THE STATE
versus
ROY LESLIE BENNET

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 28th January 2010 and 3 February 2010

ASSESSORS: 1. Mr. Musengezi
2. Mr. Chivanda

Mr Tomana and Mrs Ziyambi and Mr Mutangadura, for the State
Mrs Mtetwa, Mr Maanda, for the Defence

BHUNU J: The accused is charged with various counts involving terrorism, sabotage and illegal possession of firearms in contravention of the Public Order and Security Act [*Cap11:17*] and the Firearms Act [*Cap10:09*].

During the course of the trial the state produced various exhibits including assorted ammunition, arms of war and a laptop computer belonging to one of its main state witnesses Michael Peter Hitschmann who has since been impeached by this Court. Hitschman is a convicted accomplice witness.

The gravamen of the state case at this stage is that the laptop computer was used as a mode of communication between the accused and Hitschmann in the course of executing the alleged criminal acts. To this end the state has sought to produce certain e-mails as evidence of such communication. The e-mails are alleged to have been printed by one Precious Matare, a typist in the Ministry of Security in the President's Office.

Ms Matare was called as a state witness. Her testimony is to the effect that on 6 March 2006 she was called to Mutare Central Police Station at Murahwa building. At the police station and in senior assistant commissioner Muderedzwa's office she was asked to download certain e- mails from a laptop in the presence of Hitschmann. She then printed certain e-mails from the laptop computer with the assistance of Hitschmann who was showing her what to print She identified the laptop already produced in evidence as the one she downloaded the e-mails in question from.

This witness also identified the e-mails before her as the ones she had printed from the laptop. We now know that the laptop belongs to Hitschmann because he admitted the same in open court.

Counsel for the defence has strongly objected to the production of the e-mails as an exhibit on the following grounds;

1. That the laptop was already open when the witness printed the e-mails.

2. That we do not know whose laptop it was because the laptop had no serial numbers and that she has not told us what the serial numbers were.

3. That the state's own expert witness' evidence clearly shows that the e-mail address could have been created anywhere in the world.

4. We do not know who the authors were

5. That the defence does not know why the e-mails were being produced. Whether it was merely to say they were printed or to say the contents are correct.

6. That the court has already ruled that whatever was said by Hitschmann is inadmissible and that includes any indications.

7. That it has not been shown who was in possession of the laptop at Muderedzwa's office.

8. That Hitshmann had stated that the origins of the e-mails were not known.

The state countered the defense's objection on the following grounds:

1. That the e-mails can never be classified as admissions by Hitshmann. As such they can not be held to be inadmissible on the basis of duress or improper conduct on the part of the police or state officials. These are separate and distinct documents from any admissions or indications which Hitschmann made.

2. That the e-mails were admissible under s 281 of the Criminal Procedure and Evidence Act [*Cap 9:07*] as both the alleged laptop and e-mails were in the custody of Hitschmann.

3. That the purpose of the e-mails was to show that in the course of investigations relevant documents which implicate the accused were found through this witness.

4. That the e-mails constitute executive communication between the accused and Hitschmann. The e-mails that the witness printed contain executive communication

between co conspirators. Executive statements between conspirators are at law admissible in evidence against each conspirator.

In resolving this legal dispute it is important to remain focused and not confuse the weight of evidence with admissibility of evidence. In this case the witness is merely endeavouring to tell the Court what she did and experienced with her own senses in the presence of Hitshmann It is clear from her testimony and the summary of the state case that her evidence is limited to telling the Court that she printed the e-mails in question from Hitschmann's laptop. She did not read the documents and at no time did she allude to any evidence tending to show the correctness or otherwise of the contents of the said e-mails. That being the case, her evidence is not geared towards establishing the correctness or otherwise of the disputed e-mails. In my view her evidence at this stage merely constitutes a process towards establishing the alleged conspiracy or common purpose between the alleged conspirators.

The state has intimated that the purpose of this witness's evidence is simply to show that during the course of investigations documents were found through this witness. The documents contain executive communication between the accused and his alleged accomplice.

It was this witness' testimony that Hitschman pointed out the information that she printed out from the laptop. Relying heavily on that testimony Mr Tomana argued rather forcefully and convincingly that where there is an improperly extracted confession it becomes inadmissible. But, if that same witness points out evidence that is verifiable outside the confession, such evidence is admissible.

That proposition of law finds expression under s 258 as read with s 281 (3) of the Criminal Procedure and Evidence Act [*Cap 9:07*] which provides as follows:

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(1) It shall be lawful to admit evidence of any fact otherwise admissible in evidence, notwithstanding that such fact has been discovered and come to the knowledge of the witness who gives evidence respecting it only in consequence of information given by the person under trial in any confession or statement which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and come to the knowledge of the witness against the wish or will of the accused.

(2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial.

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(3) Where it is alleged that two or more persons are involved in the same offence, any statement that is admissible in evidence in terms of subsection (2) against one such person in respect of such offence shall be admissible in evidence against the other such person or persons."

In this case the evidence of Ms Matare to the effect that Hitschmann pointed out the information she printed out is admissible against Hitschmann in terms of s 258 (2) of the Act. While those documents would ordinarily be inadmissible against the accused under that section they nevertheless become admissible against him under s 281 (3) by virtue of the state's allegation that the two are accomplices. At this stage the state has gone beyond mere speculation that Hitschmann is an accomplice witness in that he has already been convicted and sentenced for the illegal possession of the same weapons and firearms for which the accused is standing trial. It does not matter that he has an appeal pending in the Supreme Court. The mere conviction on that charge deprives him of the presumption of innocence. The conviction stands until it is upset by a Higher Court of competent jurisdiction.

The admissibility of the e-mails can not possibly be tainted by the alleged assault or abuse of Hitschmann by the police or state functionaries because the e-mails are said to have been created before the assault or abuse.

The evidence of Ms Matare is equally innocuous in that all what she is saying is that she punched the computer and this is what came out. If Hitshmann's assailants could produce the guns he pointed out without any objection, I can perceive no logical reason why the production of relevant e-mails extracted by Ms Matare after he had pointed them out to her in the computer should be objectionable. Her evidence simply seeks to establish a link in the chain of evidence. The e-mails are therefore eminently admissible.

Looked at from another angle, judicial precedence both at home and abroad establish that executive statements made in furtherance of the commission of a crime are admissible against the conspirators or partners in crime. In the case of *The State v Mathew Governor and Another* H-H-9-07 I had occasion to quote with approval the wise words of GUBBAY CJ in the case of *State v Sibanda* 1992 (2) ZLR 438 at page 12 of my cyclostyled judgment when I remarked that

> "It is true that generally an extra curial statement is admissible only against its maker, but the rule is subject to two exceptions. The two exceptions were amply articulated by GUBBAY CJ at page 441 when the learned Chief Justice observed that:

> *'It is only in two exceptional situations that an extra curial statement may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The first is whereby the co accused by his words accepts the truth of the statement so as to make all or part of it a statement of his own.*
>
> *The second exception in the case of conspiracy, statements of one or two conspirators made in the execution or furtherance of a common desire are admissible in evidence against any other party in the conspiracy.* ***See R v Miller and Anor 1939 AD 106*** *at Page 115,* ***R v Mayet 19****67 (1) SA 492 at 495F" (my emphasis)*

In the Miller case (*supra*) WATERMEYER JA had this to say:

> "There is a well recognized rule that the acts and declarations of one conspirator are admissible in evidence against another, provided that they are acts performed and declarations made in furtherance of the common purpose"

In this case we have been told by the state that the e-mails in question contain no ordinary narrative statements but executive instructions concerning the modalities of committing the crime charged. That being the case the e-mails snuggly fit into the second exception referred to by GUBBAY CJ in the *Sibanda* case (*supra*), thereby rendering the e-mails admissible at law.

In conclusion I am constrained to say that the purpose of a criminal trial is to determine the correct factual position without sweeping anything under the carpet or reducing the trial to a game of wits. Having regard to the legal position I have articulated above, it is plain that the e-mails in question are relevant and vital to the just determination of this case. I therefore, hold that the e-mails are admissible against the accused.

It is accordingly ordered that the e-mails be and are hereby admitted in evidence as exhibit 13.

The Attorney General's Office, the States legal practitioners.
Mutetwa and Nyambirai, the accused's legal practitioners.