

THE STATE  
versus  
OWEN KUCHATA  
and  
BORMAN NGWENYA  
and  
SILAS PFUPA  
and  
SOLOMON MAKUMBE

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 18 and 29 September 2017, 13 October 2017 and 14 November 2017

**Criminal Trial – Postponement**

**ASSESSORS: 1. Msengezi  
2. Mtambira**

*C Mutangadura*, for the state  
*J Mutoono*, for the 1<sup>st</sup> accused  
*E Mangezi*, for the 2<sup>nd</sup> accused  
*G Dzitiro*, for the 3<sup>rd</sup> & 4<sup>th</sup> accused

CHITAPI J: The 4 accused persons stand charged of treason as defined in s 20 (1) (b) of the Criminal Law Codification & Reform Act [*Chapter 9:23*]. They are alleged during the period 1 August 2015 and 22 September 2016 to have conspired to overthrow the Government of Zimbabwe by engaging in conduct preparatory to realizing their goal.

The 1<sup>st</sup> and 2<sup>nd</sup> accused raised pleas of *autre fois* convict and *autre fois* acquit respectively. The two pleas are provided for in ss 180 (2) (c) and (d) of the Criminal Procedure & Evidence, [*Chapter 9:07*]. If the pleas succeed, the present charges will be struck out to give effect to s 70

(m) of the Constitution which provides that an accused has a right not to be tried for an offence in respect of an act or omission for which he or she has previously been pardoned or either acquitted or convicted on the merits.

Counsel filed written submissions and heads of argument following which they agreed that a determination be made on the filed papers. In the course of considering the submissions, I noted that the 1<sup>st</sup> and 2<sup>nd</sup> accused's counsel had not filed the extracts of record of prior proceedings on which they based their pleas. Counsels were directed to provide the certified extracts as well as in the case of the 2<sup>nd</sup> accused, the transcript of the relevant court record. The 1<sup>st</sup> accused had attached the transcript of the proceedings he relied upon on filing papers to motivate his claim to the relief of *autre fois* convict.

The extracts of record showed that both the 1<sup>st</sup> and 2<sup>nd</sup> accused persons had been separately tried on similar charges of contravening s 27 of the Criminal Law Codification & Reform Act which creates the offence of possessing weaponry for insurgency, banditry, sabotage and terrorism. They were both also charged with contravening s 9 of the Money Laundering and Proceeds of Crime Act, [*Chapter 9:24*]. From the extracts of judgment, the 1<sup>st</sup> accused was convicted on the two accounts aforesaid whilst the 2<sup>nd</sup> accused was acquitted.

Upon perusal of the record of proceedings relating to the 2<sup>nd</sup> accused, I noted that following on his acquittal by the trial court *a quo* on the charges I have set out above, the state filed a chamber application in this court on 31 May 2016 seeking leave to appeal against the acquittal. The chamber application is referenced HC 5403/16 and was filed in the Civil Registry. For reasons not apparent, the application was not referred to a judge for consideration and determination. The application should have been filed in the Criminal Registry. The application is provided for in s 61 of the Magistrates Court Act, [*Chapter 7:10*]. I assume that the application was not processed by the Civil Registry because there was no certificate of service of the application filed of record by the State. The civil rules require that every chamber save those excepted under the rules or any other law should be served upon interested parties. The Registrar will not therefore refer a chamber application which has not been served on interested parties and proof of such service filed to a judge for determination.

In terms of s 61 of the Magistrates Court Act as aforesaid, the accused person who was acquitted is given a right to make his or her own representations if he desires to do so by himself

or through counsel of choice on the application for leave to appeal brought by the State. The right of the accused person to be heard in such an application is peremptory. This implies that the application must be served upon the accused person. Service of the application is evidenced by the filing of proof service. It does not in this regard really matter whether the chamber application was filed in the Civil Registry or the Criminal Registry. Proof of service would still have to be filed after which the Registrar should then refer the record to a judge for consideration and set down.

In the light of the pending application for leave to appeal by the State, I arrested judgment on the first and second applicant's objection to the *autre fois* convict and *autre fois* acquit pleas. The reason for doing so is based on practical considerations. In the event that leave to appeal is granted and an appeal is noted, the judgment of the lower court cannot be said to be final and sealed because it can be set aside on appeal. Should this happen, the plea of *autre fois* acquit cannot be sustained because it is based on a final judgment. A judgment becomes final upon the exhaustion of the appeal processes by the appellant as the case may be.

Mr *Mutangadura* for the State submitted that it was not necessary in his view to await the process of leave to appeal because the charges forming the basis the acquittal were different from the current charges. This submission failed to take into account that in motivating that the plea of *autre fois* acquit should excuse him from the current charges, the second accused was relying on the record of proceedings and judgment which the State seeks to impugn on appeal if leave to appeal is granted. I cannot make a determination which may conflict with what the appeal court may come up with. The powers of the High Court on appeal by the state are set out in s 38 A of the High Court Act [*Chapter 7:06*] The High Court can substitute the acquittal verdict by the lower court to a verdict of guilty, amongst various other powers which the High Court is empowered to exercise. If for example the High Court substitute the acquittal for a conviction, the first accused's plea of *autre fois* acquit tells falls away.

In order to avoid conflicting decisions and a multiplicity of proceedings leading to inconsistent judgments by the court, the appropriate course of action to adopt was to stay this trial until the State had prosecuted the application for leave to appeal and the appeal itself in the event that a judge grant have to appeal.

Mr *Mutangadura* suggested that the case be postponed sine die to allow for the disposal of the application for leave to appeal and possible appeal if leave is granted. The accused persons consented to such a course.

Resultantly the following order is hereby made.

“The trial of the four accused persons under CRB 74/17 is hereby postponed sine die.”

*National Prosecuting Authority*, state’s legal practitioners  
*Sheshe & Mutoono*, 1<sup>st</sup> accused’s legal practitioners  
*Mangezi & Partners*, 2<sup>nd</sup> accused’s legal practitioners  
*Mutumbiwa, Mugabe & Partners*, 3<sup>rd</sup> & 4<sup>th</sup> accuseds’ legal practitioners