down the appellant hit him on the neck and severely injured him.

Mr *Gillespie*, for the appellant, did not argue that his client was justified in striking this blow on the grounds of self defence. He did, however, submit that the blow was the consequence of provocation and he suggested that the factor of provocation denuded the appellant's conduct of any unlawfulness, so that he should be acquitted. This last-mentioned contention was not strenuously advanced by Mr *Gillespie* and Mr *Chigovera's* answer to it was that provocation only operates to reduce an offence of which special intent is an element to an offence where no special intent is required, and can therefore never be a complete defence to a charge of assault; and he referred to *S v Zengeya*, 1978 R L.R 29, especially at page 32B - C

In convicting the appellant of the more serious offence with which he was charged, the magistrate rejected the appellant's version of what occurred and accepted that of the complainant. It is this aspect of his judgment which Mr *Chigovera* found himself unable to support. He

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conceded that the evidence of the complainant and of his uncle was improbable and contradictory, and he accepted that the appellant's guilt is properly to be determined on the basis that the appellant's account of how the offending blow came to be struck might reasonably be true. That concession, in our view, is amply justified in the light of the unsatisfactory evidence of the State witnesses; but there is, in addition, a feature of the magistrate's treatment of the appellant's evidence concerning which comment should be made.

The appellant was not legally represented. The record reflects, in only ten lines, the outline that he gave of the defence case at the outset of the trial. After the close of the State case the appellant elected to give sworn testimony, and the record of his evidence-in-chief reads:

"I adhere to what I said in outline. I have nothing to add." Cross-examination then commenced. No doubt he was prompted to offer the outline that he had given at the outset of the case as his evidence-in-chief, and it appears that this is a shortcut that is almost invariably used, especially when the accused is unrepresented.

The problem with this is that the accused's initial outline is no more than just that. It is merely an initial "outline" given in response to a similar "outline" of the State case, and it is not a comprehensive and detailed exposition such as would be expected in the course of evidence-in-chief given in the normal way after the testimony of the prosecution witnesses has been fully given and explored. Accordingly, the emergence for the first time during the

cross-examination of an accused of something important that is absent from his outline of defence ought to be less susceptible to criticism than it could otherwise be if he were to give comprehensive and detailed evidence-in-chief without making mention of it in the course of so doing. It is for that reason, of course, that section 163 (4a) (b) of the Criminal Procedure and Evidence Act [Chapter 59] requires the court to explain to an unrepresented accused the provisions of section 163A (2) of the Act. If that safeguard is carefully observed the trial court has greater justification for drawing an inference adverse to the accused for his failure to mention in his outline an important averment that he makes later in evidence. Even then, however, the trial court must always bear in mind that an unrepresented accused who is required to give an *ex tempore* précis of the features of his defence may very easily fail, despite the statutory warning, so to marshal his thoughts as to include in the outline everything that should be included. In many such instances it might well be that the omission would spontaneously be cured if the accused were to give comprehensive evidence-in-chief in the normal

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way; but, as I have said, the device of inviting him merely to adhere to his defence outline before cross-examination commences, even when he is asked if he wishes to add anything to that outline, largely removes that opportunity and leads to assertions that are first made when under cross-examination being regarded with a scepticism that might be unjustified.

The main reason that led the magistrate in the present case to reject the appellant's evidence was the appellant's failure to have said in his defence outline something that he said when under cross-examination, which, if true, would certainly have added materially to the provocation to which he was subjected. The record does not reveal whether or not the magistrate in fact observed the injunction contained in section 163 (4a) (b) of the Act. The omission to record compliance with that section will as a general rule operate to the disadvantage of the State, for this court will not assume, against an accused person, that it was done if the record is silent on the point, and if such an assumption in favour of the prosecution might prejudice the accused. Prosecutors should therefore ensure that magistrates do not inadvertently omit to comply with the section and, whenever necessary, should draw to the attention of the trial court the need to do so, and the need to record that it has been done.

We were satisfied at the conclusion of argument that Mr *Chigovera* had correctly conceded that the impetuous blow which the appellant struck was not proved to have been delivered with an intent to cause grievous bodily harm, despite its serious consequences for the complainant, and we were further satisfied that he was correct in contending that, on the appellant's own evidence, he was guilty of common assault. Accordingly we set aside the conviction and substituted for it a conviction of common assault, and we reduced the sentence of imprisonment that was imposed by the magistrate to a sentence of a fine of \$50 or, in default of payment, 25 days' imprisonment with labour, and intimated that our reasons for so doing would be furnished later. These are our reasons.

Baron JA: I agree.

S v RHOTAN (PVT) LTD 1982 (2) ZLR 137 (SC)

Court Supreme Court, Harare

Baron and Georges JJA

5th July and 17th September, 1982

Flynote

Criminal Law - Parks and Wild Life Act, No. 14 of 1975 - section 62 (1) (a) - purchasing trophy without being satisfied that seller authorised under Act to make sale - onus on accused to show that bona fide and on reasonable grounds he believed that seller had authority - appropriate sentence.

Headnote

The appellant company, a dealer in hides and skins, was convicted of contravening section 62 (1) (a) of the Parks and Wild Life Act, No. 14 of 1975, and fined \$1000, the present conviction being its second under the Act. One of its employees, a clerk responsible for buying skins, had been approached by a woman who had an expired permit from the Department of Parks and Wild Life which authorized the sale of three zebra, four kudu and one duiker skins. The clerk advised the woman to have the permit renewed, which she did. When she returned, she told him that she had been advised by the Department that she would be granted a trophy dealer's licence. On the strength of this, the clerk, over a period of three months, bought some 770 skins from the woman. She was, after these events, in fact granted a trophy dealer's licence.

It was argued, for the appellants, that while the section cast an *onus* on it to establish, on the balance of probabilities, that it was satisfied that the seller had the requisite authority under the Act, all that it had to do was show that it did so *bona fide*; it was not necessary to show that it had reasonable grounds for its belief.

Held, dismissing the appeal against conviction, that, unlike the cases which involve a claim of right, this offence simply involved the commission of a prohibited act, and there was nothing in the definition of the offence to exclude a requirement of reasonableness. The defence was one of mistake of fact; and before the defence could succeed the appellant had to show that its servant *bona fide* and on reasonable grounds believed that the woman had authority to sell all the skins in question (*R v Stainer*, 1956 R and N 199 (FSC); applied.)

Held, further, on the facts, that there were no reasonable grounds for the clerk to have believed that the woman had the necessary authority.

Held, further, that there was nothing to show that the appellant had deliberately refrained from ensuring that the law was being complied with; it was a case where the appellant's system was inadequate in several respects. Accordingly, the maximum fine was not justified and a fine of \$750 was substituted.

Cases cited:

R v Stainer, (supra); 1956 (3) SA 498 (FSC);

S v Zemura, 1974 (1) SA 584 (RAD); 1973 (2) RLR 357;

S v Banet, 1973 (4) SA 430 (RAD); 1973 (1) RLR 335;

S v Appleton, 1982 (2) ZLR 110;

S v Johnson, 1977 (4) SA 116 (RAD); 1977 (2) RLR 3;

S v Randen and Another, AD Judgment 165/80.

I.A. Donovan, for the appellant.

C.S. Grossman, for the respondent.

Judgment

Baron JA: The appellant, a company which *inter alia* deals in hides and skins, was convicted of contravening section 62 (1) (a) of the Parks and Wild Life Act, No. 14 of 1975 ("the Act"). The subject of the charge was 770 skins which were purchased by one Richard Jacob Matanda, who was employed as a game skin buying clerk by the appellant, from a Miss Madara, and the prosecution case was that the seller did not have authority to sell the skins in question to the appellant.

The circumstances in which the skins were purchased were these: the seller had come to him with a permit which authorised the sale of three zebra, four kudu and one duiker skins; the buying clerk, on examining the permit, saw that it had expired and told the seller to go to the Department of Parks and Wild Life and obtain a new permit. It appears that she went to the Department and had her permit renewed for a further period, and it was common cause that there was a stamp and signature on the permit supporting this renewal; it is equally common cause that the number and type of skins authorised to be sold was not altered. However the seller told the buying clerk that she had been informed by the Department of Wild Life that she would be granted a trophy dealer's licence in due course and that in the meantime she could use the licence which had been extended. On the strength of this statement the buying clerk, during the course of a period of three months, purchased the 770 skins in question; subsequently the seller was indeed granted a trophy dealer's licence.

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Section 62 (1) of the Act, so far as is relevant, reads:

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"62. (1) . . . no person shall purchase any live animal or trophy unless he is satisfied that -

(a) the seller has authority in terms of this Act authorising him to make the sale . . .".

Mr *Donovan*, on behalf of the appellant, accepted that this provision casts an *onus* on the appellant to establish its satisfaction on a balance of probabilities; he submitted, however, that the provision required the appellant to establish simply that its employee was *bona fide* satisfied that the seller had the requisite authority and that it was not necessary that he should be so satisfied upon reasonable grounds. He submitted further that in any event the evidence established that the buying clerk was *bona fide* satisfied upon reasonable grounds.

I cannot accept the first submission. In support of his proposition Mr *Donovan* submitted that the decision in *Stainer v R*, 1956 R & N 199 (FSC) is of limited assistance since it was concerned with a mistake of fact situation, and that in any event, as was said in *S v Zemura*, 1974 (1) SA 584 (RAD) at page 588D, the impact on the rule in *Stainer's* case (*supra*) of the decision in *S v Banet*, 1973 (4) SA 430 (RAD) has still to be considered. I have had occasion to consider this question in *S v Appleton* Supreme Court Judgment No. 120/82.*⁽³⁾ I drew attention to the fact that *Banet* (*supra*) had been disapproved by this Court in *S v Johnson*, 1977 (4) SA 116 (RAD) and again very recently in *S v Randen and Anor.*, Appellate Division Judgment No. 165/80. I pointed out at pages 9 and 10 of the cyclostyled judgment [†](4) that in claim of right cases the question of reasonableness is irrelevant (save to the extent that it is a consideration in the decision as to *bona fides*) because the absence of a *bona fide* claim of right, not a *bona fide and reasonable* claim of right, is by definition an ingredient of the offence, and that for the same reason, once the question of a *bona fide* claim of right has been sufficiently raised, the *onus* is on the prosecution to negative it; however, where the offence was simply the commission of a prohibited act there was nothing in the definition of the offence to exclude a requirement of reasonableness. In the present case the offence consists in purchasing a trophy without being satisfied that the seller has authority to sell it, and the defence is that the buying clerk *bona fide* thought that the seller had such authority. It seems to me that this defence is one of mistake of fact and I see no reason not to apply the rule in *Stainer's* case (*supra*),

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BARON JA

particularly since, as Mr *Donovan* accepts, the statute casts the *onus* on the accused to establish his satisfaction and in *Stainer's* case (*supra*) a similar *onus* was held to be cast on the accused as a matter of construction. I am satisfied that before the appellant can discharge the *onus* cast upon it by the section (and I am dealing here with the satisfaction of the buying clerk) it must show that the buying clerk *bona fide*, and on reasonable grounds, believed that the seller had authority to sell all these skins.

Turning then to the facts, it seems to me clear that the steps taken by the buying clerk to satisfy himself that the seller had authority were not reasonable. In the first instance he sent the seller away to obtain a current license; but when she returned with the same licence simply extended he cannot possibly have imagined that that license covered the vast quantity of skins which he purchased from her on the various occasions thereafter. He purchased the skins because he accepted the seller's word that she had been informed by the Department that she would be

granted a trophy dealer's license. It seems to me that, on his own evidence, he must have known that the seller was not, at the time of the first purchase, authorised to sell any skins save those listed on the extended permit; it is not sufficient, and cannot be said to be reasonable, to purchase skins from a person who *will be* authorised to sell them - the section says "*has* authority in terms of this Act." And in respect of the subsequent purchases the buying clerk equally cannot have been satisfied on reasonable grounds that the seller had authority; he appears to have made no enquiries as to whether the expected trophy dealer's licence had in fact been granted, but simply proceeded on the basis that such licence would in due course be granted. In my view the appeal against conviction must be dismissed.

The magistrate imposed a fine of \$1 000 on the company, which is the maximum for a second or subsequent conviction. It appears that the company had been convicted on two previous occasions for offences under the Act, but both of them were merely failures to renew licences and furthermore one of them was not an offence which ranks as a previous conviction for the present purpose. Mr *Donovan* submits that in all circumstances of the present case the imposition of the maximum sentence for a second offence was manifestly excessive.

He submits also that the magistrate was wrong in finding, as she did, that the appellant had deliberately refrained from ensuring that the law relating to the purchase of skins was being complied with.

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BARON JA

I think Mr *Donovan* is right in this second submission. While I am satisfied that the system employed by the company to ensure that the law was being complied with was inadequate - a point to which I will return in a moment - I do not think that the evidence supports the conclusion that this inadequate system was deliberately employed. In this regard the magistrate misdirected herself and this Court is consequently at large in respect of sentence. Having said that, however, I cannot but regard this offence as very serious. Legislation of this kind imposes a heavy duty on the persons concerned and in particular on their employers; it is consequently the duty of the employer not only to employ an adequate system to ensure compliance with the law but to ensure also that the employees in question are adequately supervised. It seems to me that in both these areas the appellant was seriously at fault. As the magistrate very correctly pointed out, the appellant's major concern appears to have been to ensure that the money paid to the sellers of skins, which was paid by a senior employee on requisition by the buying clerk, was the correct amount of money; it would have been a matter of the utmost simplicity for that same senior employee to have ensured at the same time that the authority produced by the seller in fact covered the skins being sold. The system employed by the appellant did not make provision for this very simple and very important step - and particularly important as the evidence established that the buying clerk had been employed only in February and had not previously done this particular kind of work. In addition I consider that the actual supervision of the buying clerk, even within the context of the system employed, was inadequate; bearing in mind the number of skins which the senior employee was paying for over the period in question it seems to me that he should have taken steps to satisfy himself of the seller's authority.

In all these circumstances I am of the view that, although I would not regard this case as so

serious as to justify the maximum sentence on a second conviction, I regard it as sufficiently serious for a heavy fine. I would set aside the fine imposed by the magistrate and substitute therefore a fine of \$750.

Georges JA: I agree.

Gill, Godlonton and Gerrans, appellant's legal representatives.

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SADOMBA v FARAI UZUMBA (PVT) LTD 1982 (2) ZLR 142 (HC)

Court High Court, Harare

Squires J

6th August and 22nd September, 1982

Flynote

Practice and procedure - prescription - Prescription Act, No 31 of 1975 - section 18 (2) (a) - service of summons - effect of - interrupts extinctive prescription if claim is prosecuted to a successful conclusion - "successful" - meaning of - summons issued in October, 1978 and not acted on until December 1981 - whether and when a summons becomes stale - no rule of law Court's discretion - factors to consider.

Headnote

In August, 1976 the plaintiff was involved in a collision between his vehicle and a bus owned and operated by the defendant company. In October, 1978 he issued a summons claiming damages, but did nothing further in pursuit of his claim until December, 1981, when he applied for judgment by default against the defendant. One possible reason for the delay was that he also brought an action against the defendant's insurer but the insurer successfully pleaded that the claim against it had been prescribed, in terms of the Road Traffic Act, by virtue of it having been brought more than two years after the accident.

The application in December 1981 was, in effect, refused, but the then Judge President advised the plaintiff to serve a fresh summons. This he did on the 25th January, 1982; and on the 26th February the defendant finally entered an appearance to defend.

The defendant pleaded prescription to the claim so resuscitated. He did so on two bases. The first was that by operation of section 18 (2) (a) of the Prescription Act, No. 31 of 1975, the running of extinctive prescription from the date of the accident was not interrupted by the service of the first summons in October 1978. The alternative argument was that the summons had, by virtue of the passage of time, become stale and had lapsed.

Held, that there is a clear difference between a right that is enforceable by action at law and the process of enforcing it. The Prescription Act is concerned with the existence or non-existence of rights or claims, not with question of procedural law. Extinctive prescription relates only to the rendering unenforceable of rights by the lapse of time and not to any question of the

subsequent procedures of enforcement. It is interrupted - provisionally - by

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the service of any process which claims payment of the debt, the proviso being that the claim must be successfully prosecuted (*Chauke v President Insurance Co. Ltd*, 1978 (2) SA 947 (W) disapproved; *Titus v Union and SWA Insurance Co. Ltd., v Ltd.*, 1980 (2) SA 701 (Tk.) and *Union and SWA Insurance Co. Ltd. v Hoosein*, 1982 (2) SA 481 (W.), followed).

Held, further, that the word "successfully" imports that an identifiable stage must have been reached in the proceedings at which one could say whether the claim is successful or not. It did not mean "timeously" or "expeditiously," or "with all possible vigour". It is only when it can be said that the claim had not been successfully prosecuted that the provisionally suspended prescription starts to operate again. On the facts, it was not possible, in this case, to say that the claim was unsuccessful.

Held, further, that there was no rule of court under which a summons could be said to become "stale". There was a discretion in the court to dismiss an unreasonably delayed claim; but such factors as -

- (a) the "invitation" by the Judge President to issue a fresh summons;
- (b) the likelihood that the plaintiff was awaiting the outcome of the claim against the defendant's insurer

meant that it would be unjust to non-suit the plaintiff.

Cases cited:

Chauke v President Insurance Co. Ltd, (*supra*);

Kuhn v Kerbel and Another, 1957 (3) SA 525 (AD);

Evins v Shield Insurance Co. Ltd. 1979 (3) SA 1136 (W);

Titus v Union and SWA Insurance Co. Ltd, (*supra*);

Sieberhagen v Grunow, 1957 (3) SA 485 (C);

Union and SWA Insurance Co. Ltd. v Hoosein, (*supra*);

Matthews v Central Mining and Investment Corporation Ltd, 1956 (1) SA 731 W);

Caldwell v Prinsloo, 1932 TPD 5;

Schoeman en Andere v van Tonder, 1979 (1) SA 301 (O).

Special plea in Bar.

M. Gillespie, for the plaintiff.

A. de Bourbon, for the defendant.

Judgment

Squires J: The plaintiff in this case was involved in a collision with a bus owned and operated by the defendant, and he suffered both injuries to himself and damage to his own motor vehicle. This happened on 8th August, 1976. On 5th October, 1978, the plaintiff issued summons

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claiming damages against both the defendant and its insurer under the then Roads and Road Traffic Act [*Chapter 263*], and on the next day, 6th October, 1978, this was served on the prospective defendants. So far as the present defendant is concerned nothing further was done until 18th December, 1981, when the plaintiff made application to this Court for judgment by default against it. For reasons which are not clear - but probably due to the fact that the Court did not sit over the Christmas period - this application was made by way of the Chamber Book, on 28th December, 1981. On 4th January, 1982, this application was refused by the then Judge President who, after pointing out that a claim for damages required oral evidence, observed in addition that:

"... the question arises as to whether or not the summons is superannuated. It was issued and served more than 3 years ago, which is in excess of the period of prescription that would apply to this claim, and to proceed to judgment without requiring re-service of the summons would be unreasonable."

Thereafter, on 25th January, 1982, the summons was served a second time on the defendant, followed by notice on 12th February that application would be made on 3rd March for default judgment against it. On 23rd February a declaration was issued, and on 26th February the defendant eventually entered appearance to defend.

This suddenly increased tempo of progress was punctuated by the Insurer, who had been the second defendant throughout this period, filing a special plea to the effect that the plaintiff's claim against it had become prescribed after the lapse of 2 years from the date of the accident in terms of the operative provisions of the Roads and Road Traffic legislation. The special plea was upheld by WADDINGTON, J, in judgment HC-S-101-82, and save to the extent remarked hereafter, nothing more turns on that claim. Perhaps waiting for that to be disposed of, and no doubt interested in the outcome, the present defendant also filed a special plea in bar on 20th April. All this is common cause.

As part of the agreed facts on which the matter was argued, it is also not disputed that between October 1978 and 25th January, 1982 there was no contact whatever between the plaintiff and the present defendant, either directly or through their legal representatives. And although limited correspondence passed between plaintiff's legal advisers and the insurer's advisers after the accident, nothing of these exchanges was known to the present defendant.

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To the claim now resuscitated the defendant pleads prescription. It does so on two bases. First, it says that although the plaintiff served a summons on it on 6th October, 1978, he did nothing further to prosecute his claim, and by operation of section 18 (2) (a) of the Prescription Act, No 31 of 1975, the running of extinctive prescription from 8th August, 1976, was not interrupted by the service of the summons on 6th October, 1978. Since this particular claim for damages is one of those that falls into the omnibus provision of section 14 (d) of the Act, it becomes prescribed after the lapse of 3 years from the date when the claim arose, and it therefore became prescribed on 8th August, 1979. Since the new Act now extinguishes unclaimed debts after the expiry of the prescriptive period - see section 13 (1) - as opposed to merely making them unenforceable, the defendant asks for judgment to be entered for it.

Alternatively, the defendant says that in view of the passage of time since the summons was first issued and served, it has become stale and lapsed: and while there is no fixed period of time in the Rules of Court that provides for the lapsing of a summons, the period here involved is sufficiently long for the Court to hold that this summons has become superannuated. Because of this fact, aggravated by the lack of any explanation from the plaintiff as to the reasons therefor, it would not be fair or just to allow the plaintiff to continue this action, and the claim should be dismissed for that reason too.

The first point taken by the defendant raises the interesting though difficult question as to the intention and effect of section 18 (2) (a) of the Prescription Act, 1975. The difficulty arises not only from the lack of any previous decisions from our own courts on this relatively new Prescription Act, but from the fact that Courts in South Africa that have considered the equivalent section in the South African Prescription Act have divided equally on the effect of the provision - there being two decisions one way, and two the other.

In support of his argument on the first part of his case, Mr *de Bourbon*, for the defendant, relied strongly on the decision in *Chauke v President Insurance Co. Ltd.*, 1978 (2) SA 947 (W). In that case the plaintiff had issued a summons on 11th April, 1972, in respect of a claim for damages which had arisen on 12th December, 1970. On 7th February, 1975, the plaintiff had required the defendant to enter appearance to defend. The defendant did so, intending to raise a special plea of prescription. The plaintiff's claim was one that, by section 11 (d) of the South African Prescription Act - which is in the same terms as section 14 (d) of our Act - became prescribed on the expiry of 3 years. THERON, J, whose

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single decision it was, considered that although under the previous legislation in South Africa it was the situation that once action was instituted prescription was interrupted and the continuance of the case was governed by the appropriate Rules of Court, the proviso to section 15 (2) - which corresponds to our section 18 (2) (a) and (b) - fundamentally altered the position, and rendered decisions such as *Kuhn v Kerbel and Another*, 1975 (3) SA 525 (AD) irrelevant. He held that as the plaintiff had not prosecuted his claim under the Rules of Court within the 3

years it had expired, and his action was dismissed.

That decision was followed and applied, albeit as an alternative basis and without any discussion of its merits, by KING, J, in *Evins v Shield Insurance Co. Ltd.*, 1979 (3) SA 1136 (W). The decision in *Evin's* case was upheld on appeal - 1980 (2) SA 814 (AD) - but for reasons related to the principal grounds of decision by KING, J, in the Court below. In giving the minority's reason for also dismissing *Evin's* appeal, TROLLIP, JA, said, however, that he expressed no view on the correctness of *Chauke's* case.

On the other hand, *Chauke's* case was disapproved in terms which verge on the robust by MUNNIK, CJ (as he then was), in the Transkei Supreme Court in *Titus v Union and SWA Insurance Co. Ltd.*, 1980 (2) SA 701 (Tk). The learned CHIEF JUSTICE points out that the judgment in *Chauke's* case pays no regard whatever to the presence and use of the word "successfully" in the provisions of section 15 (2) - that is to say, that the interruption of prescription caused by the issue of a summons claiming payment lapses only if the creditor does not "successfully" prosecute his claim to final judgment. Such an interpretation, that is the one by THERON, J, would again expose a plaintiff to the unsatisfactory situation described by HERBSTSTEIN, J, in *Sieberhagen v Grunow*, 1957 (3) SA 485 (C), namely that once he had commenced an action within the appropriate prescription period for his claim, a plaintiff might be unable to finish it for reasons entirely beyond his control, such as delays by his opponent, congestion in the Court rolls, or even judicial irresolution. The effect of section 15 (2), said the CHIEF JUSTICE, was that only if a plaintiff creditor failed in his claim or having obtained a judgment he abandoned it or it was set aside did the interruption of prescription lapse, and the running of extinctive prescription was deemed not to have been interrupted.

This view of the effect of section 15 (2) was approved and followed by GOLDSTONE, J, in *Union and SWA Insurance Co. Ltd. v Hoosein*, 1982 (2) SA 481 (W). Also sitting as a single judge, and notwithstanding

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that *Chauke's* case was decided in the same Division of the Supreme Court, he was satisfied that it was plainly wrong and that he was therefore not bound by it.

In such uncertain legal waters and knowing the difficulty of correctly picking a passage through the shoals and shallows, one must necessarily move with trepidation, diffidence and reserve. But it seems to me on giving the matter the best consideration of which I am capable that *Chauke's* case was indeed wrongly decided, and that I should not follow it.

I reach that conclusion by the following process.

Under the old South African Prescription Act of 1943 it seems that the clear difference in Roman Dutch law between a right that is enforceable by action at law, and the process of enforcing it by legal proceedings, was still recognized and preserved as part of the operative common law. The Act in no way impinged on or altered that difference, since it was only concerned with prescription. The enforcement of a legal right by proceedings at law, on the other hand, is what the old Roman Dutch writers called "an instance"; and a right enforceable by action became an

instance only if, and once, it was in the process of being enforced. Furthermore, the Roman-Dutch Law, unlike the Roman Law, did not provide for a time limit within which proceedings at law had to be concluded.

These distinctions had important consequences, because as stated above, the Prescription Act 1943 did not purport to deal with instances, but only with the rights that were enforceable by legal proceedings; and the extinctive prescription regulated by the Act did not refer to or encompass instances in its ambit. It only prevented a right enforceable at law from becoming an instance if the creditor took too long a time to proceed to enforce it - see *Kuhn v Kerbel and Anor*, *supra*.

Since the Act dealt only with extinctive prescription and not with the procedural means of enforcing a right, the bringing of legal proceedings and timeous prosecution of an action fell to be determined by the appropriate Rules of Court once the extinctive prescription had been interrupted by the issue of the Court's process to recover the debt claimed. It was the Rules of Court which thereafter provided periods within which a plaintiff had to take the necessary steps to bring his claim to adjudication and which provided sanctions for non-compliance.

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Such difficulty as there was relating to the interruption of extinctive prescription was caused by the provisions of section 6 to the effect that prescription began to run *de novo* from the date when interruption occurred, namely by the issue of process to enforce the right. This had led the court in *Matthews v Central Mining and Investment Corporation Ltd.*, 1956 (1) SA 731 (W) to hold that after interruption of prescription the consequential suit also had to be concluded within the appropriate period of prescription, which of course means that the debt is prescribing while proceedings are in progress. This interpretation was disapproved and not followed in *Sieberhagen v Grunow*, (*supra*) and firmly overruled as incorrect in *Kuhn v Kerbel and Anor*, (*supra*). It also seems to be in some contradiction of the judgment in *Caldwell v Prinsloo*, 1932 TPD 5, where at page 10, a full bench of the Transvaal Provincial Division had said:

"... once action is instituted timeously, i.e. before the prescribed period is exhausted, the action may thereafter be continued to its conclusion and the operation of prescription is then suspended irrespective of whether during the course of the trial the period of prescription becomes exhausted";

although, of course, *Caldwell's* case was decided on the old Transvaal Act, No. 26 of 1908, in which this wording was clearer.

With such a dichotomy between the existence of a claim and its subsequent enforcement being clearly emphasized and established, does Act 68 of 1969 in any way alter that? An examination of its provisions leads one to the conclusion that it does not. Like its predecessor the Act is concerned with the existence or non-existence of rights or claims, and not with questions of procedural law. It embraces only the requirements for the acquisition of ownership by prescription, the acquisition and extinction of servitudes, and the extinctive prescription of debts.

In the field regulatory of the instant problem the provisions of section 15 of the South African Act

provide that the running of extinctive prescription is interrupted by the service of any process which claims payment of the debt. But since that could merely prolong uncertainty if the matter was not carried to a definitive conclusion - as by the intermittent issue of summonses - the interruption thus established is really made provisional only. And if the creditor claimant of the right does not proceed to the stage of final judgment in prosecuting it, that interruption ceases and is regarded as not having taken place. If that final judgment is successful then *caedit quaestio*, because the claim or right is then novated as a judgment of the court. If it is not prosecuted to a successful

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conclusion, but the claimant has not had a final judgment given against him - as where, for example, the Court orders absolution from the instance against him - then he has not prosecuted the claim successfully and the interruption of prescription lapses. If this lapsing of the provisional suspension of prescription occurs before the relevant prescriptive period of that particular claim has expired, then there would appear to be nothing to prevent the creditor starting proceedings afresh. On the other hand if he is unsuccessful without the claim being *res judicata*, the interruption of prescription that resulted from the service of process lapses and the period spent in litigation up to then is added to any period already run before summons was issued. If together they equal or exceed the period within which a claim of that kind must be brought, then it would appear that the claim is extinguished. If, however, he obtains judgment, then unless he abandons it or it is set aside by a higher court, it is from that day that any new period of prescription begins to run.

The learned judge in *Chauke's* case appears to have reasoned that because section 15 (2) introduced a new provision, the requirement previously re-iterated by *Kuhn v Kerbel and Anor*, (*supra*), namely that once action was instituted its continuance was governed by the Rules of Court, no longer applied.

With respect, it is difficult to see how that can be so. In the first place so to hold seems to result in exactly the same manifestly untenable situation that resulted from the decision in *Matthews v Central Mining and Investment Corp.*, (*supra*). If prescription is held to run while an action is proceeding then for all the reasons referred to by HERBSTEIN, J, in *Sieberhagen v Grunow*, (*supra*), this can work a severe injustice on the claimant; and is not a result that one would think the Legislature intended in the absence of express wording or inescapable implication to that end. And in the second place, as MUNNIK, CJ, pointed out, the reasoning takes no account of the word "successfully" in the prosecution of his claim to final judgment by the claimant creditor. That word surely imports that a stage must have been reached in the proceedings at which one can say whether it is successful or not. It must either have been withdrawn, or dismissed for want of prosecution, or some other similarly identifiable stage attained at which point it can be said that the claim has not turned out well, or in the words of the section has not been successful. Equally clearly the word "successfully" does not mean "timeously" or "expeditiously". The phrase means that in prosecuting his claim the claimant creditor has established or vindicated it, not that he has not pursued it with all the vigour he might have used. And it is only once it can be said that he has not successfully prosecuted it that the

provisionally

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suspended prescription starts to operate again. The claim by *Chauke* never reached a stage - prior to the special plea - at which it could be said that *Chauke* had not successfully prosecuted it. The interruption of prescription resulting from the service of his summons therefore still operated, and it should not have been held that the claim had become prescribed.

Applying that reasoning to our own Prescription Act of 1975, since it is clearly taken from the South African Act and most of its provisions are in identical terms or words, the result, so far as concerns this aspect of the special plea, must be the same. Although this country did not have any legislation similar to the South African Prescription Act of 1943, having managed somehow with the old Cape Act, No. 6 of 1861, from the time of its founding to 1975, there can be no doubt, on the common law that applied in the absence of statutory provision, that extinctive prescription related only to the rendering unenforceable of rights by the lapse of time, and not to any question of the subsequent procedures of enforcement. "Instances", as identified in *Kuhn's* case, were something else: and as in South Africa their progress and prosecution would have been regulated by the appropriate Rules of Court.

The passing of Act 31 of 1975 would not, as in South Africa, have interfered with this aspect of the law and suddenly imported the unavoidable obstacles set out in *Sieberhagen's* case as a means of hence forward non-suiting even a diligent plaintiff.

Applied to the present case, the plaintiff here served process commencing the action to recover his claim on 6th October, 1978. By reason of section 18 (1) of the Act, this interrupted the extinctive prescription which had begun to run on 8th August, 1976. It is true that nothing seems to have been done after October 1978 until 18th December, 1981; but the Rules of Court provided ample remedies for the defendant to ensure that the plaintiff prosecuted his claim or had it dismissed. And while it is possible to say that the mere service of a summons does not entirely dispel the uncertainty that could surround the alleged existence of a claim by a creditor in a claim for damages, in this case and by not taking any steps that it could have taken under the Rules of Court - such as requiring the plaintiff to file a declaration under threat of bar if he failed - the defendant has in some measure been prepared to acquiesce in the uncertainty.

In the result it seems to me that the plaintiff having served and re-served a summons, issued and served a declaration and the defendant having entered appearance, I cannot say that the plaintiff has not

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SQUIRES J

successfully prosecuted his claim under the process of Court. In other words the claim is still pending and unresolved and has not reached the stage where it can be said to be successful or not. For these reasons the interruption of prescription achieved by service of the summons on

6th October, 1978 has not yet lapsed, and the special plea cannot succeed on that basis.

As already indicated, however, the defendant relied on an alternative ground that the summons here had become stale; and that such a long time had elapsed since its service that the Court, in the exercise of its discretion, should dismiss the plaintiff's claim for want of prosecution, particularly in the absence of any good reason for the delay.

Now it is true that there have been cases, a number of which were referred to in argument, where a court has refused to grant judgment where there has been an unreasonably long delay in seeking to obtain judgment on a summons, because it has regarded the summons as stale. But there is no rule of Court or practice or even of the common law which provides that a summons becomes stale or lapses or otherwise becomes invalid if the plaintiff who issues it does not seek judgment on it within a particular period of time.

Mr de Bourbon relied on the decision of BRINK, J, in *Schoeman en Andere v van Tonder*, 1979 (1) SA 301 (O) as reflecting the proper approach to a problem of this kind. As I understand that judgment, the learned judge dealt with an argument to the effect that because there were rules of Court which enabled a defendant to bring a suit against him to finality, the court had no discretion to rule that a defended action unreasonably delayed by a plaintiff could not continue. After referring to authority which described the basis and objects of the Court's discretion in that type of situation - namely as a duty to see that justice was done - the learned judge declined to accept such a fettering of the Court's discretion, and he held that although it might only be very sparingly exercised there undoubtedly was a discretion to dismiss an unreasonably delayed claim even where it was defended. It really only emphasizes what both counsel in the present case agreed, and that is that the exercise of the Court's discretion requires a value judgment considering the justice of the matter in all the circumstances that bear upon it.

Unlike the magistrate's Court, there is no rule of Court or even rule of practice in the High Court which lays down a period which must elapse before a summons is regarded as being stale. Even then it appears to be in the Court's discretion to allow proceedings on a stale summons to continue. Delay for longer than the period in which the particular claim

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sued for would have become prescribed can be called unreasonable and, in such a situation, courts have refused to grant judgment but have given the plaintiff leave to issue a fresh summons.

Had this special plea been taken prior to the application for judgment in December 1981, there may have been more room and a better basis for upholding it, but I rather think that the situation has changed against the defendant. While the Judge President did not, in terms, give the plaintiff leave to re-serve the summons, the order he made on the application for default judgment could well be construed as at least a suggestion, if not a directive, that the plaintiff do so, and thereafter proceed with this claim. In the event the summons was served again, followed by a declaration and the entry of appearance to defend. The claim has at last become activated and shows clear signs of the plaintiff genuinely wanting to proceed. In its present

state it is quite the antithesis of a plaintiff who does not really intend to prosecute the matter. Even if the learned Judge President had not impliedly invited the plaintiff to reserve the summons and proceed afresh, I think the present facts would have persuaded me to permit the plaintiff to continue, despite the fact that the action had been in apparent abeyance for over 3 years since the summons was served.

But in case I am wrong in that conclusion there is another fact which should legitimately have a bearing on the decision and that is the probable reason for the delay, because the circumstances that have caused or contributed to the lack of prosecution of proceedings are always relevant and influential in deciding whether or not to grant an indulgence; cf. *Schoeman's case (supra)*. In the present case, and although the insurer as second defendant was successful in its special plea, this was only decided on 7th April this year. Until then it must have been a possibility, in the plaintiff's eyes at any rate, that the insurer might be liable to him respect of his loss. And I think there is substance in Mr *Gillespie's* argument that the lack of proceedings against the first defendant can be explained by the nourishing of the hope that these would be superfluous if the insurer accepted liability, or was likely to be found liable for, the plaintiff's damages - or even made an over to settle.

If that is so, and I think it a probable and likely explanation, it would be unjust to now non-suit the plaintiff simply because he did not proceed with this action in the hope that relief from another source would have avoided the present proceedings. While it is not the way a fully diligent or conscientious litigant would approach matters, it cannot really be called culpable nor really indifference to the outcome of proceedings

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SQUIRES J

In my view, on balance, the justice of the case will best be served by allowing the plaintiff to continue his action. If it turns out that he has no case he will suffer the consequences in an award of costs against him. If he has a case then I think the broader considerations of justice that I have attempted to describe require that he be allowed to pursue this matter.

In the end result, therefore, the special plea must be dismissed with costs.

Plaintiff's legal practitioners: *Sawyer and Mkushi*.

Defendant's legal practitioners: *Gill, Godlonton and Gerrans*.

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COMMERCIAL GRAIN PRODUCERS ASSOCIATION v TOBACCO SALES LTD 1982 (2) ZLR 154 (SC)

Court Supreme Court, Harare

Baron, Georges and Beck JJA

4th August and 29th September, 1982

Flynote

Contract - option to purchase - not essential to pay monetary consideration for option itself - if paid can form part of whole of subsequent purchase price - company law - articles of association - clause resting right of shareholder to transfer shares - such restrictions must be made in clear language - companies Act [Chapter 190] - section 186 (c) transfer of shares void after winding up commences unless court orders otherwise - grounds on which court's discretion to be exercised.

Headnote

It is not essential, for an option agreement to be valid, for a monetary consideration to be agreed upon. Where such monetary consideration is agreed upon, there is no reason why the parties should not agree that, in the event of the option being exercised, the sum agreed upon as consideration for the option should form part or the whole of the subsequent purchase price, provided that that price was a genuine one.

A clause in the articles of association of a company which purports to restrict the right of a shareholder to transfer his shares to whomever he chooses should be strictly construed. A share, being personal property, is *prima facie* transferable, although the conditions of the transfer are to be found in the articles. If the right of transfer inherent in such property is to be restricted, this should be done by language of sufficient clarity to make it apparent that that was the intention.

In terms of section 186 (c) of the Companies Act [Chapter 190], where there is a winding up by the court, every transfer of shares (among other transactions) made after the commencement of the winding up is void unless the court otherwise orders. The principles on which the court exercises its discretion in such cases are the broad areas of what is just and fair in the circumstances of each case, having special regard to the question of the good faith and honest intention of the persons concerned. Considerations of fairness include considerations of adverse effects on the company's creditors; but there is no need for a further requirement that the desired relief must also positively operate to the benefit of the company. Where parties have agreed to the

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BECK JA

sale of shares and there was no reason why the company should not be authorized by the court to recognize and give effect to the contract, and since the contract is not, as between the parties, void because of the section, it would be illogical and wrong to deprive the agreed transfer of completeness by refusing to authorize registration of it by the company in fulfilment of what the parties contemplated and intended.

Decision of Squires, J, in *Tobacco Sales Ltd v Agricultural Investments (Pvt.) Ltd.*, 1982 (1) ZLR 180 upheld.

Cases cited:

Greenhalgh v Mallard [1943] 2 All ER 234 (C.A.);

Greenacre and Others v Falkirk Iron Co. Ltd. and others, 1953 (4) SA 289 (N)

Re Clifton Place Garage Ltd [1970] 1 All ER 353 (C.A.);

In re Onward Building Society [1891] LR 2 QB 463;

In re Overend, Gurney & Co. (Ward and Garrets case) (1867) LR Equity 189.

A. N B *Masterson*, for the appellant.

I. A *Donovan*, for the respondent.

Judgment

Beck JA: The appellant (Commercial Grain Producers Association) and the respondent (Tobacco Sales Limited), together with the Commercial Cotton Growers Association and the Cotton Agricultural Buying Co-op Limited (in liquidation), are shareholders in Agriculture Investments (Private) Limited. Between them they own all the issued shares (which are also fully paid up) in this company, which was placed under compulsory liquidation on the 10th December, 1980.

In motion proceedings before SQUIRES, J, the respondent alleged that it had purchased all the appellant's shares in Agriculture Investments (Private) Limited but had not yet obtained transfer of these shares before the 10th December, 1980, when the liquidation order was made. In terms of section 186 (c) of the Companies Act [*Chapter 190*] the respondent sought the authority of the court for the shares in question to be transferred to it.

Only the appellant opposed the relief sought. It did so unsuccessfully, and now appeals against the judgment of the Court *a quo* on various grounds, with which I shall deal in the order in which they were advanced by Mr *Masterson*.

The respondent's case was that it purchased the appellant's shares by means of exercising an option that the appellant granted to it, and it is Mr *Masterson's* first submission that the option agreement relied on by the respondent was unenforceable.

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BECK JA

The facts are that in October 1979, the appellant wrote to the respondent and offered to sell its shares in Agriculture Investments (Private) Limited to the respondent for \$2 094. For reasons of policy that are stated in the papers, the respondent did not wish to purchase the shares immediately, although it did wish to acquire them in due course. Instead of accepting the appellant's offer forthwith, therefore, the respondent verbally sought and obtained from the appellant an option to purchase the shares. Mr *Masterson* accepts that the terms of that verbal agreement are faithfully reflected in a letter that the respondent's Executive Director wrote to the appellant's Chairman on the 22nd November, 1979. That letter reads:

"Further to my telephone conversation, I can confirm that Tobacco Sales Limited has taken an option on your

entire share-holding for Agriculture Investments (Pvt.) Limited for a consideration of \$2 094. This option consideration will cover the total purchase price of your shares in the event of our deciding to exercise our option. The option will remain open in our favour for an indefinite period.

I have pleasure, therefore, in enclosing a cheque for \$2 094, being our option money in full."

The appellant accepted the cheque on these terms.

It is Mr *Masterson's* submission that this agreement was unenforceable because, so he contends, the price of \$2 094 was the consideration for the option only and could not also be the purchase price in the event of the option being exercised. He reasoned that the agreement therefore purported to give the respondent the right to buy the shares for no price at all, whereas it is an essential element of the contract of sale that there must be a definite and genuine purchase price.

In our law it is not, of course, essential to the validity of an option agreement for a monetary consideration to be agreed upon for the option itself; but where such a monetary consideration is agreed upon there is no reason why the parties should not be free to agree that, in the event of the option being exercised, the sum agreed upon as consideration for the option should go towards, or even constitute the whole of, the purchase price, subject to satisfying the requirement that the purchase price must be a genuine one. Such agreements, which benefit both parties, are not unusual. I agree with the learned judge *a quo* that effect should be given to the clear intention of the parties, which was to protect the option giver against loss if the option were not exercised, while gaining for the option holder the time that he required without risk that the opportunity for purchasing would be lost to him.

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BECK JA

The initial designation of the payment of \$2 094 as the "option consideration" is therefore no obstacle to that same payment serving to "cover the total purchase price of your shares in the event of our deciding to exercise the option", as recorded in the above-mentioned letter of the 22nd November, 1979, which reflected the agreement that the parties made, and Mr *Masterson's* first submission must fail.

His next submission was that the respondent had failed to establish that it ever exercised its option to buy the appellant's shares before Agriculture Investments (Private) Limited was placed in liquidation on the 10th December, 1980. In support of this contention he laid stress on passages in letters that are annexed to the affidavits which reveal confusion as to when the option was exercised. He emphasised in particular the phraseology of a letter dated the 2nd April, 1981 - more than three months after the date of liquidation - written by the respondents' Secretary, one Rautenbach, to the Liquidator of Agriculture Investments, in which Rautenbach having referred the Liquidator to the option held by the respondent, wrote that the respondent "now wished to exercise this option and would be grateful if you can action this on our behalf."

Despite that letter, and despite the confusion regarding the exercise of the option that is to be found in correspondence that was written between April and August 1980, I am not persuaded that the Court *a quo* erred in concluding that the option was in fact exercised before liquidation

intervened. A minute of a meeting of the Board of Directors of Agriculture Investments (Private) Limited, held on the 6th October, 1980, reflects that the same Mr Rautenbach (who was the Chairman of the Board of Agriculture Investments as well as the Secretary of the respondent) reported to the meeting that -

"... he, together with the Financial Controller of Tobacco Sales, had met with Mr Bond on this issue [viz. the matter of the purchase of the appellant's shares by the respondent] and had advised that Tobacco Sales had taken up the option to purchase the Grain shares in the sum of \$2 094."

The minute goes on to record that -

"It was established that the offer had been taken up, but the shares had not as yet been transferred."

Mr Bond, who was the Secretary of Agriculture Investments, and a Mr Whitaker, who was also a member of the appellant's Board, were both present at this meeting. Neither then, nor since, have they, or anyone else with personal knowledge of the events of that time, disputed the truth of what Mr Rautenbach said or the accuracy of what the minute recorded.

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BECK JA

The matter is really put beyond doubt by two letters that were written on behalf of the respondent by Mr Rautenbach on the 31st October, 1980. To the Chief Executive Director of the appellant he wrote:

"Can you please instruct the Secretary of Agriculture Investments (Private) Limited to transfer your portion of the Agvest shares to Tobacco Sales Limited with effect from 1st November 1980. All that will be required is a signed Transfer Deed with the Transferor and the Transferee's names on it plus the Share Certificate forwarded to the Secretary of Agriculture Investments (Private) Limited."

And to the Secretary of Agriculture Investments he wrote:

"I have instructed the [Commercial Grain Producers Association] to forward to you a signed Transfer Deed plus the Share Certificate of the [Commercial Grain Producers Association] portion of Agvest shares for transfer to Tobacco Sales Limited with effect from 1st November, 1980."

In the face of the unchallenged minute of the 6th October, 1980, and of these requests for transfer of the shares with effect from the 1st November 1980, it is difficult to know why Rautenbach expressed himself as he did when he wrote to the Liquidator in April 1981. It may be that the fact that a liquidator was then in control of Agriculture Investments led him to think that it was necessary to exercise the option afresh; or he may have intended no more than that it was registration of transfer of the shares that was now required, as is perhaps suggested by his concluding phrase "and would be grateful if you can action this on our behalf". Whatever his thought processes may have been, there is no sufficient warrant for holding, as Mr *Masterson* suggested we should hold, that the minute of the 6th October, 1980, and the letters of the 31st October, 1980, stemmed from a mistaken belief on Rautenbach's part that the option had been exercised, when it had not. In my view the learned judge *a quo* was correct in holding that the option was exercised before liquidation ensued.

It should perhaps be mentioned at this stage that a contention which was unsuccessfully advanced in the Court below, namely that the option agreement was void for vagueness

because the option was granted for an indefinite period, was not pursued before us.

Mr *Masterson's* third submission is concerned with the meaning and effect of Clause 8 of the Articles of Association of Agriculture Investments (Private) Limited, which imposes certain restrictions on the right of a shareholder to transfer any of his shares.

The arrangement and context of the whole of Clause 8 is relevant to this submission, but I do not propose to burden this judgment with a

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repetition of the entire clause. It is, however, necessary to set out the first two of the eight sub-paragraphs that go to make up Clause 8. They read as follows:

- "8.(a) No shares shall be transferred to any person who is not a member of the Company so long as any member (hereinafter called 'the purchasing member') is willing to purchase the shares at the fair value.
- (b) Any shareholder proposing to transfer any shares (hereinafter called the proposing Transferor') shall give notice in writing (hereinafter called 'the transfer notice') to the Directors of the Company that he desires to transfer the same. Such notice shall constitute the Directors his agent for the sale and transfer of the shares specified therein to the other members of the Company in proportion to their shareholding:

PROVIDED ALWAYS that any shares not taken shall be offered to the remaining members in proportion to their share-holding, and PROVIDED FURTHER that no shares shall be transferred to a person who is not a member so long as any member is willing to purchase the shares.

The transfer notice may include several shares and in such case it shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable, except with the sanction of the Directors. "

It is Mr *Masterson's* submission that sub-paragraph (b) of Clause 8 applies to a proposed transfer of shares to a member of the company no less than it does to a proposed transfer of shares to one who is not a member. He urges that the absence in sub-paragraph (b) of any qualification expressly limiting the application of that subparagraph to proposed transfers to non-members, and the repetition, in the second proviso to sub-paragraph (b), of a prohibition that is already set out in subparagraph (a), leads to that conclusion. He also lays stress upon those portions of Clause 8 - one of which is to be found in the first proviso to sub-paragraph (b) - which serve to minimise the chance of any major alterations in the respective proportions of the remaining members' shareholdings, and he rhetorically asks why such provisions should apply only in the event of a proposed transfer of shares to a non-member.

The learned judge *a quo* pointed out that this submission involves -

" . . . the improbability of the craftsman setting out in the first paragraph a general prohibition on transfer of shares to non-members if any members were willing to buy at the fair value, and then introducing in the next paragraph another prohibition on transferring any share whether to member or non-member alike, except by offering them to the others . . .".

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BECK JA

I agree with that observation. The submission not only postulates an improbable approach on the part of the craftsman, but it also makes the restriction in sub-paragraph (a) on transfers to non-members meaningless if the whole of sub-paragraph (b) is to be understood as applying to all transfers, whether to member or to non-members.

When Clause 8 is read as a whole, as it must be, I think there is really no doubt that sub-paragraph (b) and each of the other sub-paragraphs that follow it, are all pursuant to and consequential upon the restriction contained in the opening sub-paragraph (a). Their only purpose is to furnish a procedure that is calculated to give practical effect to the limited restriction that is contained in sub-paragraph (a), without intending to enlarge the scope of that restriction.

I do not consider that this construction of Clause 8 renders tautologous the second proviso in sub-paragraph (b). That proviso, following as it does upon the proviso that immediately precedes it which requires any left-over shares that are not taken up by members on the first offer to be re-offered to members, is designed to make it clear that the restriction against transfer to non-members contained in the opening sub-paragraph (a) is not to end when members have reacted to the first offer, so as to cease to be operative as regards shares not taken up by members at that stage, but is to endure for the whole of the time that is afforded to members by the machinery of Clause 8 to take up all the shares that the proposing transferor intends to alienate.

Nor do I consider that the matter is taken any further by those provisions of Clause 8 which accord to remaining members the opportunity to acquire the shares of a proposing transferor to an extent which is proportionate to the ratio of their existing share-holdings. The mere circumstance that the underlying reason for such provisions could apply as well to a proposed transfer of shares to a member as to a non-member cannot properly be used to extend, by implication, a restriction upon ordinary rights of ownership beyond that which is clearly imposed by the language of the Article in question. It must be emphasised that -

"... in the case of the restriction of transfer of shares I think it is right for the court to remember that a share, being personal property, is *prima facie* transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention."

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BECK JA

(Per LORD GREENE, M R, in *Greenhalgh v Mallard* [1943] 2 All ER 234 at page 237 B-C).

In *Greenhalgh v Mallard*. (*supra*), and in the South African case of *Greenacre and Others v Falkirk Iron Company Limited and Others*, 1953 (4) SA 289 (N.), the relevant portion of the Articles of Association bore a very close similarity to Clause 8 of the Articles in the instant case. In conformity with the approach outlined by LORD GREENE, arguments similar to that which Mr *Masterson* addressed to us were rejected by the English Court of Appeal in the first-mentioned of these cases, and by HOLMES, J (as he then was), in the second. I am

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satisfied that the argument falls to be rejected in the instant case as well, for similar reasons.

Finally, it was contended that the order authorizing the registration of the transfer of the appellant's shares to the respondent was a wrong exercise of the power granted to the Court by section 186 (c) of the Companies Act, which provides that -

"186. In a winding up by the court -

- (a) . . .
- (b) . . .
- (c) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void."

In the case of *Re Clifton Place Garage Ltd.* [1970] 1 All ER 353, HARMAN, L J, speaking of the similarly worded section of the English Companies Act, 1948, said at page 356 d-f:

"That is an extremely jejune direction to the court, and it is not surprising that the cases do not seem to give very much help. The only one I can get any assistance from at all for this purpose is *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21. That was a considered judgment of VAISEY, J, who admitted that he was not given any great guidance and must do the best he could. The headnote states:

'HELD: the legislature, having omitted to indicate any particular principles which should govern the exercise of the discretion vested in the court by section 227, must be deemed to have left such exercise entirely at large and controlled only by those general principles which applies to every kind of judicial discretion; in exercising its discretion the court must decide what would be just and fair in the circumstances of each case, having special regard to the question of the good faith and honest intention of the persons concerned; and, as the applicant had acted throughout in good faith, his object being merely to enable the company to fulfil its contracts, the court would make the order asked for.' "

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BECK JA

Both the abovementioned cases were concerned with dispositions of company property, and not with transfers of share or alterations in the status of members, but I can conceive of no reason why the approach of the court to the exercise of its discretion should vary in principle according to the nature of the transaction for which approval is sought.

In the instant case the facts are such that the transaction under consideration can have no adverse effect on the asset structure of the company and can in no way prejudice any of the company's creditors. It was submitted by Mr *Masterson*, however, that this is not enough, and that the power granted by the section should only be exercised when the Court is satisfied that to do so would operate to the positive benefit of the company. That seems to me to put much too narrow a construction on the provision. Where there is no lack of good faith, and where considerations of fairness (which include considerations of any adverse effects on the company's creditors) support the relief sought, I see no reason why it should be a further and separate requirement that the desired relief must in addition positively operate to the benefit of the company.

Mr *Masterson* has pointed out that withholding the order sought would not have left the

respondent remediless as against the appellant. In the case of *In re Onward Building Society* [1891] LR 2 QB 463, LORD Esher, MR, said at page 475:

"Therefore it appears to me that the true construction of the section is that a transfer made between parties after the winding-up order is void, so far as regards any effect to be given to it by or against the company, unless the Court otherwise orders. The result is that the Court may make an order that such a transfer shall not be void. I say that it is 'void so far as regards any effect to be given to it by or against the company' on account of the case of *Rudge v Bowman* LR 3 QB 689: because I take that case to have really decided that, as between the parties to such a transfer and as regards the liability of one of them to the other, the transfer is not affected by the Act. If the parties choose to make such a contract, it may be good between themselves, though, if either of them desires that any effect should be given to it by the company, the Act does apply."

In my view, however, this is not, *per se*, a circumstance that militates against granting the relief that the respondent sought. Indeed, if anything, it would seem to assist the respondent's case. If there is no other reason why the company should not be authorised by the Court to recognize and give effect to the contract made by the parties, and since that contract is not, as between the parties to it, void because of the section, it would seem illogical and wrong to deprive the agreed transfer

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BECK JA

of completeness by refusing to authorize registration of it by the company in fulfilment of what the parties contemplated and intended. The decision in *In re Overend, Gurney, and Co. (Ward and Garfit's Case)* (1867) LR Equity 189 supports this view. In that case Garfit sold shares to Ward, the transfer of which had not been registered before a petition for the winding up of the company was presented to the Court. At Page 195 MALINS, VC, said:

"... it is clear, on every principle, that Mr *Ward* must accept these shares. He has paid his money; Mr *Garfit* has done all that was required of him; and if, instead of falling, the value of these shares had increased, it would have been for the benefit of Mr *Ward*. He is bound, therefore, on every principle, to carry out his contract; and if I refused to place his name on the list, I should be handing the parties over to a Chancery suit, Mr *Garfit* having a right to file a bill against Mr *Ward* to indemnify him against the calls."

The learned judge *a quo* correctly appreciated the nature of the discretion conferred by the section, and gave careful consideration to what fairness and justice required. His judgment on this aspect of the matter is in these terms:

"What would be just and fair in this case, then?"

I am impressed by the fact that the applicant [now the respondent] first wanted, and tried, to acquire these shares well before the event of liquidation; and on my finding exercised its option to do so before winding up was applied to the first respondent. It had exhibited a faith in the long-term viability of the first respondent and thought its value and prospects were worth an effort to save. It tried with conspicuous persistence to avoid the liquidation of the company and proposed alternative schemes to keep it going. But these came to nought and someone else eventually placed the first respondent in liquidation. Its continuing desire to obtain these shares that no-one else wanted may therefore properly be regarded as an indication of its belief in their value and in the eventual success of the first respondent. On the other hand, the second respondent [now the appellant] was obviously only too glad to offer its shares for purchase to the applicant, and the situation that would thus follow was at least acquiesced in, if not actually approved, by the other shareholders. That is the result they thought had occurred or would occur and no-one objected or made any protest. But for the omission, whether fortuitous or not, to transfer the shares in October or November of 1980 when requested to do so, the anticipated transfer would have taken place before

liquidation and there would not have been any need for the present proceedings.

In these circumstances, I would have thought it patently unfair on the applicant to now keep it out those shares, and unduly and even capriciously considerate to the second respondent to allow it to keep them or distribute them amongst all shareholders. Moreover, there is the important

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BECK JA

requirement of public policy that *pacta servanda sunt*. The second respondent made a bargain and ought to be kept to it, especially when considerations of fairness are the criterion.

In short, it seems eminently fair and just to me if the order sought were to be granted."

Mr *Masterson* has left no stone unturned in an endeavour to persuade us that the learned judge took too benevolent a view of the respondent's conduct. I do not propose to go into the detail of his submissions with regard to the facts of the matter. Since these were all presented in the form of affidavits, this Court is in as good a position as was the judge below with regard to questions of fact and to the inferences to be drawn therefrom. It is sufficient to say that in my view the learned judge in no way misdirected himself, and that Mr *Masterson* has not succeeded in showing that the exercise by the learned judge of his judicial discretion is susceptible to attack.

Accordingly, I would dismiss the appeal with costs.

Baron JA: I agree.

Georges JA: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives.

Winterton, Holmes & Hill, respondent's legal representatives.

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ATTORNEY-GENERAL v CHAGWIZA
ATTORNEY-GENERAL v MATAMBO
ATTORNEY-GENERAL v MUKONDO 1982 (2) ZLR 165 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Baron JA and Georges JA

22nd and 29th September, 1982

Flynote

Criminal procedure - appeals by the Attorney-General against inadequate sentences - where right should be exercised - approach of appeal court - before sentence is interfered with, must be found to be manifestly inadequate - necessity for Attorney-General to act speedily - Dangerous Drugs Act [Chapter 319] - cultivation and possession of dagga - factors affecting appropriate sentence - suspended sentence - breach of

conditions of suspension - principles applicable to exercise of courts' discretion in bringing suspended sentence into effect.

Headnote

In these three appeals, which were heard on the same day, the Attorney-General appealed against what he considered to be inadequate sentences passed in the magistrates courts, seeking, not an increase in the sentences, but a declaration in terms of section 11 (4) (b) of the Supreme Court of Zimbabwe Act, No. 28 of 1981, as to what sentence should have been passed.

The Attorney-General's right to appeal against sentence is an unusual one, not existing in England or South Africa. There also exists the review procedure, which helps ensure some degree of consistency with regard to sentence. The right of appeal should, therefore, be used with circumspection, and there are three main situations where it is appropriate -

- (1) where a magistrate has adopted an entirely erroneous view of the law;
- (2) where a sentence is so inadequate as not to do justice to the community as a whole; and
- (3) where, because of special circumstances, such as the prevalence of a particular type of offence, a higher scale of penalties is called for than that being applied.

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It should also be borne in mind that the appeal court's approach will be, substantially, that before a sentence will be increased it must be found to be manifestly inadequate. The court will be more reluctant to increase a sentence than to reduce one, particularly if a prison sentence has already been served. If the Attorney-General wishes to ensure that a particular convicted person should serve a longer sentence of imprisonment than that imposed by the magistrate, he must act quickly and take the matter up as a matter of urgency.

In charges of cultivation and possession of dagga in contravention of the Dangerous Drugs Act [Chapter 319], sentence should not be determined by any sort of tariff based on the quantity of dagga. The quantity is relevant but some new magistrates and prosecutors are unaware of the significance of the quantity. In appropriate cases, the prosecution should lead evidence to show, for example, that the quantity was more than one individual could possibly use or that the offence is prevalent in the particular area.

In deciding whether to bring into operation a suspended sentence, the court should not only look at the seriousness of the later offence, but should take the circumstances of both offences together. Viewing these, it should decide whether, in all the circumstances, it is appropriate to bring the suspended sentence into effect (*S v Jussab*, 1970 (1) RLR 181; 1970 (3) SA 727 (R.A.D.), followed).

Cases cited:

Attorney-General v van Aardt, 1975 (1) R L.R 89; 1975 (2) SA 372 (R.A.D.);

Attorney-General v Tobiwa and Others, 1980 Z L.R 192;

S v Zvondai, G-S-84-80 (not reported);

S v Zhou, G-B-89-79 (not reported);

Attorney-General v Ngivazi, AD Judgment 156/80 (not reported);

S v Mangenga, G-S-53-81 (not reported);

S v Maruza and Others, G-S-249-80 (not reported);

R v Shaba, 1964 RLR 162;

S v Vink, 1964 (2) SA 788 (G.W.)

S v Mutize, 1978 RLR 148;

S v Jussab (*supra*).

H. A Eleftheriades, for the appellants.

No appearance for the respondents.

Judgment

Fieldsend CJ: We heard these three separate appeals on the same day. The only feature common to each of them is that each appeal was an appeal by the Attorney-General against the allegedly inadequate sentence imposed in the court below. In each case he seeks merely a declaration in terms of section 11 (4) (b) of the Supreme Court of Zimbabwe Act, No. 28 of 1981, as to what sentence should have been passed. Any such declaration would therefore not affect the respondents in any way.

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Despite the diversity of the cases this seemed an appropriate opportunity to deal with the principles governing such appeals. We therefore heard argument in each case and reserved judgment.

General Principles

The right of the Attorney-General to seek an increase in sentence has its origin in section 54 of the Law and Order (Maintenance) Act, 53 of 1960. This introduced a new section into the Magistrates Court Act entitling the Attorney-General to bring on review a case where he considered a sentence inadequate. It gave the High Court power to substitute the sentence it thought the lower court should have imposed. This was amended by Act 33 of 1973 to allow an appeal instead of a review. The present section, introduced by Act 29 of 1981, also allows an appeal based upon a challenge of the magistrate's findings of fact in regard to sentence, thus

reversing *Attorney-General v van Aardt*, 1975 (1) RLR 89, 1975 (2) SA 372 (R., A D.). Section 11 (4) (b) of the Supreme Court Act 1981 now in addition allows the court to declare what the sentence should have been without altering the sentence passed at the trial.

The right of the Attorney-General to appeal against the inadequacy of the sentence is an unusual one. It does not exist either in South Africa or in England and there have been few cases in this country. There is therefore very little guidance to be found as to the principles to be followed when the Attorney-General invokes his right.

It is important not to lose sight of the fact most cases of any moment come automatically before the High Court on review, even if in some instances only after scrutiny by a Regional Magistrate: sections 63 and 63A of the Magistrates Court Act, It is true that the Court on review cannot increase a sentence but the procedure does provide an opportunity in appropriate cases to point out errors to magistrates and in this way to ensure some degree of consistency in the approach to sentencing. However, consistency in approach must not be confused with uniformity of sentences, which is both impracticable and undesirable; the trial court's discretion cannot be replaced by a schedule or a computer.

For these reasons the Attorney-General's right to appeal against inadequate sentences should be used with circumspection. There are perhaps three main situations in which this right to appeal is appropriate -

- (1) Where a magistrate has adopted an entirely erroneous view of the law in imposing a particular sentence which needs to be corrected;

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- (2) Where a sentence is so inadequate as not to do justice to the community as a whole; and
- (3) Where because of special circumstances, such as the prevalence of a particular type of offence, a higher scale of penalties is called for than that being applied.

He will also have to bear in mind that, just as in appeals by convicted persons against sentence, the appeal court will not interfere merely because it would itself have imposed a different sentence. The approach is substantially the equivalent of that applied in appeals against the severity of sentence: before a sentence will be increased it must be found to be manifestly inadequate: *Attorney-General v Tobiwa and Ors*, 1980 ZLR 192. It is well recognised that sentence is primarily a matter for a trial court which has had an opportunity of seeing precisely the type of person with whom it is dealing - a very important factor in assessing sentence. An appeal court will be even more reluctant to increase a sentence than to reduce one because of the hardship to the convicted person who may have reconciled himself to his initial punishment. And this reluctance becomes greater if the sentence has already been served and an increased sentence would result in a person who had been released being recalled to serve further imprisonment.

But it must not be thought that this last consideration is necessarily overcome by the making of a declaration as to what the sentence should have been. Such declarations should be reserved

for those cases where an important principle is involved, or the scale of sentences for a particular type of offence is regarded as inadequate.

It follows from what I have said that if the Attorney-General wishes to ensure that a particular convicted person should serve a longer period of imprisonment than that imposed by the magistrate, he must act quickly. It is in most cases no good waiting until the case comes on review and a reviewing judge comments on the inadequacy of a sentence. Prosecutors who are dissatisfied with a sentence should immediately inform the Attorney-General of the facts, the sentence and the reasons for dissatisfaction. The Attorney-General can then take the matter up as a matter of urgency with the Registrar of the Supreme Court and with the clerk of the magistrate's court. This will ensure that the necessary papers are prepared with the utmost speed.

The present procedure laid down in Part IV (sections 15 to 20) of the Appellate Division (Magistrates Court) (Criminal Appeals) Rules 1979 (S.I. 504/1979) is somewhat cumbersome. Consideration will have to be given shortening the procedure, perhaps by omitting the stage of giving

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notice to a convicted person before determining the application. Practice has shown that this stage serves no useful purpose, and if it becomes known that leave will be granted only in obvious cases applications are unlikely to be made which can be successfully opposed at that stage.

The Attorney-General v Chagwiza

The respondent was convicted on 13th March, 1982 on one count of cultivating 14 dagga plants and one count of possessing 30 grams of dagga, in contravention of section 6 (1) and 9 (b) respectively of the Dangerous Drugs Act [Chapter 319]. The magistrate treated the two counts as one for sentence and imposed a fine of \$150 or 150 days' imprisonment and six months' imprisonment suspended for three years on appropriate conditions. The Attorney-General appeals, contending that a proper sentence would have been 12 months' imprisonment with six suspended on appropriate conditions.

The respondent was a first offender of about 47 years of age, and married with seven children. He was employed by the District Development Fund at a wage of \$50 a month. He admitted to the use of dagga and the magistrate seems to have thought that the number of plants indicated that he was dealing in it and sentenced him on that basis.

On this basis the magistrate's sentence was certainly on the low side. Once it is accepted that a person is dealing in dagga in any quantity an effective sentence of imprisonment is usually called for. The cases quoted by the Attorney-General (*S v Zvondai*, G-S-84-80, *S v Zhou*, G-B-89-79 and *Attorney-General v Ngivazi*, Appellate Division Judgment No. 156/80) support this conclusion and there are many others. But there must be set against these such cases as *S v Mangenga*, G-S-53-81, and *S v. Maruza and Ors*, G-S-249-80, where fines and suspended sentences were imposed on review. Sentences must always be considered in the light of the

particular circumstances of the offender and of its likely effect upon him. Considerations of general deterrents to others should normally take second place to these circumstances: *R v Shaba*, 1964 RLR 162; *S v Vink*, 1964 (2) SA 788 (G.W.).

Mrs. *Eleftheriades*, who appeared for the Attorney-General, explained the difficulties where different magistrates imposed different sentences for similar offences, especially when judges on review refused to certify some sentences as being in accordance with substantial justice because they were too low. It is obviously desirable that in general sentences for similar offences should at least be based on the same principles. But so far as sentences for dagga offences are concerned, the relevant principles have

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been authoritatively laid down in *S v Mutize*, 1978 RLR 148 with admirable clarity. That case finally exploded the idea that there should be a tariff for this type of offence based upon the quantity of dagga or the number of plants cultivated. The main problem arises in the application of these principles. This is exacerbated by the fact that many new magistrates and prosecutors are not aware of the significance of the quantities of dagga possessed or of what a plant will produce. These are important facts because whether the facile statement, so frequently made by an accused, that he possessed or grew dagga for his personal use can be believed depends on the likelihood of his being able to use that quantity in a reasonable period. In appropriate cases the prosecution will have to consider putting such information before the courts in the most convenient form together with evidence of the prevalence of the offence in any particular area if this is to be relied upon.

In this case there was no such evidence on either aspect and in its absence I can see no good reason for interfering with the magistrate's discretion.

The magistrate appreciated the seriousness of the offence - that is reflected in the suspended sentence of imprisonment of six months - but he also took into account the respondent's personal circumstances. He considered that the respondent should be kept in his employment, poorly paid though it was. I cannot say that he has misdirected himself nor can I say that the sentence was manifestly too low although, as I have said, it was certainly on the low side. I am not prepared to say that he should have imposed a different sentence.

I have one further comment. The respondent was sentenced on 13th March, 1982 and leave to appeal was granted only on 24th June, the delay presumably being due to the difficulty of tracing the respondent to serve the papers on him. Even then it took three weeks to prepare a record of only a few pages. This case illustrates the undesirability of waiting until the case is reviewed and also the delay caused by the need to save an application for leave to appeal.

The appeal against sentence is dismissed.

The Attorney-General v Matambo

The respondent pleaded guilty to the theft of a shifting spanner valued at \$38 from the back of a truck in the Monomatapa car park at about 9.30 p.m. He was sentenced to imprisonment for

three months.

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The respondent has a bad criminal record, starting in 1967 with an offence of criminal injuria. In January 1978 he was sentenced to twelve months' imprisonment for housebreaking and theft; in June 1979 he was sentenced to eighteen months, of which nine months were suspended, for loitering with intent; in February 1980 he was sentenced to nine months for housebreaking and theft and his suspended sentence brought into operation; and in July 1980 (presumably having benefitted from the Amnesty) he was sentenced to 24 months of which nine were suspended for housebreaking and theft.

The Attorney-General's main complaint is that the suspended sentence imposed in July 1980 was not brought into effect. Certainly, despite the respondents record, I would not have said that three months' imprisonment for the offence of which he was convicted was manifestly too little in itself.

The principles applicable to the exercise of a court's discretion in bringing into effect a suspended sentence are set out in *S v Jussab*, 1970 (1) RLR 181 at 183-4; 1970 (3) SA 727 (RAD) at 729 in the following way:

"A question also arises here as to the extent to which the appeal Court should look at the offence breaking the condition of suspension rather than the original offence for which the sentence of suspension was imposed. In the case of *S v Stephen Morgan Mupatsi* (Judgment No. AD 59/70) Lewis, A.J.P., stated:

'It is clear that one of the main reasons for the amendment of this section of the Act was to deal with this very situation - to avoid the necessity of bringing into effect a suspended sentence of a substantial period of imprisonment where the subsequent offence constituting the breach of the condition is of a comparatively trivial nature (see the case of *R v George*, 1968 (3) SA 113 (R) and, particularly, the concluding paragraph of the judgment at page 119).'

I do not, however, read that statement by the learned ACTING JUDGE PRESIDENT as laying down that it is only the second offence which must be looked to - in other words, laying down that the second offence must be taken *in vacuo* in coming to a decision as to whether or not the suspended sentence should be brought into operation. There are many cases when the gravamen of the matter is the wilful defiance of the law, and this does not necessarily turn on the seriousness of the second offence. I would suggest that a proper approach in these matters is to take the circumstances of the first offence together with the circumstances of the second offence and, viewing these together, decide whether, in all the circumstances, a sense of shock is induced if the accused is set in gaol."

On neither score do I think that the bringing into effect of the suspended sentence in the present case would offend against any sense of justice. The respondent's whole history shows a deliberate disregard of punishment

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imposed on him and in particular of any suspended sentence. Nor was the offence of which he was convicted a trivial or unpremeditated one. It is most likely that he was in the car park on the

look-out for pickings and was not the victim of sudden temptation. He must have had to look into the truck to find the spanner that he took.

Presumably because of the delay from the date of his conviction on 14th May, 1982 to the date of hearing of this appeal, the Attorney-General is not seeking an effective increase in the respondent's sentence, but only a declaration that it would have been proper to bring into effect the suspended sentence.

Had the appeal been heard whilst the respondent was still in custody I would have had little hesitation in bringing the nine months into effect. As it is, I am content to say that the magistrate should have so ordered.

The magistrate's error lies in the last paragraph of her reasons for sentence. She said:

"I have done so [not brought into effect the suspended sentence] only because I think it would be out of proportion for you to serve more than 9 months' imprisonment with labour for this particular offence . . .".

If the nine months had been brought into effect this would not have been for the offence for which the respondent was before the court; it would have been for the much more serious offence of housebreaking and theft to which it related. If the magistrate had thought that the combined effect of that and the imprisonment for the present offence would have been too great she could have made the periods run concurrently. In saying this I do not necessarily mean that a total of twelve months' imprisonment in the circumstances would have been out of the way.

The Attorney-General v Mukondo

This is in an appeal by the Attorney-General against the sentence of twelve months of which eight were suspended imposed on the respondent by a Provincial Magistrate on conviction for culpable homicide. The respondent pleaded guilty and the case proceeded on the basis of the prosecution outline and the respondent's warned and cautioned statement. The respondent and one or two others were drinking beer in his kitchen hut at about 8 p.m. on the evening in question. A report was made to him that there was a naked man in the bedroom of his house

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who refused to identify himself and who had scattered the respondent's possessions about in the bedroom. The respondent said in his warned and cautioned statement:

"I went to the bedroom accompanied by Peter Toendepi. I passed through the dining room and picked up my walking stick and went towards the bedroom. I then asked the man to identify himself and he asked me why he should do that. I then started hitting him with my walking stick and I dragged him outside and continued hitting him. My walking stick broke and I went to fetch the whip and then started using the whip on him. The whip slid out of my hand and I looked for it but could not find it. I then hacked a branch from the guava tree at our place and started hitting him with the branch.

My cousin Thomas who was in the kitchen then came out and advised me to stop hitting the man for I could possibly injure him. I then stopped hitting him and went back to the bedroom to check if anything had been stolen. I found nothing missing and then went back to the kitchen and started drinking beer with others. We went to sleep

but nobody bothered to go and find out whether the man had gone."

The post mortem report on the deceased showed that he had suffered very serious injuries, including multiple bruising to the chest, abdomen, arms, legs and back. Internally there was severe bruising to the small bowel and to the left chest wall, together with bruising to the spleen. The stomach of the deceased, who was a man of about 62 years of age, was apparently full of beer.

Clearly on the face of the evidence this was a very serious offence. Indeed we were told at the hearing that the Attorney-General had intended the case to be tried by a Regional Magistrate but that, due to an administrative error, this was not done.

[His Lordship dealt with the facts, and continued:]

It is clear in the present appeal that the respondent assaulted the intruder primarily because he thought he was a thief. Even when he eventually said that he thought the intruder might be a wizard he coupled this only as a secondary reason to his being a thief in order to explain his assault.

The magistrate clearly misdirected himself in attaching any significant weight to the respondent's statement that he thought the intruder was a wizard. In the result the sentence he imposed was manifestly inadequate and a derisory sentence, both from the point of view of the public and of the relatives of the deceased. The respondent's conduct called for an effective period of imprisonment of at least three years, even allowing for the fact that he had been drinking. Indeed, having regard to the fact that the magistrate found that the respondent intended to injure the

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deceased severely and was quite reckless about his welfare and life he was lucky not to have been indicted for murder. I should perhaps point out that as a Provincial Magistrate the magistrate's jurisdiction as to punishment was limited to two years' imprisonment but, of course, he could always have referred the matter to the Attorney-General.

If the respondent had still been in custody when this appeal was heard I would have been inclined to increase the sentence so that he would serve the additional period of imprisonment. The case falls within the second category of those situations I have referred to where it is appropriate for the Attorney-General to appeal. The sentence was not adequate to do justice to the community as a whole or to those affected by the killing. But the respondent was convicted on the 21st January and will long since have been released from prison. He might in fact have been released by about the day the record was requested for the Supreme Court, 18th April, 1982. Even then there was a further delay until 16th July, before the record was received by the Registrar. In those circumstances it would be unjust and an excessive punishment to recall the respondent to prison. The Attorney-General recognizes this and that is why he is asking only for an order under section 11 (4) (b) of the Supreme Court Act.

Baron JA: I agree.

Georges JA: I agree.

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S v MLILO 1982 (2) ZLR 175 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Georges JA and Beck JA

29th September, 1982

Flynote

Criminal procedure - appeal - finding of fact in favour of appellant by trial court - whether and when appeal court can upset such finding - Supreme Court Act, No. 28 of 1981 - section 11 (3).

Headnote

In terms of section 11 (3) of the Supreme Court Act, No. 28 of 1981, the Supreme Court is enjoined to dismiss an appeal despite an erroneous finding of fact in favour of the appellant by the trial court "if it is satisfied that the evidence which has to be considered has not been substantially affected by the misdirection and that the conviction is justified having regard to the evidence". While the subsection may allow the Supreme Court to upset a magistrate's finding of fact in favour of an appellant, in appropriate circumstances, the court would be very reluctant, unless there were very compelling reasons, to do so.

Cases referred to:

R v Owen, 1942 AD 389;

S v Strydom and Others, 1980 ZLR 364; 1981 (1) SA 236 (ZA).

The appellant in person.

H.A. Eleftheriades, for the respondent.

Judgment

Fieldsend CJ: The appellant and co-accused were tried together on a charge of robbery. Each was convicted but only the appellant has appealed. His case throughout has been that it was not he but his brother, Sam, who was the second person involved in the offence with the co-accused.

The direct evidence of the appellant's involvement was that of the complainant who was employed as a storekeeper of the shop that was robbed. She gave evidence of the robbery in May 1981 when she had ample opportunity of observing the two persons who robbed her.

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The two alleged robbers were picked up by the Police in July 1981. The appellant's co-accused was co-operative and took the Police to various properties which he admitted having robbed. On 3rd July, 1981 the two accused were taken by Police Landrover to the store in question on the indications at least of the co-accused. From there they were taken to the complainant's house. There they were in the back of the Landrover together with four policemen in plain clothes.

Presumably because of the attitude of the co-accused, PO Dube, who was in charge of the investigation, did not anticipate that any serious issue of identity would arise. He did not therefore make any attempt to hold a proper identification parade. Instead he brought the complainant to the back of the Landrover "and asked [her] to then indicate the two people that robbed her". He said that "she had no hesitation at all, she just stood up, went and pointed out this one and this one".

This evidence in itself would not have been very satisfactory evidence of identification: it took place some six weeks after the offence; the circumstances indicated that the complainant would have thought that the robbers would be in the vehicle, and the only other persons in the vehicle were Police Officers of whom no description was given. But PO Dube's account does not tally with that of the complainant. Her evidence was that when she was first brought to the vehicle and asked if she recognised the people who had robbed her she said she did not. She says she was then asked to take a good look at them and only then identified the two. This deprives the identification of most of its weight. It is not evidence upon which reliance can safely be placed without corroboration. So far as the co-accused was concerned, there was corroboration in a warned and cautioned statement properly found to be admissible in which he admitted participation. This makes the identification of the appellant himself even more doubtful, for the complainant says that the two of them were sitting together. It being a proved fact that she correctly identified the co-accused, there would be the greatest inclination to associate the two people sitting together and to include the appellant as the other participant.

For all these reasons it was quite unsafe to rely alone on the identification of the appellant. But in any event the magistrate misdirected himself in saying that the complainant immediately picked out the appellant and the co-accused. This is not in accord with the complainant's evidence I have referred to above.

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At the trial the prosecution relied upon a confession by the appellant made on 10th July, 1981. There was produced a handwritten confession in the vernacular said to have been written by, the appellant. The translation of this was typed on a formal charge sheet said to have been signed by the appellant. This bears the word "Bigboy" (the appellant's first name) in capital letters. These documents were put before a magistrate in confirmation proceedings. There the appellant admitted having made a statement but said that he did so under duress, details of which he gave. The statement was therefore not confirmed.

At the trial the appellant denied having made the statement at all. Indeed he denied having been taken before Inspector Wilde and Sergeant Moyo, who gave evidence of the taking of the statement, and he even denied knowing them. He further said that he could not write as he had only gone as far as sub. B at school. The magistrate gave the accused a piece of paper (Exhibit 7) on which to write his name. This he did with difficulty in simple printing which bore no resemblance to the rounded and educated cursive script in which the warned and cautioned statement was written.

The magistrate said of the accused's statement:

"When one compares that writing [*Exhibit 7*], and I am not expert, with the exhibit that has been produced in the confirmation proceedings, I am quite satisfied you never wrote as alleged, the handwritten copy. So, I am not going to admit that statement, I disregard it."

Nevertheless the magistrate convicted the appellant on the evidence of identification.

Mrs. *Eleftheriades* argued that the magistrate had rejected the appellant's statement on grounds that were quite unreasonable and that this Court on appeal was entitled to reject his findings and find that there was corroboration of the identification in the appellant's admissions. On this basis she submitted that the appeal should be dismissed.

This argument raises an interesting question. Can the appeal court upset a magistrate's finding of fact which is in favour of an appellant, and uphold a conviction which, on the basis of that favourable finding of fact, would be unsound? The facts of this case illustrate the problem very clearly. We are quite satisfied that on the evidence of identification alone the magistrate should not have convicted. If the appellant's statement to the Police is to be excluded from consideration there is no other evidence to confirm the evidence of identification. But if we can find, contrary to the magistrate's conclusion, that the evidence establishes that the appellant made his statement to the Police there is clearly sufficient to support the otherwise unsatisfactory evidence of identity.

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Mrs. *Eleftheriades* referred us to no authority in support of her proposition and the limited research that we have been able to do has not brought any light. But as a matter of principle the argument derives some support from section 11 (3) of the Supreme Court Act, No. 28 of 1981. This reads:

"(3) If any point raised is decided in favour of the appellant and it consists of a misdirection by the trial court or tribunal of itself on a question of law or a question of fact or a question of mixed law and fact, the Supreme Court shall dismiss the appeal if it is satisfied that the evidence which has to be considered has not been substantially affected by the misdirection and that the conviction is justified having regard to the evidence."

Applying the section to this case, the point decided in the appellant's favour is that the magistrate misdirected himself in relying on the uncorroborated evidence of identification. The appeal court is then enjoined to dismiss the appeal "if it is satisfied that the evidence which has to be considered has not been substantially affected by the misdirection and that the conviction is justified having regard to the evidence". The evidence to which regard is to be had includes

the evidence of Inspector Wilde, Sergeant Moyo and Mr Geddes, as well as that of the appellant. For this Court to look at that evidence and, subject to the magistrate's judgment as to credibility and probability, to reach its own conclusion is to do no more than apply the reasoning in *R v Owen*, 1942 AD 389 (an appeal from the High Court of Southern Rhodesia). This case was applied recently in *S v Strydom and others*, 1980 ZLR 364; 1981 (1) SA 236 (ZA). In neither of these cases, however, was there a question of upsetting a magistrate's finding of fact in favour of an appellant. But it can be contended that to do justice to the prosecution the appeal court should in an appropriate case be able to do that. It may be that a trial judge has misheard a vital piece of evidence and wrongly based his finding of fact on a false premise. If that results in an acquittal nothing can be done about it because the Attorney-General has no appeal on fact against a conviction. But if the mistake concerns an incidental matter and it is the appellant who appeals against his conviction the correction of that error might appropriately be achieved by the application of section 11 (3) of the Supreme Court Act.

But the appellant was not represented in this appeal, and, as I have said, Mrs. *Eleftheriades* referred us to no authority on this unusual point. There may be countervailing arguments to be considered. For instance, the result of accepting the contention might be to allow the Attorney-General to challenge findings of fact which he is not able to do under his right of appeal conferred by section 69 of Magistrate's Court Act

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[*Chapter 18*]. This section limits his appeal to an appeal on a finding upon a point of law, and even then if he is successful the finality of the finding of the court below is not affected.

Because of our view of the facts in this appeal it is not necessary to reach a conclusion on Mrs. *Eleftheriades*' contention. Assuming it to be sound the appeal court would be very reluctant to depart from a finding of fact in an appellant's favour unless there are very compelling reasons for doing so. The real issue in this appeal is whether we can reach a different conclusion from that of the magistrate on whether the appellant made the tendered statement to the Police.

It is apparent that the magistrate has not properly analysed the evidence relating to the making of the statement. He has made no comment upon the crisp conflict between PO Wilde and Sergeant Moyo on the one hand and the appellant on the other as to whether the two policemen warned and cautioned the appellant in Inyati on 10th July. He has made no finding on the making of the formal charge sheet which bears the signature "Bigboy". He appears to have rejected the whole of the statement because he found that the appellant did not write the vernacular in his own hand; and this conclusion he appears to have reached by a comparison of that handwriting with the writing by the appellant of his name in Exhibit 7.

But I do not think it would be safe to conclude that these appearances constitute all the magistrate's mental processes on this issue. He saw the appellant throughout the trial and could form some impression of his standard of education and ability to write. He cannot have been so naive as to have thought that his handwriting test alone could have been a decisive factor in settling the issue, or to have thought that the appellant would not have sought to disguise his writing. If he reached the conclusion that the appellant did not write the vernacular in his own

hand, then that casts grave doubt on the Police evidence that the appellant made the statement at all despite this signature on English version. It is also unfortunate that the magistrate did not consider the significance of the appellant's attitude before the confirming magistrate, especially as he found as a fact that the appellant did then admit having made the statement now disputed.

There are many factors which indicate that the magistrate may well have reached a wrong conclusion on this issue, and I find his whole approach very difficult to follow from his reasons for judgment. I can

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only assume that he reached his conclusion as a matter of impression, having seen the appellant throughout his trial. I would not be prepared to upset the magistrate's conclusion despite the weight of evidence against the appellant.

In those circumstances our only course is to allow the appeal and set aside the conviction and sentence.

Georges JA: I agree.

Beck JA: I agree.

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S v RUREDZO 1982 (2) ZLR 181 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ Baron, JA and George JA

30th September, 1982

Flynote

Criminal law - road traffic cases - negligent driving - passing a pedestrian - what margin must be allowed - issue is whether on all the facts motorist allowed a safe margin - appeal - appellant charged with several alternative - convicted on one and formally acquitted on others - whether appeal court, in reversing that conviction, can convict on alternative charge supported by the evidence - High Court of Zimbabwe Act, No. 29 of 1981 - section 29 (2) (b).

Headnote

When a motorist passes a pedestrian who is on or near a road, it is not necessary to pass at such a distance as to allow for any unforeseen movement on the pedestrian's part; the standard of care of a reasonable man is concerned with the foreseeable, not the unforeseen. The issue is whether on all the facts the motorist allowed a safe margin. It cannot be said that a driver should reasonably foresee that a pedestrian, whose actions give every appearance of a person

who has seen the oncoming traffic and is waiting for it to pass, will suddenly step forward into the path of an approaching vehicle. The motorist is entitled to assume that the pedestrian will continue to stand still until it is safe to cross. In these circumstances a driver who is driving at a perfectly proper speed and in a perfectly proper position on the road cannot be said to be negligent if he maintains that speed and position.

Where charges against an accused person are framed in the alternative, the question may arise on appeal whether, a verdict of acquittal having been entered on the alternative charges, a conviction on such a charge can be substituted on appeal where the evidence supports it. The practice is that where an accused person is convicted on one charge, he is formally acquitted on the alternative charges. In *R v Labuschagne*, 1961 R & N 305; 1961 (2) SA 740 (SR) (BEADLE, J, held that what are now paragraphs (i) and (iii) of section 29 (2) (b) of the High Court of Zimbabwe Act, No. 29 of 1981, gave the courts power on review or appeal to substitute a conviction on an alternative charge, notwithstanding that there had been an acquittal entered on that charge in the court below.

The correctness of this decision was questionable, when consideration was given to the other relevant legislation, in particular section 308 of the Criminal Procedure and Evidence Act [Chapter 59], and the opportunity should be taken to remove all doubt by legislation.

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Cases cited:

R v Sacco, 1958 (2) SA 349 (NPD);

R v Pandisiri, 1964 RLR 515 (AD); 1965 (1) SA 651 (SRAD);

R v V, 1953 (3) SA 314 (AD);

R v Melvin [1953] 1 All ER 294 (CCA);

R v Labuschagne, (*supra*);

R v Motala, 1927 AD 118.

D. Foroma, for the appellant.

S. Ahmed, for the respondent.

Judgment

Baron JA: The appellant was charged in the magistrate's court with culpable homicide and in the alternative with driving with a concentration of alcohol in his blood of 133 milligrams per 100 millilitres contrary to section 45 (1) of the Road Traffic Act (the Act), No. 48 of 1976, and in the further alternative with negligent driving contrary to section 43 (1) (a) of the Act. The appellant pleaded not guilty to the main charge, guilty to the first alternative charge and not guilty to the second alternative charge; the prosecutor declined to accept that plea and the matter

proceeded to trial. The magistrate found the appellant guilty of culpable homicide and entered verdicts of not guilty in respect of both the alternative charges.

The evidence disclosed that the appellant, who is 64 years of age, had been celebrating the opening of his farm in Mtoko on the evening prior to the events in question; he said that he and the other people who attended the party had been drinking African beer until about midnight. He left for Harare at about 6.30 a.m. on the morning of 14th September, 1981; he was driving a left-hand drive Chevrolet Impala. His wife was in the passenger seat next to him; in the rear seats were a man who was employed by him and whom he was assisting with his education, and two other passengers. At about 8.45 a.m. the appellant reached the point on the Enterprise Road where there are pedestrian traffic lights just to the north of the road feeding the Chisipite Shopping Centre (the Enterprise Road at that point runs approximately North-East to South-West, but it was described at the trial as running approximately North to South and I shall for convenience use the same directions). The accident took place some 200 yards to the south of those traffic lights, at the intersection between Enterprise Road and Drew Road.

The accident was witnessed by a Mr Ross Duncan who was driving in a northerly direction along Enterprise Road, that is away from town, and was intending to turn right. He saw the deceased, a small 87 year old

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lady, standing "round about the white line" in the middle of the road; she was facing the town bound lane and it is of some significance that Mr Duncan had not seen her crossing his lane. He saw a maroon Chevrolet car approaching from the opposite direction about 50 metres from the deceased. He then saw the deceased move forward, then back and then forward again and at that moment the deceased was hit by the vehicle; he said he thought the deceased panicked. Mr Duncan stopped his vehicle about ten metres short of where the deceased was lying and jumped out to assist.

The appellant said that he had stopped at the traffic lights near the Chisipite Shopping centre behind two other vehicles and that when they turned green he proceeded behind those vehicles. He saw the deceased standing in the middle of the road, facing the town bound lane, and he proceeded behind the other two vehicles at a speed which he estimated to be 15 to 20 m.p.h. He said the right-hand side of his vehicle was about two metres from the centre white lane. He did not see the deceased move; he only heard a bang, he looked round and saw that the deceased had fallen down and he immediately braked and pulled his car off the road. He thought that he stopped some five or six metres from the point of impact, but the evidence of Mr Duncan and the police witness was that this distance was about 25 metres and magistrate so found.

The only other eye-witness evidence was that of the man seated in the rear right-hand passenger seat of the appellant's car. He said that the appellant's vehicle had moved off from the traffic lights behind two other vehicles but he did not know at what speed the car was travelling at the point of impact. He saw the deceased when the car was 20 or 25 yards away and he saw her move when they were six or seven paces away. He did not see the actual

impact; he explained that he did not think "that this person was going to collide with the motor vehicle. I thought we were just simply going to pass by". He said the appellant did not take any avoiding action but just continued straight on; he did not try to reduce his speed or to apply his brakes; he said he was "not running at a great speed because he was just moving off". He was not able to say how far from the centre line the appellant's car was travelling but said simply that it was travelling in the middle of the town bound lane.

Shortly after the accident a Police traffic section patrol, consisting of a male and a female officer, arrived at the scene. They made observations and took measurements in a manner to which I will return presently, and the female officer made a sketch plan of the scene which was put in as Exhibit 4. There was also put in as Exhibit 3 a more carefully drawn plan

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accompanied by a key. The male officer gave evidence. He said that the deceased was sitting in the middle of the town bound lane; she appeared to him to be in a state of severe shock and one of feet had been severed. He gave confused and contradictory evidence concerning the width of the road, saying first that each lane was about four metres wide and then, in response to a question by the magistrate based no doubt on a measurement given on the plan, that the lanes were each eight metres wide. He was also very vague as to the length of his colleague's paces, which was the method by which the various distances were measured.

The particulars of negligence alleged against the appellant were these:

"Travelling at a speed which was excessive in the circumstances;

Failing to stop or act reasonably when an accident or collision seemed imminent;

Failing to keep a proper look-out.

Failing to sound horn.

Failing to keep car under proper control; and

Driving whilst under the influence of alcohol to the extent that the Accused was incapable of having proper control of his vehicle."

The magistrate found specifically that, although he did not accept that the appellant's vehicle was travelling as slowly as the appellant said it was, he could not say that it was travelling at a speed which was excessive in the circumstances. He found that there was no obligation in the circumstances for the appellant to sound his horn. He found that the appellant had 133 milligrams of alcohol per 100 millilitres of blood and that this may well have affected his ability to drive; he did not, however, find that the appellant's driving was in fact affected. He found that the appellant failed to stop or to act reasonably when a collision seemed imminent and that he failed to keep a proper look-out. But his real approach to the case seems to be expressed in the following passage of his judgment:

"The only possible conclusion I can come to on the evidence is that either the Accused's vehicle was travelling much closer to the centre line or that his vehicle moved towards the deceased at the last moment . . . Even were it the case that the deceased, in fact, had moved into the Accused's path, that could not, in my view, be an end to

the matter as it is trite law that a driver must make allowance for the possibility that when a pedestrian suddenly finds a vehicle close to him he may instinctively jump one way or the other and, therefore, it is clear that when passing a pedestrian a driver must allow that pedestrian a sufficiently wide berth. There can be no doubt in this case that the Accused was travelling too close to the deceased and that he failed to give her a sufficiently wide berth."

It is clear that a crucial item of evidence in this case is the point in the road at which the impact took place; the width of the road is almost equally important.

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[His Lordship analysed the evidence and continued:]

The question then is whether, accepting that appellant was, on the evidence of the passenger in his vehicle, travelling in the centre of his lane and therefore about one metre from the centre line, such conduct establishes that he was negligent.

The magistrate said that it was trite law that a driver must make allowance for the possibility that when a pedestrian suddenly finds a vehicle close to him he may instinctively jump one way or the other, and consequently when passing a pedestrian a driver must allow that pedestrian a sufficiently wide berth. Certainly *dicta* on these lines are to be found in a number of cases; but those were cases in which a motorist was in the process of passing a pedestrian from behind or in other circumstances in which the pedestrian was not, or may not have been, aware of the approach of the motor vehicle, and they were decided on the basis that a motorist must anticipate that a pedestrian, suddenly finding a motor vehicle unexpectedly bearing down upon him, might jump in the wrong direction. Those *dicta* have no application to facts such as the present; the duty of a motorist is so to regulate his driving that he can cope with any reasonably foreseeable emergency. In *R v Sacco*, 1958 (2) SA 349 (NPD), HOLMES, J (as he then was), commenting on a passage in the judgment of the court below that -

"Accused was negligent in that he passed the complainant at a distance which was not reasonably sufficient to allow for any unforeseen movement on the part of the complainant",

said at page 351:

"In my view this was clearly a misdirection . . . because the standard of care of a reasonable man is concerned with the foreseeable, not with the the unforeseen."

As HOLMES, J, pointed out at page 354 there is all the difference between a motorist passing a pedestrian at 45 m.p.h. at a distance of two feet, and of passing at 15 m.p.h. at a distance of four feet. The issue is whether on all the facts the motorist allowed a safe margin. I propose to adopt the same approach, but I must deal first with a matter on which there was a conflict.

The appellant and his passenger both said that there were two other cars in front of that of the appellant when he pulled away from the traffic light; Mr Duncan was asked specifically whether there were any cars in front of the appellant's and he said there were not. The magistrate made no finding adverse to the appellant in this regard and I think he was right to do so. The fact that Mr Duncan did not see the deceased

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actually crossing his lane but saw her only for the first time standing on the white line suggests that there may well have been something obscuring his vision (the plan shows that the road bends slightly from left to right viewed from the point of view of a driver in the north bound lane); furthermore Mr Duncan's attention would have been concentrated on the deceased who was standing precisely at the point over which Mr Duncan's car would have to proceed in executing his right-hand turn. Consequently the presence of two other cars which were already to the south of the point of impact when the accident occurred may well not have registered with Mr Duncan. And there is a further probability in favour of the presence of such cars. It perhaps explains why the deceased suddenly and for no apparent reason started forward and then stepped back and forward again immediately prior to the impact; this suggests that she may have seen these two cars but not that of the appellant and have started across the eastern half of the road believing that it was then safe to do so. I do not, of course, suggest that this Court should make any finding in this regard; but a consideration of the probabilities satisfies me that the evidence of the appellant and his passenger as to the presence of the two cars cannot be rejected, and that the value judgment as to whether his driving was or was not negligent must be made on the basis that those cars were indeed present.

I return then to approach the matter in the manner adopted by HOLMES, J, in *R v Sacco*, (*supra*); the following are the facts on which the court must proceed:

1. The deceased had already crossed the western half of the road and was standing on the centre white line waiting to cross the eastern half.
2. The deceased, precisely because she was stationary, conveyed the impression that she was aware of the approach of traffic from the north.
3. The appellant was travelling in the centre of his lane at a speed which the magistrate found was probably more than his own estimate of 15 to 20 m.p.h. but which the magistrate found was not an excessive speed in the circumstances.
4. The appellant was driving behind two other vehicles in the middle of the south bound lane, which meant that had she not moved the appellant would have passed the deceased with approximately one metre to spare.
5. The appellant saw the deceased when he was some distance north of the point of impact but did not see her move.

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6. The appellant did not slow down or alter his position in the road.
7. The two cars in front of the appellant passed the deceased.
8. At the last moment the deceased moved forward and either walked into or was struck by

the right front wing or the right front corner of the wing of the appellant's car.

On these facts the two questions for decision are what behaviour of the pedestrian should a prudent driver reasonably foresee; and on the basis of what is reasonably foreseeable how should the prudent driver in such a situation regulate his driving.

Anyone who drives in Harare or in any other city or town in this country has constant experience of pedestrians crossing roads, both major and otherwise, at points other than those controlled by traffic lights; and particularly where the roads are wide, as so many of the roads in this country are, it is common to see pedestrians crossing half the road and then waiting on the centre line for the traffic to pass before crossing the other half. It cannot in my view be said that a driver should reasonably foresee that such a pedestrian, whose actions give every appearance of a person who has seen the oncoming traffic and is waiting for it to pass, will suddenly step forward into the path of an approaching vehicle. The motorist is in my view entitled to assume that the pedestrian will continue to stand still until it is safe to cross.

The answer to the second question follows. A driver who is driving at a perfectly proper speed and in a perfectly proper position cannot be said to be negligent if he maintains that speed and position; if drivers passing pedestrians in these circumstances in broad daylight should be required to slow down to a walking pace lest the pedestrian should suddenly step forward the effect on traffic would be chaotic. And although it seems clear that the appellant could have moved a metre to his left, the question is whether by continuing on his course he was leaving a safe distance between himself and the deceased. In my view he was. One metre is approximately the width of a normal-sized office desk, and one sees motorists passing pedestrians at this kind of distance constantly; there is nothing unsafe in passing a pedestrian with a metre to spare if one has every reason to believe that the pedestrian has seen one's car and is waiting for it to pass.

For these reasons we were satisfied at the conclusion of the hearing that the State had not proved the allegation of negligence against the appellant, and that the appeal must be allowed.

The question then arises as to the position concerning the alternative charges, and in this regard the case raises issues of some importance.

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The first question is the manner in which the charges were framed. Miss *Ahmed* conceded, and rightly so, that the first alternative charge, namely that relating to the concentration of alcohol in the blood, should not have been charged as an alternative but as a separate charge; charges are not alternatives if the accused can properly be convicted of both. For instance to charge negligent driving in the alternative is proper (although not strictly necessary in view of section 210 of the Criminal Procedure and Evidence Act) where on a charge of culpable homicide there may be some doubt as to whether the death can be proved to be the result of the negligence; and it is necessary to charge in the alternative where the respective particulars are mutually inconsistent and the prosecution is not certain which of the alternative allegations can be proved. Thus in the present case, on the first example above, the second alternative was

properly so charged. But the first alternative should have been framed as a separate charge since, although the concentration of alcohol was included as one of the particulars of negligence, a conviction under section 45 (1) of the Act does not depend on the prosecution proving that the accused was incapable of having proper control of his vehicle. Had the appellant in the present case been charged separately with a contravention of section 45 (1) of the Act he could properly have been convicted on both that charge and (if the evidence had established it) the charge of culpable homicide.

In the event the magistrate, having entered pleas of not guilty on the main charge and both the alternatives and having convicted on the main charge, found the appellant not guilty on the alternatives. The question was debated before us whether, a verdict of acquittal having been entered on the alternatives, it was competent for this Court to convict on one of them (and in particular the blood/alcohol charge, since on the merits a conviction for negligent driving did not arise). The question is complicated by the fact that the blood/alcohol charge, although framed as an alternative, was in truth a separate charge, and if I understood her position correctly it was for a combination of both the foregoing reasons that Miss *Ahmed* did not ask for a conviction on that charge to be substituted. That being so, it is unnecessary to make any decision on the issue, particularly since neither Miss *Ahmed* nor Mr *Foroma* had come prepared to argue it and it was not therefore fully argued. But it is, I think, important nonetheless to draw attention to some of the anomalies to which the existing legislation and practice give rise.

In entering verdicts of not guilty on the alternative charges the magistrate was proceeding in accordance with established practice based on section 13 of the Criminal Procedure and Evidence Act [*Chapter 59*] which reads:

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"13. The Attorney-General may, at any time before conviction, stop any prosecution commenced by him or by any other person charged with the prosecution of criminal cases; but, in the event of the accused having already pleaded to any charge, he shall be entitled to a verdict of acquittal in respect of that charge."

In *R v Pandisiri*, 1964 RLR 515 (AD), 1965 (1) SA 651 (SRAD), BEADLE, C J pointed out at page 516 that, a verdict of guilty having been entered on one alternative charge, the magistrate should have entered a verdict of not guilty on the other alternative. However, section 308 of the Criminal Procedure and Evidence Act reads:

"308. When an indictment, summons or charge containing more counts than one is framed against the same person, and when a conviction has been obtained on one or more of them, the prosecutor may withdraw the remaining charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction is set aside. In that event the court (subject to the order of the court setting aside the conviction) may, upon the application of the Attorney-General, proceed with the trial of the charge or charges so withdrawn."

Clearly this section, which as framed seems to apply to both alternative and separate charges, was specifically intended to meet the situation where a conviction on one of a number of counts has been obtained and the Attorney-General wishes to guard against the possibility that the conviction may be set aside on appeal. The assumption underlying this provision is that once an acquittal had been entered the accused could not thereafter be convicted on that charge.

This assumption seems to me to have been well-founded, since it is based on the fundamental principle of the common law that once an accused person has been acquitted on a charge no appellate court can alter that acquittal into a conviction; an appellate court can do this only if is specifically given power to do so by legislation. Yet prosecutors seem never to have invoked section 308, with the result that magistrates, as they were enjoined to do by section 13 of the Criminal Procedure and Evidence Act (set out above), having convicted on one of a number of charges, entered verdicts of acquittal on the remainder.

Both in South Africa and in England this position resulted in an accused person going scot free if the conviction on the count on which he had been convicted was set aside on appeal even where the evidence shows he was guilty of the alternative charge (see, for instance, *R v V*, 1953 (3) SA 314 (AD); *R v Melvin* [1953] 1 All ER 294 (CCA)). Obviously, this is an undesirable position and one which should be rectified, but this rectification must come from the Legislature and not from the courts. In *R v Labuschagne*, 1961 R & N 305; 1961 (2) SA 740

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(SR), BEADLE, J (as he then was), held that what are now paragraphs (i) and (iii) of section 29 (2) (b) of the High Court of Zimbabwe Act, No. 29 of 1981, gave the courts power on review or appeal to substitute a conviction on an alternative charge, notwithstanding that there had been an acquittal entered on that charge in the court below. I must, with great respect, express my reservations as to the correctness of that decision. Although this portion of this judgment is *obiter*, I think I should, for the sake of completeness and because I am questioning the validity of a long established practice in Zimbabwe, set out my reasons.

The relevant portions of section 29 (2) of the High Court of Zimbabwe Act (which repeat the previous legislation, save for amendments not relevant to the present discussion) read as follows:

"(2) If . . . the High court considers that the proceedings -

- (a)
- (b) are not in accordance with real and substantial justice, it may, subject to provisions of this section -
 - (i) alter or quash the conviction; or
 - (ii) . . .
 - (iii) set aside or correct the proceedings of the inferior court or tribunal or any part thereof or generally give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made on any matter which was before it in the proceedings in question; or
 - (iv) if the convicted person was convicted on one of two or more alternative counts, when quashing that conviction remit the case to the inferior court or tribunal with instructions that he be retried on one or more of the alternative counts before a presiding officer other than the presiding officer who recorded the previous conviction; or
- (v) . . .

- (vi) . . .
 - (vii) if the convicted person was convicted on one or more counts and acquitted on one or more counts and it appears to the High Court that the inferior court or tribunal intended to -
 - A acquit him on one or more of the counts on which he was convicted; and
 - B convict him on one or more of the counts on which he was acquitted;
- correct the proceedings in accordance with such intention."

I see nothing in paragraphs (i) and (iii) which can be construed as abrogating the common law rule and giving power to an appellate court to convict on a charge on which the accused was acquitted in the court below. But

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when one reads these provisions in the context of other provisions in the same section and other legislation in *pari materia* it is in my view clear that the Legislature did not intend the courts to have such power. Section 15 (d) of the Supreme Court of Zimbabwe Act No. 28 of 1981 and Section 41 (d) of the High Court of Zimbabwe Act No. 29 of 1981 give the courts power to remit the charge *which is the subject of the appeal* to the court or tribunal of first instance (see *R v Motala*, 1927 AD 118 at 122), this power was formerly given by section 24 (d) of Chapter 14. This general power to remit applies to a quite different situation from that contemplated in paragraph (iv) of section 29 (2) (b) set out above; that provision gives power to remit (but no other power), in the particular circumstances set out, charges other than the charge the subject of the appeal. But it must still be read with section 308 of the Criminal Procedure and Evidence Act; the power does not exist if the Attorney-General has not, in terms of that section, withdrawn the alternative charges in question.

Subparagraph (vii) is also relevant. If there were a general power to correct proceedings by entering a conviction where there had been an acquittal in the court below this section would seem to be unnecessary.

Finally, and I think conclusively, the very existence of section 308 indicates that the *dictum* in *Labuschagne's* case (*supra*) is open to doubt. If the position as stated in that case were the law there would be no necessity for prosecutors to withdraw alternative charges since it would then be proper for the Attorney-General to ask the appellant court either to substitute a conviction on one of those charges or to remit the matter back to the lower court for retrial on one or more of those charges.

I have expressed my reservations as to the validity of the existing practice in Zimbabwe because a new Criminal Procedure and Evidence Act is in the course of preparation and it seems to me that the opportunity should be taken to remove all doubt. These problems have arisen also in South Africa, and it is perhaps significant that the South African legislation was amended in 1935 to give an appellate court precisely the powers which *Labuschagne's* case (*supra*) said that our appellate courts have (see, for instance, *R v V*, (*supra*). per GREENBERG, A C.J., at page 322). The present position is, to put it at its best, uncertain and is clearly

unsatisfactory, and I cannot do better than to support the plea of BEADLE, J, in *Labuschugne's* case (*supra*) - a plea which, perhaps precisely because of that decision, was ignored - when he urged the amendment of the legislation.

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One final ambiguity which could with advantage be cleared up is the use of the expression "alternative charges". Sometimes the expression as used in both judgments and text books appears to refer to any situation in which more counts than one are included in an indictment, summons or charge; on the other hand the expression sometimes relates to alternatives properly so called. As I have indicated, I think it is desirable that an appellate court should have power to substitute a conviction on an alternative charge properly so called when an appellant succeeds in having a conviction on the main or another alternative charge quashed; but I see serious objections to applying the same approach when a verdict of acquittal had been entered on one or more of separate charges.

The other matter on which I feel it is necessary to comment relates to the investigation and presentation of the case. This court has on several occasions recently drawn attention to the importance in traffic cases of detailed plans drawn accurately to scale being placed before the Court especially in serious cases where death or injury has occurred. Eye-witness evidence is often unreliable, not only because the witnesses frequently have an interest but also because the events happen so quickly and unexpectedly that the observation and recollection of even the most honest and independent eye-witnesses may be faulty. The courts, not only in this country but in many other countries also, have said repeatedly that conflicts of evidence in such cases can frequently be resolved only on the basis of the evidence on the ground, so to speak. The courts therefore, particularly in criminal cases, look to the Police and the prosecution to assist them in coming to their findings of fact by presenting as clearly as possible a picture of all the evidence "on the ground" that is available. This includes, as I have said, an accurate depiction of the scene drawn to scale; and on such plan should be marked the length and position of skid marks, the position of broken glass and mud droppings, the positions of persons injured in the accident, the positions of the vehicles after the accident and any other matters which the investigating officer has observed. For instance in the present case there was evidence that the deceased bled profusely; the precise area within which blood was found on the road should have been marked and accurately depicted on the plan. And I should, I think, refer to what has apparently become an invariable practice, namely for the Police officer to mark what in his opinion was the point of impact. It is, of course, quite proper for the investigating officer to mark the indications as to the point of impact made to him by eye-witnesses, since these represent statements made to him at the time and not his conclusions. But at the end of the day the decision as to the point of impact is for the Court to make and is made on the basis of all the evidence including in particular the evidence on

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the ground; it is reason that items of evidence such as the position of broken glass and mud

droppings is of such importance; this evidence is frequently a very accurate guide as to the point of impact. Subject to what I have said about indications made by witnesses, investigating officers should not therefore mark what was in their opinion the point of impact; their function is to make observations and to record the results. Where, as is often the case, the nature of the damage to vehicles is of significance, independent evidence of this, supported if possible by photographs, can also be of great assistance.

The foregoing comments are not offered simply as criticism of the give rise to matters which in the circumstances can materially assist the court in coming to a conclusion. The point I seek to stress is that the court cannot come to a reliable conclusion without adequate evidence, and particularly in a criminal case where the gathering and presentation of that evidence is in the hands of the prosecution the courts cannot and will not make good the deficiencies in the prosecution case by making assumptions adverse to the accused. If, because a case has been inadequately investigated or inadequately presented, there is doubt as to what really happened that doubt must be resolved in favour of the accused. The shortcomings of the investigation in this case illustrates the difficulty of doing justice to all parties.

The foregoing comments are not offered simply as criticism of the investigating officer, although in a sense criticism is implicit; they are made in order to underline the extent to which the courts rely on the assistance of investigating officers matters of this kind and the way in which those officers can provide that assistance.

Fieldsend CJ: I agree.

Georges JA: I agree.

Sawyer & Mkushi, appellant's legal representatives.

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ATTORNEY-GENERAL v NURMAHOMED 1982 (2) ZLR 194 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Baron JA and Georges JA

22nd September and 4th October, 1982

Flynote

Criminal law - Exchange control Act [Chapter 170] - sections 5 (3) (a) and 7 - special reasons for not imposing minimum, fine and ordering forfeiture - ignorance of the law - when can amount to a special reason.

Headnote

The respondent, a resident of Malawi, imported \$7 000 into Zimbabwe. He had bought it in Malawi and sewn it into the lining of a jacket because he knew it was illegal to export foreign currency from Malawi. It was found that he at least suspected that there were controls on the importation into Zimbabwe of Zimbabwe currency, but he did not trouble to find out what these

were, nor did he volunteer to the Customs authorities his possession of the money. In spite of this, the magistrate found that there were special reasons for not imposing the minimum fine, of the value of the currency, and ordering forfeiture of the currency, saying that -

"The accused was unaware of the Law and there was no apparent prejudice to the country's reserves."

The Attorney-General appealed against the sentence of \$1 000 that was imposed.

Held, allowing the appeal, that while ignorance of the law can constitute a special reason, this is only in the case of an unconscious contravention of the Act, reducing the accused's moral guilt to a point where it is virtually absent. The respondent did not fall into this category; strict exchange control laws apply over much of the world, particularly in Africa, and must be known by a person of any education to exist. The fact that the respondent did not know exactly what the Regulations prescribed was hardly a special circumstance.

Held, further, that it was incorrect to say that there was no apparent prejudice to the country's reserves. The object of preventing the unlicensed import of Zimbabwe currency is to prevent its illegal export. Further, importation of Zimbabwe currency would lessen the amount of foreign currency that might otherwise come in.

Cases cited:

S v Ndeketi, 1978 RLR 377;

R v Maphosa, G-B-16-80 (not reported);

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S v Chiswa, 1981 ZLR 666.

IR Deeks, for the appellant.

No appearance for the respondent.

Judgment

Fieldsend CJ: The respondent was convicted on his plea of guilty of contravening section 5 (1) (a) (i) of the Exchange control Act [*Chapter 170*], as read with section 18 of the Exchange Control Regulations, 1977, for importing Z\$7 000 into Zimbabwe from Malawi without authority. He was sentenced to a fine of \$1 000 or four months' imprisonment.

The magistrate did not impose the minimum fine of the amount of the currency involved in terms of section 5 (3) (a) of the Act nor order forfeiture of the money in terms of section 7 because he found there were special reasons. These reasons he recorded, as required by the section, as:

"The accused was unaware of the Law and there was no apparent prejudice to the country's reserves."

The Attorney-General has appealed against the sentence, contending that the respondent should have been sentenced to the minimum fine of \$7 000, being the amount of the currency

involved, and that a forfeiture order should have been made in respect of the currency under section 7 of the Act.

The facts are that the respondent was born and educated in Malawi. He went to England in March 1979 when he was twenty. In April 1982 he came from Malawi to this country to assess the prospects of settling here. The day before he arrived he bought Z\$7000 from an unknown person in Malawi at a discount. This he sewed into the lining of a jacket which he packed in his suitcase, because, he said, he knew that it was illegal to export foreign currency from Malawi. Arriving in Harare he made his way to the Green Route in the Customs Hall, indicating that he had nothing to declare. There he was stopped, his luggage searched and the money found.

Mr *Deeks*, for the Attorney-General, concedes, and rightly so in the light of *S v Ndekete*, 1978 RLR 377 and *R v Maphosa*, G-B-16-80, that ignorance of the law can constitute a special reason for not imposing the minimum sentence. See, too, *S v Chisiwa*, 1981 ZLR 666. The principle is correctly stated by NEWHAM, J, at page 378 of *Ndekete's* case (*supra*) as follows:

"It seems to me that if an accused is guilty of an unconscious contravention of the Act, this is a factor which reduces his moral guilt to a point where its virtual absence can be regarded as a special reason for not imposing the penalties which are otherwise mandatory."

1982 (2) ZLR p196

FIELDSEND CJ

Mr *Deeks* contends, however, that the respondent does not fall within that principle. It was found that the respondent at the very least suspected that there were controls on the importation of even Zimbabwe currency into Zimbabwe which he should have taken the trouble to find out about. Further, he at no stage volunteered to the authorities - as did the accused in *Maphosa's* case (*supra*) - his possession of the money before it was found. These circumstances, it was argued, take the respondent out of the category of a person whose moral guilt has been reduced to a point where it is virtually absent. I cannot but agree with that argument. Strict Exchange control Regulations are common the world over and particularly in Africa and must be known to exist by a person of any education. In these circumstances it is not for a person to assume that what he is doing on a scale such as the respondent was in this case would not be contrary to the Regulations.

The fact that the respondent did not know exactly what it was that the Regulations prescribed is hardly a special circumstance. The fact that he suspected that there were some controls but took no trouble to find out what they were does not mean that his moral guilt was reduced substantially, if at all.

The other reason relied on by the magistrate - that there was no apparent prejudice to the country's reserves - is unsound. The whole purpose of preventing the unlicensed importation of Zimbabwe currency is to inhibit its illegal export. If the importation of Zimbabwe currency is illegal those who take it out illegally will not be able to dispose of it either at all or at a rate which will make the export worthwhile. In any event, such importation lessens the amount of foreign currency which might otherwise come in.

For these reasons I am satisfied that the magistrate should not in this case have found special

reasons for not imposing the prescribed fine. So far as the forfeiture is concerned it is difficult to see, where the commodity in issue is currency, how any different tests can be applied in assessing whether there are special reasons for not ordering the forfeiture. In my view there was no reason for not ordering the forfeiture in this case.

Baron JA: I agree.

Georges JA: I agree.

1982 (2) ZLR p197

S v NYATHI 1982 (2) ZLR 197 (HC)

Court **High Court, Bulawayo**

Gubbay J

8th October, 1982

Flynote

Criminal law - rape consent - complaint mentally retarded - whether mental deficiency sufficient to render incapable of giving consent.

Headnote

Where the complainant on a charge of rape is mentally retarded, it is not incumbent on the prosecution to prove the idiocy or imbecility of the complainant in order for her to be deemed incapable of consenting. It is sufficient that she has not sufficient knowledge or understanding to comprehend -

- (a) that what is proposed to be done is the physical fact of penetration of her body by the male organ or, if that is not proved,
- (b) that the act of penetration proposed. is one of sexual connection as distinct from an act of a totally different character.

Whether the requisite State of mental defectiveness has been reached in a particular case is a question of fact upon which expert opinion should be sought.

Cases cited:

R v Kalil Katib, 1904 ORC 1;

R v Ryperd Boesman, 1942 (1) PH, H 63 (SWA);

R v S, 1951 (3) SA 209 (C);

R v K, 1958 (3) SA 42 (AD);

R v K, 1951 (4) SA 49 (O);

R v Morgan (1970) VR 337;

R v Z, 1960 (1) SA 739 (AD).;

S v S, 1971 (2) SA 591 (AD).

Judgment

Gubbay J: The accused was charged in the Court of the Regional Magistrate with the crime of rape. The carnal connection was admitted. The defence was that it had been consented to. The evidence established that the complainant, aged 18 years, was mentally retarded and prone to psychotic episodes during which she had visions of non-existent objects. She was, however, not incompetent to testify in terms of section 232 of

1982 (2) ZLR p198

GUBBAY J

the Criminal Procedure and Evidence Act [*Chapter 59*] and though given to irrelevancies, her account of the incident was substantially coherent. The regional magistrate described her as having a vacant expression and protruding eyes. He found, firstly, that the complainant had consented to sexual intercourse with the accused, but being mentally subnormal she was incapable of giving "informed consents"; and secondly, that the accused was aware of the complainant's feeble-mindedness but notwithstanding had intercourse with her. He accordingly convicted the accused and ordered him to undergo three years' imprisonment with labour.

On perusing the record of the proceedings, I queried with the Attorney-General whether it had been proved that the degree of the complainant's mental retardation was such as to vitiate consent; and if so, whether the accused must have foreseen the possibility that she was so mentally abnormal as to be incapable of consenting. I was duly advised that the Attorney-General did not support the conviction. As his view confirmed my own and that of my brother SQUIRES with whom I had previously consulted, I ordered the immediate release of the accused from prison, intimating that my reasons for setting aside the conviction would be given at a later date. These reasons now follow.

The test as to whether the mental capacity of a woman is such as to render her incapable of consent dug to sexual intercourse has been enunciated in a trilogy of South African decisions with reference to the affliction of idiocy or imbecility. In the earliest case of *R v Mail Katie*, 1904 O R.C.1, the complainant was completely deaf and dumb and quite idiotic. FAWKES, J, directed the jury that they had to be satisfied that the girl was in such a state of idiocy as to be incapable of expressing consent or dissent. In *R v Ryperd Boesman*, 1942 (1) PX, H 63 (SWA), the accused stood trial on a charge of raping a woman of 23 years of age. HOEXTER, J, (as he, than was) found that sexual intercourse had been proved, but that the victim was an idiot without any human intelligence and thus incapable of giving any consent to the act. Finally, In *R v S* 1951 (3) SA 209 (C), the accused was acquitted of raping a 16-year-old girl who had the mentality of a child of eight years. STEYN, J, held that the complainant's low intelligence did not justify her being classed as an imbecile or idiot. Her consent could not therefore be regarded as

having been vitiated (see at 210H-211B).

With due deference to these authorities, I do not consider it incumbent upon the prosecution to prove the idiocy or imbecility of the complainant in order for her to be deemed incapable of consenting. It is sufficient if her mental condition rendered her unable to appreciate what she was doing. See *R v K*, 1958 (3) SA 420 (AD) at 422B - E That position will

1982 (2) ZLR p199

GUBBAY J

obtain, of course, if she is an idiot, but not necessarily if she is an imbecile (See, for instance, *R v K*, 1951 (4) SA 49 (O) at 49 H). In the Australian case on *R v Morgan* [1970] VR 337 at 341, the Supreme Court of Victoria held that for a woman lack capacity consent to intercourse

"it must be proved that she has cast sufficient knowledge or understanding to comprehend

- (a) that what is proposed to be done is that physical fact penetration of her body by the male organ or, if that is not proved,
- (b) that the act of penetration proposed is one of sexual connection as distinct from an act of a totally different character."

This formulation is warmly approved by Professor Manville Williams his *Textbook of Criminal Law* at page 523, and seems to me to present a moral logical approach to the problem. To accept any higher level of understanding, as did the regional magistrate, would be to forbid sexual expression to women of subnormal intelligence, thereby diminishing their liberty. But whether the requisite state of mental defectiveness has been reached in a particular case is solely a question of fact upon which expert opinion should be sought.

To revert to the present matter, all that can said of the complainant is that she was mentally retarded or feeble-minded. To what extent is doubtful. She was certainly competent to give evidence. There is the further factor that the complainant was no stranger to sexual intercourse. The indications were that she was very sexually aware indeed. This turn suggests that she appreciated what the accused proposed to do and consented to it.

In any event it is highly unlikely that the accused foresaw the possibility that the complainant was so mentally deficient as not to comprehend the true nature of what he proposed to do. See *R v Z*, 1960 (1) SA 739 (AD) at 745E-F; *S v S*, 1971 (2) SA 591 (AD) at 597 B-D. He may well have known of her strong sexual propensities and believed that although feeble-minded, she appreciated what sexual intercourse entailed. Accordingly on this ground as well the conviction was erroneous.

1982 (2) ZLR p200

S v MAROMWE 1982 (2) ZLR 200 (HC)

Court High Court, Harare

Pittman J

20th October, 1982

Flynote

Criminal law - theft - nature of offence - a continuing offence - single offence committed by thief who retains possession of property after conviction.

Headnote

The accused was convicted on the 30th September of the theft of clothing. In mitigation he pointed out that he had been tried and punished on the 4th June, 1982 for the theft of the same clothing. The prosecutor argued that the accused continued to commit theft by retaining possession of the property.

Held, that it is true that by retaining the stolen property the accused continued to commit theft, but the theft he was committing on the 30th September was the original theft and not a new one.

Judgment

Pittman J: The accused came before a magistrate on the 30th September, 1982, charged with the theft of certain clothing. He pleaded guilty and was then convicted. On the 4th October he pleaded in mitigation of sentence, and it transpired that he had already been convicted of and punished for the same then on the 4th June, 1982. The prosecutor argued that the accused still continued to commit theft by keeping the stolen property, and he evidently expected a second punishment to be imposed on the accused. The magistrate has rightly ruled that an accused cannot be convicted and punished twice for the same offence. It is true that by retaining the stolen property the accused continued to commit theft, but the theft he was committing on the 30th September was the original one and not a new one. The magistrate has therefore rightly requested that the conviction pronounced on the 30th September, 1982 be quashed, and with the agreement of SQUIRES, J, it is now so ordered.

1982 (2) ZLR p201

S v A JUVENILE 1982 (2) ZLR 201 (HC)

Court High Court, Harare

McNally J

27th October, 1982

Flynote

Criminal procedure - remands - juvenile accused - correct approach to be adopted. Criminal Procedure and Evidence Act [Chapter 59] - section 123 (1).

Headnote

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It is important for magistrates, when remanding juvenile accused, to enquire into the facts of the case. This will enable them to decide whether it would be appropriate to invoke the provisions of section 123 (1) (a) of the Criminal Procedure and Evidence Act [Chapter 59], which allows the accused to be released without bail and simply warned to appear in Court. If it is necessary to place a juvenile under some sort of restraint, he can, in terms of section 123 (1) (c), be placed in a place of safety, which would be preferable to the Remand Prison.

Judgment

McNally J: This is a judgment about the boring subject of remands. Anyone who has sat in a Magistrates Court while prisoners are being remanded will know how unexciting an exercise it is. Yet vigilance and a sixth sense must be developed by magistrates if injustices are to be avoided.

Take the present case as an illustration. A seventeen-year-old youth on his way home past a municipal building site on the evening of the 21st March this year picked up a bit of rubber piping worth at most \$10. He was seen by a Security Guard, arrested after quite a struggle, and taken to the police station. The stolen property was recovered.

On the 24th March bail in the sum of \$20 was granted. However, the boy obviously could not raise the money and he was then further remanded in custody until eventually he paid his bail on the 6th July. That means he spent 3 1/2 months in the Remand Prison.

His trial began on the 21st July, he was convicted and sentenced on the 30th July to a moderate correction of 3 cuts with a light cane, and the cuts were inflicted on the same day.

1982 (2) ZLR p202

McNALLY J

The delay in bringing him to trial was apparently caused by his changing his plea of guilty to one of not guilty. When I asked the magistrate to explain why this young man had spent so long in prison, he said, "If my recollection is correct, this particular accused had an aged father who attended Court on each occasion that the accused appeared but who, when asked, was unwilling to accept the responsibility of ensuring that the boy would attend Court as directed if released into his custody. The Court had little option then other than to grant the accused bail (which he could not pay). The pettiness of the offence was not known until the matter was brought to trial."

Now, two things may be said about that comment. First, it shows an insufficient appreciation of the provisions of section 123 of the Criminal Procedure and Evidence Act [Chapter 59]. Subsection (1) (a) of that section empowered the magistrate to:

"release him without bail and warn him to appear before a court or magistrate at, a time and on a date then fixed by the Judge, magistrate or police officer."

Secondly, in order to decide whether or not that would have been an appropriate thing to do, the magistrate should have inquired into the facts of the case. He would then have been made aware of the pettiness of the offence, and would surely have realised that it was not necessary to rely on the provisions of section 123 (1) (b) which provides for releasing the juvenile into the

care of his custodian while warning that custodian of the penalty he faces for failing to produce the accused at the appointed time.

In short, the refusal of the father to accept the responsibility imposed on him if section 123 (1) (b) was used should have prompted the judicial officer to investigate further.

I should mention for the sake of completeness that subsection (c) allows a magistrate to place a juvenile in a place of safety pending his trial. So there are numerous ways of avoiding the Remand Prison.

I asked the magistrate also why he felt it necessary to impose cuts after such a lengthy sojourn in the Remand Prison. He replied that notwithstanding the period spent in remand the accused remained "very obviously impenitent".

1982 (2) ZLR p203

McNALLY J

I wonder if "notwithstanding" is the right word. It seems to me more probable that it was *because* of the long period in the Remand Prison that the young man took a jaundiced view of the process of justice, which manifested itself in an impenitent attitude.

The conviction and sentence are, subject to these cautionary remarks, confirmed.

1982 (2) ZLR p204

DIESEL ELECTRIC (SALISBURY) (PVT) LTD v S & T IMPORT AND EXPORT (PVT) LTD **1982 (2) ZLR 204 (HC)**

Court **High Court, Harare**

McNally J

27th October & 3rd November, 1982

Flynote

Practice and procedure - action under Lex Aquilia - joint wrongdoers - judgment obtained against one but not paid in full - whether this bar to proceeding against other wrongdoer - distinction between actio injuriarum and actio legis Aquiliae.

Headnote

The plaintiff company sued the defendant for damages established: as being \$23 604.60, for loss of profits. The loss arose from the wrongful act of one of the Plaintiff's employees, one Oates, who unlawfully disposed of certain import licences held by the plaintiff. These licences were used by the defendant company, which thus prevented the plaintiff from importing certain tools and so realising the profit of \$23 604,60 which it would have made on the sale of the tools.

The plaintiff obtained judgment against Oates on the 8th February, 1982 in the sum of \$20 000, arising out of the same facts. In terms of the judgment, Oates was to pay the sum in instalments and, at the date of the present hearing, had paid \$1400. As a result of that judgment, the defendant filed a special plea in bar, contending that the plaintiff could not recover against the defendant any more than the amount of the compromise settlement with Oates,

Held, that between joint wrongdoers, as in this case, there is no right of contribution. Even if the plaintiff had released Oates altogether, it could still have recovered the full amount from the defendant. The only limitation is that the plaintiff cannot recover more than he has lost.

Held, further, that a clear distinction can be drawn between cases under the *actio legis Aquiliae*, such as this, and those arising under the *actio injuriarum*, such as defamation. The former are reipersecutory and intended to reimburse a plaintiff's patrimonial loss. For this reason, the right of action passed to the plaintiff's heirs and the question which of the offenders bear the loss and in what proportion is of secondary importance. The latter cases are penal and the object is primarily to punish each defendant. If one were not to pay because, for example, he became insolvent the plaintiff would have to accept a lesser amount of damages from the other.

1982 (2) ZLR p205

McNALLY J

Held, further, that accordingly judgment would be given against the defendant in the sum claimed, less any amount already paid by Oates.

Cases cited:

Gray v Poutsma & Others, 1914 TPD 203;

Dwyer v Goldseller, 1906 TS 126;

Prinsloo v du Preez, NO, 1965 (4) SA 300 (WLD);

Robinson v Kingswell, 1913 AD 513;

Greik v Jankelowitz, 1918 CPD 140;

Toerien v Duncan, 1932 OPD 180;

Naudé and du Plessis v Mercier, 1917 AD 32;

Union Government v Lee, 1927 AD 202.

I. A Donovan, for the plaintiff.

B. W K Whaley, for the defendant.

Judgment

McNally J: The plaintiff (Diesel Electric) sues the defendant (S & T) for damages in the sum of \$24 800,44 with costs, The claim arises against a background of import control and it may be

convenient to extract from the evidence, which on this aspect was not disputed, the broad outline of the administration of this control by the Government between July 1978 and July 1980.

In order to conserve foreign currency reserves the Government required all importers to hold an import licence for any goods imported. In each quarter of the year importers would be invited to apply for an allocation of foreign currency for the particular goods they wished to import. The goods would be identified by their item number in the Customs Tariff. Once the currency was allocated an import licence could be obtained for the importation of goods under that particular tariff item up to the limit of the currency provided. As the goods came in their value would be recorded on the import licence and deducted from the total until the whole amount was used up or until the licence expired at the end of the quota period.

Currency allocations were made on the basis of the amount of currency available, the priority accorded to the various sectors of the economy and "past performance", i.e. the amount imported by that particular importer under that tariff item in the days prior to import control.

On occasion "*ad hoc*" licences might be granted, either in respect of something urgently needed or where an allocation under one head could not be used for one reason or another and a transfer of the currency for use in respect of another item was authorized. Such transfers are apparently no longer authorized.

1982 (2) ZLR p206

McNALLY J

The plaintiff is an established agent for the importation of motor vehicle parts and spares and tools. The bulk of its imports were motor vehicle engine spares (tariff item 103 (1) (c) and tractor spares (103) (2) and its second biggest item was 129 (d) (v) - motor vehicle chassis and body parts. A relatively small, but highly profitable line of imports was tools, under tariff item 146 (b).

During the relevant period the plaintiff employed a man named Oates who was in charge of the routine administration of the company's import licences. He would make the applications on behalf of the company and he had a standing instruction to maximise the importation of tools for which there was a great demand (and a high mark-up). Thus where because of a delay in delivery there was spare currency allocated, say under tariff item 103, he would know that he should seek a transfer of that currency and an *ad hoc* licence under tariff item 146 for the importation of tools.

It is common cause that between July 1978 and July 1980 Oates conspired unlawfully with one Barlow, acting for and on behalf of the defendant company. The effect of their conspiracy was that ten import permits for artisan tools under item 146 (b) which had been granted to the plaintiff company were in fact used by the defendant company for the importation of goods. As a result the plaintiff company was deprived of the opportunity of using the permits to import tools.

[His Lordship analysed the evidence and continued:]

Accordingly, but subject to the further consideration with which I deal below, I am satisfied that the plaintiff has established a delictual claim for loss of profits in the sum of \$23 604,60 against

the defendant.

The question then arises as to the effect on this claim of the fact that, in case No. 1017/81, judgment was given on the 8th February 1982, in this Court against Oates and in favour of the same plaintiff for the sum of \$20 000, arising (by common cause) out of the same facts.

The judgment in full reads as follows, and was by consent:

- "1. That judgment be and is hereby entered for the plaintiff in the sum of \$20 000.
2. That there be no order as to costs.
3. That the defendant pay the said sum of \$20 000 by way of \$100 *per mensem* for the months of February and March 1982 and thereafter \$200 *per mensem*, such instalments to be payable monthly in arrear commencing on the last day of February 1982 with subsequent payments on the last day of each and every succeeding month.

1982 (2) ZLR p207

McNALLY J

4. That should the defendant fail to make payment on due date the plaintiff shall be entitled to claim payment of the whole amount then outstanding.
5. That the monthly instalment payable by the defendant shall be subject to review between the parties at the option of the plaintiff whenever the financial circumstances of the defendant improve. In this connexion the defendant shall supply the plaintiff with full details of his financial circumstances as and when reasonably requested so to do by the plaintiff. Should the parties be unable to agree on any increase in the monthly instalment, the matter shall be referred to a senior legal practitioner appointed by the President for the time being of the Law Society of Zimbabwe and his decision shall be final and binding on the parties. In making any decision the said legal practitioner shall determine which party shall meet the costs of his adjudication."

It is not disputed that, as at the date of the hearing, Oates had paid \$1 400 to plaintiff in terms of this judgment. The plaintiff's costs, which were not recoverable in terms of the judgment, were \$1 458. I can see no basis for taking account of those costs in this judgment.

The defence arising out of the Oates matter was first raised by way of a special plea in bar, filed of record on the 21st October 1982. In that special plea it was contended that the plaintiff was barred from recovering anything by reason of the fact that it had obtained judgment against Oates. However, at the outset of the hearing Mr *Whaley* indicated that it was now his contention that the plaintiff could not recover against the defendant any more than the amount of the compromise settlement with Oates.

No evidence was led for the defendant, and in argument it was again submitted by Mr *Whaley* that if the Court found that damages properly calculated amounted to more than \$20 000 the figure should be discounted to \$20 000 because the compromise with Oates was applicable to the present defendant.

Mr *Whaley* did not argue that if I found that the correct figure was \$23 604,60 (as I have found) I should subtract \$20 000 and award the balance. He said that I should subtract \$1 400, being the amount already paid by Oates.

The law is not very easy to apply to the facts of this case. I can perhaps begin by disposing of the English authorities. English law has the same distinction as Roman-Dutch between joint

tortfeasors on the one hand and concurrent tortfeasors on the other. Clearly, we are concerned here

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McNALLY J

with joint tortfeasors, or, as we could call them, joint wrongdoers. The law is summarised in *Halsbury's Laws of England*, Third Edition, Volume 37 at paragraph 246, as follows:

"The common rule that judgment against any one of joint tortfeasors barred future actions against the others in respect of the same charge has been abolished by statute, in consequence of which such a judgment is no longer a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage. It would appear that this statutory provision has left unaltered the former rule that release of, as opposed to a mere covenant not to sue, a joint tortfeasor operates as a release to all who are jointly liable."

As to the question of contribution between joint tortfeasors, the former English common law rule was that a joint tortfeasor who had satisfied a judgment could not recover contribution save in certain irrelevant circumstances (*ibid*, page 137, note Z).

1914 GREGOROWSKI, J, had this to say in *Gray v Poutsma & Others*, 1914 TPD 203 at 215:

"In England it has been decided that the recovery of judgment against one tortfeasor, is a bar to the action against the other joint tortfeasors, whether the judgment is satisfied or not...

Our law agrees with the English law that there is no contribution among tortfeasors, but according to our law mere recovery of judgment against a joint tortfeasor would not extinguish the action against the others unless the judgment were paid . . . " .

In South Africa the common law position has already been altered by statute - the Apportionment of Damages Act, No. 34 of 1965. The matter is admirably summed up by Joubert's *The Law of South Africa*, Volume 8, page 109, paragraph 60, as follows:

"Before the enactment of the Apportionment of Damages Act it was necessary to distinguish between joint and concurrent wrongdoers. Joint wrongdoers were persons who jointly committed a delict by acting in pursuance of a concerted purpose or in furtherance of a common design. They were jointly and severally liable for the same delict; payment of the damages by one absolved the other from liability. The plaintiff was entitled to hold all the joint wrongdoers liable in one sum awarded to him by way of an undivided judgment....

The weight of common law authority is against the recognition of a right of contribution between joint wrongdoers."

It is worth pausing for a moment to consider this question of the right of contribution. Take the case of two sureties who stand surety for a debt of \$1 000. The debtor dies insolvent and the creditor looks to the sureties for payment. However, for whatever reason, he settles with the one surety

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McNALLY J

for \$100. Quite clearly he cannot proceed against the other surety for \$1 000, or even \$900. The reason is that he has destroyed that other surety's right of recourse for a contribution. That other surety can now only be sued for \$500. This, as I understand it, is precisely what is said by

INNES, CJ, in *Dwyer v Goldseller*, 1906 TS 126. In so far as *Prinsloo v du Preez*, NO, 1965 (4) SA 300 (WLD) deals with the matter, it is not inconsistent with this line of reasoning.

In effect therefore the limitation of the creditor's rights against the second debtor, resulting from his dealings with the first debtor, arises from the fact that there is a right of contribution between the two debtors. If there is no such right of contribution between the two debtors, that basis for the limitation of the creditor's rights falls away. That, it seems to me, disposes of Mr *Whaley's* contention.

In the present case we have established, as a matter of common cause, that there is no right of contribution. Thus, if the plaintiff had released Oates altogether, S & T would not have been prejudiced and the plaintiff could still recover from S & T the full \$23 604,60. A partial release similarly can have no effect. The only limitation that arises in such a case is one which is designed not to protect the wrongdoers but to ensure that the plaintiff does not benefit more than he ought. That is the limitation which says that the plaintiff may not recover more than he has lost. So, if he has actually recovered some money from (in this case) Oates, he can recover only the balance from S & T

Were it not for the decision in *Robinson v Kingswell*, 1913 AD 513, I would have no hesitation in giving judgment against the defendant in this case for \$23 604,60 (less \$1400 paid by Oates), and then ruling that to the extent of \$3 604,60 the defendant is individually liable, but to the extent of the balance of \$20 000 less \$1400 it is liable jointly and severally with the defendant in case No. GD 1017/81, the one paying, the other to be absolved. It is true that Oates, the defendant in case No. GD 1017/81, is not before me, but on the other hand this ruling can be nothing but advantageous to him. He can hardly therefore complain.

Unhappily *Robinson's* case (*supra*) is at first blush against me as to the form of that proposed order and it is a judgment of DE VILLIERS, JP, with whom LORD DE VILLIERS, C J and INNES, J, concurred. The relevant part of the judgment, which concerned two separate defamation actions brought by Mr Kingswell against Robinson, who wrote a letter to *The Star*, and against the Argus Company, who published it, reads as follows at 526-7:

1982 (2) ZLR p210

McNALLY J

"In the two cases the learned Judge in the court below was of opinion that £100 damages in all, together with the cost of both actions, would meet the justice of the case. But as pointed out above, while giving an absolute order against the defendant in the first action for that amount, in the second action he gave a similar order against the defendant in this second action, but added to this; second order that so far as either of the defendants pays the \$100 awarded, the other will be absolved. The form this order took was, strictly speaking, somewhat irregular, as no order could have been given in the second case affecting the defendant in the first action. A nice point of law might arise if, after the defendant in the second action had paid the amount of the judgment in full, the plaintiff issued a writ of execution against the defendant in the first action also for the full amount. However, it is clear from the reasoning of the learned Judge in the court below that he did not intend the plaintiff to have more than £100 damages in all, and this amount seems to me to meet the justice of the case. The form of the two orders will, however, be altered as follows: In each case judgment is given for the plaintiff for £50 damages and costs."

I confess that I have a number of difficulties in understanding this judgment. The first concerns

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the statement "no order could have been given in the second case affecting the defendant in the first action." That must be so of an order *adversely* affecting the defendant in the first action. But surely one can make an order *beneficially* affecting a person who is not before the Court? As to the question of the "nice point of law" which might arise, it seems to me with respect that the answer is given by JUTA, JP, in *Grek v Jankelowitz*, 1918 CPD 140 at 144, where he says, of a similar situation:

"I have no doubt that the same procedure can be adopted should the one tortfeasor pay all the damage sustained by plaintiff in the first case before the judgment is delivered in the second case (i.e., that the second defendant can raise that fact as a defence); and should payment be made after such judgment is delivered I have no doubt that execution could be stayed in the second case."

But perhaps a clear distinction can be drawn between cases arising under the *Actio legis Aquiliae* (such as this one), and those arising under the *Actio Injuriarum*. *Robinson's* case (*supra*) was a defamation action and thus a case under the *Actio Injuriarum*. Different considerations apply. This was pointed out by GREGOROWSKI, J, in *Gray v Poutsma*, (*supra*), where he said at 217 - 8:

"Originally in the Roman law all actions for . . . tort under the *Lex Aquilia* were poenal and each defendant (wrongdoer) was liable for the whole penalty which went to the person injured. Payment by one did not release the others and the penalties were cumulative. In Roman-Dutch law these actions ceased to be poenal and all the plaintiff could claim was damages for the loss sustained and payment by one of the joint tort-feasors discharged all the others, *Voet*, 9, 2, 12. The action passed to and against the heirs as it was no longer poenal but *rei persecutoria*."

1982 (2) ZLR p211

McNALLY J

In case of *injuria* the process of development was different. The actions remained poenal ... "

The same approach was adopted by FISCHER, J, in *Toerien v Duncan*, 1932 OPD 180 at 203, where he said:

"There is no doubt that under the Roman-Dutch law wrongdoers whether sued under the *Lex Aquilia* or on an *Injuna* were liable *in solidum* and that there was no contribution as between themselves. Payment moreover under the *Lex Aquilia* by one of the joint wrongdoers debarred an action against any partner in the wrongdoing (cf. *Voet*, 9.2.12 and 17.1.6 and 47.10.3.). I have found in authority extending this defence of payment to a joint wrongdoer in a case of defamation."

In effect, as I understand these judgments, they are saying that in defamation actions against two or more persons it is appropriate to punish each offender for his personal wrongdoing, whereas under the *Aquilian* action one is dealing with the reimbursement of a plaintiff's patrimonial loss. In this case the question which of the offenders bears the loss and in what proportion is of secondary importance.

Accordingly, I am emboldened to distinguish the remarks of DE VILLIERS, JP, in the *Robinson* case (*supra*) on the basis that they were made in the context of an action under the *Actio Injuriarum*. In passing, I note that GREGOROWSKI, J, in his comment on *Robinson's* case at 217, says:

"The Appellate Division thus equally divided the damages suffered by the plaintiff between the two defendants,

and if both were solvent (my italics) the plaintiff would not be prejudiced assuming that he was entitled to judgment for the full amount from each."

This, with respect, perceptive comment highlights the danger of extending the reasoning in *Robinson's* case to a case involving *Aquilian* damages. Where the object of the exercise is primarily to punish the defendants (as in defamation) it may be reasonable that if one of them goes insolvent he should not pay and the plaintiff should accept a lesser amount of damages. But where the object is primarily to reimburse the plaintiff, and one of the defendants goes insolvent, the plaintiff must surely be allowed to recover in full from the other.

I conclude that the judgment in *Robinson's* case is no bar to my making an order in the form I proposed earlier. In actions under the *Lex Aquilia* the action may be brought against all the wrongdoers as co-defendants and the judgment made be recovered in full from any of them (*Naudé and Du Plessis v Mercier*, 1917 AD 32 at 39, *Union Government v Lee*, 1927 AD 202 at 227).

1982 (2) ZLR p212

McNALLY J

In the premises, and making allowance for the \$1400 paid already by Oates (which will presumably be increased by a further \$200 by the time this judgment is delivered, but I will leave that to be resolved in terms of the "joint and several" provision in the judgments, I make the following order:

1. There will be judgment for the plaintiff in the sum of \$22 204,60 with costs.
2. To the extent of the first \$3 604,60 the defendant is to be individually liable.
3. To the extent of the balance of \$18 600,00 the defendant's liability is to be joint and several with that of the defendant in case No. GD 1017/81, Aubrey James Gates, the one paying the other to be absolved.

Coghlan Welsh & Guest, legal practitioners for the plaintiff.

Seirlis Higham & Lewis, legal practitioners for the defendant.

1982 (2) ZLR p213

v

S v JAMBANI 1982 (2) ZLR 213 (HC)

Court High Court, Harare

McNally J

10th November, 1982

Flynote

Criminal procedure - charges - duplication of charges arising out of one course of conduct - correct course is

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to charge with offence which was dominant purpose of course of conduct.

Headnote

It frequently occurs, during a course of criminal conduct, that several offences are committed. To charge the accused with all those offences, however, may well result in prejudice to him, since the whole of the criminal conduct imputed to him in substance constitutes only one offence. In such a situation, the correct course fits to charge the accused with that offence which was his dominant purpose. This does not mean that the test of "dominant purpose" is the only one to be applied: in some situations it may still be appropriate to charge the accused with more than one offence.

Cases cited:

R v Peterson and Others, 1970 (1) RLR 49; 1971 (2) SA 130;

Gordon v R, 1909 EDC 254;

S v Mutawarira, 1973 (1) RLR 292; 1973 (3) SA 901 (RAD);

S v Grobler and Another, 1966 (1) SA 507 (AD);

R v Hymans, 1927 AD 35;

R v Zindoga, 1980 ZLR 86; 1980 (2) SA 991 (RAD).

Judgment

McNally J: The accused pleaded guilty to one count of theft by false pretences, six counts of forgery and six counts uttering. The facts were clearly summed up by the Magistrate in the following terms:

"You are a school teacher in Mount Darwin. You came to the Charter District, Chivhu, on teachers pay day and got into the queue. You pretended to be I Nago, a teacher at Svinurayi School. You were then given the six cheques to take to your fellow teachers. You well knew at time that you were not a teacher at that school and so could not receive the money on their behalf. You then took the cheques to the Standard Bank, Chivhu where, with the assistance of a schoolteacher there, who has a savings

1982 (2) ZLR p214

McNALLY J

account at the same bank, you were able to cash the cheques. You took the total amount of \$1411,70 and converted it to your own use. Only \$92,00 was recovered. You uttered these cheques after signing the names of the owners and Gondo's name."

The theft charge related to the theft of the six cheques from the school official. (Whether or not this amounts to theft I will consider later). The six charges of forgery related to his signing the names of the payees and Gondo's name on each of the cheques. The uttering charges related to the cashing of the cheques thus forged.

The accused was sentenced to 12 months' IWL on the theft charges and to 6 months' IWL on each of the six pairs of forgery and uttering charges. That came to a total of 48 months and of

this 18 months were suspended for 5 years on conditions.

My first reaction was that 4 years' IWL for the stealing of some \$1400 was very severe. My second thought was that 12 months' IWL for stealing six pieces of paper was excessive unless one took into account the value inherent in those pieces of paper. My third thought was the forgery and uttering sentences must also have taken into account the value of the cheques and therefore in effect the accused was being punished twice, if not for the same offence, then at least on the basis of the same prejudice.

This line of thinking leads to the question of splitting of charges. It is a difficult question. A few examples will illustrate the problem.

If A steals an expensive gun and goes poaching with it, he may clearly be convicted of theft and of poaching. Yet if he steals a key to a store and uses it to break and enter the store and steal thousands of dollars' worth of goods, is he likely to be charged with theft of the key as well as housebreaking with intent to steal and theft? If there is a distinction between the two examples, on what is it based?

BEADLE, CJ, examined the problem in *R v Peterson & Ors*, 1970 (1) RLR 49; 1971 (2) SA 130. There the accused stole a car. It broke down, and to cover their traces and eliminate finger-prints, they burned it. They were charged both with theft and with malicious injury to property. The CHIEF JUSTICE (GREENFIELD, J, concurring) confirmed the convictions, and used two useful examples to illustrate his point.

He said at page 53B-F:

"Take a case where the accused decides to steal a sheep and he decides to steal it by shooting it and carrying it away. He shoots the sheep and then carries it away. By shooting the sheep he has undoubtedly damaged the property of the owner of the sheep, but his dominant intention in

1982 (2) ZLR p215

BEADLE CJ

shooting the sheep was not to cause malicious injury to property but to steal the sheep, and in these circumstances I would consider it wrong if the accused were to be charged both with the malicious injury to property by shooting the sheep and with the theft of the carcass of the sheep when he carried it away. Take a converse case. An accused is annoyed by the behaviour of a neighbour's dog. He steals the dog with the object of destroying it. He steals it and destroys it. In that case I consider it would be wrong to charge the accused both with the theft of the dog and with the malicious injury to the dog by destroying it, as his dominant intention in taking the dog away was not to steal it but to destroy it. His dominant intention was to cause malicious injury to property but not theft. In cases of this sort where the accused, in pursuance of a dominant intention, commits two offences it seems to me the proper thing to do is to charge him only with that offence which was his dominant purpose."

Although the "dominant purpose" test is a useful one, it should not be seen as the only one. For instance, in the example I gave earlier where a man steals a valuable gun and goes poaching, his dominant purpose might be to go poaching, but one's sense of justice is not shocked if he is charged with, and convicted of, both offences. Whether this is because then complainants are different, or because the stealing of the gun is more than a mere step on the way to the poaching offence, or because the gun is not used up in the poaching offence but remains

afterwards as a valuable unlawful acquisition, one hesitates to formulate a test to cover all eventualities. I fall back on the words of KOTZE, JP, in *Gordon v R*, 1909 EDC 254 at 268-9, where he said:

"It is difficult, if not impossible, in view of the decided cases, to lay down a hard and fast rule which will apply with justness in every instance . . .".

Both in *Person's* case (*supra*) and later in *S v Mutawarira*, 1973 (1) RLR 292 at 296F, the then CHIEF JUSTICE referred to the dictum of WESSELS, JA in *S v Grobler & Arzor*, 1966 (1) SA 507 (AD) where, at 523, he said:

"Having regard to the genesis of the rule (which could in my opinion be more aptly described as a rule of practice against the duplication of convictions) I am of the opinion that it was designed to prevent a duplication of convictions in a trial where the whole of the criminal conduct imputed to the accused constitutes in substance only one offence which could have been properly embodied in one all-embracing charge and where such duplication results in prejudice to the accused."

I now return to the facts of the present case. It seems to me to be abundantly clear that there was one dominant purpose in the mind of the accused and that was to steal the proceeds of the six pay cheques. In

1982 (2) ZLR p216

BEADLE CJ

order to steal the proceeds he had first to acquire the cheques from the school official, second to forge the payees' endorsement (and, for some unknown reason, Gondo's as well) and third to utter the cheques to the bank.

In my view therefore he should have been charged with the overall offence of theft by false pretences of the proceeds of the cheques from the bank. Since he was not so charged, there is no objection to his being convicted on 6 counts of forgery and 6 counts of uttering. (Cf *R v Hymans*, 1927 AD 35). But to charge him, on top of that, with the theft of the six cheques from the school official has brought about a duplication which has prejudiced the accused.

I am satisfied that, whatsoever test one applies, the "theft" of the cheques themselves from the school official should not have been charged separately. That "theft" was merely a step in the achievement of the dominant purpose. Indeed I doubt if there was even an *animus furandi* since the cheque forms were handed to the bank, who in the normal course of business would have sent them back to the maker. Going back to one of my earlier examples about the theft of the key, it is as if the key was left in the door after being used in the storebreaking.

Accordingly, and with the agreement of the Attorney-General, to whom I referred these papers, the conviction and sentence on count 1 are set aside.

In view of the magistrate's global approach to sentence it is necessary to reconsider the sentence on counts 2 to 13, although the convictions are in order. The Attorney-General agrees that some reduction is appropriate. My attention has been drawn to the case of *R v Zindoga* 1980 ZLR 86; 1980 (2) SA 991 (RAD) where the accused was convicted of theft by conversion of various amounts totalling \$1 685,05 from his employer over a period of five months. MACDONALD, CJ, described a sentence of two years' IWL, of which nine months were

conditionally suspended, as "very properly . . . a severe sentence" on a first offender. He went on to stress the desirability of suspending a portion of the sentence where there is any possibility of the accused - or his relations - making restitution. He suspended a further eight months of the sentence on condition that restitution was made within two months.

The accused in this case did over to make restitution, but it must also be noted that the incidence of white-collar crime has increased markedly since *Zindoga's* case was decided.

1982 (2) ZLR p217

BEADLE CJ

In all the circumstances I make the following orders:

1. The conviction and sentence on count 1 are set aside.
2. The convictions on the remaining counts, 2 to 13 inclusive, are confirmed.
3. The sentences on these counts are set aside.
4. The accused is sentenced as follows:
 - a. on counts 2 and 3 taken together, 5 months' IWL;
 - b. on counts 4 and 5, 5 months' IWL;
 - c. on counts 6 and 7, 5 months' IWL;
 - d. on counts 8 and 9, 5 months' IWL;
 - e. on counts 10 and 11, 5 months' IWL;
 - f. on counts 12 and 13, 5 months' IWL.

Of the total of 30 months' IWL, 6 months are suspended for 5 years on condition that the accused is not convicted of an offence committed during to imprisonment without Me option of a fine or to a fine in excess of \$50; a further 6 months are suspended on the saline conditions and on the further D condition that the accused repays or causes to be repaid to the Standard Bank through the Clerk of Court, Chivhu, the sum of 1319,70 on or before the 30th September, 1983.

Smith JP: agrees.

1982 (2) ZLR p218

ATTORNEY-GENERAL v CHIMWADZE 1982 (2) ZLR 218 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Georges JA and Beck JA

8th and 12th November, 1982

Flynote

Criminal law - Precious Stones Trade Act (No. 8 of 1978) - section, 3 (1) - unlawful possession of uncut emeralds - "possession" - meaning of - includes custody or control.

Headnote

On charge of unlawful possession of uncut emeralds under section 3 (1) of the Precious Stones Trade Act (No. 8 of 1978), it is not necessary for the prosecution to establish legal possession; the section penalises detention, custody or control. Thus, where the respondent kept 6 emeralds for another man, to return to him later in the day, his custody of the emeralds during that time amounted to possession.

Cases cited:

S v Masson and Another, 1982 (1) ZLR 216;

S v Brick, 1973 (2) SA 571 (AD);

R v David, 1957 R & N 180; 1957 (2) SA 279 (SR);

R v Takawira and Others, 1965 RLR 163.

JB Colegrave, for the appellant.

No appearance for the respondent.

Judgment

Fieldsend CJ: The respondent was acquitted of a charge alleging the possession of uncut emeralds in contravention of section 3 (1) of the Precious Stones Trade Act (No. 8 of 1978). The facts were that a police trap was set for the respondent and it was established that he produced six uncut emeralds worth about \$340 to the police on 1st March, 1982 at their insistence. The section penalises any person who deals in or possesses precious stones unless he is licensed or authorised by a licensed person to do so.

The magistrate had some reservations about the reliability of part of the police evidence, but accepted - as the respondent had accepted - that the respondent produced six emeralds to the police. He rightly rejected

1982 (2) ZLR p219

FIELDSEND CJ

the proffered defence of entrapment as not existing in our law, but he concluded on the facts that it had not been established that the respondent was dealing in emeralds. He found that the respondent had been handed the emeralds by one Tobias, to be kept for Tobias until later the same day, that he knew it was emeralds he had been handed and that it was illegal to deal in uncut emeralds. He acquitted the respondent on the basis that his custody of the emeralds did

not amount to possession or them in terms of the Act. It is against this conclusion of law that the Attorney-General now appeals under section 69 of the Magistrates Court Act [*Chapter 18*].

The magistrate on this issue said:

"It also has to be established whether or not the State has clearly indicated that the accused, acting in the manner that he did, had assumed control of the emeralds. Also, the court has to be satisfied that at the time that the accused had received the stones into his possession, had he concluded a contract with the person who initially had the stones, that is, Tobias? (*sic*).

I do not think that there was any concluded contract between the accused and Tobias from the facts in the charge."

And:

"It is quite evident that the accused was given these stones by Tobias so that Tobias would come back, collect the stones and thereafter, sell them to any purchaser who came along I do think, on the facts of the case, that the accused and this Tobias ever sat down and agreed on how the stones were going to be disposed of at all."

In effect the magistrate seems to be saying that the Act penalises only legal possession and not mere custody or factual possession. This is a proposition which it is difficult to support.

In the area of the possession of arms of war we decided recently in *S v Massorz and Anor*, 1982 (1) ZLR 216, that section 37 (1) of the Law and Order (Maintenance) Act [*Chapter 65*] penalises a person who has custody or control of arms, and not only a person who has legal possession of them. There the legislation uses the words "has in his possession". In the area of indecent or obscene photographic matter it was held in *S. v. Brick*, 1973 (2) SA 571 (AD) that the possession penalised was detention, custody or control and not legal possession. In the area of possession of gunpowder it was held in *R v David*, 1957 R & N 180; 1957 (2) SA 279 (SR) that actual control by an accused with an intention to hold the gunpowder until he could execute his mandate to deliver it as asked was sufficient to constitute possession under the Firearms Restriction Act, 1944.

1982 (2) ZLR p220

FIELDSEND CJ

The present appeal is virtually on all fours with *R v David* (*supra*). There the accused was handed gunpowder by another to take to Portuguese East Africa. Here the respondent was handed the emeralds to hold until Tobias reclaimed them. There is in effect no distinction between the cases.

Further support for the conclusion that possession means only detention, custody or control it is to be found in section 3 '(1) (d). This exempts from the prohibition against dealing in or possessing -

"the employee or agent of any person referred to in paragraph (a), (b) or (c) (i.e. a person licensed to possess) who is authorised by his employer or principal to deal in or possess on his behalf precious stones".

If an employee or agent holding stones for another was not within the prohibition there would be no need to exempt him. This clearly shows that custody or control by an employee or agent

would, but for the exemption, have been caught by the word "possess".

The magistrate was clearly wrong in law in holding that section 3 (1) of the Precious Stones Trade Act required the prosecution to establish legal possession, as distinct from mere detention, custody or control, of the emeralds, and he erred in holding that the respondent did not have such custody or control. The appeal is Therefore allowed to that extent.

This appeal has, of course, been decided on its own particular facts, and on the basis that the respondent was consciously holding emeralds on behalf of Tobias until Tobias reclaimed them. It does not necessarily follow that every instance of custody or control is penalized by the section. For example it would be absurd if the policeman who took the emeralds into his custody were to be guilty of an offence. See *R v Takawira and Ors*, 1965 RLR 162 at page 166. Consideration should, in our view, be given to adding qualifying word to section 3 (1) of the Act, to exempt from its operation a person who has "lawful authority or reason able excuse" for his possession to meet this type of situation.

Georges JA: I agree.

Beck JA: I agree.

1982 (2) ZLR p221

S v RAWSTRON 1982 (2) ZLR 221 (HC)

Court **High Court, Harare**

Dumbutshena J

28th and 29th October and 17th November, 1982.

Flynote

Criminal procedure - sentence - Exchange control Act [Chapter 170] - acquisition of foreign currency by underinvoicing goods exported - using money to purchase goods which were then sold at profit in Zimbabwe - proceeds used to buy further goods which were exported - net result was at advantage to Zimbabwe, not prejudice - special reason for not imposing mandatory minimum sentence - "special reasons" - distinction from mitigatory circumstances.

Headnote

The accused pleaded guilty, and was convicted, on four charges under the Exchange control Act [Chapter 170] and one under the "Control of Goods Act [Chapter 280]. The charges arose out of his activities in connexion with the export of wild birds from "Rhodesia (and, later, Zimbabwe). He had falsely under-stated in the appropriate forms the number of birds exported and thus acquired foreign currency outside the country. However, he had used this currency to purchase exotic birds which he imported into the country and sold at a profit. With the profit he purchased more wild birds in Zimbabwe, and these he exported. The net result of these activities was that the country's foreign currency reserves were not actually prejudiced; on the

contrary, they were increased.

The mitigating features were considerable. The accused at no time built up a "nest-egg" of foreign currency for himself. The country benefitted from his activities. The unlawful nature of what he did was motivated in part by inefficiency and delays in the Department of National Parks and in part of the practical difficulty, during the period of UDI and sanctions, of acquiring export markets and the necessity to resort to unlawful means to retain those markets. The questions arose whether he had, in all the circumstances, shown that there were "special reasons" why the minimum sentences prescribed in section 5 (3) of the Act should not be imposed.

Held, that a distinction must be drawn between those factors which create special reasons and those that are only mitigatory. A special reason is one which is special to the facts which constitute the offence, as opposed to special to the offender. Matters which might be pleaded as mitigation, such as good character or particular hardships, are not "special" but general circumstances.

1982 (2) ZLR p222

DUMBUTSHENA J

Such mitigatory features cannot be ignored when assessing sentence, but do not constitute "special reasons". Conversely, "special reasons" may also be mitigatory.

Held, further, that in the circumstances of this case there were, as was agreed between counsel, special circumstances which, together with the real circumstances of mitigation, made the case unique and allowed the Court to impose a relatively moderate fine.

Cases cited:

S v Horowitz, 1976 (1) RLR 238;

S v Hawa, 1981 ZLR 526; 1982 (1) SA 896 (ZSC);

Attorney-General v Nurmahomed, 1982 (2) ZLR 194;

Whittal v Kirby [1946] 2 All ER 552;

da Costa Silva v R, 1956 R & N 369;

S v Chisiwa, 1981 ZLR 666;

Lines v Herson [195] 2 All ER 650.

N. M. Willsmer, for the appellant

I. R. Deeks, for the State

Judgment

Dumbutshena J: The accused was charged with one count of contravening section 5 (1) (by of

the Exchange control Act [Chapter 170] and three counts of contravening section 5 (1) (a) (ii) of the same Act. He was also charged with contravening section 6 (4) of the Control of Goods Act [Chapter 280], as read with section 13 (e) of the Control of Goods (Import & Export) (Commerce) Regulations, RGN 766 of 1974. He pleaded guilty to all the five counts and was found guilty as charged.

No evidence was led. The parties handed in an Agreed Statement of Facts, Exhibit 1; for a better appreciation of the matters which are material in this case, I have decided to set out the Statement of Agreed Facts in its entirety because it gives the general background of the activities of the accused and an adequate synopsis of the evidence upon which the parties are agreed. It is in the following terms:

"GENERAL

1. The accused is a Zimbabwean resident, living in Harare. He was born on the 20th January, 1953. His school days hobby of collecting wild birds matured into a full-time business. At first he merely trapped and sold birds locally but he then commenced exporting birds, receiving the necessary authority from the Department of National Parks and Wild Life Management. He also embarked upon the importation of exotic birds for the purpose of export of the same birds at a profit, obtaining the necessary import licences.

1982 (2) ZLR p223

DUMBUTSHENA J

2. In conjunction with the Department, he was instrumental in forming the Bird Trappers Association, whose members consisted of all Zimbabwean bird trappers interested in exporting birds, becoming (chairman. The stated objectives of the Department were *inter alia* to achieve close liaison between it and the ten members of the Association, for their mutual benefit and to work out a quota system for exports, but these objectives were frustrated by delays and problems. The Department failed to formulate a policy and to issue any more than two quotas, however.
3. In January, 1979, the accused and others decided that the only way in which they could continue to operate their businesses was by means of the over exportation of birds through the medium of the accused (their Chairman and one of the only two quota-holders) so as to finance imports of foreign birds bought with the externally-acquired foreign currency; these foreign birds would be traded in, locally, and further export business would then be generated.
4. On various occasions between January, 1979 and June, 1981, in contravention of section 5 (1) (b) of the Act, the accused completed CD1 forms in respect of the export of trapped wild birds, making false statements of two types; he under-valued the birds to be exported and under-stated the numbers of birds to be exported.
5. By means of these misrepresentations, the accused accumulated foreign currency outside Zimbabwe to a amount equivalent to Z\$14 909,00, this amount representing the total difference between the value of exports as declared on the CD1 forms and the actual value of exports. Foreign currency in the amount of such declared values was remitted to Zimbabwe, but this balance was held externally, in foreign currency.
6. With the exception of R3 915 (Z\$2 600,00) which the accused has been trying to recover, these externally-acquired funds were all utilized in importing exotic birds into Zimbabwe.
7. \$11482,00 of these externally-acquired funds was acquired for the benefit of the accused, the balance of \$3 427,00 being acquired for the benefit of his accomplices.

COUNTS 2, 3 and 4

8. On the three occasions resected in the charges, the accused obtained import licences for the import of exotic birds into Zimbabwe, one of the conditions of such licences being that these birds would subsequently be exported. The rationale for this arrangement was the fact that such subsequent export would be effected at a profit, and the payment in Zimbabwe of such profit (being made in foreign currency) would be of benefit to the country.
9. In contravention of section 5 (1) (a) (ii) of the Act, however, the accused failed to comply with such conditions by exporting the exotic birds imported in terms of these three licences. He exported local birds instead, repatriating the proceeds.

1982 (2) ZLR p224

DUMBUTSHENA J

10. As a result, the following equivalents of amounts OR foreign: currency reflected in the import licences were sent out of Zimbabwe:

Z\$1 985,00

Z\$ 204,00

Z\$ 358,00

Z\$2 547,00

COUNT 5

11. Quite apart from his activities which have given rise to Count 1, in contravention of section 6 of the control of Goods Act as read with section 13 (e) of its Regulations, 766/74 as amended, the accused also exported 1490 birds in excess of the number authorised by the permits granted by the Director of the Department.
12. The appropriate value of these birds was Z\$4 500,00."

Not only did the parties agree on the facts that led to the commission of these offences, they also agreed on the facts in mitigation of sentences except to the extent that here and there different emphasis and interpretation was placed by the State and the defence on the same set of facts. In any event a Statement of Agreed Facts in Mitigation was tendered in evidence and produced as Exhibit 2. The accused, according to that Statement, was Chairman of the Bird Trappers Association and the sole representative of the interests of all interested and potential exporters of birds. As such representative, he received one of the only two export quotas which were issued by the Department, whereas the Department had previously agreed to issue the full number of ten equal quotas the Department had originally agreed to issue to all members. The members who did not receive any quotas believed they had been effectively prevented from exporting birds. It is said these members gained the impression that the accused and the other quota-holder were benefiting unfairly from a monopoly situation created by the Department.

The accused tried to get the Department to rectify the position, without success. As a result the

accused found it necessary to afford the other members the use of his export quota on a *pro rata* basis. However, his quota was insufficient to carry the burden of the volume of exports sought by himself and others. It is said in the Statement of Agreed Facts in Mitigation:

"Had the Department not been guilty of delays, inefficiencies and inconsistencies of policy, this background situation would not have been created."

In an attempt to consider all the factors of mitigation and of aggravation which will assist me in the assessing of appropriate sentences, I feel it is proper to consider the submissions of counsel as they relate to each of the five counts.

1982 (2) ZLR p225

DUMBUTSHENA J

In count 1, the contravention of section 5 (1) (b) the Act, the accused made false statements by under-valuing birds to be exported and by understating the numbers of birds to be exported. As a result the accused is said to have accumulated foreign currency outside the country amounting to an equivalent of Z\$14 909,00. This amount was the difference between what the accused declared on the CD1 forms and the actual value of exports. What the accused did was to remit into the country foreign currency in the amount declared on the CD1 forms but the balance represented by the undervaluation of the price of birds and the understating of the numbers of birds exported was the foreign currency that was kept or held externally.

What makes this case different from other cases of its kind is the fact that the foreign currency acquired and held externally was all used buying exotic birds which were imported into Zimbabwe. The only exception was the R3 915 or the equivalent of Z\$2 579,59 held in South Africa, which the accused has now succeeded in repatriating. A breakdown of the Z\$14 909,00 reveals that Z\$11482,00 of that amount was acquired for the benefit of the accused and the balance of Z\$3 427,00 was acquired for the benefit of his accomplices. If I understand the position, in as far as count 1 is concerned, there are now no externally held funds, the R3 195 or its equivalent Z\$2 579,59 having now been received in Zimbabwe in terms of section 5 (4) (b) of the Act.

Why did the accused undervalue the birds? The answer is found in the Statement of Agreed Facts in Mitigation which puts down the reasons as follows:

"The decision to undervalue exports was made purely as a result of the insistence of the accused's only available foreign purchaser of the birds exported from Zimbabwe, a Belgian businessman. (The accused was operating against the background of sanctions against Zimbabwe and really had little option).

On a number of occasions the Belgian purchaser stated categorically that he would cease purchasing such exports unless the accused afforded him the opportunity of lowering the duty payable by him, on the import into his country of the birds, by undervaluing the birds. This has been established from telexes between the parties.

The accused was at first reluctant, and reluctant for some time, to comply with this request, but was faced with the situation that if he did not comply he would have no other foreign purchaser with whom to do business.

There was another reason for the accused's undervaluing, and that lay in the fact that he had guaranteed that all birds exported would be alive on arrival.

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It frequently happened that certain mortality and theft-in-transit losses occurred and, naturally, the foreign purchaser would decline to make full payment of the amount required to acquit the CD1 forms."

Mr *Deeks*, who appeared for the State, submitted that there was no dispute as to the facts because all concessions made by him were made after careful consideration and examination of documents and exhibits.

He said: "There is documentary evidence of arrangements between the accused and the Belgian operator. There is correspondence from the Belgian to the accused insisting that the birds be valued at such and such a price." And accounts were rendered to show that that was the position. He affirmed in his submission that the funds held were used to purchase birds overseas. He said the concessions made by the State were properly made and not made on frivolous grounds.

One of the most important concessions made by the State and contained in the Statement of Agreed Facts on Mitigation is to the effect that:

"When the accused's activities are viewed in their overall effect, in fact the country's foreign currency reserves were not prejudiced at all; they were increased.

The overall effect of the accused's activities, so far as Count 1 is concerned, is explained in the following manner:

1. By under invoicing and undervaluing his bird exports (to a total value of Z\$14 909,00) he acquired foreign currency externally.
2. For the reasons set out below, he could not bring this foreign currency as such back into the country, so he used it to buy birds outside the country.
3. He brought these foreign birds into Zimbabwe (in lieu of the externally acquired foreign currency) and traded them locally through pet shops, both selling and exchanging them for other exportable birds.
4. With the money acquired from these sales he bought further exportable birds.
5. He then (lawfully) exported these fresh birds (i.e. those bought and acquired from exchanges) at sale-prices which incorporated the cost to him, his expenses and a fairly high profit margin.
6. The sale-prices payable for these freshly exported birds were, naturally, payable in foreign currency.
7. These prices were duly paid; in other words, the requisite foreign currency was brought into Zimbabwe.

The foreign currency which eventually found its way back to Zimbabwe by the above means exceeded the foreign currency equivalent to Z\$12 309,00 of the Z\$14 909,00 involved in Count 1."

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Mr *Deeks* argued that Z\$14 909,00 should have been theoretically repatriated to Zimbabwe. Instead, foreign currency equivalent to Z\$12 309 was used to purchase birds which were imported to Zimbabwe. What is clear here is the fact that the undervaluing of the birds exported

by the accused did not benefit him. He did not, counsel are agreed, create a nest-egg, in the way of externally-held funds, for himself.

The birds that were imported were sold or exchanged here and as already stated, the money realized was used to purchase local birds in Zimbabwe. These birds were then exported to foreign countries and foreign currency in excess of \$12 309 was repatriated to Zimbabwe. Mr *Deeks* submitted that, using this method, it required two export transactions to realise what one export transaction would have generated for the country. Had the accused complied with the strict letter of the law, foreign currency would have been enhanced, that is, the total amount of the value of birds in foreign currency would have been repatriated to Zimbabwe for each of the two export transactions instead of making two transactions to realize what one transaction would have realised. If I understood him well, Mr *Deeks*'s contention is that the value of one transaction of foreign birds repatriated was \$12 309, which is also the value of the second transaction of foreign birds. It means therefore the second batch of foreign birds did not bring into the country foreign currency to the equivalent of \$12 309.

The accused was engaged in setting up businesses in Botswana and the Transkei where he and an Irish purchaser would go jointly into business together. As a result of these business activities foreign currency in the form of US\$5000,00 (approximately Z\$3 800,00) was brought into Zimbabwe in 1981. The destination of that foreign currency should have been Botswana and the Transkei. The State has accepted that that money was repatriated to Zimbabwe. For the purposes of count 1, the State says with that amount (Z\$3 800) the amount of foreign currency not brought into the country is approximately Z\$8 500,00. It is common cause that the accused does not hold this amount of money outside the country. He made false statements in relation to \$14909 worth of Zimbabwe birds. Instead of the accused repatriating \$14 909 in foreign currency, he repatriated birds to the value of \$12309,00. It was the State's contention that this type of repatriation was unsatisfactory because the country does not need birds, it needs foreign currency. It seems to me that the accused's devious methods would ultimately have achieved his objective of bringing all foreign currency to Zimbabwe.

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As already pointed out, the foreign currency which, by these methods, eventually found its way back to Zimbabwe exceeded the foreign currency equivalent of Z\$12 309,00 of the Z\$14 909,00 with which we are concerned in count 1.

There was, in addition, an outstanding balance of R3 915,00 held in South Africa which the accused intended to use to buy birds following the procedures described above. This amount was repatriated during the three months' adjournment granted to enable him to repatriate that amount.

The factors I have outlined above are mitigatory in nature and provide the special reasons required for purposes of sentence, and are accepted both by the State and the defence as such. Now, in terms of section 5 (3) of the Act, as amended, which reads:

"5 (3) Subject to the provisions of this section, a person convicted of an offence in terms of subsection (1) shall be

liable to such fine or to imprisonment for such period as the court deems fit or to bow such fine and imprisonment.

(3a) Where a person is convicted of an offence in terms of -

- (a) paragraph (a) of subsection (1) which involves gold, currency, security, goods Or any other property whatsoever; or
- (b) paragraph (b) of subsection (1) and the statement was made or the document was produced for the purpose of or in connexion with the exportation from, or acquisition outside, Rhodesia of any goods, currency, security, goods or other property whatsoever in contravention of the provisions of this Act:

the court shall, whether or not it imposes any sentence of imprisonment, impose a fine of not less than the value of the gold, currency, security, goods or other property concerned unless the convicted person satisfies the court that there are special reasons in the particular case, which shall be recorded by the court, why a lesser fine should be imposed."

are there any special reasons in this case? I should now consider whether or not there are special reasons entitling the Court not to impose any sentence of imprisonment: and/or a fine of not less than the amount of the foreign currency not repatriated because the facts outlined above are in the main special reasons.

In this case it was conceded by Mr *Deeks* that although a prison sentence is mandatory by virtue of the provisions of section 5 (5) (b) of the Act, imprisonment was not called for although the Court was

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obliged to impose a sentence of imprisonment. In *S v Horowitz*, 1976 (1) R L.R 238 at 242 C-D, MacDONALD, ACJ (as he then was), said, when commenting on a mandatory sentence:

"Where the Legislature has decreed a mandatory prison sentence, a court will not lightly order the whole of that sentence to be suspended (compare the remarks in *S v Mtembu*, 1970 (1) SA 435 (N.)) and will only do so when the mitigating circumstances clearly make such a course desirable."

Before attending to the special reasons so ably summarised by Mr *Deeks* and Mr *Willsmer*, who appeared for the accused, let me set out what was said by BARON, JA, after laying down the relevant portions of subsections (4) and (5) of section 5 of the Acts At page 900A-B of *S v Hawa*, 1981 ZLR 526, 1982 (1) SA 896, he had this to say:

"Thus the position is this: A person who has been convicted of an offence which involves the exportation of currency from Zimbabwe and who has not already repatriated the funds will, if he wishes to avoid the imposition of a prison sentence, which is mandatory in terms of subsection (5) (b), ask the court to adjourn the proceedings to enable him to effect such repatriation. If he fails to repatriate all the funds involved within the period of the adjournment the court is obliged to impose a prison sentence, although it may in a proper case suspend the whole of it. On the other hand, if he succeeds in repatriating all the funds within the period in question the Court may in a proper case decide not to impose any prison sentence, even one wholly suspended; but in the absence of special reasons the court will be obliged in terms of section 7 (1) of the Act to declare forfeit the funds repatriated."

Mr *Deeks* put the mitigatory features in relation to count 1 as follows:

That the accused had an unusual motive:

- (a) he had a lack of motive to acquire a nest-egg of foreign currency out side this country;
- (b) he had a partial motive to help friends to export birds without deriving any benefit for himself;
- (c) he was forced to commit the offence by the Belgian purchaser of birds, who also forced him to make adjustments for losses suffered; and
- (d) there was no actual prejudice to the State, although there was an appreciable potential prejudice.

These are indeed mitigatory features relating to count 1 and which have been generously conceded and argued out in favour of the accused by Mr Deeks. The absence of prejudice to the State is also, in my opinion, a special reason in that the foreign currency content was brought back into the country, either in cash or in the form of birds. The facts in As case are distinguished from those in *Attorney-General v Nurmahomed* 1982 (2) ZLR 194.

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In my view there is substance in Mr *Willsmer's* contention that this is a most unusual case on account of the fact that accused's intention it was to bring back foreign currency to Zimbabwe. This was to a large extent achieved and therefore there was no actual prejudice to the country with regard to the country's foreign currency reserves. The only prejudice lay in the lack of control by the Department of local bird population figures. The proceeds of the local birds exported in substitution came to at least Z\$8 547 in foreign currency brought back to the country. Mr *Willsmer* also submitted that the country benefitted from accused's activities to the tune of \$20 000. If accused had gone about carrying out his business lawfully, it would not have got off the ground and there would have been no foreign currency brought to Zimbabwe. This submission carries appreciable weight when consideration is given to the fact that the accused was operating against the background of sanctions imposed during UDI against Rhodesia (now Zimbabwe) and had little option. He had under those circumstances to undervalue the birds at the insistence of the only available foreign purchaser, the Belgian businessman, who threatened to cease purchasing such exports unless the accused afforded him the opportunity of lowering the duty payable by him on the import of the buds into Belgium by undervaluing the birds. Both counsel say this fact was established from telexes exchanged between the parties.

Mr *Willsmer* submitted that the export of birds involving under-valuing and under- invoicing which resulted in the return of birds as opposed to foreign currency, resulted in the disposition of birds and export of fresh birds, which brought into the country foreign currency. If one took a broad view of the contravention of section 5 (1) (b) of the Act, the accused brought back foreign currency as a result of unlawful export. It is taking the narrow view to argue that that foreign currency was brought into the country during the second phase of export, because full foreign currency was brought in, and not only \$14 909, but also \$3 800 plus \$1 500 (that being the sow of US\$2000 brought into the country when the accused was worldling in Mocambique awaiting his trial). The country therefore received \$20 000 foreign currency. That, according to Mr *Willsmer*, satisfies the provisions of section 5 (4) (b) (i) of the Act, which reads:

"(4) Where a person -

(a)

(b) does not satisfy the court that -

(i) foreign currency in an amount of not less than the value of such property which has been exported from, or acquired outside, Rho-

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desia has been received in Rhodesia; or

(ii)

the court may, before passing sentence, adjourn the proceedings for such period not exceeding three months as the court deems fit in order to give the convicted person an opportunity of so satisfying the court on the resumption of the proceedings."

The State accepts that the US\$5 000,00 brought into the country from the accused's business activities in Botswana and the Transkei should be regarded as repatriation. However, Mr *Deeks* did not accept that the the US\$2 000, part of the accused's earnings, brought into the country from Mocambique was in the form of repatriation of foreign currency in terms of the Act. I fully share this view. I shall not therefore consider that amount as a repatriation in terms of the Act. One cannot, however, ignore it when it comes to assessing sentence.

The difficult circumstances under which the accused operated are vividly expressed in the Statement of Agreed Facts on Mitigation. The parties have expressed accused's predicament in this way:

"The situation was then reached, therefore, that the accused was accumulating funds externally for himself and his accomplices, by means of all of the offences with which he has been charged, purely to keep their businesses going and without intending these funds to continue to be held for any appreciable length of time outside the country.

The accused was most unhappy with his predicament and suggested to the Belgian purchaser that all the externally-acquired funds to be repatriated to Zimbabwe in this manner; foreign currency (Belgian francs, since no other currency was available) would be concealed in a false bottom fitted to a cage containing birds imported by the accused into Zimbabwe from the Belgian purchaser.

The Belgian purchaser agreed to this solution of the accused's problem. Without divulging full details of his unlawful activities, the accused approached his bank manager to see whether any difficulties would arise in Zimbabwe.

After consideration, the accused's bank manager decided that the amount of foreign currency involved would be too large for the bank to accept surrender thereof and Belgian francs were not acceptable, anyway, so the plan was discarded.

Clearly, the Belgian purchaser could not himself remit the necessary foreign currency through normal channels, without laying himself open to investigation as to the cause of such payments and prejudice in the form of prosecution, payment of arrear duty, fines and other such consequences.

He tried to accommodate the accused's plan of repatriation by means of smuggling in German currency (there is

correspondence establishing this) but plan also fell through.

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In due course disputes arose with the Belgian purchaser in regard to birds that he claimed he never received, numbers and prices.

In the event, the accused decided he could not continue to do business with the Belgian purchaser. Business ceased and the outstanding balance of externally-acquired funds was applied towards the purchase of birds which were then exported from Belgium to South Africa."

I have generally dealt with factors that constitute special reasons which cover counts 1, 2, 3 and 4. To avoid repetition the above special reasons will, in my opinion, adequately cover all relevant counts.

Since there is no dispute as to the existence of special reasons, let me set out briefly the written submissions on counts 2, 3, 4 and 5, made by Mr *Willsmer*. He submitted that as far as counts 2, 3 and 4 were concerned the following constitute special reasons: -

- "(a) The accused never intended his activities to cause actual prejudice to the State. There was really no acquisition of externally-held foreign currency as such.
- (b) The State has not suffered actual prejudice. In fact, a considerably greater value of foreign birds was brought into Zimbabwe than the equivalent of Z\$2 547,00 (the exotic birds imported were undervalued) and the local birds exported in lieu actually realised a foreign currency realization for the country greater than the Z\$2 547,00 involved (he could not export any more local birds, not having an additional quota).
- (c) The accused was, in a sense, compelled to commit the offences by virtue of the fact that his commission of the offence in Count 5 would otherwise have come to light, if he was to repatriate the equivalent of the foreign currency involved (by means of an NCI Permit)."

As far as count 5, which covers the contravention of section 6(4) of the Control of Goods Act [Chapter 280] as read with section 13 (4) of the Control of Goods "(Import and Export) (Commerce) Regulations 1974, is concerned, and in which the accused was issued with permits by the Director of National Parks & Wildlife Management authorising him to export certain number of birds in terms of these permits, the accused exported 1490 birds in excess of the authorized number. The approximate value of those birds was put at Z\$4 500,00.

Mr *Willsmer* submitted that special reasons in respect of this count are found in the following:

- (a) The accused never intended his activities to cause prejudice to the State, nor has the State suffered any prejudice to its foreign currency.
- (b) The commission of the offence brought into Zimbabwe Z\$4 500,00 in foreign currency which the country would not otherwise have acquired.

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- (c) There was only potential prejudice which lay in the lack of control on the part of the Department in the local bird population figures.

I agree with counsel that there are special reasons in terms of section 5(3) of the Act, high reads:

"5 (3a) Where a person is convicted of an offence in terms of -

- (a)
- (b) paragraph (b) of subsection (1) and the statement was made or the document was produced for the purpose of or in connexion with the exportation from, or acquisition outside, Rhodesia of any gold, currency, security, goods or other property whatsoever in contravention of the provisions of this Act:

the court shall, whether or not it imposes any sentence of imprisonment, impose a fine of not less than the value of the gold, currency, security, goods or other property concerned unless the convicted person satisfies the court that there are special reasons in the particular case, which shall be recorded by the court, why a lesser fine should be imposed."

In addition to the above, section S(5) of the Act conjoins the Court to pass a mandatory term of imprisonment on an accused's failure to repatriate within three months either all the birds exported or the entire Z\$14 909,00, in foreign currency, now reduced to \$8 SOD. In this regard section 7(1) of the Act reads:

"7 (1) Where a person is convicted of an offence in terms of section five which was committed by means of or in respect of any gold, currency, security, goods or other property Whatsoever, the court shall, unless the convicted person satisfies it that there are special reasons in the particular case, which shall be recorded by the court, why forfeiture to the State should not take place, declare such property or the rights of the convicted person thereto to be forfeited to the State:"

It is common cause in this case that special reasons exist. However, a distinction must be drawn between those factors which create special reasons and those that are only mitigatory circumstances. In *Whittal v Kirby* [1946] 2 All ER 552, LORD GODDARD, CJ, when considering what I may call the nature of special reasons, said at 555F-G:

"What then can be said to be a special reason beyond saying that it must be one that is not a general character? This was expressly considered by the King's Bench Division of Northern Ireland in *R v Crossan*, In that case the court adopted a test that I had ventured to use in an address that I gave to the magistrates assembled at the Summer Assizes for Essex in 1937. I suggested that the reasons must be special to the offence, and not to the offender, and the court in adopting what I had said used these words [1939] 1 NI 106 at 112, 113):

'A "special reason" within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the

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offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a "special reason" within the exception.' "

BEADLE, J (as he then was), in *Da Costa Silva v R*, 1956 R & N 369 at 372, regarded the above as a narrow view of what constitutes special reasons but accepted the definition for the purposes of the appeal he was considering. BEADLE, J's view was closely examined by SQUIRES, J, in *S v Chisiwa*, 1981 ZLR 666, a case in which the learned Judge also referred to

LORD GODDARD, C J 's definition of special reasons and said:

"It is true that BEADLE, J (as he then was), did apply in part of his judgment in the *Da Costa Silva* case the definition referred to by the magistrate, which is taken from the judgment of GODDARD, L C.J., in the English case of *Whittall v Kirby* [1946] 2 All OR. 552 at 555. But it is clear from what follows that the learned judge did so only to show, even in that limited meaning, the circumstances of *Da Costa Silva*'s case could properly be called special. If regard is paid to what he said later in his judgment at page 379 of the report, it will be seen that the learned judge did not agree with the limitation placed on the words "special reasons" by the LORD (CHIEF JUSTICE in *Whittall v Kirby* in limiting the words as it they read 'special reasons relating to the offence.' There was a difference, BEADLE, J, said, between 'a circumstance of the offence' and 'a circumstance of the case', and latter connoted a wider breadth of considerations than the former, and he said at page 379G-H:-

'The Court is here dealing with the quantum of punishment, and in making a decision on this I think that any fact which might legitimately be considered as an aggravating or mitigating feature of the case must be regarded as a "circumstance of the case", even though it may not be "a circumstance of the offence." '

Save that that passage does not emphasise the word 'special' sufficiently, it does, in my view, indicate the ambit of the factors which may be urged on a Court and which it may take into account when considering whether a penalty may be effected by such reasons."

With respect, I believe BEADLE, J, went a little too far in giving as wide an interpretation as he did in *Da Costa Silva*'s case to the nature of special reasons.

In my view, a clear distinction must be drawn between special reasons or special circumstances and mitigating features which go to the determination of the *quantum* of sentence.

I go along with the explanation of what was said in *Whittall v Kirby* (*supra*) made by LORD GODDARD, CJ, in *Lines v Hersom* [1951] 2 All ER 650 at 653A-C, where he said:

"... that the reasons must be special to the case and not to the offender. It is often difficult to maintain a sharp distinction between the case and the offender, but we meant that matters which might be pleaded as mitigation,

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e.g., the defendant's previous good character, particular hardship, or some thing off that sort, were irrelevant and ought to be left out of account. The words of section 7 (4) 'having regard of the special circumstances of the case' emphasise that for the purpose of that subsection the circumstances must be special to the case. I will not say that the conditions relating to the offender are to be ignored altogether, because that is almost impossible but it is the circumstances which are special to the case which are to be the primary consideration. We also pointed out in *Whittall v Kirby* that, where Parliament says that the circumstances are to be special, they are obviously contrasting circumstances that are special with circumstances that are general. For instance, we know perfectly well that before *Whittall v Kirby* justices used to be asked to refrain from disqualifying because the defendant had been driving for a great number of years without complaint-in other words, because he was a first offender. We pointed out that that could not possibly be a special circumstance. It was a circumstance of the most general application, because, even now, although motoring cases are numerous in the courts, the majority of motorists have not been convicted, and it cannot be a special circumstance that a motorist has never been convicted. Another reason was that, if Parliament had wished that to be regarded as a special circumstance, it could have so provided."

In this case there are many circumstances or reasons which are special to the offender. I have outlined some of these above. I intend to mention a few in order to make the distinction I seek to draw between special reasons and mitigatory circumstances. He repatriated additional amounts of US\$5 000,00 and US\$2 000,00 to the country over and above the benefit accruing to the

country from the accused's business activities. He provided the fullest possible co-operation to the police and the Department and the South African authorities, and made the task of investigation much easier and thereby enabled all offenders to be successfully investigated and prosecuted. He expressed contrition by his plea of guilty and by his co-operation. These are general circumstances peculiar to the accused which cannot be ignored when assessing sentence, but there are not special reasons for the purposes of the Act. It is, however, correct to say that some of the special reasons may be also factors of mitigation.

In *S v Chisiwa (supra)*, SQUIRES, J, put it perhaps slightly differently from BEADLE, J, in a clear passage enunciating what I have said above.

He stated:

"It is most important, however, not to overlook the word 'special' in the section. The clear intention of the Legislature in using this word is that the reasons have to be out of the ordinary, either in their extent or their nature, and by definition, therefore, not all mitigatory factors may be special reasons. On the other hand, if they are 'special reasons' they will always be mitigatory, whether they arise from the commission of the offence, or the facts and conditions affecting the offender. It should be clear from this that

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the Court may have regard to factors arising either out of commission of the offence or peculiar to the offender, as long as they are out of the ordinary. This will involve the making of a value judgment, since the question whether such reasons exist will often be a matter of degree. And, furthermore, by use of the plural 'reasons' it should be borne in mind that the Legislature clearly allowed for the cumulative effect of a number of reasons to be taken into account by the Court in arriving at its decision."

The finding of special reasons in this case was made easier because of the well-prepared submissions and the thoughtful arguments made and submitted by Mr *Deeks* and Mr *Willsmer*, who have been helpful to the Court and to whom I am greatly indebted. It is my task now, in the light of what I have said above, to assess sentence. I, however, have to bear in mind the remarks (previously quoted) of MACDONALD, A C.J., with regard to an effective sentence:

"Where the Legislature has decreed a mandatory prison sentence, a court will not lightly order the whole of that sentence to be suspended (compare the remarks in *S v Mtembu*, 1970 (1) SA 435 (N.)) and will only do so when the mitigating circumstances clearly make such a course desirable."

In the instant case both the special reasons and the mitigating circumstances are overwhelming. I am more than satisfied that there are special reasons enabling me in terms of section 5 (3a) (b) of the Act to impose a lesser fine. Counsel are agreed that an elective sentence of imprisonment is not, in the circumstances of this case, called for. This appears to me to be a correct assessment of the approach which the Court should adopt in cases which are generously endowed with special reasons. In such cases, where the facts justify it, any terms of imprisonment imposed should be wholly suspended. In this case there has not been a repatriation within three months of Z\$14 909,00 nor the lesser amount of \$8 500 in foreign currency because there is no foreign currency held outside this country that could have been repatriated.

As far as section 7 of the Act is concerned, there would be no justification in ordering forfeiture.

The section reads:

"7 (1) Where a person is convicted of an offence in terms of section pre which was committed by means of or in respect of any gold, currency, security, goods or other property whatsoever, the court shall, unless the convicted person satisfies it that there are special reasons in the particular case, which shall be recorded by the court, why forfeiture to the State should not take place, declare such property or the rights of the convicted person thereto to be forfeited to the State:

.....".

The accused, it is accepted by the State, never intended his activities to cause actual prejudice to the State because he never intended that the externally-acquired foreign currency would remain outside Zimbabwe.

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He always intended to repatriate such foreign currency. Mr *Willsmer* submitted that the State would not have suffered any prejudice to its foreign currency reserves even if the Z\$2 579,59 had not been repatriated. He contends that a considerably greater value of foreign currency would have been brought into Zimbabwe than the equivalent of Z\$14 909,00 as a result of the accused's overall business activities, and foreign goods in the form of exotic birds to this value have in addition been brought into Zimbabwe, and now that foreign currency to the equivalent of Z\$2 579,59 has been repatriated, the benefit to the country is much greater. This point was, in my view, well made.

The accused was, in fact, persuaded to commit the offence by the Belgian purchaser. His good intentions are amply demonstrated by his desire to have all the externally-acquired funds repatriated to Zimbabwe by concealing Belgian francs in a false bottom fitted to a cage containing birds imported by him into Zimbabwe. He even approached his bank manager, who decided that the amount of foreign currency would be too large for the bank to accept surrender thereof and that Belgian francs were not acceptable. It is said the Belgian purchaser tried to accommodate the accused's plan by smuggling in German currency. It would be wrong, in my judgment, to order forfeiture in the circumstances I have described above. Besides, it is said the accused stopped committing the offence voluntarily before there was any hint of detection. In my view, these special reasons are in every respect substantial, and ordering forfeiture would be unjustly warranted.

I have already come to the conclusion that special reasons and mitigatory circumstances exist in respect to all counts to which the accused has pleaded guilty and has been convicted.

In assessing the sentences I am about to read, my mind has been exercised by the submissions and concessions made by counsel. I have also borne in mind the fact that the prejudice to the State was only potential and that no actual prejudice has been established. Besides, the presence of mitigatory circumstances, some of which are a part of the special reasons outlined above, the preponderance of special reasons and real circumstances of mitigation make this case a unique one. One has also to consider the fact that this is a rare species of cases of this nature which did not, if one accepts the submissions of counsel, have any option but to deal in the business of importing exotic birds and re-exporting them or local birds according to the rules

set down by the Belgian purchaser and under conditions of sanctions then prevailing. I am satisfied that this is a proper case to exercise my discretion favour of the

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amused. Due regard must also be had to the fact that the only funds held outside the country have now been repatriated.

Accordingly, the accused is sentenced as follows:

On count 1:

\$4 000 or, in default of payment, 1 year's IWL, of which \$2000 or, in default of payment, 6 months' IWL is suspended for 3 years on condition accused does not within that period contravene the Exchange control Act [*Chapter 170*].

In addition, 8 months' IWL wholly suspended for 3 years on condition that the accused does not within that period contravene the Exchange control Act [*Chapter 170*].

Counts 2, 3 and 4:

I shall treat the above counts as one for sentence, which is as follows: \$600 or, in default of payment, 6 months' IWL, of which \$300 or, default of payment, 3 months' IWL is suspended for 3 years on condition that the accused does not contravene the provisions of the Exchange control Act [*Chapter 170*].

In addition, 4 months' IWL wholly suspended for 3 years on condition that the accused does not during that period contravene the Exchange control Act [*Chapter 170*].

On count 5:

\$800 or, in default of payment, 4 months' IWL, of which \$400 or, in default of payment, 2 months' IWL is suspended for 3 years on condition the accused does not during that period contravene the provisions of the control of Goods Act [*Chapter 280*].

Surgey, Pittman, Kerswell, Scott & Willsmer, legal practitioners for the appellant

Attorney-General, legal practitioners for the State.

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S v MACEYS OF SALISBURY LTD 1982 (2) ZLR 239 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Georges JA and Beck JA

7th October and 18th November, 1982

Flynote

Criminal law - statutory offences - mens rea in - strict liability Condemnation of Foodstuffs Regulations, 1948 - section 1 - offence creating provision not requiring intent, knowledge or negligence as an element - new approach of courts to such offences - not to be applied to pre-existing offences - regulation imposing liability without faults procedure - charge laid against company by citing a director - no allegation in charge that director himself guilty of act complained of - offence one not attributed to any particular person - offence one which can be committed by a company - unnecessary to allege that committed by any individual or by persons unknown.

Headnote

The appellant company was charged, by citing as its representative one of its directors, with contravening section 1 of the Condemnation of Foodstuffs Regulations, 1948, which prohibits, *inter alia*, exposing for sale any fish or other food which is packed in an air-tight receptacle if such receptacle is blown to such a degree that there is bulging of the flat or concave sides or end or so that gas escapes from it on puncturing. The charge itself cited the director, Mr Levy, as the representative of the company but did not allege that Mr Levy himself nor any particular director or servant nor even an unknown director or servant had committed the acts complained of.

The evidence showed that municipal health inspectors had removed from shelves in the appellant's shop certain tins of fish and fish soup. On examination by the government analyst the tins were found to emit gas when punctured.

No explanation was given on the appellant's behalf.

It was argued, firstly, that the evidence did not establish the charge, namely, that Mr Levy had exposed the tins for sale; and secondly, that the offence was not one of "strict liability". Some form of *mens rea* was required, in the form, at least, of failure to exercise care.

Held, that the portion of the charge in which Mr Levy was cited was a recital, in the language of section 357 (1) of the Criminal Procedure and Evidence Act [Chapter 59]. The offence was not one which is to be laid at the door of any particular person, and the proposition that a company can be liable

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only if one of its servants has committed an offence is not one that is universally applicable. It would be a vain formality if it were necessary to add in such a case words to the effect "through some person or persons unknown". This offence is one which can be committed by a company.

Held, further, that the offence is one of strict liability and not one in which fault can be found. There is certainly a growing tendency on the part of the courts to interpret an offence-creating provision which has no mention of a fault element in it as requiring such an element. This trend has much to recommend it, but to apply a newly-developed approach to pre-existing legislation may frustrate the intention of the legislature. On a proper construction of the Regulations, a trader could commit the offence without being aware of the nature of the defect in the tins. This

may impose a severe burden on him, but in such legislation such a result is by no means unknown.

Cases cited:

Alphacell Ltd. v Woodward [1972] AC 824; [1972] 2 All ER 475 (HL);

R v de Lange, 1949 (3) SA 1088 (T);

R v van Heerden, 1949 (4) SA 949 (N);

R v City Butchery (Pvt.) Ltd. and Another, 1967 RLR 69; 1967 (3) SA 5 (R);

R v P Hall & Co. (Pvt.) Ltd., 1966 RLR 374; 1966 (3) SA 669 (RAD);

S v GD Haulage (Pvt.) Ltd., 1977 (1) RLR 24; 1977 (2) SA 255 (RAD);

S v Gampel Brothers and Barnett (Pty.) Ltd., 1978 (3) SA 772 (AD);

Sweet v Parsley [1970] AC 132; [1969] 1 All ER 347 (HL);

Leicester v Pearson [1952] 2 QB 668; [1952] 2 All ER 71 (QBD);

Tesco Supermarkets Ltd v Nattrass [1971] 2 All ER 127 (HL);

Lim Chin Aik v R [1963] 1 All ER 223 (PC);

Smedleys Ltd v Breed [1974] 2 All ER 21 (HL);

S.v. Arenstein, 1964 (1) SA 361 (AD);

S v Zemura, 1973 (2) RLR 357; 1974 (1) SA 584 (RAD).

R R Horn, S C., for the appellant. While it is accepted that the regulations in question are obviously framed for the protection of the public this is only one of a number of relevant considerations in deciding whether or not the legislature intended "strict liability". See *R v City Butchery*, (*supra*); 11 Halsbury's Laws (4th edition) paragraph 18, page 20.

There are a number of factors which indicate that strict liability should not be held to have been intended by the legislature in the regulations in question. Firstly, the presumption is that the legislature does not intend an offence to fall within the strict liability category in the absence of positive indications to the contrary: *S v Zemura*, (*supra*). Secondly,

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there are indications in the Public Health Act [Chapter 328] that not all offences under that Act should be regarded as involving strict liability. Indeed it is clear from section 124 that the offences there referred to do *not* involve strict liability. Thirdly, it is accepted in our law that in appropriate cases failure to exercise care can constitute *mens rea* necessary to render a person liable for a contravention of a statutory provision. *S v Fernandes*, 1974 (2) SA 627 (RAD); *R v H*,

1944 AD 121 at 130. This being the case it cannot be said that the beneficial provisions of the regulations could easily be evaded unless strict liability was imposed. On the tests propounded in *Zemura's case (supra)* at page 590H it cannot be said that the legislature intended to impose strict liability. The penalties prescribed are neither very severe nor very lenient (section 131 of the Act). The offence is not difficult to detect. The object of the regulations would not be likely to be defeated if strict liability is not imposed. In view of the fact that failure to exercise care can constitute *mens rea* it is unsafe to rely on pre- 1974 authorities in deciding whether or not a particular offence involves strict liability.

Y. Omerjee. for the respondent.

Judgment

Fieldsend CJ: The appellant is Maceys of Salisbury (Pvt.) Ltd, a firm which carries on trade at Maceys Hypermarket in Angwa Street, Harare, selling groceries and other commodities. The shop is operated on a self-service basis, customers selecting their goods from those displayed on the shelves and taking them in trolleys or baskets to checkout points where they pay for them.

The charge alleged a contravention of section 1 of the Condemnation of Foodstuffs Regulations. This regulation was promulgated in 1948 (G.N. 235 of 1948). So far as is relevant to this appeal it reads:

"No person shall sell, expose for sale, trade in or supply for any consideration whatever any meat, fish, fruit, vegetable, jam, preserve, pickle, condensed milk or any other food which is packed in an air-tight receptacle if such receptacle -

- (a) is blown to such a degree that there is bulging of the flat or concave sides or end, or so that gas escapes from it on puncturing (unless it can be proved that such bulging is not due to deterioration of the contents)."

The relevant particulars of the charge read that on 10th September, 1981-

"... the accused did wrongfully and unlawfully expose for sale 15 tins of Protene Brand Bream Soup and eight tins of Protene Brand (Select) Lake Fish which were blown to such degree that there was bulging of the flat or concave ends or so that gas escaped on puncturing..."

Four other tins were said to have been extensively rusted in contravention of paragraph (b) of the regulations and one to be leaking in contravention

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of paragraph (c). It was found at the close of the prosecution case that there was no evidence to establish these latter defects and the appellant was not put upon its defence on these particulars.

The evidence established that on 17th September, Dr. Nhari, an analytical chemist, found that eight of the fifteen tins of the soup and all three tins of fish submitted to him were blown in that they emitted gas when punctured. He did not say whether any of them were visually bulging.

These tins, part of a total of one hundred and eleven, had been removed by the Municipal

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Health Inspectors, Boardman and Lidgely, on 10th September from the shelf on which they were exposed for sale in the appellant's shop. Of this total sixty-seven tins were returned to the appellant and the remainder destroyed.

It is unfortunate that a detailed account was not kept of the appearance of the tins that were taken from the shop, of the appearance of the tins that were sent to the Government Analyst, and of the defects in those tins which were destroyed without being submitted to the analyst. This would not have been difficult to do, and it would have avoided the long and acrimonious cross-examination of the two inspectors.

As it is the trial court was and this Court is thrown back on very vague evidence. It is, however, clear that Boardman went to the appellant's premises because there were suspicions about the quality of this strand of soup and fish. It is clear too that he saw on thin shelf a bulging tin and that this prompted him to make a more careful examination of the tins displayed. This showed "a number of blown cans." He decided to take a representative sample of the cans on the shelf and assembled about 24 cans of which a proportion (probably about a fifth) were bulging. There was then trouble with Mr Levy, who is a director and Chairman of the firm. In the result all the tins displayed were taken by Mr Boardman and Mr Lidgely. Again the number of bulging tins was not noted but was said to have been between 20 and 24.

Despite the vigorous cross-examination of these witnesses no defence evidence was led as to the appearance of these tins at the time they were taken. Mr Levy who was present throughout was apparently incensed at the behaviour of the inspectors and would co-operate in no way in the seizure of the tins. He made no effort to see if there was any substance in the allegation that a number of the tins were visually bulging.

As I have said the investigation was not carried out with the care which one expects if a criminal prosecution is to be based on it. The reason for

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this may be that there seems to be no recorded prosecution under the Regulations, at least in Harare; or it may be that it was not originally contemplated that the case would reach court. Nevertheless, despite Mr *Horn's* determined argument on the facts designed to show the unreliability and prejudice of the Inspectors, I think that there was no reason to doubt their evidence that there were a number of obviously defective tins exposed for sale.

On all the evidence the magistrate was clearly right in finding that a number of the tins exposed for sale were defective and that about twenty were to be seen to be bulging.

The first of appellant's main submissions in its heads of argument was that the State had failed to establish the charge as laid, namely, that Mr, Levy, a director or servant of the company, exposed the tins in question for sale, thereby rendering the company guilty of the offence charged by virtue of section 357 (1) of the Criminal Procedure and Evidence Act [*Chapter 59*]

It must the outset be determined whether the charge was laid as alleged in the submission.

The first portion of the charge reads -

"Name of accused:

Accused is Maceys of Salisbury (Private) Limited, represented by Samuel Rahamin Levy, a director or servant of the said Company and cited in terms of section 357 (2) of the Criminal Procedure and Evidence Act (Chapter 59) as a representative of that Company (hereinafter called the accused). Whereas at all relevant times to the charge set out here Samuel Rahamin Levy, who divides then a servant of the accused and was acting in the exercise of his powers or in the performance of his duties as a servant of the accused, or in furthering or endeavouring to further the interests of the accused the accused is charged with the contravention of Section 1 of the Regulations."

The charge then sets out as I have already said that the appellant did wrongfully and unlawfully expose for sale certain goods.

I do not think that it can be successfully argued that the charge, as laid, alleged that Mr Levy exposed the defective goods for sale, nor does it allege that the company's liability is sought to be established through Mr Levy's action. The portion of the charge beginning with the word "whereas" and ending with the words "to further the interests of the accused" is drafted as a recital. The language is that of section 357 (1) of the Criminal Procedure and Evidence Act, but there is no reference to that section nor is there a direct allegation that responsibility is sought

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to be established virtue of that section. Significantly Mr Levy himself is not charged as he could have been had the allegation been that the company was liable as a result of an act committed by Mr Levy. As was also pointed out by Mr Omerjee in the course of argument the State outline made no reference whatsoever to Mr Levy.

It appears to me that the portion of the charge to which I have referred as being in the form of a recital in no way sets out a substantive element of the offence alleged. It may have been intended to do no more than explain why Mr Levy had been chosen as the representative of the company.

It has not been argued that the charge would have been defective had that part of it been omitted and had the argument been advanced it would not in my view have been sound. Indeed the offence charged in this appeal is not one which is to be laid at the door of any particular person. Exposing for sale is quite different from, say, actually selling. In the latter case a sale is effected by an individual: in exposing for sale the exposure is the result of more than one action. Someone puts goods on a shelf, but they are not exposed for sale until the shop is opened to customers. This case is similar to *Alphacell Ltd. v Woodward* [1972] AC 824; [1972] 2 All ER 475 (H.L.). There the offence was "causing . . . to enter a stream any poisonous, noxious or polluting" matter. In any large enterprise such as that operated by Alphacell it would be virtually impossible to establish that any one individual had caused the polluting matter to enter the stream, and so impossible to find any one individual whose criminal act could be attributed to the company. It is a case such as this which shows that Mr Horn's proposition, based on pages 336, 338 and 334 of Vol. 1 of Burchell & Hunt, *South African Criminal Law and Procedure*, and on *R v de Lange*, 1949 (3) SA 1088 (T.), that a company can be liable only if one of its servants has committed an offence is not a proposition that is universally applicable. It

would be a vain formality (and not in accordance with the facts) if it were necessary to add in such a case "through some person or persons unknown"; of *R v van Heerden*, 1949 (4) SA 949 (N.). The offence in issue in this appeal can, in my view, be committed by a company even though no one individual can be singled out as an offender whose offence is then attributed to the company.

This conclusion makes it even more obvious that the words referring to the representation of the company by Mr Levy are, as Mr *Omerjee* submitted, mere surplusage, and do no more than explain why Mr Levy had been chosen as a representative of the company.

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Mr *Horn* contended that the defence had been misled by the form of the charge into thinking that the appellant company was being charged only with Mr Levy's act and had conducted its case on that basis to its prejudice. The only reference to Mr Levy in the defence outline is in the Paragraph which reads -

"If any of the tins exposed for sale were in the state described the said paragraphs (a), (b) or (c), the accused denies that it was aware or should have been aware of this fact through Mr Levy and puts the State to the proof of this."

This to my mind raises the question only of the fault element and does not relate to the actual exposure of the tins for sale. But in any event the charge does not in my view allege that Mr Levy knew the tins were defective, nor was it necessary for it to do so, following as it did the precise form of the Regulation.

The only evidence which the appellant might have been able to lead, had it not wrongly thought it could rely on the lack of evidence implicating Mr Levy personally, would have been evidence from the shelf packer to say what condition the tins were in when they were put on the shelf. Having regard to the evidence of rapid turnover and to the evidence of Boardman and Lidgely as to what they found, it is difficult to see how the shelf packers evidence could have affected the outcome.

But I prefer to base my conclusion on the fact that the charge did not allege that the appellant was liable through Mr Levy's act and should not have been so read by the appellant. In my view Mr, *Horn's* first main point must fail.

The main point of interest in this appeal is whether the Regulation imposes strict liability, and if not what fault element is to be read into the legislation.

In 1948, when this Regulation was passed, there was certainly a much stronger tendency than there is to-day to interpret legislation of this nature as imposing strict liability. This was perhaps stronger in England than in South Africa. As is said in *Halbsury's Laws of England* 4th ed. paragraph 18:

"It is not unusual to find strict liability imposed in relation to offences which are not criminal in any real sense by legislation concerned with matters such as the sale of food and drugs, the supply of intoxicating liquor, the safety of those employed in factories, the control of weights and measures, and the less serious road traffic offences."

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That this has been the approach of the courts of this country appears from such cases as *R v City Butchery (Pvt) Ltd. & Anor*, 1967 RLR 69; 1967 (3) SA 5 (R) (selling meat with a preservative added); *R v P. Hall & Co. (Pvt) Ltd.*, 1966 RLR 374; 1966 (3) SA 669 (RAD) (defective brakes and steering on an omnibus); *S v GD Haulage (Pvt) Ltd.* 1977 (1) RLR 24; 1977 (2) SA 255 (RAD) (overloading a heavy vehicle). This approach, it was argued, is not in line with the more recent trend in South Africa exemplified by, for example, *S v Gampel Brothers & Barnett (Pty) Ltd.*, 1978 (3) SA 772 (AD).

In England, too, there is a growing tendency to interpret an offence - creating provision which has no mention of fault element in it as requiring such an element. Following the decision in *Sweet v Parsley* [1970] AC 132; [1969] 1 All ER 347 (HL), new offences of strict liability will be recognised only within the classes of offences where the acts are not truly criminal, but are prohibited in the public interest under a penalty. This trend has, if I may say so with respect, much to commend it. I would, however, sound a note of warning. The object of statutory interpretation is to give effect to the intention of the Legislature, and what we are dealing with in this appeal is an offence-creating provision which does not specifically require either intention, knowledge or negligence as an element of the offence. If developing ideas are to be applied to old legislation (and the regulation has existed since 1948) there will be considerable confusion in the minds of those administering the law as to how pre-existing similar offence-creating provisions are to be interpreted. Put another way the Legislature is presumed to know of the practice of the courts and to have legislated with that in mind: Craies on *Statute Law*, 7th ed., p. 97, and Maxwell on *Interpretation of Statutes*, 11th ed., paragraph 303; to apply a newly developed approach to pre-existing legislation may frustrate the intention of the Legislature.

The further trend in South Africa to mitigate what otherwise might be strict liability offences by interpreting them as requiring at least negligence also has much to commend it. The attempt to achieve this in England in *Leicester v Pearson* [1982] 2 QB 668 has not apparently found favour. See Glanville Williams, *Criminal Law, The General Part*, 2nd ed., paragraph 80. In trading and consumer legislation, defences with a persuasive burden on the defendant have been introduced, see, for example, section 24 (1) of the Trade Descriptions Act 1968, dealt with in *Tesco Supermarkets Ltd v Nattrass* [1971] 2 All ER 127 (HL) at page 130.

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This is certainly a satisfactory solution for offences of this nature but I would be hesitant to achieve it - at least in this appeal - by judicial decision, on the ground that it must have been the intention of the Legislature and is apparent from the wording of the regulation. There is also a problem in regard to the placing of the burden of proof. The more recent South African cases referred to in Burchell & Hunt, *SA Criminal Law and Procedure*, Vol. 1, page 175 point to the conclusion that where the Court is satisfied that the fault element to be implied in an offence is negligence, the burden of proving negligence beyond reasonable doubt is upon the prosecution. I do not think that that conclusion would do for a number of the food and trading offences. This

is a further reason for my reluctance to legislate too far by judicial decision.

Coming to the particular regulation in this appeal, I think that the fact that it goes so far as to penalise exposing for sale tins which emit gas on puncturing is an important consideration. It would seem that a trader could commit the offence without being aware of the nature of the defect in the tins. This may impose a severe burden on the trader, who could in some circumstances be characterised as the "luckless victim" referred to by LORD EVERSHED in *Lim Chin Aik v R* [1963] 1 All ER 223 (PC) at page 2771. But in legislation of this nature such a result is by no means unknown. See *Smedleys Ltd. v Breed* [1974] 2 All ER 21 (HL).

In my view section 1 of the Regulations does impose liability without fault. Even if it did not, however, the evidence in this case was sufficient to show in the absence of any answer from the appellant that the appellant was negligent in allowing tins that were visibly bulging to be exposed for sale.

The only evidence on this aspect was that the total stock on the shelves at any one time was close on 20 000 tins, that between 5 000 and 10 000 were moved each week and that shelf packers had instructions to ensure that Pawn tins were not packed on the shelves. These facts clearly do not come anywhere near showing that sufficient care was taken not to expose Town cans on the shelves.

I would dismiss the appeal against conviction.

So far as sentence is concerned the evidence was that this was the first conviction under the Regulations since they were enacted. It was also pointed out that the magistrate had appeared to take an exaggerated view of the seriousness of the offence.

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He said:

"This is a matter which concerns public health and God knows how many people have bought contaminated food from shops, taken it home, opened He tins, found the food contaminated and threw it away without taking any action and God knows how many people have bought contaminated tinned food, taken it back to the shops, confronted the trader with the tin and the shop owner has refused either to refund or take any action to make sure that he does not sell contaminated food and God knows how many people have suffered in silence after consuming contaminated food and God knows how many people have died from food poisoning.

I do accept that we have no evidence to this effect but one can imagine what would happen if such a situation is allowed to continue."

I have already dealt with the unsatisfactory nature of the evidence as to how many tins were obviously defective on 10th September.

In all the circumstances I would say that the magistrate has misdirected himself as to sentence and that a proper sentence would be a fine of \$50. This will be sufficient to show traders that prosecutions may well be brought under the Regulations and that without the exercise of proper care they can expect something more than a caution and a discharge.

Georges JA: The sections relevant to the charge and the facts have been set out in the judgment of the CHIEF JUSTICE and need no elaboration. I agree with the conclusion at which he has arrived and would also dismiss the appeal. I also agree with his conclusions on the appellant's main submission that the State has failed to establish the charge as laid, namely that Mr Levy, a director or servant of the appellant company, had exposed the tins in question for sale. I have nothing to add to his conclusions on that submission.

I do not wish to be as positive, however, in concluding that the section under consideration imposes strict liability. The trend in South Africa and in England to interpret an offence-creating provision which makes no mention of fault as requiring such an element appears to me to be sound in principle and deserving of emphasis.

It is a well recognized canon of construction that the Legislature should not be taken to intend to displace well known principles of common law unless it does so in clear language. Such a well known principle is that encapsulated in the maxims *nulla poena sine culpa* and *actus non facit reum nisi mens sit rea*. There would be no problem in stating, when creating a new statutory offence, that it was intended to be one of strict liability.

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Courts in the past, both in England and South Africa' have interpreted regulatory offences concerning such activities as the sale of food and drugs and the supply of intoxicating liquor as imposing strict liability. The overriding consideration has been the need to protect the public by making the enforcement of the legislation as simple and as effective as possible.

This is an important consideration, not lightly to be ignored. The recent trend whereby the element of fault in statutory offences is defined as negligence rather than intent seems to me satisfactory to serve the interest of providing due protection to the public.

In *S v Arenstein*, 1964 (1) SA 361 (AD) BOTHA, JA stated:

"There is no general rule in regard to the degree of *mens rea* required for the violation of a statutory prohibition or injunction, and it is clear that 'negligence may constitute sufficient proof of *mens rea* even in cases where negligence is not the gist of the offence charged, if there was a duty on the part of the person charged to be circumspect . . .'

- *per* CENTLIVRES, JA, in *R v H*, 1944 AD 121 at page 130.

The degree of blameworthiness required. for a culpable violation of a statutory prohibition or injection must in the first place be sought in the language used by the lawgiver. The requirement of intentional wrongdoing is usually indicated by such words as 'wilfully', 'intentionally' or 'maliciously', and in the absence of any words expressly indicating the particular mental state required, the degree of *mens rea* must depend on that foresight or care which the statute in the circumstances demands".

Where the degree of circumspection is set sufficiently high the purpose of the statute can be served while not imposing liability where all due care has been taken. Punishing defendants who have taken all due care cannot logically contribute to ensuring the taking of due care.

The section under consideration contains no words specifically requiring proof of fault. It makes

it an offence to sell or expose for sale certain itemised articles of food and generally any other food in an airtight receptacle if such receptacles

"... is blown to such a degree that there is bulging of the flat or concave sides or end, or so that gas escapes from it on puncturing (unless it can be proved that such bulging is not due to deterioration of the contents)."

One of the factors which could be said to lead to the conclusion that strict liability was intended is the fact that it is made an offence to expose for sale an airtight receptacle which is blown to the extent that gas escapes from it on puncturing. The suggestion was that there was no

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procedure which could ensure against not committing that act save puncturing every tin before exposure. If such is the case the argument is indeed powerful. There is, however, nothing on the record to establish that this is the case.

On the proved facts there were on the shelves at Macey's tins blown to such an extent that there was a bulging of their concave sides. That would have been visible on any inspection which was not purely cursory. The presence of such tins in any consignment would lead to doubts as to the soundness of other bins. Steps could have been taken to withhold exposure.

In my view, therefore, it is not necessary in this case to decide whether the offence created by the regulation is one of strict liability or not. The regulation is open to the interpretation that an element of fault must be established arising from negligence. Even if this is so there was adequate evidence on the record to support a finding of negligence.

The evidence in this case is such that it is not necessary deal with the issue discussed in *S v Zemura* 1973 (2) RLR 357; 1974 (1) SA 584 (RAD) as to the burden of proving negligence in such cases. I do find persuasive, however, the view there expressed by BEADLE, CJ, at page 364 (586 of the South African report) that statutory offences of this kind fall into the "intermediate" group -

"... where the *onus* is on the State to prove that the accused committed the acts constituting the offence, but thereafter an evidential *onus* is thrust on the accused to disprove the inference that he had the requisite *mens rea* when he committed these acts."

I appreciate the force of the contention that the State may be caught unawares so to speak by the shift in the approach to the interpretation of statutory offences. Legislation may have been drawn on the basis that the courts would be likely to follow the earlier approach of being more ready to find strict liability. In fact, however, where the interpretation requires proof of fault in the nature of negligence the level of protection afforded to society should not be significantly less effective.

Beck JA: I agree that the appeal against conviction must be dismissed. I do not, however, agree that the portion of the charge beginning with the word "whereas" and ending with the words "to further the interests of the accused" is nothing more than a mere tautologous recital.

Having cited Mr Levy as the representative of the accused company in terms of section 357 (2)

of the Criminal Procedure and Evidence Act [*Chapter 593*] it seems to me that the further referent to him in the very language of section 357 (1) of the Act (the sole purpose of which is to

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make a corporate body criminally liable for the criminal acts of its servants) can only have intended to convey that criminal liability was sought to be imposed upon the company through and by reason of the conduct of Mr Levy. I do not consider that the fact that Mr Levy was not also charged is an indication that the charge against the company is not to be understood in the way I understand it. The provisions of section 357 (5) of the Act are permissive only, and, in any event, there was evidence that enforcement of this Regulation by way of prosecution has been very rare, so much so that this is the first prosecution to have been brought in Harare under this Regulation for the 34 years of its existence.

In the circumstances of this particular case, however, I do not consider that the failure of the State to establish that it was in fact Mr Levy who exposed the blown tins of fish for sale was fatal to a conviction under the charge as laid. It was not on dispute that the tins of fish that were admittedly exposed for sale were so exposed in consequence of the conduct of one or more servants of the company, other than Mr Levy, in the performance of their duties. It was also not in dispute that the servants concerned, whoever they may have been, would at all times have been aware that what was being exposed for sale was food that was packed in air-tight receptacles. Because of the nature of the offence the identity of those servants was irrelevant in my view, and the incorrect selection by the State of Mr Levy as one of the servants, or as the only servant concerned, was matter of no moment to the appellant and was incapable of prejudicing the defend In the conduct of its case, because the offence is one of strict liability. It would be otherwise if *mens rea* in the form of *culpa* were to be a requisite. In that event the State would have to prove the charge as laid, or fail.

With regard to the nature of the liability that is created by this particular Regulation, I agree with the judgment of the learned CHIEF JUSTICE. I think that the prohibition against exposing for sale tins which emit gas on being punctured puts the matter beyond doubt. However, for the reasons stated in the judgment of my brother GEORGES I too would favour encouraging the concept of *mens rea* in the form of *culpa* to achieve, where possible, the purposes sought to be achieved formerly by the imposition of liability without fault.

I am also in agreement with the reduction of the sentence to a fine of \$50.

Brown & Diamondis, appellant's legal representatives.

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Court **Supreme Court, Harare**

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Fieldsend CJ, Georges JA and Beck JA

21st October and 18th November, 1982

Flynote

Criminal law - statutes - Employment Act, 1980 (No. 13 of 1980) - section 5 (2) (a) - regulations made under Act - inconsistent with industrial agreement made in terms of Industrial Conciliation Act [Chapter 267] - terms of latter prevail - common law right to give notice incorporated in Agreement not restricted by regulations.

Headnote

In terms of section 5 of the Employment Act, No. 13 of 1980, the Minister of Labour and Social Services may make regulations relating to or connected with the employment of employees. Subsection (2) (a) provides that in the event of any inconsistency between such regulations and the provision of any agreement given effect to in terms of any enactment the terms of the latter shall prevail. The Minister had, in terms of the section, made the Employment (Conditions of Service) Regulations, 1981 (S.I. 894 of 1981), section 4 (1) (b) of which prohibits the laying off or dismissal of employees without the prior written approval of the Minister.

The appellant, the owner of a bottle store, employed a driver whose conditions of service were governed by an industrial agreement made binding in terms of the Industrial Conciliation Act [Chapter 267]. In terms of this agreement, the common-law right to dismiss on due notice was preserved. The appellant exercised this right in respect of the driver referred to and was charged with a contravention of section 4 (1) (b) of the Regulations.

Held, that in view of the provisions of section 5 (2) (a) of the Employment Act, the provisions of the industrial agreement prevailed over those of the Regulations and the common law right of dismissal was not affected. It was not correct to say that the Regulations merely required a further step to be taken before employment could be terminated; the Regulations limited the right of an employer to terminate employment on notice.

Cases referred to:

Natal Organic Industries (Pty.) Ltd. v Union Government, 1935 NPD 701;

Arenstein v Durban Corporation, 1952 (1) SA 279 (AD).

I A Donovan for the appellant.

M J Gillespie for the respondent.

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FIELDSEND CJ

Judgment

Fieldsend CJ: The appellant, Elizabeth Jovner, was convicted of contravening section 4(1) (b) of the Employment (Conditions of Service) Regulations (S.I. 894 of 1981). The essence of the charge was that she dismissed an employee, Victor Marimira, without the prior written approval

of the Minister of Labour and Social Services.

The appellant trades as United Bottle Store in Main Street, Gweru. On 26th February, 1982 she engaged Victor Marimira as a driver for her business at a weekly wage of \$27. She was not satisfied with the way Marimira carried out his duties and on 2nd April she gave him notice that his employment would end on 9th April. This was in fact Good Friday. He was paid on 8th April up to and including 9th April.

Marimira was dissatisfied because he felt he had not been paid for certain overtime he said he had worked and he sought the advice of the Industrial Relations Officer in Gweru. During the course of looking into the complaint this officer realised that the appellant had not obtained "the prior written approval of the Minister" to Marimira's dismissal required by the Regulations. It was this that led to the appellant being charged.

The issues on appeal are purely legal.

Mr *Donovan* has taken three points -

- (i) that section 4 (1) (a) of the Regulations is inconsistent with the terms of the Industrial Agreement governing the employment, and that by virtue of section 5 (2) (a) of the Employment Act (13 1980) the latter prevail;
- (ii) that section 4 (1) (b) of the Regulations is *ultra vires* the Employment Act, and
- (iii) that "dismiss" in section 4 (1) (b) of the Regulations means "dismiss summarily" and not discharge with due notice.

For many years now labour relations in most industries have been governed by Industrial agreements negotiated by industrial councils terms of the Industrial Conciliation Act [Chapter 267]. Such agreements are transmitted by the councils to the Minister of Labour and Social Services. If the Minister is satisfied that the parties to the agreement are sufficiently representative of the industry, and that it is expedient to do so, he declares the agreement to be binding on all employers and employees in the industry (section 114). In considering whether it is expedient to make the agreement binding he must pay due regard to-

"... the terms of any other agreement or determination which has been made binding in allied, similar or related undertakings, industries, trades or

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occupations, and shall also pay due regard to the interests of consumers and members of the public as a whole" (Section 116).

Once an agreement is in force it becomes an offence in terms of section 129 to contravene any provision of the agreement.

It is therefore not surprising to find that section 5 of the Employment Act, 13 of 1980, which empowers the Minister to "make regulations relating to or connected with the employment of

employees", provides in subsection (2): -

"(2) In the event of any inconsistency between the provisions of any regulations made in terms of subsection (1) and -

- (a) the provisions of any enactment or of any agreement or determination made or given effect to in terms of any enactment, the provisions of the latter shall prevail;".

It could not have been envisaged for example that under section 5 the Minister could make regulations varying employment regulations made under section 36 of the Industrial Conciliation Act following recommendations of an industrial board set up under section 22, or the minimum conditions of employment laid down in Part VII A of the Act. Nor could it have been envisaged that he could by regulations made under section 5 alter a wage notice made under section 3 of the Minimum Wages Act, 4 of 1980.

Indeed Mr *Gillespie* could not argue that if there was conflict between the Regulations and an Industrial Agreement that the Regulations should prevail. He contended that there was no conflict between the Regulations and the Agreement.

The basic Agreement was one reached in 1974 and published in, and made binding by, Government Notice 1172 of 1974. It was an Agreement settled by the Industrial Council for the Commercial Undertaking of Gwelo. It was originally made binding up to 19th December 1976 but was extended on a number of occasions thereafter. On 28th November 1980 the present Minister declared that he was satisfied that the parties to the Agreement were still sufficiently representative of the employers and employees and declared it binding until 30th April, 1982 (S.I. 783 of 1980). On 9th January, 1981, the Minister made binding certain agreed amendments to the weekly wages in clause 4 of the Agreement to be effective from 10th January to 30th April.

It was common cause that the appellant's business was a commercial undertaking defined in the Agreement, that it was within the area for which the Agreement operated, and that she made contributions to the Industrial Council both for herself and for her employees by way of

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deductions from their wages. It is true that she had failed to comply with the Agreement in that she does not seem to have informed; this particular employee in writing of the nature and terms of his employment as required by clause 27 of the Agreement. The magistrate relied on this failure as indicating that the Agreement did not apply to the case before him. This reasoning was, rightly in my view, not adopted by Mr *Gillespie*. There can be no doubt that the Agreement applied to the appellant and to this employment in particular.

The Agreement deals comprehensively with the conditions of employment of anyone falling under it. It covers -

- (i) Grades and minimum rates of pay
- (ii) Normal hours of work

- (iii) Overtime payments
- (iv) Deductions for absences, etc
- (v) Accommodation
- (vi) Leave
- (vii) Sickness benefits and
- (viii) Termination of employment.

Clause 27 is important. The relevant subclauses are:

"(2) The first month or four weeks of every contract of service shall be a probationary period, unless the employer and employee agree in writing to such a period being of some other duration and during the probationary period the contract shall be terminable on 24 hours of notice by either parties.

(3) ...

(4) If the probationary period of service is not terminated during or at the end of such service, the employee shall be deemed to be a full-time monthly paid or weekly-paid employee, as the case may be.

(5) Subject to the provisions of subclause (2) an employer or an employee may terminate the contract of service by giving notice in terms of such contract.

(6) Nothing contained in this clause shall affect the right of the employer H to dismiss an employee summarily on grounds recognised by the law as justifying instant termination of a contract of employment.

(7) An employer may discharge his obligations by paying an employee his full wage and allowances for and in place of the period of notice required to be given in terms of this clause.

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(8)

(9)

(10) ...

(11) An employee who has given or received notice to terminate his employment shall not be required to take vacation leave during the period of such notice.

(12) Subject to the provisions of subclause (13), no employer or employee shall give notice of termination of service to run concurrently with sick leave, vacation leave or military or police service.

(13) Notwithstanding the provisions of subclause (5), no employer shall give notice of termination of employment whilst the employee is sick or disabled, unless or until such employee has been absent for a continuous period of not less than forty-five days.

(14) Any contract of employment which is for a stipulated period shall specify the starting date and the date of termination thereof and no further notice to terminate the contract shall be required from either party,"

The scheme of the Agreement in regard to the termination of employment clearly emerges -

- (a) during the probationary period of four weeks the employment is terminable on 24 hours notice on either side (Clause 27 (2));
- (b) if the employment continues after the probationary period it continues on a monthly or weekly basis as the case may be (Clause 27 (4));
- (c) this employment is terminable by either party on the appropriate notice (Clause 27 (5)); and
- (d) the employees right to dismiss summarily for misconduct is preserved by Clause 27 (6).

The remaining subclauses regulate the rights of the parties in the event of termination under any of the proceeding provisions.

It is clear beyond doubt that Clause 27 (2) of the Agreement gives an employer the right to terminate a probationary employee's employment on 24 hours notice. It is equally clear that Clause 27 (6) gives an employer the right summarily to dismiss an employee for misconducts. It follows that (clause 27 (5) can only be read as giving an employer the right to terminate employment on giving the requisite notice. It is true that the length of notice required is determined by the contract between the parties. But this does not alter the fact that the right to terminate on

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notice is recognised by the Industrial Agreement. Put another way, the Industrial Agreement gives the right to the parties - and in this case to the employer - to terminate an employee's employment on requisite notice provided there is no contract to the contrary.

I have dealt with this point some detail, but I should say that it was not disputed on appeal that this right to dismiss on notice was given by the Agreement.

The next point for consideration is whether section 4 (1) of the Regulations is inconsistent with the Agreement. The section reads:

"(4) (1) No employer shall -

- (a) retrench or lay off any employee from employment without the prior written approval of the Minister, who shall approve the same, with or without conditions, if he is satisfied that it is necessary for economic or other reasons, including the relative interests of the undertaking, industry, trade or employees to retrench, or lay or any such employees;
- (b) dismiss any employee from employment without the prior written approval of the Minister, who may approve the same, with or without conditions, if he is satisfied that such dismissal is not in any way a retrenchment or lay off or an attempt to retrench or lay off.

(2) No retrenchment, lay off or dismissal in breach of the provisions of subsection (1) shall have any effect unless approved by the Minister in writing:

Provided that in the event of such approval the retrenchment, lay off or dismissal shall only take effect from the date of such approval."

The effect of this section is clear. It purports to deprive an employer of his right to terminate an employee's employment without Ministerial approval both in the case of probationary

employees, and in the case of employees guilty of misconduct justifying summary dismissal. This creates an obvious inconsistency between clauses 27 (2) and 27 (6) of the Agreement and the Regulations. In the same way because of the requirement of Ministerial authority for a termination on notice under Clause 27 (5) an inconsistency with that clause is created. An employer no longer has an unconditional right to terminate an employment on notice.

Mr *Gillespie* contended that there was no inconsistency. His contention can be shortly stated thus: it is that the Agreement does not alter the common law relating to termination on notice, therefore, the Regulations do not detract from the provisions of the Agreement; all the Regulations do is to impose a further step to be taken before any employment can be terminated.

1982 (2) ZLR p258

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There are, I think, two faults in this argument. First, it is clear from the form of Clause 27 of the Agreement that the Agreement specifically incorporates the common law as to the termination of employment. The fact that it does not alter it is of no significance. In terms of the Agreement the normal common law rules relating to termination on notice and dismissal for misconduct are made part of the Agreement and the right of the parties under the common law specifically recognized and conferred by it.

Secondly, it is not right to say that the Regulations merely require a further step to be taken before employment can be terminated. Had they merely required notice to the Minister the contention may have been sound, but they require that approval must be given before there can be any termination. This is not the same as saying that a further step must be taken by the employer. The Regulations limit the rights of the parties which are conferred by the Agreement, and deprive the employer of the right to terminate employment on notice, because Ministerial permission may not be granted. There is then in effect nothing that an employer can do to enforce his right. The Regulations have taken it away, and they are therefore inconsistent with the Agreement which gives the right.

There are other considerations arising from the Employment Act, and from the related Minimum Wages Act, No. 4 of 1980, which point strongly in the same direction.

Section 8 (1) of the Employment Act provides:

"(1) Except where it has otherwise been provided for in the contract concerned or in any relevant enactment, including any regulation made in terms of this Act, or in any agreement or determination made or given effect to in terms of any enactment, an employer shall not dismiss an employee summarily except - "

and then follow the grounds upon which an employer may rely.

It must be noted that the section does not seek to give the right to dismiss summarily: this is assumed to exist. The wording of the subsection is that, except as provided in any regulations, an employer shall not summarily dismiss save in the circumstances provided. It follows that a regulation may only widen the grounds upon which an employer may dismiss; it may *not* limit the grounds.

The second point concerns the Minimum Wages Act, No. 13 of 1980. Section 3 gives the Minister power to prescribe minimum wages, and presumably this gives him the power to vary any Industrial Agreement in which wages have been fixed. Section 7 (1) then explicitly prohibits an employer from terminating an employee's service because he is obliged

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to pay him the new minimum wage. But section 7 (2) allows the Minister to grant an employer exemption from the provisions of subsection (1) in special circumstances. That the Act itself prohibits termination is significant; and when one comes to the next Act, the Employment Act. One would expect this Act itself to contain such a provision if it was the Legislature's intention to allow Ministerial regulations to override the provisions of an Industrial Agreement which provided for dismissal either on notice or summarily.

In my view the appeal must be allowed on the basis that section 5 (2) (a) of the Employment Act specifically provides that the terms of an Industrial Agreement prevail over a regulation inconsistent with it and that section 4 (1) (b) of the Regulations is inconsistent with the Agreement.

This makes it unnecessary to consider the interesting argument advanced by Mr *Donovan* on whether section 4 is *ultra vires* the enabling section 5 of the Act. I would only say that it would have been necessary to consider the last two points I have now mentioned arising from section 8 of the Act and from the Minimum Wages Act in this context too. There is the additional point so forcefully made that it is not providing for the matters referred to in section 5 (3) of the Act merely to say that there shall be no dismissal without the Minister's prior approval. Cases such as *Natal Organic Industries (Pty.) Ltd. v Union Government*, 1935 NPD 701 and *Arenstein v Durban Corporation*, 1952 (1) SA 279 (AD) are very persuasive authorities for this proposition.

If a Ministerial power to control retrenchments and dismissals is required in order to regulate the incidence of unemployment it would be far safer to give that power by Act of Parliament, as is done by section 7 of the Minimum Wages Act. That could not be open to legal attack.

As it is the appeal is allowed for the reasons I have given and the conviction and sentences set aside.

Georges JA: I agree.

Beck JA: I agree.

Danziger and Partners, appellant's legal representatives.

1982 (2) ZLR p260

S v PIVISAYI 1982 (2) ZLR 260 (HC)

Court **High Court, Harare**

Pittman J

19th November, 1982

Flynote

Criminal law - Witchcraft Suppression Act [Chapter 73] - section 3 - imputation of use of non-natural means in causing disease or injury - allegation that complainant had caused fairies to upset accused's family - not covered by section.

Headnote

An allegation by the accused that the complainant had caused "fairies" to "upset" his wife and children is, not conduct that falls under section 3 of the Witchcraft Suppression Act [Chapter 73]. In the first place, the use of the word "upset" is too vague to be classified as an injury or disease. Secondly, merely to call someone a witch is not sufficient: the imputation must be that the person referred to used non-natural means, to cause disease or injury. The evidence that the accused had told the complainant that she had used fairies to upset his children was too vague to provide the necessary proof that he had imputed to her the use of non-natural means in causing injury or disease.

Cases cited:

R v K, 1965 RLR 571; 1966 (1) SA 366 (SRAD),

S v Mbiri, 1982 (1) ZLR 44; 1982 (2) SA 519 (ZSC)

Judgment

Pittman J: The accused was convicted on his plea of guilty at contravening section 3 of the Witchcraft Suppression Act [Chapter 73] in that he "did wrongfully and unlawfully impute to Rebecca Shava, a person there residing, the use of non-natural means in causing a disease to his children, that is to say, did name or indicate the said Rebecca Shava as being a witch."

Section 3 reads as follows:

"3. Whoever imputes to any other person the use of non-natural means in causing any disease in any person or animal or in causing any injury to any person or property, that is to say, whoever names or indicates any other person as being a wizard or witch shall be guilty of an offence and liable to a fine not exceeding two hundred dollars or to imprisonment for a period not exceeding three years or to a whipping not exceeding twenty strokes or to any two or more of such punishments."

1982 (2) ZLR p261

PITTMAN J

To establish the charge, the prosecutor handed in as Exhibit 1 an agreed statement of facts, which contained the following sentence:

"When the complainant had arrived at the house of the accused, the accused indicated to the complainant that

she was a witch and that she was using fairies to bewitch his family at night."

In amplification of Exhibit 1, the accused said -

- "a) I admit that I called the complainant a witch.
- b) I admit that I accused her of using non-natural means (fairies) to upset my wife and children.
- c) I had no right."

He was convicted on this evidence and sentenced to 12 months' IWL, of which 4 months' IWL were conditionally suspended.

When he applied to this Court for leave to appeal in person against his sentence, it occurred to me that possibly the conviction should not be upheld, on the ground that the charge was wrongly drawn and the evidence was too vague to establish that the accused had imputed to the complainant the use of non-natural means in causing disease to his family or children, in that the word "disease" could not properly cover a mere "upsetting" of persons, because such an upsetting cannot be regarded as a mental disease, even if mental disease is included in the concept of "disease". Likewise, even if it were possible to consider the charge as amendable to refer to the causing of "injury" instead of "disease", the same difficulty would arise. This would occur even although QUENET, J (as he then was), said in *R v K*, 1965 RLR 571 that the word "injury" goes so far as to include any "hurt, loss, harm, detriment or damage", and thus possibly mental harm. "Upsetting" is too vague to be classified as mental harm.

Furthermore, in case it is thought that section 3 allows a conviction simply because the accused has named or indicated the complainant as being a witch, as the wording of the charge suggests, the remarks of the learned CHIEF JUSTICE in *S v Mbiri* 1982 (1) ZLR 44, are relevant. He said that -

"... it is clear from the decision of TREDGOLD, J, in *R v Ntozonke*, 1947 SR 59 that the gravamen of a section 3 offence is imputing to another person the use of non-natural means in causing any disease in any person or animal or in causing any injury to any person or property. The words which follow in the section, that is 'whoever names or indicates any person as being a wizard or witch' are merely descriptive words and are not in themselves the words which constitute the offence. It is necessary in a charge under this section to make the allegation that the person imputed used non-natural means to cause disease or injury to a person or property."

1982 (2) ZLR p262

PITTMAN J

For all these reasons, I considered that the evidence that the accused had told the complainant that she had used series to upset his children was too vague to provide the necessary proof that he had imputed to the complainant the use of non-natural means in causing any disease in his children or injury to them.

The papers were submitted to the Attorney-General for comment and in his reply it was submitted that the conviction cannot be supported.

He said -

"The accused admits that he claimed that the complainant was despatching 'fairies' to 'upset' his wife and children

but that is hardly the same thing as suggesting that the 'fairies' were causing them disease or injury."

Accordingly, it is now ordered that the conviction of the accused for contravening section 3 of the Witchcraft Suppression Act is quashed, and the sentence is set aside.

Squires J: agrees.

1982 (2) ZLR p263

JEPHCOTT v VAGHMARIA 1982 (2) ZLR 263 (HC)

Court **High Court, Bulawayo**

Lloyd AJ

22nd October and 19th November, 1982

Flynote

Procedure - Rules of High Court - Rule 37 (2) - service of summons - at place of residence - defendant having two residences in different towns, though not continually resident in either - service of summons adequate if made at one such residence.

Headnote

A summons was served on the 22nd July, 1982 by handing it to his domestic servant at his house in Chegutu, although the applicant did not become aware of the summons until the 23rd September when he called there. His usual place of residence was Harare and his residence in Chegutu was intermittent. In the meantime, default judgment had been entered against him. He sought to have the judgment set aside on the grounds that the service of the summons was bad, not having been served at his residence or place of business or employment.

Held, that in order to constitute residence, physical presence is required, though such presence need be no more than intermittent. It is, therefore, possible for a person to have more than one place of residence. The service of the summons was accordingly good.

Case cited:

Ex p. Minister of Native Affairs, 1941 AD 53;

Hogsett v Buys, 1913 CPD 200;

Green v James, 1973 (2) RLR 31; 1973 (4) SA 114 (R).

C W Jordaan, for the applicant.

H I Basset, for the respondent.

Judgment

Lloyd AJ: This is an application to rescind a judgment given in default of appearance of the

defendant in this Court on the 18th August, 1982. The defendant in that case, HC 608/82, is the applicant and the plaintiff is the respondent. Judgment was entered for the plaintiff the sums \$400,00 and \$3 000,00 with interest thereon a *tempore morae* from the 22nd July 1982, to date of payment.

1982 (2) ZLR p264

LLOYD AJ

At the hearing of the application Mr *Jordaan*, for the applicant, took a point *in limine* that the default judgment had not been properly granted because there had been no service of the summons and its annexure teas of the Rules of Court relating to service of such process.

The summons was served by the deputy sheriff for the district of Kadoma/Chegutu on the 22nd July, 1982 (to quote from Me return of service) "by handing to Mr Petros Kamuso, a responsible person, being the domestic worker, at the defendant's residence, 10 Seigneury Road, Chegutu, at the same time exhibiting to him the original and explaining to him the nature and exigency thereof."

Even in regard to the point taken *in limine*, leaving aside the matter of the merits of the application for rescission, which are not presently under consideration, the papers are deficient. No affidavit has been filed from Mr Petros Kamuso; in support of the application as to what happened to the summons and annexure after it had been served upon him. The applicant baldly states in his founding affidavit that he lives and works in Harare and that he called at his property in Chegutu on Thursday, 23rd September, 1982, and "ascertained for the first time that a summons had been issued and, moreover, a default judgment must have been taken as the deputy sheriff was there with a writ of execution." The applicant proceeded to state that he had a good defence to the respondent's claim in that the respondent had never rendered to him any professional services, a statement on oath which he retracted a week later.

Be that as it may, Mr *Jordaan* argued that the service was bad that in terms of Rule 37 (2) the summons was not served at the applicant's residence or place of business or employment. *Ex facie* the summons the applicant had been described, not as a miner, but as director of companies. The rule required the summons to be served at his ordinary place of residence. He attacked the affidavit of the deputy sheriff, filed on behalf of the respondent, as being based on hearsay.

I refer to paragraphs 2 and 6 of that affidavit which seem fully free from the taint of hearsay, where he says:

"2. I know the applicant, Thomas Peter Jephcott, who has resided and mined in the Chegutu district for some time."

"6. It is incorrect to say that no one is resident at 10 Seigneury Road, Chegutu save for a domestic servant because applicant resides there when he is in Chegutu as I have mentioned above. I have no doubt whatsoever that applicant spends time at that property and would be most surprised to hear that he had not attended on the property between the 22nd July, 1982 and 23rd September, 1982."

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LLOYD AJ

In the work *Uniform Rules of Court* [of South Africa] by Nathan, Barnett and Brink, at page 23, relating to service at a residence or place of business, the learned authors say: "The residence or place of business contemplated by the sub-rule is the present residence or place of business of the defendant", there being no provision for service at the last-known residence or place of business. Residence is described in Herbstein and van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 3rd Ed., page 34, as being more than physical presence, "because, although such presence is a necessary element, it may be no more than intermittent and need not be continuous, in other words, at a given moment a person may be resident in an area without physically being present therein." Those remarks relate to jurisdiction, but at page 209 where the learned authors consider service of process, they refer back to their statements made at pages 33-34.

At page 65 of Volume 2 of Jones and Buckle's *Civil Practice of the Magistrates Court in South Africa*, 7th Ed., the learned authors speak of residence as being present residence.

Mr Bisset, for the respondent, relied upon Herbstein and van Winsen at page 34 to submit that a person may have more than one residence. Citing the case of *Ex parte Minister of Native Affairs*, 1941 AD 53, he submitted that the residence of a person has to be decided on all the facts.

In *Hogsett v Buys*, 1913 CPD 200 at 205, approved in *Ex. p. The Minister of Native Affairs* (*supra*), SEARLE, J, said that the degree of permanency required in residence had never been laid down; but it should be shown that the person sought to be brought within the jurisdiction had some interest in the place where he was served, in the sense that there was some good reason for regarding it as his place of ordinary habitation at the date of service. See also *Green v James*, 1973 (2) RLR 31 at 34; 1973 (4) SA 114 (R) at 115 where BECK, J (as he then was), held that a respondent had constituted this country as his home - or at least one of his homes - for the time being.

Mr Bisset criticised the vagueness of the applicant's affidavit which he described, with some justice, as being vague almost to the point of evasion.

In my view of the matter, based upon the authorities referred to and the facts set out in the papers, the applicant has two residences, one in Harare, the other at Chegutu which is used by him when engaged in mining in the Chegutu district. The unassailable portions of the affidavit

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LLOYD AJ

of the deputy sheriff, a responsible official with no personal interest in the matter, at pages 25 and 26 of the papers, establish that the applicant has resided and mined in the district for some time and uses his fully furnished home as his headquarters when so engaged. The applicant has obviously not been frank and open-minded with the Court and, in any event, has placed insufficient evidence before it. The reasonable inference from his behaviour and from the evidence as a whole before the Court is that he has two homes of which 10 Seigneury Road was his present habitation at the time of the service of the summons. The point taller *in limine*

on his behalf in his application to set aside the default judgment given against him fails and is dismissed. Having been successful in his opposition to the point taken *in limine*, the respondent is entitled to the costs of the hearing.

1982 (2) ZLR p267

S v HOLMES 1982 (2) ZLR 267 (HC)

Court **High Court, Harare**

Pittman and Squires JJ

8th and 24th November, 1982

Flynote

Criminal law - Exchange control Act [Chapter 170] - section 5 (3) (a) "special reasons" not to impose a minimum sentence - meaning of - accused buying foreign cheques but not exporting them, thus ensuring no loss of currency.

Headnote

The accused, a businessman, bought two cheques from a woman. The cheques were expressed in foreign currency, and he paid for them considerably more than their face value. At that stage it was his intention to export them from Zimbabwe, but he later changed his mind and deposited them at his local bank. By so doing he ensured that there was no loss of foreign currency to the country. It was argued on appeal that the circumstances were such that there were "special reasons" why the minimum fine provided for by section (3a) should not be imposed.

Held, that in the context of the section, "special reasons" means special reasons which make less than normal the moral blameworthiness of the accused, to the extent that the mandatory minimum fine should not be imposed. The word "special" must be taken to refer to reasons or circumstances that are out of the ordinary either in their degree or their nature. The appellant's genuine remorse and his early and voluntary determination to right the wrong he had committed were such circumstances.

Case cited:

S v Chidziva, SC 96/82.

C S Grossman, for the appellant.

I R Deeks, for the State.

Judgment

Pittman J: This is an appeal against a sentence imposed in a regional magistrates court.

The appellant is a businessman living in Harare. Early in 1981 he met a woman named Mrs

Patterson. She told him that she had foreign currency accruing to her and asked him if he would be interested in purchasing it. He said he might be. In mid-September 1981 she

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PITTMAN J

approached him with a cheque drawn on a Swiss bank and payable to bearer for the sum of US\$2 500. He bought it from her for Z\$3 000. Likewise, towards the end of September he bought another cheque, this one drawn on a Dutch bank, payable to bearer for US\$3 000, for which he paid her Z\$3 600. At that stage, he intended to take the cheques out of Zimbabwe and in some manner to negotiate them.

Shortly afterwards, he had to go on a business trip to Europe, and he ascertained that there was a large amount of money, about \$12 800, available for him to use on it. He left on the 10th October 1981. Prior to leaving, he was already regretting having bought Mrs Patterson's cheques, and at that stage he decided not to take them out of Zimbabwe. He returned from Europe on the 5th November 1981 and left that day for Johannesburg. Before so leaving, he decided to dispose of the cheques in the best manner he could to right the wrong he had done. To this end he deposited both the cheques in his bank account, and was credited with about Z\$3 950 for the US\$500 represented by the cheques. As he had paid Mrs Patterson Z\$6 600 for them, he suffered a loss of about \$2750 for buying them, and for depositing them as he did. But in doing so, he ensured that no loss of foreign currency was suffered by Zimbabwe.

The above statement of facts does not cover all the evidence led. There were other points raised which might have made the learned regional magistrate hold that the appellant's decision to dispose of the cheques to right the wrong he had done was not truthfully described. However, this more sceptical evaluation of the evidence was not adopted by the magistrate. Instead, he expressly accepted that the appellant had had second thoughts about the matter. He had thought it silly to have purchased the cheques, that it was wrong to have done so, and that he had tried to right the wrong by paying the cheques into his bank in the normal way.

The appellant was convicted on his pleas of guilty of two counts of contravening section 5 (1) (a) (i) of the Exchange control Act [*Chapter 170*], as read with section 3 (1) (a) (i) of the Exchange control Regulations 1977, in that he had twice bought foreign currency from a person other than an authorized dealer.

In sentencing the appellant, the magistrate was obliged, in terms of section 5 (3) (a) of the Act, to impose a fine of not less than the value of the currency concerned, "unless the convicted person satisfies the Court that there are special reasons in the particular case, which shall be recorded by the Court, why a lesser fine should be imposed." Furthermore,

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PITTMAN J

in terms of section 7 (1), the magistrate had to order that the rights of the appellant to the currency concerned be forfeited to the State, "unless the convicted person satisfies it that there are special reasons in the particular case which must be recorded by the court, why forfeiture to

the State should not take place."

The applicants legal representative on his behalf that the facts that the appellant had had second thoughts about the matter after purchasing the foreign currency and had paid it into a local bank, constituted special reasons why the magistrate should not impose the mandatory minimum fine or order forfeiture.

The relevant part of the magistrate's judgment reads as follows:

"The Act provides that if, in a case such as this' the foreign currency is, in fact, exported - in other words, if you had exported the currency, as was your original intention, the Court must regard that as an aggravating feature and impose a fine obviously in excess of the minimum mandatory one which is the dollar for dollar fine. The Court is also obliged in such a case, if the money is not repatriated, in addition to any fine which might be imposed, to impose a sentence of imprisonment That is how stringent the Legislature regards offences of this type so if you had, in fact, exported the currency-in other words, if you had taken the cheques outside the country and banked them, I would have been obliged to regard that as an aggravating feature and also have imposed a sentence of imprisonment in addition to the minimum mandatory fine, so having regard to the facts, then, in my view the fact that you later changed your mind - I don't think that amounts to special reason for the commission of the offence.

Special reasons have been laid down in other cases to mean any factor arising out of the commission of the offence itself or any actor which is peculiar to the offender, as long as these factors are out of the ordinary, then the Court can take these into account as a special reason.

I think the only factors in this particular case that are out of the ordinary is that you did, in fact, have second thoughts about the matter. You thought it was silly to have done this and that it was wrong and then you tried to right your wrong by, in fact, paying the cheques into your bank in the normal way.

As I say, I don't think that that is a special reason relating to the commission of the offence itself. This is something that you thought of afterwards, after you had already bought the foreign currency and although it might be stretching it a bit, I am prepared to accept that this might be a special reason for not ordering forfeiture - in other words, for the provisions of section 7 which relate to the forfeiture of your rights to this money. I think the fact that you changed your mind about it and that you paid it into your Bank would be sufficient reason not to order that your rights to that sum be forfeited, so I think that there are not, in fact, special reasons as far as the offence itself is concerned but there will be sufficient for me not to order

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PITTMAN J

forfeiture of your rights to this money once it had been banked. Accordingly I propose to impose a fine in that vicinity. Mr Hartley argued that you have already been penalised to some extent because you paid a premium to Mrs. Patterson for this money over and above what it was worth. That is, of course, true, but it seems from what you have said that that was something you were prepared to do at the time. You realised that she was charging you a premium but you were prepared to accept that and to pay her that when you initially bought it so I don't think: that is something to which I should pay too much regard in assessing sentence.

The value of the currency involved is just under \$4 000. According to the State's figures it is \$3 985,50 and according to the money you were paid by the Bank it is \$3 941,06. As I have said, the Act says that that is the minimum mandatory fine - that is the jumping off place - so I propose to round that off and IMPOSE A FINE OF \$4 000, TAKING BOTH COUNTS AS ONE FOR SENTENCE.

I will not order forfeiture because I will find as special reasons the fact that you did have this change of heart, that you did pay the money into the Bank and that it accrued to the State in the normal way."

The appellant has appealed against this sentence, on the ground that the Court should have found that special reasons existed why a fine less than the value of the currency should be

imposed. The arguments advanced by Mr *Grossman*, for the appellant, will later be considered in detail, but at this stage I must first mention that Mr *Deeks*, for the respondent, accepted that the fact that the appellant paid the foreign currency into his bank prior to being confronted by the authorities was a "special reason" for not ordering forfeiture. However, he submitted that no special reasons existed for reduction of the mandatory minimum fine.

Mr *Grossman's* first point was that it was self-evident that such special reasons did exist, because on identical facts they were found to exist in respect of non-forfeiture. I do not agree with this point. In section 5 (3a), the Act sets out what may be called the normal kind of punishment for committing the offences referred to. As this is the normal kind of punishment, the normal criterion for assessing that kind of punishment must govern the interpretation of the section. The normal criterion is the moral blameworthiness of the convicted person, and hence "special reasons" in section 5 (3a) means special reasons which make less than normal the moral blameworthiness of the convicted person to the extent that the mandatory minimum fine should not be imposed. The word "special" must, of course, be taken to refer to reasons or circumstances that are out of the ordinary either in their degree or their nature. See *S v Chidviza*, Judgment No SC 96/82.

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PITTMAN J

Whilst "special reasons" in section 5 (3a) thus involve an inquiry whether the facts of the case reveal that the moral blameworthiness of the convicted person is less than normal for reasons extraordinary in nature or degree, and thus justify a reduction of the normal punishment, the same words in section 7 (1) involve an inquiry whether there are special reasons why an order of forfeiture should not be made. Such special reasons relate to the appropriateness of an order of non-forfeiture, and not necessarily to whether the moral blameworthiness of the convicted person is less than normal. Likewise, it does not follow that because there are special reasons not to order forfeiture in terms of section 7 (1), there are necessarily special reasons why the moral blameworthiness of the convicted person should be regarded as less than normal.

Therefore, my reason for rejecting Mr *Grossman's* first point is that it does not follow that because there are facts constituting special reasons for not ordering forfeiture, such facts inevitably constitute special reasons for not imposing the minimum fine. Likewise, it does not follow that because there are facts constituting special reasons for not imposing the minimum fine, therefore such facts inevitably constitute special reasons for not ordering forfeiture.

Each mitigating fact must be assessed in the light of section 5 (3 a) and in the light of section 7 (1) separately, and it may result that any one fact must be treated as operative in both sections, or in only one, or in neither.

In the present case, the magistrate held that the appellant's action in voluntarily depositing the cheques in his bank account constituted a special reason for non-forfeiture, presumably because by doing so he had ensured that Zimbabwe suffered no prejudice through his unlawful purchase of Mrs. Patterson's cheques. I agree with that view.

I accept, however, the next point, namely that he was genuinely remorseful and sought to rectify

the situation at the first possible opportunity. That did reduce his moral blameworthiness in connection with the offence, as contrition always does. For this reason, I am unable to agree with the learned regional magistrate that the appellant's contrition and his active steps to give effect to it were not special reasons relating to the commission of the offence. They reduced his moral blameworthiness and were thus special reasons in relation to section 5(3 a).

For this reason I consider, with respect, that the learned regional magistrate misdirected himself by taking too narrow a view of the nature of the special reasons which are relevant to section 5 (3 a). This Court

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is therefore at large in deciding whether to reduce the fine of \$4000 imposed by the trial court.

Weighing up the reprehensibility of contravening the law in the first place, but adjusting it in the light of the appellant's voluntary withdrawal from the scheme before any actual harm was done to the country's pool of resources in furtherance of his original intention. I would say that a fine of \$3 000 would be an ample and adequate punishment.

I consider that the appeal be allowed to that extent and the fine should be reduced to one of \$3 000.

Squires J: I agree.

Coghlan Welsh & Guest, legal practitioners for the appellant.

Attorney-General, legal practitioners for the State.

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S v JAMBA 1982 (2) ZLR 273 (SC)

Court **Supreme Court, Harare**

Beck JA

26th November, 1982

Flynote

Criminal law - Miscellaneous Offences Act [Chapter 68] - section 5 (c) - does not apply to occupiers of property whose former lawful right to occupation has ended.

Headnote

Section 5 (c) of the Miscellaneous Offences Act [Chapter 68] is intended to punish criminally a person who, while perhaps aware that his entry upon any land, enclosed area or building, was in fact unauthorized, disobeys a request to leave made by the owner, lawful occupier or person

in charge or on behalf of the owner, lawful occupier or person in charge. It presupposes that the initial entry onto the property was unlawful, but is not intended to provide a criminal sanction against occupiers of property whose former lawful right to occupation has ended, as here, where the accused's estate had been sequestered and his property (including his farm) sold.

Judgment

Beck JA (in Chambers teens of section 10 (3) of the Supreme Court of Zimbabwe Act): The applicant seeks leave to prosecute an appeal in person.

He was convicted of having contravened section 5 (c) of the Miscellaneous Offences Act [Chapter 68] in that:

".... upon or about the 25th April, 1982, the accused did wrongfully and unlawfully enter into or upon any land, to wit Farm 49, Nyahunda Purchase Area, Bikita, and failed or refused to leave such land after being requested to do so by the owner or occupier thereof or any person authorized them by or on behalf of the owner or occupier."

The facts of the case are that the farm in Mention is one which the applicant himself owned and occupied and farmed for many years. 1975, however, he was sequestered. He remained in occupation of the farm, but in January 1982 was sold by the applicant's trustee to lair. Marakata, and transfer was registered the purchaser's name. On the date stated the charge, namely 25th April, 1982, Mr Marakata went to the farm armed with the title deed in his name and requested the applicant to vacate the farm. The applicant refused to do so. In fairness

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BECK JA

to him it should perhaps be said that this refusal appears not to have been whimsically obstinate, but to have been grounded in a sense of in-justice. It is apparent that the applicant feels very keenly that it should never have been necessary to sell the farm in order to satisfy the debts he had at the time of his sequestration, and he considers that he has been wronged.

The Attorney-General does not support the conviction. He points to the fact that, sub-section (c) is closely linked with sub-section (b) of section 5 of the Act. Subsection (b) makes any person guilty of an offence who "wilfully enters into or upon any land, enclosed area or building, on or near to which there is conspicuously displayed a notice in large, legible letters forbidding entry". It is clear that what is criminally prohibited sub-section (b) is a conscious act of trespass that is constituted by an unauthorized act of entry upon the property.

Sub-section (c) makes any person guilty of an offence who -

"whether or not there is a notice mentioned in paragraph (b), enters or has entered into or upon any land, enclosed area or building, and fails or refuses to leave such land, enclosed area or building after being requested to do so by the owner, lawful occupier or person in charge thereof or any person authorized thereto by or on behalf of the owner, lawful occupier or person in charge thereof."

The intention of this provision is to punish criminally one who, while perhaps unaware that his entry upon the property was in fact unauthorized, disobeys a request to leave the property upon which he has entered. It still presupposes, however, in the view of the Attorney-General, that the initial entry upon the property was in fact an unauthorized entry, and the sub-section is not

intended to provide a criminal sanction against occupiers of property whose former lawful right to occupation has ended.

I am prepared to accept that this is a proper construction to place upon the sub-section. Occupiers of property whose right of lawful occupation has ended can be subjected to an eviction order, and there does not seem to be any good reason to extend the ambit of the sections penal provisions by giving to the concept of "entering" in sub-section (c) a wider meaning than that which it has in sub-section (b).

Accordingly, in the exercise of my powers of review it is directed that the conviction be quashed and the sentence set aside.

My brother Georges agrees.

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S v TWO JUVENILES 1982 (2) ZLR 275 (HC)

Court **High Court, Harare**

Waddington J

1st December, 1982

Flynote

Criminal procedure - trial - conduct of - plea of not guilty to one charge and guilty to another - irregular to proceed to verdict and sentence on latter before doing so in respect of first charge.

Headnote

Where an accused person is charged at the same time with more than one offence, it is irregular for the trial court to dispose of one of those counts in its entirety before dealing with the others. Verdict on all counts should be pronounced at one and the same time. One reason for this is that it is wrong to subject the accused to the additional expense and the general inconvenience of standing trial for a second time on the same charge sheet. Another reason is that the facts may be such that any sentence on the count that is dealt with later would, when considered in the light of the sentence already passed, be excessive.

Cases cited:

S v Leopeng, 1966 (4) SA 484 (AD);

S v Mthetwa, 1970 (2) SA 310 (N).

Judgment

Waddington J: The two accused in this case were charged jointly with two counts of housebreaking with intent to steal and theft. Both accused are juveniles, one being 15 years of

age and Me other 16 years of age.

Brought before the magistrate for trial on the 14th October, 1982, each accused pleaded not guilty to the first count and guilty to the second count. Each count involved a breaking into different portions of the same school on the same day and at about the same time. Stolen from each portion of the school broken into were quantities of property of roughly equal value, judging from the charges.

When the prosecutor realized that he would have to lead evidence on count 1, he requested the presiding magistrate to proceed on count 2 to convict the accused on their pleas of guilty and to pass sentence. He wished, he informed the Court, to return the police docket to the

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WADDINGTON J

police so that the investigating officer could conduct further investigations into the offence constituting count 1. The magistrate acceded to the prosecutor's request and convicted the two accused and sentenced them to a moderate correction of 6 cuts and in addition imposed a sentence of 6 months' IWL which was wholly suspended for 5 years on condition that the *first* accused "does not commit any crime of HB and theft or involving dishonesty during the period of suspension" (*sic*).

It was irregular for the magistrate to dispose of the second count on its own in its entirety before dealing with count 1. In *South African Criminal Law & Procedure*, Volume V, the authors Lansdown and Campbell state:

"Where there are more counts than one in an indictment or charge, a verdict should be returned on each count and verdict or judgment should be pronounced on all at one and the same time, and it would be irregular to deal with the case in separate parts."

The learned authors refer to the cases of *S v Leopeng*, 1966 (43 SA 484 (AD) and *S v Mthetwa*, 1970 (2) SA 310 (N) in support of this statement, but in the context of the instant case these two authorities are not of much assistance. However that may be, it is quite obvious that the prosecutor was wrong in making the request and the magistrate was wrong in granting the request to deal with the trial piecemeal. The accused have each pleaded to the charge which forms the subject of count 1 and each is entitled to a verdict (see section 163(5) of the Criminal Procedure & Evidence Act). Each has already undergone trial on count 2 and has been sentenced therefor. It will now be necessary for each accused to be brought before the same magistrate aged for trial on count 1 if that chase were to be pressed; in other words, the accused will have to undergo a second trial in effect. It should be obvious that it is undesirable to force accused persons to undergo two or snore trials when one will suffice, because an accused person should not be subjected to the additional expense and general inconvenience of standing trial for a second time on the same charge sheet.

There is another considerable difficulty which concerns the future passing of any sentence on count 1 in this case. The accused have each been sentenced to receive corporal punishment because they are juveniles. Had they been convicted on count 1 on the same day on which they were convicted on count 2, I very much doubt if the corporal punishment awarded to the

accused would have been any different from the sentence imposed upon them by the magistrate in relation to count 2. Also, as both offences were committed at the same time and place

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WADDINGTON J

and only by the veriest technicality constituted two counts and not one, it would not have been proper to sentence the accused separately on each count. Both counts should have been treated as one for the purposes of sentence. Any additional sentence in respect of count 1 would therefore be excessive in the circumstances.

I have drawn the attention of the Director of Public Prosecutions to what has happened, and he has informed me that the prosecutor believes that he withdrew the charge against the two accused in relation to count 1. This, however is not borne out by what is recorded in the record or by the magistrate's written explanation submitted to me as a result of my earlier inquiry. In that explanation the magistrate stated quite plainly that, having been requested by the prosecutor to premed on count 2, he did so. He continues: -

"... the Public Prosecutor informed me that we would proceed into a trial as soon as investigations were over and that he was sending the docket back to the Station for further investigations [in regard to count 1]."

However that may be, in view of the fact the accused pleaded to count 1 and are therefore entitled to a verdict, and in view of the difficulties relating to sentence to which I have adverted already, the Director of Public Prosecutions, on behalf of the Attorney-General, has properly undertaken to ensure that the charge which forms the subject of count 1 will be formally withdrawn and the two accused acquitted in respect thereof.

So far as the sentence which was passed on the accused in relation to count 2 is concerned, the moderate correction of 6 cuts was in my view a proper punishment. But the imposition of a suspended sentence of 6 months was excessive, having regard to the extreme youth of the two accused. The purpose of imposing corporal punishment was no doubt to keep the accused out of prison because they are so young. It is most unlikely, furthermore, that either accused would be sent to prison if they were to breach the condition of suspension in the near future because for the next two or three years they would probably be regarded as still too young to be sent to prison. Thereafter, it is probable that the Courts would further suspend the sentence because the accused would have complied with the conditions for such a lengthy period of time. In all the circumstances, the imposition of the sentence of 6 months' IWL was most inappropriate.

There is also another difficulty in relation to the suspended sentence. The magistrate has recorded that the period of imprisonment would be suspended in relation to both accused on condition that the *first* accused

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refrains from engaging in specified forms of criminal conduct. The unjust result is that if the first accused were to breach the condition the second accused would be liable to go to gaol. If the

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second accused breached the condition, nothing would happen. This absurdity is academic, however, because, as I have already said, the imposition of the additional sentence cannot be justified in any event.

The convictions on count 2 are accordingly confirmed. The sentences passed on the two accused, however, are altered by the deletion of the suspended sentences.

Dumbutshena J: agrees.

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IN RE PETITION OF STANDARD TRUST LIMITED 1982 (2) ZLR 279 (HC)

Court **High Court, Harare**

Dumbutshena J

2nd and 8th December, 1982

Flynote

Succession - wills-construction of - trust established under will to provide for testator's widow in her lifetime - renunciation by her of rights - whether interest of beneficiaries may thereby be accelerated and realised as from date of renunciation.

Headnote

The late William Harold Rooker-Smith executed a will, in terms of which he made two specific bequests (one to his widow, one to his daughter) and appointed his children as his heirs. In terms of the will, a trust was created to provide for the support of his widow; on her death, the trust was to be realised and the proceeds, less the specific bequests, to be divided among his children. He gave his widow considerable jurisdiction over the trust in the matter of advances and loans from it to the heirs.

The testator's widow remarried and, being financially independent, agreed to waive her right to receive income from the trust and to the termination of the trust. The applicant, which was administrator and trustee, sought an order authorising the payment of the proceeds of the trust to the heirs. The *curator-ad-litem* opposed this accelerated interest of the beneficiaries because it would extinguish the contingent rights of the testator's grandchildren to inherit.

Held, that it was trite that the intention of the testator was always the paramount consideration; but in a situation such as this the authorities were moving in favour of allowing the date of vesting of the rights of inheritance to shift from the date of death of the holder of an intervening life interest to the date on which such holder renounced that interest. There was no indication in the testator's will that his widow's death should be the only time for the determination of the ultimate beneficiaries. The sounder approach to these situations is that acceleration should be permitted unless it appears that the testator positively intended to postpone the distribution of capital even if the income beneficiary should renounce his rights.

Held further, the phrase "on the death" (of the income beneficiary) includes the end of the life interest created by means other than death.

Cases cited:

Ex p. Zachau, 1951 (4) SA 378 (CPD);

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Ex p Alberts and Others, 1944 TPD 187;

Ex p Marais and Others, 1953 (4) SA 620 (TPD);

Scholtz and Others v Standards Bank of SA Ltd. NO, 1979 (2) SA 395 (CPD);

Tempest v Lord Camoys (1882) 21 Ch. D 571; [1881-5] All ER Rep 836 (CA);

Ex p. Porter: in re Estate Porter, 1978 (4) SA 226 (ECD).

M T O'Meara, for the applicant.

BWK Whaley, as *curator-ad-litem*.

Judgment

Dumbutshena J: The applicant is the Standard Trust Limited, the successor to the Standard Bank Limited which was appointed the Administrator of the Estate and Trustee of the Trusts created by the Will of William Harold Rooker-Smith, which Will was executed on the 7th September 1973. William Harold Rooker-Smith, who is hereinafter referred to as "the testator", died on the 25th August 1974.

The testator is survived by his wife, then Marjorie Aggett Rooker-Smith, who has since remarried and is now Mrs. Nye-Chart. The testator made two specific bequests: to Mrs. Nye-Chart in the sum of \$30 000,00, together with three Stands of the Township in respect of the farm Greenfields, being stands 622, 623 and 624, and to his daughter Mrs. Janet Alice Reed (born Rooker-Smith), to whom he bequeathed Stand 660 and the dwelling-house thereon.

He appointed his children, namely Donald Weir Rooker-Smith, William Bruce Weir Rooker-Smith, Robert Harold Rooker-Smith and Janet Alice Reed (born Rooker-Smith) to be his heirs. Upon the death of his wife, he directed the Trustees to realize the trust and to make from the proceeds thereof specific bequests to his above-named children, and then to divide the residue in equal shares amongst the said children. There was a further provision which plainly stated was to the effect that should any of his children predecease him or his wife then such child's share, after collation of any advances made to such child, should devolve upon such child's children of the first degree and, failing children of the first degree, equally amongst his surviving children or their children of the first degree.

After making bequests and other provisions, clause (e) of the Will provides that -

- "(e) I hereby place on record that it is my intention that should any of my said children find during the subsistence of the Trust that they are in

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need of capital funds, they shall be entitled to receive from the Trust whatever monies they require provided, however, that my said wife is agreeable to the advance of such monies.

I direct, therefore, that my Trustees shall upon receipt of written instructions from my said wife, release to any child so much of the capital of his or her share of the Trust as she may be prepared to agree to be paid to such child. It must be understood, of course, that any one child shall not be entitled to withdraw more than his or her share of the Trust capital to which he or she will eventually become entitled. I further direct that any child who may receive any monies in terms of this Cause shall pay interest to my said Trustees at the rate of six percent per annum from the date of payment of such monies, such interest to be paid annually in arrear and to form portion of the income derived from this Trust subject, however, to the condition that my said wife may in her sole discretion instruct my said Trustees to waive such interest either in whole or in part and from time to time but nothing shall prevent my said wife requiring my said Trustees to reinstitute such interest at any time after any waiver should she in her sole discretion decide provided such interest shall only be payable from the date of such re-institution."

On the 15th September 1982, by order of this Court, Mr BWK Whaley, a legal practitioner, was appointed *curator-ad-litem* "to report on and, if necessary, to represent the interest of the minor children and unborn children" of the testator's children in connection with the petition, of Standard Trust in the present case.

The testator has nine grandchildren, one of whom - that is Zoe Marjory Beaufoy Rookan-Smith - is a major.

Mrs. Nye-Chart is said in the petition of the applicant to be financially independent. She agreed, having prior to that adiated under the Will, to waive her right to receive income from the Trust and she has also agreed to the termination of the Trust in a Deed of Waiver, annexure "C", which among other things states:

"I, the said MARJORIE AGGETT NYE-CHART, do hereby waive, renounce and abandon my rights to the income for my life from the Trust established in terms of the Deceased's Will, and agree that the administration of the Trust be terminated, that our children be paid the bequests referred to in the Will of the Deceased less any amount which they have been advanced and that the residue be distributed equally between them subject to collation in respect of funds advanced over and above those specially bequeathed."

The applicant, the Standard Trust Limited, now prays for an order in the following terms:

"1. That upon the renunciation of MARJORIE AGGETT NYE-CHART of her right to the income derived from the said Trust, the Trustees of the said Trust are hereby authorised -

- (a) to pay the sum of TWELVE THOUSAND DOLLARS (\$12 000,00)

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DUMBUTSHENA J

to DONALD WEIR ROOKEN-SMITH

- (b) to pay the sum of TWENTY SIX THOUSAND DOLLARS (\$26 000,00) to WILLIAM BRUCE WEIR ROOKEN-SMITH less the sum of TWELVE THOUSAND DOLLARS (\$12 000,00);
 - (c) to transfer to JANET ALICE REED the Stand with the dwelling house thereon on the farm GREENFIELDS but in the event of her being unable to obtain transfer, then to pay her the sum of THIRTY THOUSAND DOLLARS (\$30 000,00);
 - (d) to distribute the remainder of the Trust assets to DONALD WEIR ROOKEN-SMITH, WILLIAM BRUCE WEIR ROOKEN-SMITH, ROBERT HAROLD ROOKEN-SMITH and JANET ALICE REED (born Rooker - Smith) subject to the sum of TWENTY SEVEN THOUSAND DOLLARS (\$27 000,00) being collated by ROBERT HAROLD ROOKEN-SMITH.
3. THAT the costs of this application, as between attorney and client, including the costs of the application for the appointment of and the fees of the Curator ad [item, be paid out of the funds of the said Trust."

The Master has filed a report which in a way highlights the two-way line of legal authority established by judicial decisions in applications of this nature. He says in paragraph 2 of his report:

- "2. There is an element of disharmony in the judicial decisions as to whether or not the interests of beneficiaries may be accelerated by the renunciation of the holder of an intervening life interest particularly where, as in this case, the ultimate beneficiaries may be minors and/or undetermined. It seems that the question rests upon a proper interpretation of the will under consideration. In this instance the will does not appear expressly to prohibit such acceleration; indeed, the provisions in it for capital advances to be made to the beneficiaries might indicate that the testator did not contemplate the death of the holder of the intervening interest as being the only circumstance upon which the trust would come to an end."

The burden of Mr *Whaley's* opposition to the acceleration of the interests of beneficiaries because of the renunciation of an intervening life interest by the holder, in this case Mrs. Nye-Chart, is that -

"If . . . the devolution of the Trust *corpus* to the testator's four children is accelerated upon the widow's waiver of her rights as in presently proposed, the grandchildren's rights to inherit under the will, which are at this stage contingent rights only, will be thereby extinguished by virtue of the termination of the trust."

In support of his submission he relies on *Ex parte Zachau*, 1951 (4) SA

378 (C.P.D. The headnote reads:

"The testators had by will directed that the residue of their joint massed estate should be held by an administrator in trust, the income therefrom to

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DUMBUTSHENA J

be paid to the survivor and on such survivor's death, after the payment of a legacy, the income was to be paid to a daughter who was married and had three children. The will further provided that on the death of such daughter, or on the death of the survivor should the daughter have predeceased the survivor, the remaining balance of the capital of the estate 'shall be paid to the children then living of our daughter, born out of her marriage with (her husband) in equal shares or to their legal issue by representation.'. On the death of the surviving spouse the daughter received the income, but subsequently wished to renounce her 'usufructuary' right to the income from £6,000 out of the trust assets of about £15,000. She accordingly applied for an order (a) declaring that the trust had come to an end in respect of £6,000 and (b) authorizing the administrator to realise sufficient of the assets of

the trust to pay out of the proceeds thereof the sum of £2,000 to each of her three children. She was past child-bearing age.

Held, that the testators clearly made the death of the applicant or if she predeceased the survivor such survivor's death, as the date on which the ultimate heirs were to be determined.

Held, further, that the renunciation of the usufructuary right did not alter the clearly expressed intention of the testators."

Mr *Whaley* submitted that the testator's present grandchildren and any further grandchildren that may yet be born during the lifetime of the widow, acquired a contingent interest in the trust upon the death of the testator, and if upon the death of the widow any of the testator's four children had predeceased her, then the rights of the children of such predeceased child would vest at that point in time. He also finds support for his argument in a passage in *Ex parte Zachau* (*supra*) at 382 D - G where VAN WINSEN, J, said:

"It is obvious that the Court should be careful before making an order, because it is clear that if £6,000 is realised from the assets of the trust at this stage and is allowed to go to the children of applicant, then it may very well mean that the Court is substituting these children as heirs in place of certain other persons who might, under another eventuality, take in terms of this will. For instance, if before applicant's death one or other of her children were to die then according to the terms of the will the children of that child would take in place of their parent. There is no indication at the moment that the petitioner's children will not have further children; and if we are now to declare that in regard to the 6,000 of the *corpus* of the estate petitioner's three children, presently living, are to take, it may well be that we are preventing certain of the trust property from devolving upon petitioner's grandchildren, born and to be born, and so frustrating the true intention of the testators."

There is much force in Mr *Whaley's* argument, which is supported by a strong line of authorities which, however, are now losing out to cases which advocate termination of a trust upon repudiation. Generally, decisions that uphold this line of reasoning are based on the premise that

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once a testator has fixed the date of the survivor's death as the point at which the vesting in the heirs of the property bequeathed begins, and there is provision for substitute heirs in the event of a child not outliving the survivor, this date of vesting could not be anticipated and the contingent rights of the substitute heirs defeated, despite the renunciation of rights by the holder of the fiduciary interest (see Corbett, Hahlo, Hofmeyer and Kahn: *The Law of Succession in South Africa*). In *Ex parte Alberts & Others*, 1944 TPD 187, the renunciation of a fiduciary right by the surviving spouse was held not to entitle the existing children to obtain transfer of the fixed property free from any condition in favour of heir children and the children of their brothers and sisters. It was held that a *fideicommissum* was constituted and that the fideicommissaries were ascertainable only on the death of the surviving spouse. MURRAY, J, said at page 190:

"In view of this contingent right of succession possessed by the grandchildren, now born or hereafter to be born, in regard to the eventuality mentioned, it is not competent for any of the sons of the restating parties, to waive the rights of any of their children . . . the first applicant cannot now in her lifetime, in disregard of the contingent right of succession of her grandchildren, transfer unfettered *dominium* to her sons, or *dominium* limited only by a usufruct in her own favour."

And again:

"It is trite law that the intention of the testator, always the paramount consideration in construing a will, is not intention as surmised, but intention is gathered from the language used by the testator . . . with such clear language it is impossible to see what desire could have been present in the testator's mind at the execution of the will other than that (1) each son's right of succession was contingent on his outliving his surviving parent and (2) if he did not outlive such surviving parent, then his issue (if any) should be substituted for him in the succession at the survivor's death."

Authorities supporting Mr *Whaley's* argument are legion but these authorities seem now to be less preferred. There is now judicial support, it seems, for shifting of the date of vesting by reason of a renunciation of rights by the holder of the intervening life interest. See Corbett, Hahlo, Hofmeyer and Kahn, *The Law of Succession in South Africa*, where the learned authors say at page 140:

"The reasoning in *Ex parte Marais* has been preferred and followed in a number of recent decisions and it is submitted, with respect, that, even if it does involve imputing an intention to the testator in regard to a situation which he may never have contemplated, it is more in consonance with practical realities than that adopted in *Ex parte Alberts*."

In *Ex parte Marais & Others*, 1953 (4) SA 620 (TPD), a case dealing with the effect of renouncing benefits under a will, the testatrix and her surviving spouse had appointed their children as universal heirs

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of their joint estate, subject to certain conditions. The surviving spouse first adiated and then withdrew the adiation and thereafter renounced all benefits under the will and claimed his half-share of the joint estate. The four children, all majors, applied for an order that they were now entitled to the payment of the remaining half unconditionally. DE WET, J, said at 623 H - 624 D:

"When property is bequeathed to A with a *fideicommissum* in favour of B taking effect on A's death, the reason for the postponement of B's rights is *pura facie* the anticipated life interest of A. When the reason fails because of A's renunciation of the bequest there is no reason to suppose that the testator intended a postponement of vesting in B under these conditions; and even where a substitute is nominated for B should he predecease A, there is still *prima facie* no reason to suppose that the testator intended the postponement to operate for the benefit of the substitute. B would be able to claim the bequest as of right if there is a renunciation by A unless there are indications to the contrary in the will.

Applying this reasoning to the present case it seems to me that the postponement of the rights of testatrix's children was provided for on the assumption that the surviving spouse would adiate. As the surviving spouse has renounced his rights I think the children are entitled to the testatrix's half share of the estate unconditionally. A contrary view would lead to a position which would, in my opinion, be the very reverse of that intended by the testatrix. If the money is not paid out to the children now it must be left in the Guardian's Fund for an indefinite period, and the Children, who are primarily intended to be benefited, may in fact derive no benefit at all from this fund."

It seems to me that in the instant case a reading of clause (e) of the Will shows no indication that the testator intended the date of termination of the intervening life interest by death as the only time for the determination of the ultimate beneficiaries and the vesting of their interests, in

which case there would be no acceleration of vesting. See Corbett, Hahlo, Hofmeyer and Kahn, *The Law of Succession in South Africa*, paragraphs 141-143.

The view expressed above appeals to me because in my judgment where the surviving spouse decides that she, as in this case, is in her own right wealthy and has no need of income from the Trust and has, for that reason, no objection to the children of the testator, the fideicommissaries, inheriting the corpus not upon her death, as stipulated in the Will, but immediately upon her renunciation of her rights, the Trust should be determined for the enjoyment and benefit of the immediate heirs, especially when there are indications in the Will that such a course was necessarily not excluded. This is more so where the surviving income beneficiary, because of her lack of interest, is no longer desirous of postponing the acceleration of the distribution of the *corpus* among the fideicommissary beneficiaries.

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The learned author, A M Honoré, in *The South African Law of Trusts*, 2nd ed, says, commenting on the correct approach in an area where judicial decisions are in a state of uncertainty, at pages 433 - 34:

"The sounder approach is rather that acceleration is permitted unless it can be shown that the testator positively intended to postpone the distribution of the capital even if the income beneficiary should renounce or repudiate. Such a positive intention has been found where vesting in the capital beneficiaries was to take place 'upon the death of the longest living' of the income beneficiaries and where the trustees were then given a discretion to distribute half his share to a capital beneficiary on attaining 25, or when a trust set up on divorce provided for farming operations to be carried on during the lifetime of the income beneficiary, for insurance policies on her death to fall into the trust fund, and for her funeral expenses to be paid out of the trust. The founder of a trust is entitled to postpone the distribution of capital if he wishes to do so in the interest of some beneficiary other than the person who has repudiated or renounced.

The fact that the capital beneficiary has a vested interest in the corpus is an indication in favour of allowing distribution to take place when the interest of the income beneficiary determines."

See also *The Law of Succession in South Africa (supra)*, pages 140 - 143.

More recently, in *Scholtz and Others v Standard Bank of SA Ltd. NO*, 1979 (2) SA 395 (CPD), GROSSKOPF, J, wrestled with this problem and came out with the following comments at 400-1 (official translation):

"The principle which is applicable is, therefore, that the testatrix' renunciation resulted in the inheritance passing to her children unless it appeared from will that it was the intention of the testators that the vesting of the fideicommissaries' rights was necessarily to be postponed until the death or remarriage of the *fiduciaria*.

In the application of this principle it is in the first place clear that the mere omission to make express provision in the will for the consequences of the renunciation or repudiation cannot be decisive. If such express provision was made, no problem could have arisen. The problem indeed arose because the testators in all probability never thought of the possibility of repudiation or renunciation, but accepted that the survivor's rights would continue until they were terminated by the express terms of the will. The mere fact that the time when the rights of the *fideicommissarii* vest, is determined with reference to the death or remarriage of the *fiduciaria* can, therefore, also not be decisive. In terms of the will her rights would have continued until one or other of these occurrences took place, and the reference to these occurrences can be explained as a reference only to the moment when the

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If the will is read as a whole it is, in my opinion, reasonably certain that it was the testators' sole intention in the creation of the *fideicommissum* to provide for the survivor during his or her life (or, in the case of the testatrix, until her remarriage) and thereafter to let the estate pass to the children or their descendants. The inheritance of the *fideicommissarii* was therefore postponed merely for the sake of the interim interest of the survivor. To formulate it differently, there is in my opinion not sufficient indication in the will that the testators intended to postpone the vesting in the *fideicommissarii* as an object in itself, and apart from the interim enjoyment of the assets by the surviving testate. My reasons for this conclusion are briefly as follows.

In the first instance this is the ordinary, natural and very common custom to make provision in this manner for the passing of property, especially farm properties, to the children or grandchildren of testators and simultaneously to provide for the maintenance of the survivor. Cf *Ex parte Marais and Others*, 1953 (4) SA 620 (T) at 623 - and *Van Niekerk's case supra*, at 263 - 4. This approach, in my opinion, also appears clearly from the present will. It is worth noticing that the testator's rights would have continued until his death, if he was the survivor. The testatrix on the other hand would have lost her rights on remarriage. This provision stresses on the one hand that fiduciary rights were granted to provide for the survivor's maintenance for as long as it would be necessary in the ordinary course of things. On the other hand this provision indicates, in my opinion, that there was no independent intention to postpone the vesting in the *fideicommissarii*. Not only was it obviously uncertain when the testators would die, but it was also uncertain who would die first, and, if the testatrix should be the survivor, 13 whether she would remarry and if so, when. In my opinion it would be completely unrealistic to accept that the testators intended to withhold the inheritance from the *fideicommissarii* until the solution of all these uncertain ties even if the survivor would no longer have interim rights requiring protection. Cf *Ex parte De Villiers en Andere*, 1960 (1) SA 102 (T) at 103 E - 104 C; *Ex parte Marais and Others (supra)* at 623 H - 624 C; *Ex parte Estate Boonzaanier*, 1952 (3) SA 204 (C) at 209 F "

A close examination of clause (e) of the Will reveals that the testator gave wide powers to the Trustees upon receipt of written instructions from his wife "to release to any child so much of the capital of his or her share of the Trust as she may be prepared to agree to be paid to such child." Any child who availed himself is required to pay interest to the Trustees but this is made subject "to the condition that my said wife may her sole discretion instruct my said Trustees to waive such interest either in whole or in part and from time to time but nothing shall prevent my said wife requiring my said Trustees to re-instituting such interest at any time after any waiver should she in her sole discretion decide . . .". Two of the children availed themselves of this condition. William Bruce Weir Rooker-Smith received the sum of \$12 000 and the sum of \$57 000 was paid to Robert Harold Rooker-Smith.

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In my opinion this does not; only constitute "a *prima facie* indication militating in favour of a construction that the testator's children's rights vested immediately upon his death", as is conceded by Mr *Whaley*, but it is also a *prima facie* indication that the wife's discretion is wide and unfettered and can be exercised in the termination of the Trust or against the postponement of the distribution of capital. Further, it is clear from the language of the provisions of the Will that the Trustees were given wide powers. When a testator has given a discretion to Trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the

wish of the Trustees unless they are using that power improperly. See *Tempest v Lord Camoys* (1882) 21 Ch 571 (CA) at 573 and 578.

I agree with Mr O'Meara, who appeared for the applicant, that in this case it was not in the testator's mind to benefit further children other than his own. This is subject to the *contra* view that were the intentions of the testator to be fulfilled in terms of the Will, the contingent beneficiaries would still have benefited. This is implicit in the words giving the widest discretion, which seems to suggest that if the wife agrees, the Trustees can give the whole corpus to the children without considering the interests of contingent beneficiaries.

In this regard, where it is clear in the instrument to be interpreted that the phrase "on the death" includes the end of the life interest created by means other than death (see *Ex parte Porter: In re Estate Porter*, 1978 (4) SA 226 (ECD) at 232 C-D), the proper construction of the Will brings one to the conclusion that the testator's intention in creating the Trust and in making the provision in clause (e) of the Will was to provide an income for his wife and children on the termination of the right of them all to receive such income, whether because of the death of the surviving wife, as provided for in clause of the Will or because of a renunciation of her right to the income for life referred to in the Will and in clause 3 (a) thereof. See *Ex Parte Porter: In re Estate Porter* (*supra*) at 232 G. The children have agreed that the Trust be terminated, therefore the matter is less complicated and more so because I have come to the view that "on the death" includes the end of the life interest which is other than death specifically mentioned in the instrument.

To carry the argument further, there is not sufficient indication in the Will that the testator intended to postpone the vesting in his children as an object in itself apart from the interim enjoyment of the assets by the

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surviving wife. I find support in what was said by GROSSKOPF, J, in *Scholtz & Ors v Standard Bank of SA Ltd.* (*supra*) at 491.

There will accordingly be an order as prayed.

Coghlan, Welsh & Guest, legal practitioners for the petitioner.

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S v GARDENER 1982 (2) ZLR 290 (SC)

Court **Supreme Court, Harare**

Baron, Georges and Beck JJA

18th November and 9th December, 1982

Flynote

Criminal procedure - evidence-sexual - cases - where complainant's evidence is unsatisfactory in certain respects - probabilities of the matter - relevant to deciding whether witness is truthful - not to be used to decide where truth lies - necessity in any case for court to be satisfied that danger of false incrimination has been eliminated.

Headnote

Where, in a case which depends on the credibility of a witness, the court finds that the evidence of the witness is untruthful in fundamental respects, it is a serious misdirection for the court to say that it finds the truth to lie elsewhere. In such a situation, the court does not find where the truth lies; it decides whether the witness on whose evidence the court is asked to rely is telling the truth. It should not examine the probabilities and on the basis of its conclusions in that regard decide where the truth lies. The probabilities are used to decide whether the witness is telling the truth. What the court may not do is reject the evidence of the witness and decide on the basis of the probabilities that the truth lies somewhere else. This is particularly so in sexual cases where, if the evidence of the "suspect" witness is disbelieved, the matter is at an end and the question of corroboration of or support for her testimony does not arise.

In any event, in a sexual case, even if the complainant is found to be a credible witness, the accused is entitled to his acquittal unless the complainant is corroborated or there is something about the circumstances of the particular case which satisfies the court that the danger of false incrimination inherent in such a case has been eliminated.

Cases cited:

Director of Public Prosecutions v Morgan [1975] 1 All ER 147 (HL);

S v Mupfudza, 1982 (1) ZLR 271;

S v Kaswaurere, 1981 ZLR 375.

S v Bvandura, SC 125/82 (not reported).

M.J. Gillespie for the appellant.

H.A. Eleftheriades for the respondent.

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Judgment

Baron JA: The appellant and two other young men to whom I will refer respectively as the second and third accused, were charged with rape. The second and third accused were acquitted but the appellant was convicted and now appeals against conviction.

The complainant was a young woman 23 years of age who came originally from Malawi. She had been married for two years but was at the relevant time divorced. She had lived and

worked for some time in Zambia and on the 16th January, 1982 had come to Harare for a visit. Her mother lives in Harare although it does not appear that the purpose of the complainant's visit was particularly to see her mother; on the contrary, it seems to emerge from the evidence that she came down from Zambia with a young man called Carlyn Felix, who explained to the Court that he had to leave Zambia temporarily because his work permit had expired and would take about a fortnight to renew. In fact Felix and the complainant were due to return to Zambia together two days after the events that form the subject of the case. The complainant told the Court that very shortly after coming to Harare she had met a young man with whom she had fallen in love but on the night in question he was working.

Certain facts are either common cause or not seriously in dispute. The complainant whilst in Harare sometimes spent the night with her mother and sometimes at the house of Carlyn Felix's parents. It is clear that on the day that the alleged rape took place she had been at the Fells' house. On this night, the 5th February (Friday), she and three other girls and two men went to the Circus Night Club. They stayed there from about 10.00 p.m. to 1.30 a.m.; the complainant then met a police officer who was on duty and together they went to another night club, Scamps. There the complainant met the third accused whom she had known previously, they had met in Zambia and also when he had come to the Felines' house to have his hair cut by Carlyn, who was a qualified hair dresser. The complainant and the third accused danced a number of dances together and in particular the last three dances; it seems that the night club closed at about 2.30 a.m. on Saturday the 6th. At this point there is a certain conflict between the complainant and the third accused. The complainant said that the third accused offered her a lift home but she indicated that she preferred to take a taxi, notwithstanding this the third accused was persistent and she finally agreed to go with him. In fact - and it seems that the complainant knew this - the third accused did not have a car; he made it clear that the lift he was talking about was with a friend. The third accused on the other hand said that the question

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of the complainant taking a taxi did not arise and she did not demur any way when he suggested that they should get a lift home with his friend.

In the event the complainant and the third accused met the appellant and the second accused in the carpark; it is common cause that the complainant had met neither the appellant nor the second accused prior to that moment. The appellant drove and the second accused sat next to him; the complainant and the third accused sat in the back. At this point there is a serious and important conflict between the complainant and the three men; the complainant says that she and the third accused were sitting at opposite ends of the seat and that there was no petting or kissing and indeed no conversation, the appellant and the two accused on the other hand, although there are minor differences in their descriptions, all say that the complainant and the third accused were engaging in very "heavy petting" in the back of the car - the appellant's description was that "they were really rubbing each other there in the back" - and that the appellant and the second accused joined in fondling the complainant's legs. I will return later to the magistrate's treatment of this evidence and this conflict..

It seems that the original intention was first to drop the second accused and then to crap the

complainant and the third accused, although Morosely where is by no means clear. In the event the appellant drove to a quarry off the Hatfield Road which appears to have a reputation as kind of "lovers lane". The complainant says that when she realised that they were passing the road which led to the Felixes' house she commented and received some kind of an explanation. However the appellant drove the car onto this bush road and stopped it on the pretext that it had run out of petrol. Let me say at once that the evidence of the appellant that he genuinely believed at one time that the car was out of petrol is highly unsatisfactory and quite unacceptable, and the magistrate was in my view right to reject it. However, although it reflects on the appellant's credibility it hardly takes the main issue very much further, since the appellant himself admitted that he was at all times intending to drive to that particular spot.

When the car stopped the three men jumped out, the complainant remained in the car. The men went to the back of the car and then the appellant came to the rear door, opened it and told the complainant to get out. She did so and as she was getting out the appellant immediately pumped her on the side of the head, knocking her down; while she was on the ground he punched her again. He then forcibly removed all her clothes and held her with her hands behind her back so that she was

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naked and facing the other two men. She cried out for them to help but they just stood there. The appellant then threw the complainant onto the back seat of the car and in spite of her struggles and screams he raped her. The second and third accused had in the meantime walked away. The complainant told the court how she expressed the need to urinate and how the appellant led her, still naked, to a point some distance from the car where she urinated; still holding her by the hands he then led her back to the car. By this time the second and third accused had returned. The second accused told the Court that he got into the car and tried to pacify the complainant who was sobbing and saying "why did he have to hit me." "The complainant asked him whether "he wanted to do it too" and that he then had intercourse with her; there is some dispute as to whether he actually penetrated her, her own evidence being that he did not and his evidence being that she took hold of his penis and guided it into her vagina. When this act of intercourse was over the third accused came to the car and he too had intercourse. When he had finished he and the second accused proceeded to walk home leaving the appellant and the complainant together. The complainant's evidence is that the appellant raped her once again, this time from the rear. Thereafter he drove her to the Felix's house where she asked him to wait to make sure that there was someone there who would let her in, the complainant says that when she got out of the car at the Felix house she was careful to take the registration number of the appellant's car and when he saw her doing this he immediately drove off. The appellant denied that this was his reason for driving home. The complainant says that when Carolyn Felix opened the door for her she immediately reported to him that she had been raped and when he asked by whom she described the third accused but curiously made no mention at that point of the appellant or the second accused. Felix described the injuries that he saw, including the lump on the complainant's left temple and bruises on her arms which looked like bite marks. He said she was not wearing the clothes in which she had left the evening before (I will return to this question of clothes). The matter was immediately reported to the Police and the appellant was

arrested when the complainant recognised his car whilst driving around in the company of the Police; there is nothing in the record to suggest that the appellant's car was identified by its number. Shortly afterwards the second and third accused were arrested as a result of information given then by the appellant.

The appellant and the second and third accused all made statements to the Police which were not challenged. The importance of these statements is twofold. First, while there are certain variations between the

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statements and the evidence the three men gave in Court it must be said that the evidence in Court did not differ significantly from the statements. Secondly - and this matter was canvassed with great care at the trial - the appellant on the one hand and the second and third accused on the other were kept apart during the whole period prior to the statements being made and clearly had no opportunity whatever to consult each other as to what they would say; consequently where the statement of the appellant and the statements of the second and third accused display unimportant points of similarity this is a significant factor tending to show that they are speaking the truth.

I have omitted number of material facts from the foregoing outline, but it is convenient at this point to deal with the grounds of appeal advanced by Mr *Gillespie* and the concessions made on behalf of the State by Mrs. *Eleftheriades*, who did not support the conviction. Mr *Gillespie* submitted that the complainant consented to intercourse with the appellant, or at least that the State had failed to prove lack of consent. Alternatively, even if the complainant did not consent, Mr *Gillespie* submits that the appellant believed that she had consented; and in this regard Mr *Gillespie* submits that the magistrate misdirected himself in applying an objective test to the question of the appellant's belief, namely that requiring that he must have a reasonable belief. In view I take the case it is unnecessary to consider the question of the appellant's belief; but I may say in passing that in his last submission Mr *Gillespie* is clearly right. On a charge of rape, lack of consent or indifference as to whether or not the woman consented is an ingredient of the offence, and consequently if an accused in fact believed that the woman has consented, whether or not that belief is based on reasonable grounds, he cannot be found guilty of rape: *Director of Public Prosecutions v Morgan* [1975] 2 All ER 347 (HL).

Mrs. *Eleftheriades* based her concession on somewhat different grounds. She conceded that the trial magistrate failed to apply the approach in *S v Mufudza* Supreme Court Judgment No. 124/82*(5), and in particular that he specifically found that in certain important respects the complainant was not a credible witness, and that the appellant would not therefore have been convicted. It may be convenient to cite a passage from Mufudza's case (*supra*) which emphasises the reasons for the two-stage approach which was being explained:

"The importance of this two-stage approach is illustrated in the present case. The magistrate convicted the appellant because he found him to be an unsatisfactory witness and he believed the complainant; he does not appear

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to have appreciated that believing the complainant was only the first stage in the enquiry, and that, believing he must still sad himself that he had not been deceived. His acceptance of and reliance on the complainant's evidence seems to me to have been based on precisely the same considerations as are taken into account in assessing the evidence and credibility a witness in any ordinary case. Such an approach is clearly incorrect in a case where, for one reason or another, a cautionary rule must be applied; in all such situations the court must not only believe the suspect witness but must *in addition* be satisfied that the danger of false incrimination has been excluded. If this were not the position then the cautionary rule would have little meaning and all cases would be reduced to a straightforward assessment of the credibility of the witnesses."

I think Mrs. *Eleftheriades* is clearly right in her criticisms of the magistrate's approach, but the case raises yet another important question which applies in all cases which turn on the credibility of witnesses, and not only in cases where for one reason or another the cautionary rule applies; I refer to the findings of fact made by the magistrate and the way in which he used his assessment of the probabilities in deciding where the truth lay.

The magistrate made his general approach clear at the very commencement of his judgment. Having referred various meetings between the families of the complainant and the appellant and the hints of blackmail he said this:

"As a result, I feel they have finally arrived at a version what happened which shows the teller in the best light. I am not suggesting that they have deliberately set out to distort the truth but human nature being what it is, flat with each telling of the tale the facts have been warped somewhat to suit their interests and so they moved away from the truth. I believe, therefore, that the truth in this matter lies somewhere between the two extremes of the evidence of the complainant on the one hand and that of the first accused on the other."

Thus at the very commencement the magistrate makes it clear that he does not believe the complainant in everything that she said. It is of course trite that simply because a witness is shown to have lied in certain respects the Court should not without more do reject the pinhole of his evidence, if the aspects on which the witness has lied are by comparison peripheral or minor then the remainder of that witness's evidence is still entitled to examination, albeit with rather greater care than if he had not been shown to have lied at all. In the other hand, if the aspect on which the witness has lied goes to the root of his story, or is clearly major important to the story as a whole, then he cannot be regarded as credible witness. If, therefore, the areas in respect of which the complainant "moved away from the truth" were areas fundamental to her story as a whole then it was a serious misdirection for the magistrate

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to say that he finds the truth to lie somewhere else. In a situation; such as this the court does not find where the truth lies, it decides whether the witness on whose evidence the court is asked to rely is telling the truth.

The magistrate again made his approach clear later in his judgment. For instance, he said:

"In the same way, I feel that the complainant has understated her part and that what the second and third accused say is probably nearer the truth. It is, I feel, also in accord with the probabilities, having regard to the

conduct of the parties prior to that time that night."

These and other passages in the magistrate's judgment make it clear that he has used his New of the probabilities in a number of arms quite incorrectly. The hour: does not examine the probabilities and on the basis of its conclusions, in that regard decide where the truth lies; the Court assesses the probabilities in deciding whether a witness is or is not telling the truth. The situation may be one in which there its a conflict between two witnesses, in order to decide whim of the witnesses is telling the truth, or whether it is possible to make that decision, flee Court will consider the probabilities In addition to the other factors which Courts properly take into account, including demeanour. Or the situation may be one in which it is simply a question of whether the only witness as to a particular event is telling the truth. Even in the absent of a situation of conflict the Court may on the basis of all the usual considerations including the probabilities decide that the witness's evidence cannot add. What the Court may not do is reject the evidence of the witness in question may decide on the basis of the probabilities that the truth lies somewhere else, and this is particularly so in a Case such as 'the present where if the evidence of the "suspect" witness is not believed the matter is at an end and the question of corroboration of or support for his testimony does not arise. See *Mupfudza's case (supra)*.

The areas in which the magistrates own findings show that he disbelieved the complainant cannot be described as peripheral or minor. They have been cited above. The one relates to what took place in the car on the way to the quarry and the other relates to the complainant's alleged struggles and screams. Obviously the second of these is central to her allegation of lack of consent, and the first, while not quite so fundamental, is certainly very important on the question of consent and even more important on the question whether the appellant and the second and third accused believed that she consented.

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However, still on the question of the complainant's credibility the matter goes a good deal further. The complainant said that immediately she got out of the car the appellant knocked her down. I find this highly improbable. I think it far more probable that this assault - and I do not think it was the kind of slap that the appellant described, it was a far more severe blow - did in fact take place but not in the circumstances and at the time described by the complainant. I find it unlikely in the extreme that the appellant, without even first enquiring whether the complainant was prepared to have intercourse with him, should suddenly and without warning knock her down. Then the immediately following events seem to me to be equally improbable. The complainant was asked to describe the events immediately after she had been knocked down and did so, including the description of how she was stripped quite naked and then thrown back into the car and raped by the appellant. It is dear from the record that this raised certain questions as to how the complainant's clothes found their way into the car later, and the complainant thereupon gave very glib but in my view very improbable evidence, since she was at that time in the process of being raped by the appellant, as to having seen the clothes being thrown back into the car by the second or third accused. It seems to me far more probable that the appellant is speaking the truth when he says that the complainant undressed herself in the car.

We come then to the description of the complainant's struggles. She was asked whether she had scratched the appellant and she said no because at that time all her finger nails were broken. Once again I find this a glib and highly improbable piece of evidence. We all know that women who wear their finger nails reasonably long frequently break them, but I would regard it as improbable in the extreme that a woman would break all her finger nails and break them so short that she was not capable of inflicting scratches on an assailant, and indeed I would have thought that broken finger nails would be more likely to inflict severe scratches than neatly manicured nails.

A good deal was made of the complainant's injuries. It is quite clear that the blow to her temple is consistent with her story of rape; on the other hand it is also consistent with the story of the appellant. The bruising on the complainant's arms is once again equally consistent with a rape and an enthusiastic act of intercourse. However, when one comes to the complainant's bruised breasts and the scratches on one of them it seems to me that these Juries are inconsistent with the description she gave of the second act of intercourse (from the rear) but quite consistent with the appellant's description. Finally Mr *Gillespie* drew attention to

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the absence of injury in the complainant's genital region and submitted that this was inconsistent with her allegation of lack of consent. I have to confess that I attach less significance to the absence of injury to the genitals than I do to the absence of injury to the thighs. Once a woman's resistance has been overcome and the assailant is in a position to effect penetration my understanding from the textbooks is that, particularly in the case of a married woman, one will not necessarily find bruising or other injury to the genitals. But reading the description given by the complainant of her struggles I find it surprising that she bears no signs of a struggle. I need only refer to what I said in *S v Kaswaurere*, 1981 ZLR 375. Needless to say if the woman's evidence is that she submitted because of threats then the absence of the kind of injury to which I have referred is of no significance whatsoever. But here the complainant, who was strongly pressed, gave the most graphic description of extreme resistance. She said that with all three men she "tried all the way". Pressed further, and specifically in relation to the appellant, she was asked:

"Q. You didn't try and keep him off by kicking him? A I tried everything.

Q I asked you earlier what 'everything' means. I asked you what you did.

You didn't mention kicking. A I was kicking, screaming, hitting and pushing him - everything.

Q Did you scratch at him? A I didn't have my nails then. I tried to scratch but I don't think I could have scratched him because they were really short. They had all been breaking."

In my view if the complainant was telling the truth in regard to her resistance to each of her three assailants I would have expected her to have borne some signs on her thighs of her struggles, and I would have expected at least one of the assailants to have borne some signs.

Whilst on the subject it is pertinent to refer to a passage in the magistrate's judgment shortly after the one I have already quoted in which he indicated that he did not accept that the

complainant had struggled and screamed to "anything like the extent she said she did." A few lines later the magistrate said this:

"I do not feel it would be at all surprising if the complainant did not put up a real struggle. She was in a remote area bush - with - two men who were complete strangers to her and one whom she had met a couple of times before. They were all drunk to a greater or lesser extent and the biggest, physically, had hit her. I can well imagine that in those circumstances she would submit without too much resistance."

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BARON JA

Once again I have to say that this is an untenable approach. It would be perfectly valid if it were the explanation given by the complainant; but she herself said something not only different but totally irreconcilable, that being so it is not competent for the magistrate to find, as he clearly has done, that the complainant submitted without too much resistance. The magistrate has made another finding of fact to which it is necessary to refer. He said:

"I don't believe that the first Accused was really concerned whether the complainant consented to him having intercourse with her or not. In his drunken state he had made up his mind he was going to have intercourse with her and as soon as he could he proceeded to do just that. When she demurred, he hit her and then had his way with her."

At no stage did the complainant say that she demurred, and indeed I have already pointed to the improbability of the complainant's evidence that the appellant for no apparent reason and without warning knocked the complainant down. It is therefore a misdirection on the evidence to find that the appellant hit the complainant only after she demurred.

Finally we have the very curious time factor. The evidence of the second and third accused indicates that they left the appellant and the complainant at the quarry and walked home and that this took them about an hour. It appears that they got home at about 5 o'clock which means that they left the quarry about 4. The evidence of Carlyn Felix makes it clear that the appellant and the complainant arrived at his house when it was quite light at approximately 5.30. This period of one-and-a-half hours, even accounting for the evidence of the appellant himself who said that it took him some fifteen minutes to start the car, is not consistent with the act of intercourse which took place after the second and third accused left being a rape. In this regard the evidence as to the clothes in which the complainant dressed herself is also suggestive. She said that apart from her kickers she could not find her own clothes and consequently dressed in clothes she found in the back of the car, the appellant explained that these were clothes belonging to his girl-friend which he had had laundered but which he had not yet returned to her. But the complainant herself said that when she got out of the car at the Felix's house she carried her own clothes in a bundle, and it was by this time quite light, so that the complainant had had ample time to find her own clothes and put them on during the drive to the Felix's house. I do not attach overmuch weight to this evidence, but such inferences as are to be drawn seem to me to be inconsistent with the complainant's allegations.

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BARON JA

I am satisfied therefore that on the question of the complainants credibility alone the judgment contains a number of serious misdirections the result of which is that the conviction can be supported only if this Court can "apply the proviso". For the reasons I have given I am satisfied that this cannot be done. It seems to me that on the face of the record and on a proper consideration of the probabilities it cannot be said that the credibility of the complainant has been established beyond reasonable doubt. On this ground alone therefore I think Mrs. *Eleftheriades* is right when she says that the complainant was not a credible witness and that a conviction based on her evidence would not be safe.

However, the matter goes further. The second aspect of Mrs. *Eleftheriades*' submission is that even accepting the complainant's credibility the danger of false incrimination has not been excluded. The magistrate in dealing with the usual argument that the complainant was trying to cover up what was in fact a consensual intercourse said this:

"Well, had she returned to her mother's house and had she been accosted by her mother, that might have carried more weight. She was a big girl, a divorcee, grown up, staying with friends and it does not seem that she owed : explanations to anyone for her conduct, especially bearing in mind her background and the community from which she came."

Precisely what suggestion is being made is not entirely clear, but any of the possible alternatives is in my view offensive. To suggest that the complainant's new found boyfriend would not be just as distressed and angry as anybody else's boyfriend to learn, or to be given cause to suspect, that his girl-friend had had a night out whilst he was at work is totally unwarranted, or if the suggestion is simply a general one that the morals of the community from which the complainant came are looser than the morals of some other community then it is equally offensive. Whether or not the complainant might have a motive falsely to claim that a consensual intercourse was a rape is to be decided on all the facts and circumstances of the case, but whilst the accepted customs of a particular community might in an appropriate case have a bearing on this question no such considerations apply here.

We have here the standard situation in which, accepting for the purposes of this stage in the enquiry that the complainant was a credible witness, a person accused of this type of offence is nonetheless entitled to his acquittal unless the complainant is corroborated or there is something about the circumstances of the particular case which satisfies the Court that the danger of false incrimination inherent in the case has been eliminated (see *S v Bvandura*, Supreme Court Judgment No. 125/82). There is nothing in this case which eliminated that danger; all the classic

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BARON JA

ingredients are present, and the magistrate's ground for holding that there was no motive for the complainant falsely to allege that the intercourse was a rape is patently untenable. On this ground also I think Mrs. *Eleftheriades* is right in her concession that the magistrate did not properly apply the cautionary rule as laid down in *Mupfudza's* case (*supra*).

I must I think stress that my decision does not mean that I believe the complainant consented to intercourse with the appellant and the two accused or any of them, it means simply that in my

judgment it has not been proved to the standard applicable to cases of this kind that she did not.

For these reasons I am satisfied that this appeal must be allowed and the conviction and sentence set aside.

Beck JA: I agree that the appeal must be allowed and the conviction set aside for the reasons contained in the judgment of my brother BARON.

Georges JA: It is with some diffidence that I dissent in this matter in the face of the opinions of my brethren and of a concession by counsel for the State that the conviction could not be supported. Having given due weight to all that has been said and having carefully examined the record, I am satisfied that the judgment of the trial magistrate can be supported. [His Lordship examined the evidence in detail and concluded:]

In the result I am not satisfied that the judgment shows an erroneous approach. Read as a whole it shows a clear appreciation of the proper approach and the nature of the *onus*.

I would accordingly dismiss the appeal and confirm the sentence.

Gollop and Black, appellant's legal representatives.

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PRACTICE NOTE No 1 of 1982 (2) ZLR 302 (HC)

Court **High Court, Harare**

Fieldsend CJ and Smith JP

14th December, 1982

Flynote

Practice and procedure-application for variation of custody and guardianship orders.

Headnote

PRACTICE NOTE No. 1 OF 1982

The Chief Justice and the Judge President have issued the following Practice Note:

Application for Variation of Custody and Guardianship Orders

By virtue of the provisions of order 32 of the High Court Rules 1971, applications for the variation of custody and guardianship orders granted by the High Court ought normally to be brought by way of notice of motion. Where, however, both parties consent to the variation sought the application for variation may henceforth be made to a judge through the chamber book accompanied by -

- (i) an affidavit from the applicant setting out fully the reasons for the variation and an

affidavit from the respondent stating his or her acceptance of the reasons of the variation; or

- (ii) a joint affidavit from the applicant and the responded setting out fully the reasons for the variation.

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S v PEARCE 1982 (2) ZLR 303 (HC)

Court **High Court, Harare**

Squires J

29th December, 1982

Flynote

Criminal law - Schedule to Police Act [Chapter 98] - paragraph 29 - improper use of State property - what constitute - aragraph 34 - acting in an unbecoming manner or in a manner likely to bring discredit to the Force acts which are Elected by paragraph.

Headnote

The accused, a senior Chief Inspector in the Police Force, was charged before a Board of Officers with various contraventions of the Police Act [*Chapter 29*] and convicted, *inter alia*, of contravening paragraph 29 of the Schedule to the Act and of contravening paragraph 34.

The allegation under paragraph 29 was that he had improperly acquired or used various sterns of State property. In respect of some of the items, which were gardening implements, he had had permission to borrow them in order to clean up the stand next to As own when he lived at the Police depot. When he moved to a home of his own, he had failed to return the items and had used them on his own garden. He had also, without authority, borrowed riding equipment for use on his own "horses.

The charge under paragraph 34 was one of acting in an unbecoming negater or in a manner likely to bring discredit to the Force. This charge arose from his management and staging of horseriding shows on behalf of the Force. At a show at Masvingo, he had used certain items belonging to the Masvingo Show Society. He felt these items would be ideal to use at a subsequent show at Bindura. Being unable to contact anyone from whom he could get permission to borrow them, he took the items, writing a letter to the President of the Show Society, who was a friend of his, explaining what he had done and undertaking to return sheen within a week or two. The President, in spite of this letter, was unaware that the items had been taken.

Held, upholding the conviction on the Charge under paragraph 29, that the offence is committed by a member as soon as he takes or uses State property without proper leave or permission, even if he intends to return it. Similarly, if initially he had permission to take such property, to use it thereafter, without authority, for his own private purposes, is a mischief at which the

paragraph Buns.

Held, further, quashing the conviction on the charge under paragraph 34, that whether conduct is "unbecoming" or "reasonably likely to bring discredit to the Force" is very much a matter of degree. Secondly, the conduct must

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be known to or discernible by someone else who finds it unbecoming or in whose eyes the Force is brought into discredit. Not every offence against good manners or good taste or breach of etiquette establishes the offence; there must be at least a sufficient element or reprehensibility in the conduct as not only fairly warrants intervention of the criminal law but is really likely to cause offence to others.

Judgment

Squires J: The accused in this case is a Chief Inspector in the Zimbabwe Republic Police. On the 15th December last he was charged before a Board of three officers with four contraventions of the Schedule to the Police Act [*Chapter 98*]. First, he was charged with contravening paragraph 29 in that he improperly obtained, appropriated or used State property, in the shape of three wheel-barrows, one watering-can, one fork - apparently of the garden variety, two head collars and one riding; saddle, and had used all these articles at his private residence. Secondly, he was also charged with contravening paragraph 29 - in that he improperly used Government motor vehicle over some 14 km to deliver a quantity of horse feed. Thirdly, and also in contravention of paragraph 29, the delivery of the horse feed in count 2 - some eight bags-was alleged to be improper appropriation or use of State property, in that it was delivered to a private person called Hayes, and for use by Hayes. And Fourthly, contravention of paragraph 34 of the Schedule, he was charged with acting in an unbecoming manner, or in a manner reasonably likely bring discredit to the Force. The facts allegedly constituting this offence were the taking of an outdoor type garden table and four chairs from Masvingo (Nyanda, as it was then) Show Grounds on the 26th July 1982 without the permission of the owner or custodian.

The accused, who was represented at the hearing by a legal practitioner, is recorded as having pleaded guilty to all four charges. An examination of the record shows, however, that he did this contrary to the advice of his representative; and he seems to have done so because he admitted the *actus reus* in each case - that is, the actual possession, use or taking of the items set out in the charges. It is further recorded that the Court proceeded in terms of section 255 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 59*] and that the accused's legal representative accepted that the essential elements of the charges had been explained to and understood by the accused. Assuming that such statement is not only correctly recorded but correctly made, the accused's pleas of guilty can only have been tendered on some other basis than a genuine admission of the offences; for, save as appears hereafter, the charges do not appear to me to be established by such evidence as was put before the Board.

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Be that as it may, the Court found the accused guilty, and, taking counts 1, 2 and 3 as one for sentence, imposed a penalty of 30 days' imprisonment on those charges, and on count 4 imposed a fine of \$40.

[His Lordship discussed certain procedural matters and continued:] To take the counts charged against the accused in order then, the following appears:

He was charged, first, with improperly appropriating or using State property, namely, the two head collars, the saddle, the wheel-barrows, watering can and garden fork - though it is described as a pitchfork by the accused. This charge, it should be noted, particularly in view of the emphasis in the submissions to the Board that is given to the fact that the accused intended to hand these articles back, is not one of theft. If it were, it is highly doubtful that the accused could have been convicted. The charge is the lesser offence of improperly acquiring or using State property. By "improperly", one understands the ordinary meaning of the word, namely "without the proper procedure" or "without proper authority" or for a use other than that for which it is intended. And the offence would be committed by any member of the Force who obtains or takes or keeps or uses or disposes of any State property without the proper authority to do so!. Of course, if a member stole State property, he would also have committed this offence, but to establish a charge of theft, it would have to be proved, *inter alia*, that the accused intended to deprive the owner of the property permanently or was reckless as to whether it ever recovered the property or not. A member seems to me to commit an offence under paragraph 29 of the Schedule as soon as he takes or uses State property without proper leave or permission, even if he intends to return it. Presumably there would always be a designated or identifiable officer or member responsible or accountable for any of the property belonging to the Force; and if permission were obtained from such member or officer to take or use State property, no offence would be committed. Where that officer or member-in-charge is himself concerned, it must also be the position that he cannot give himself authority to claim that he properly obtained or appropriated or used any particular State property. He would have to obtain permission in turn from his superior, so that it may be said that such appropriation, use, or application, was proper.

Applying such approach to the facts of the present case, what emerges as the answer? The accused had taken for use on his own horse or riding activities, two head collars and a saddle. He also had at his private house three wheel-barrows, a watering-can and the fork. The evidence shows that these gardening implements he had initially been granted

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permission to use when he lived at the Depot, that is, for the purpose of cleaning up the stand next door to his own. That use and appropriation were therefore quite proper. These implements were thereafter moved to his Goromonzi home earlier this year when all his other household effects were moved, and they may well have been moved unwittingly, in the sense that the people doing the moving may have removed them, thinking that they were the accused's and without the accused knowing. However, the accused agreed that he did use them on his private

property after he realised they had been moved there, and such use was not authorised.

Nor can it be proper use to use State utensils or implements on a private individual's garden. If that is done without authority it is a mischief at which this paragraph of the Schedule clearly aims. Similarly, there is no suggestion in the evidence that he was given permission to borrow the head collars and saddle; nor can it be proper use of Force riding equipment to be used on the private horses of, and for the private benefit of, a member. On this count, then, I think the accused was properly found guilty, but not on the basis that the gardening tools had been unlawfully used since 1978. On the evidence he had authority to use them at least up to early this year. Such offence as there was in this respect, lay in continuing to use them at his private home without permission, after he discovered they had been moved there.

[His Lordship considered the evidence relating to counts 2 and 3, set aside the convictions on those counts and continued:]

Turning next to count 4, the offence charged was acting in an unbecoming manner, or in a manner reasonably likely to bring discredit on the Force. This episode, too, arose out of the management and staging of the horse-riding shows or displays that were part of the accused's duties. After one such tour and performance at Masvingo, and prior to another similar show at Bindura, the accused saw a garden-table and four garden-chairs made of wire, at the Masvingo Showgrounds, which he thought would be an ideal prop for a particular trick and novelty act in the Police riding display. He wished to borrow these to take on the rest of the tour to Bindura. He was unable to contact the Masvingo Showground authorities when he was packing to leave for Bindura. However, he kneeler the President of the Masvingo Show Society, and he thought this person would readily grant him permission to use the items as he wished to. He therefore took the table and chairs for his performance and on the 27th July wrote a letter to this friend, saying that the table and chairs had been borrowed, that he hoped this was acceptable, that he would return them at the end of the riding display tour, which would

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have been within a week or two, and would return them at once if the Masvingo Showground authorities required them any sooner. He received no answer to this letter and assumed that the furniture could be spared for the purpose he required. He did not in fact return it as he intended because his anticipated leave at the end of the agricultural show season did not materialize and he had planned to return this equipment on such leave. He had to forego the leave in order to prepare mounted escorts for various processions, and this garden furniture was therefore still at his house on the 2nd September when the Police searched it.

The prosecutor's outline of the case which was produced to the Court in this trial also made the point that the friend to whom the letter was addressed never received it; but not only did the friend know nothing about the taking of the chairs, he could not even recognize them as having come from the Masvingo Showgrounds when they were shown to him after their recovery.

Now, in the first place, whether conduct is "unbecoming" or "reasonably likely to bring discredit to the Force" seems to me to be very much a matter of degree. And, secondly, it must surely be

conduct that is objectively known to, or discernible by, someone else who is affected or offended by it, that is to say, someone to whom it is unbecoming or in whose eyes the Force is thereby brought into discredit. In the same way as the utterance or publishing of defamatory words do not constitute defamation unless there is publication to some audience, so someone must be aware of the conduct in order for the Force to be discredited or for it to be thought unbecoming or disorderly. In the present case, no one knew of the accused's act in borrowing the table and chairs, not even retrospectively on receipt of the letter. And there is absolutely nothing to suggest in the prosecutor's outline of facts that the President of the Masvingo Show Society, even when he heard of the matter, was in the least offended or upset or thought any the less of the Force. Indeed, he did not even know the chairs and table had been taken, and could not identify them as being missing even when he did know. But even if I am wrong in respect of this second requirement, it cannot be every offence against good manners or failure of good taste or breach of good etiquette that establishes this offence, even if such acts can arguably be said to be contrary to the general order of public opinion. If it was, it would make consideration of charges under this paragraph subject to purely individual notions of behaviour. That would be introducing far too subjective, and consequently too uncertain a criterion for conduct that can be regarded as an offence-even if it is applicable to a disciplined Force where standards of conduct may be expected to be at least as high as is socially

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acceptable outside it. In my view, there must at least be sufficient element of reprehensibility in the conduct as not only fairly warrants intervention of the criminal law, but is really likely to cause offence to others. Within those broad parameters, the matter is ultimately one of degree which the Court must fix in each case.

As applied to the present case, the Court seems to have seriously misdirected itself. In the first place, the prosecution case seems to have proceeded on the basis that the offence consisted of an unauthorised borrowing. This was an erroneous understanding of the true nature of the charge and what had to be proved. Consequently, it may not be surprising that the Court did not address itself properly to the question either. From such remarks in the proceedings as respect the Court's approach to this charge, it seems to have laid emphasis on the fact that the accused knew the property did not belong to the Police, and when he discovered the chairs and table he did not take prompt action to return them, and this discredited the Force. Of course, the accused knew the items did not belong to the Police, and he obviously did not take them back immediately. But those are not the factors that required consideration. The gravamen of this charge was whether, in the light of what the accused did, his action could be said to be unbecoming or to be reasonably likely to bring discredit on the Force.

As already stated, there was no objective evidence that established such a result, even assuming that such persons as were affected by it knew of the occurrence. And even if it be a permissible approach to regard the alleged behaviour in abstract, that is without it impinging on the knowledge of any member of the public but known only to the Police; themselves, I do not think that had it properly directed itself, the Court would inevitably have concluded that the accused was guilty. For although unauthorised borrowing without advice to the owner of the

property may be frowned upon by general public opinion it depends on the facts of each case, such as the relationship between the owner of the property and the borrower, the circumstances and urgency of the borrower's need, the value and usefulness of the article borrowed, and any consequent inconvenience to the owner, and so on. If the owner and the borrower are on good terms, and the property borrowed is not required by the owner, nor does its appropriation fly the borrower cause the owner any inconvenience or upset, I cannot imagine the owner thinking the liberty to be unwarranted nor reflecting any discredit on the borrower, much less on any organisation or body that he worked for. These may quite reasonably have been the applicable facts here as

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the accused in effect claimed; and if they were, it cannot be said to my mind that such conduct was disorderly or unbecoming or risked the slightest discredit to the Force. I do not think therefore, that the conviction on this count can stand either.

That leaves the question of an appropriate sentence for count 1, since the present sentence obviously cannot stand - a fact which makes it unnecessary to deal with the misdirections of the Court in this respect as well. The mitigatory factors have been referred to before, albeit in a different context. But, apart from 31 years' unblemished service and of holding the rank of not only Chief Inspector but the Senior Chief Inspector in the Force, it appears that the accused is due to retire on pension on the 4th January, 1983. As against that, it would only be right to have regard to the prevalence of the offence of using State property, as the Court did in this case, if there was evidence of it in these proceedings with there was not, or if this particular Court as such had tried many such cases. It is not a proper factor to import and act upon if it stems from the personal knowledge of members of the Court gained in their private capacities as officers of the Force. If, in aggravation of sentence, the prosecutor wishes to rely on the prevalence of an offence and the Court does not have such experience as a Court, then it is desirable, even necessary, to lead evidence of such prevalence so that the abundance can dilute it if so advised, or at least challenge its implication in his own case. Nor was it uproar for the Court to take into account in aggravation the fact that such conduct of the accused set a bad example to junior members of the Force, because there was no evidence whatever to suggest that any other member of the Force knew the use of the property to be irregular. In all the circumstances, bearing in mind the nature and value of the articles and the immaterial effect of their temporary absence, I think fine of \$40 would meet the justice of the case.

With the concurrence of DUMBUTSHENA, J, then, the convictions on counts 2, 3 and 4 are set aside. Furthermore, the Attorney-General, whom the papers have been sent, does not wish to support the convictions on those counts. The conviction on count 1 is confirmed and the sentence in respect of that conviction is altered to read "Fined \$40".

Endnotes

1 (Popup - Popup)

See 1982 (1) ZLR 236 - ED.

2 (Popup - Popup)

See 1982 (1) ZLR 236 - ED.

3 (Popup - Popup)

See 1982 (2) ZLR 110. - ED.

4 (Popup - Popup)

See p. 118 of the above report. - ED

5 (Popup - Popup)

See 1982 (1) ZLR 271 - ED.