

IN THE SUBORDINATE COURT OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

ISPA/048/2017

THE PEOPLE

VS.

HAKAINDE HICHILEMA AND FIVE OTHERS

BEFORE: MAGISTRATE .G. MALUMANI
(SENIOR RESIDENT MAGISTRATE)

FOR THE PEOPLE: MR .C.K. SAKALA (STATE ADVOCATE), MS M. CHANDA
(STATE ADVOCATE), MR. P. LIKE, A. YANGANANI (PUBLIC
PROSECUTORS)-NATIONAL PROSECUTIONS AUTHORITY

FOR THE ACCUSED: MR. VINCENT MALAMBO (STATE COUNSEL), MR. M. HAIMBE OF
MESSRS MALAMBO AND COMPANY,

MRS. NELLY MUTTL, MR. KASHUMBA MUTTI OF MESSRS
LUKONA CHAMBERS,

HON. JACK MWIMBU, MR CHADI MULEZA OF MESSRS
MULEZA, MWIMBU AND COMPANY,

DR. HENRY MBUSHI OF MESSRS H.B.M ADVOCATES,

MS. MARTHA MUSHIPE OF MESSRS MUSHIPE AND
COMPANY,

MR. L. MWANABO OF MESSRS L.M. CHAMBERS,

MR. KEITH MWEEMBA OF MESSRS KEITH MWEEMBA
ADVOCATES,

MR. N. INAMBAO OF MESSRS L.C. M LEGAL
PRACTITIONERS,

MR. G. KATUPISHA, MR. MILNER KATOLO OF MESSRS
MILNER AND PAUL LEGAL PRACTITIONERS,

MR. ROBERT SIMEZA (STATE COUNSEL) OF MESSRS
SIMEZA, SANGWA AND COMPANY,

JUDGMENT

CASE LAW REFERRED TO:

1. Edward J. Shamwana and others (1985) ZR 41 (SC)
2. Haonga V. The People (1976) ZR 200 (SC)
3. Re Siuluta V. The people (1979) ZR 14 (HC)
4. Daniel Chizoka Mbandangoma V. Attorney General (1979) ZR 45 (HC))
5. R.V. Ambrose (1973) 57 CR 538
6. Brutus V. Cozens (1973) A. C 854
7. Southerd V. DPP (2006) EW HC 3449
8. George Musupi V. The People (1978) ZR 271
9. The people V. Kambarange Mpundu Kaunda (1992) ZR (SC)
10. Machipisha Kombe V. The People (2009) ZR (SC)
11. Emmanuel Phiri V. The People (1978) ZR (SC)
12. Able Banda V. The People (1986) ZR (SC)
13. John Nyambe Lubinda V. The People (1988/89) ZR
14. The People V. Peter Thomas London Tembo (HP/36/1999) un reported.
15. Phiri V. The people (1973) ZR 47
16. Phiri and other V. The People (1973) ZR 50
17. Mwewa Muroso V. The People (2004 ZR (SC).
18. Woolmington V. The DDP (1935) A.C

LEGISLATION REFERRED TO:

1. Sections 43, 116, 107, 107, 127, 179 of the Penal Code Cap 87 V. 7 of the Laws of Zambia.
2. Sections 81, 82, 90, 99, 135, 150, 196, 207 of the Criminal Procedure Code Cap 88 V. 7 of the Laws of Zambia.
3. Article 18 of the Republican Constitution.

OTHER WORKS REFERRED TO:

1. John Hatchard and Muna Ndulo, The law of Evidence in Zambia.

In this case 6 accused persons initially stood jointly charged with 3 counts of treason contrary to section 43 (1) (a) of the Penal Code Cap 87 of the Laws of Zambia, Disobedience of lawful orders contrary to section 127 of the Penal Code Cap 87 of the laws of Zambia and use of insulting language contrary to section 179 of the Penal Code Cap 87 of the Laws of Zambia. The particulars of offence are as per charge sheet.

The 3 offences were subsequently separated pursuant to 135 (3) of the Criminal Procedure Code cap 88 V. 7 of the Laws of Zambia. By this court's ruling dated 26/4/2017 the prosecution were also granted to amend the count of treason which was re allocated to another court, leaving the 2 counts of disobedience of lawful orders and use of insulting language triable by the Subordinate Court.

However, before trial could commence the prosecution applied to enter a nolle prosequi in respect of count 2 for the offence of disobedience of lawful orders. I granted the application pursuant to sections 81 and 82 of the C.P.C Cap 88 of the Laws of Zambia. This leaves only count 3 for use of insulting language subject of this Judgment.

The particulars of offence allege that Hakainde Hichilema on 11th April, 2017 at Lusaka District in the Lusaka Province of the Republic of Zambia did use insulting language to Police Officers who were executing their duties by saying you are dogs, mother fuckers, idiots and asshole which was provocative and likely to cause the breach of Public Peace.

The accused denied the charge.

I warn myself at the outset, that the burden lies with the prosecution to prove the guilt of the accused beyond all reasonable doubt. The accused has no onus to prove his innocence. Any doubt cast in my mind upon considering all of the evidence may be treated for his benefit.

For the prosecution to prove its case, they must satisfy me on the essential element of the charged offence. From what can be deciphered from section 179 of the Penal Code Cap 87 which creates this offence, the accused can only be convicted if he used offending words to the complainant at a public place, if not, the words must be such that they would be likely to cause the victim to commit an offence against him.

Turning to the evidence, the prosecution led evidence from a total of 4 witnesses.

The details are on record. In brief, the evidence is this:

PW1 was MARTIN MUSAMBACHINE an Assistant Superintendent from criminal investigations department at police service headquarters. He testified on oath that on 11/4/2017 they received intelligence information that there were people planning to cause confusion to officers who had gone to arrest Mr. Hakainde Hichilema the UPND Leader at his house off Leopard hill.

In the company of Mr. Mbita, Detective Chief Inspector Munungisha and detective Inspector Hamweene they arrived at the accused's house around 09:20 hours in the morning. They entered into his premises. His lawyers Mr. Mwimbu, Ms. Nelly Mutti, Ms. Mushipe arrived. They had a chat with his lawyers. Around 11 hours Mr. Hichilema and his family came out of the house. He asked who the commander was. Before they could answer he started insulting them to say: can you remove all these dogs from my yard, mother fuckers, idiots and assholes. He said that he restrained himself and protested to Mr. Chadi, Muleza and Mr. Jack Mwimbu.

They asked him to accompany them. They jumped into a land cruiser motor vehicle with his body guard and 3 family members. He complained that he felt hurt as the insults were injurious to him.

PW1 recalled that from Woodlands Police the accused was detained at Lilayi college for treason. He identified him in court adding that he reported the matter to Kabwata Police Station. And the suspect was formally arrested.

Under rigorous lengthy cross examination by defence counsel Mr. Keith Mweemba of Messrs Keith Mweemba advocates, PW1 admitted that he has been charged for a criminal offence before on allegations of fraudulent dealing with motor vehicles an offence which borders on dishonest. He disputed that there were superior orders on their operation. On how he made the complaint at police he said he made a written report. He admitted that no police officer recorded a statement from him. That was in the course of investigations.

He said he submitted the report of his complaint to Mr. Mpazi Mbita who was the arresting officer. But he admitted that the same arresting officer was together with him at the operation. PW1 admitted that the said report and the Occurrence Book were not produced. Neither was there video evidence of the purported insults. He admitted with the defence counsel that all there is in terms of evidence is his word against that of the accused who is denying.

He disputed the allegation that property was damaged at the accused's residence. While admitting that there were other Officers already at the accused's residence when they arrived he disputed that some were wearing masks. He admitted that apart from Police officers there was no independent witness. He could not produce any note book to confirm what happened while at the accused's residence.

Under cross examination by Counsel Gilbert Phiri, PW1 said the accused insulted him by saying remove those dogs. But stated that he does not know if the accused own dogs or not. He insisted he was pointing at them.

When asked if teargas was used on the accused at his residence in the night, he said it was not to his knowledge. He denied the gate was uproofed and damaged. But contradicted himself that he was not at the residence at night to have known what happened. And I noted his demeanour in terms of section 196 of the CPC.

In the continued cross examination by Mr. Phiri, PW1 made another interesting revelation, that in the 21 years he has been a police officer, he has been insulted before in the course of duty. But none of those matters ended up in court. As a trial of facts, I note this as a serious contradiction because in examination in chief, the impression shown by this witness is that he detests insults. He deems insults as injurious and this is why he purportedly reported this matter to Police. He could not elaborate why it was different with the accused person in this matter. This is the point the defence appears to raise on that line of cross examination by Mr. Gilbert Phiri from what can be deduced.

Under cross examination by counsel Inambao, he uttered all sort of contradictions, in one breath he admitted that there should have been an Operational order at accused's

residence. He next said there was no need for one. On the capacity he accompanied Mr. Mbita he said as a citizen yet he earlier indicated that they were on course of duty as police officers after they received intelligence information.

Under cross examination by counsel Mwanambo, he acknowledged that he did not use an independent person on his allegations. This was on account of what was revealed that the arresting officer Mbita was with him at the scene.

Under re-examination by the learned public prosecutor, PW1 said the accused was pointing at them. This was all the prosecution team could try to rebuild on the rigorous cross examination conducted by the defence advocates.

PW2 was HENRY MULUNGISHA a detective chief inspector from Lusaka division headquarters (homicide department). He testified on oath that when they went to the accused's house around 09:30 hours on 11/4 /2017 with Masambachime, Mbita and Hamweene all police officers his lawyers also arrived. Mr. Mwimbu went inside the house of Mr. Hichilema. He came out around 11 hours with relatives. He came where they were standing. He allegedly uttered words: You idiots, mother fuckers, dogs, asshole while pointing at them. He did nothing but restrained himself.

PW2 stated that the accused chose to use his motor vehicle when going to police. He refused to use theirs and accused them of wanting to poison him.

He recalled that the incident was reported to Kabwata police. He identified the accused in court.

Under cross examination by Mr. Mweemba, he told the court that the insults were reported by one of them not him. He said the arresting officer Mr. Mbita is the one who reported. He could not hesitate to admit that the arresting officer was also a complainant. He later changed position and stated that the complainant was the state.

When asked how the case was investigated regarding his complaint as an individual, he said no witness statement was recorded from him. He instead wrote a report.

When asked why the report was not produced he said it was before the court. When asked what he meant he said it was in the docket. From what it appeared to him anything in the docket is before the court. I noted that the officer lacks basic knowledge on production of documents inspite of his 22 years of service. I say this because when asked further, he said the proceedings had not reached the point of production of documents yet it was at cross examination stage where he would have already identified the document and caused it to be produced.

PW2 further admitted, that he has no video evidence of the allegations of insults.

When asked where they were when insults were uttered he said he was not with Musambachine (PW1) at the point the accused was allegedly moving towards his colleague, yet it was his testimony that they were together with his colleagues.

On who was in charge of operations at the accused's house he said it was Musambachine PW1 contrary to what PW1 himself said on cross examination that a Mr. Mukomongo was the commander in charge.

Contrary to his evidence on examination in chief that the matter was reported to Kabwata police station he said he submitted a report to Mbita who is not the officer in-charge at Kabwata police station.

The next witness was PW3 MBITA MPAZI the arresting officer and Assistant Superitendant by rank from police service headquarters. He testified on oath that on 9/4/2017 he was assigned to investigate 3 cases of treason, disobedience to lawful orders and disobeying statutory duty in which the accused was Mr. Hakainde Hichilema. This is according to him. I must pause and state that the right terminology to use is suspect as the matter was at investigations stage. Anyhow, PW3 went on to state that he instituted investigations.

On 11/4/2017 around 9 hours he accompanied other police officers to the residence of Mr. Hichilema the UPND leader at plot No. 10747 off leopards hill road Lusaka. This was after they had received an intelligent information that a group of people were organizing to disrupt the operation at the said premises which started in the evenings.

Upon reaching the premises outside relatives told him Mr. Hichilima would avail himself in the presence of his lawyers. He said he was with Assistant Superintendent Musambachime, Inspector Hamweene.

He recalled, that when the lawyers came they proceeded inside the yard. In few minutes later he saw Mr. Hakainde Hichilema and family members. He then charged at them the police officers. He looked very upset. Before they could answer on who was in-charge he started insulting saying, you dogs get out from here, mother fuckers, idiots, asshole. He said he was provoked, it hurt his feelings.

But that the situation was clam and managed to apprehend Mr. Hichilema. They went to Woodlands police station thereafter to Lilayi police college where he was detained.

He recalled that he made a formal complaint at Kabwata police station on the use of insulting language. They asked other officers also to submit clearly implying that police at Kabwata was acting on their complaint. Nevertheless he said the dealing officer was himself. And wanted to charge him the same day but the other lawyer said he wanted to wait for his friends. On 12/4/2017 he made up his mind to charge Mr. Hichilema. He said he interviewed him but chose to remain silent. He charged him for use of insulting language which he denied. He identified him in court.

Under rigorous cross examination by Mr. Mweemba he admitted that he was also the complainant to this case of use of insulting language.

When asked on how the matter was commenced to which he admitted to be the complainant, he said he never made any complaint before a Magistrate. But he again denied that the matter was in court by way of an arrest without a warrant. When asked where the warrant of arrest was since he denied that the matter was in court on arrest without warrant he again said there was no warrant because they believed the accused was in the house. I must state that I was shocked with the extent of this witness inconsistencies and contradictions. The witness who is a senior policeman exhibited gross lack of basic knowledge about how a criminal matter comes to court in terms of section 90 of the criminal procedure code, that an accused may appear before court either:

- i) By complaint before a Magistrate in which case the victim is the complainant in strict sense or;
- ii) By arrest of the accused by law enforcement agencies with or without a warrant.

Anyhow cross examination continued and following the inconsistencies highlighted, Mr. Gilbert Phiri one of the defence counsel applied that the witness be cited for perjury for telling lies to the court. I declined the application on grounds that it was sufficient that the defence had demonstrated the witness's inconsistencies as such perjury would not hold under sections 104 and 107 of the Penal Code Cap 87 of the Laws of Zambia.

In further cross examination he claimed that he investigated the case and even arrested the accused for all the offences including the treason charge. When asked when he made the first entry in the investigations diary, he said it was on 11/4/2017 for the case of use of insulting language and on 9/4/2017 being the first entry. But he next said he could not remember the date of the first entry. Neither could he state the contents of his entries.

When asked about what happened at the accused's house he said there was no teargasing, no damage made on the accused's house and that not over 100 police officers were deployed. On whether Ms. Mwata Katongo is the police spokesperson he answered in the affirmative.

When asked if some officers were wearing masks he said he was not there to know, implying he was not at accused's house the night before to know that some of the deployed officers were wearing masks.

On how this charge before court was dealt with he said he reported it to Kabwata police. But admitted no witness report was recorded.

He claimed the report of investigations was produced, next he said it was not.

He admitted that there was no video evidence on the case of use of insulting language. It was admitted that neither is there any documentary evidence. On documentary evidence he invited me to look it claiming it had been produced.

At pages 199-200 of hand written proceedings I expressed a concern again that the witness did not know or understand that no document had been produced on his testimony, and it was past that stage since we were now on cross examination.

Further, contrary to the evidence of PW2 that the accused refused to get into a police motor vehicle he said he did.

When shown a copy of a previous charge sheet he denied that some counts have been abandoned as at this state, implying that despite being the arresting officer he did not know that the charges attaching to statutory duty and disobedience of lawful orders has since been dispensed with, what a contradiction because the witness quite obviously knew about it. All he did not just want is to show consistency on the prosecution case.

When asked about the purported damages at the accused's house he out rightly stated that he was refusing to answer the question because they were here on the case of use of insulting language. I took time to guide him that cross examination did not have limits on areas to be covered much as relevance was important. John Hatchard and Muna Ndulo, the Law of Evidence in Zambia at page 117 is very clear on this principle. This is premised on the proposition that cross examination is the greatest engine ever invented for discovery of the truth.

I further brought it to his attention that the defence counsel was perfectly within the law which he threatened to declare him a refractory witness pursuant to section 150 of the CPC. This provision prohibit a witness to wantonly refuse or neglect to answer questions on cross examination, unless they have a good reason. After this guidance, this witness looked down, was quiet for a moment, next he was shaking his head in clear sign of disapproval of the court's ruling.

I noted his demeanour in terms of section 196 of the CPC and will not hesitate to point out that the witness exhibited not only lack of basic knowledge of court etiquette but arrogance. He disregarded the guidance even from the prosecution counsel who had on a number of occasions tried to guide him to merely answer questions. As lawyers they knew his manner of responses was not helpful to the prosecution case.

On continued cross examination, counsel asked if any property was damaged by police and some stolen, he kept quiet for a long time, looking down. Next he said your honour no property was damaged nothing stolen. I again recorded his demeanour pursuant to section 196 of the CPC; he gave me an impression that he was concealing the truth.

When asked about the route lining on Mongu Limulunga road, he expressed ignorance saying he was not in –charge of operations. At this point counsel Sakala from prosecution objected asking for guidance on the relevance of questions on the treason charge. In reaction the defence cited the authority of **Shamwana V. The People (1)** which allows a court to take judicial notice of another court's record. It was further argued, that the defence were testing the witness on bad faith, malice and that he is the one who investigate all the 3 offences.

I made a ruling allowing the defence to continue because there was weight on the authority cited. In any event cross examination is very wide. It attaches on any issue intended to destroy the opponent's case and credibility is quite critical, as hitherto alluded the leading authority is Muna Ndulo on the law of evidence in Zambia.

The witness was asked if he could remember what he said in a matter of habeas corpus application before the high court. He was also shown copies of a note book of the official arrest of the accused which he gave the Attorney General. He admitted that he said he had investigated the cases including treason and made up his mind to arrest and charge the accused. But he was now saying he did not know how the route lining was done showing that he did not investigate all the offences. He said no superior orders were given to arrest the accused.

The arresting officer expressed ignorance on whether police officers were put on the road to Limulunga Western Province. He said Inspector Ndalama didn't tell him anything, he only submitted a report. And that as an investigations officer he did not record any statement from Inspector Ndalama on what happened in Western Province. The arrest officer further revealed that he doesn't even know the content of the report Inspector Ndalama submitted, that he didn't read it in the purported course of

investigations. But that he still effected an arrest on all the 3 criminal offences on the accused person.

The witness further revealed, that he only visited Western Province once on 8/4/2017 on the day of Kuomboka Ceremony while on duty, but that had nothing to do with the charge of treason. He admitted that he never recorded any statement from Western Province not even from Western Province Police commissioner Mr. Lungu during investigations of the 3 offences for which he charged the accused with 3 offences. And he never visited Western Province again after he left back to Lusaka.

When asked on whether the accused's entourage was cleared in western province along Limulunga road he said he didn't know.

On whether he brought any evidence to exclude the danger of false implication of the accused person, he admitted that he did not.

Under cross examination by counsel Gilbert Phiri of messrs PNP Advocates, PW3 denied that he was at the accused's residence on 10/4/2017 around 22 hours. When shown a copy of his investigations report at paragraph 6 and asked to read it loudly which I also recorded in part, the arresting officer made it very clear that he was at the accused's residence around 22 hours on 10/4/2017. He had this to say..... ***"around 22 hours on 10/4/2017 I pursued Mr. Hakainde Hichilema to his residence at plot 10747 off leopard hill road. During an operation which lasted for more than 4 hours, the following suspects were apprehended"***

At this point counsel applied that the witness be cited for telling lies to the court. Now I must state that the conduct of this witness was quite regrettable. It was quite clear that he deliberately chose to tell lies to the court on oath. The question put to him by counsel was in clear simple language. Did you visit the accused's residence on 10/4/2017 around 22 hours. And his answer was a categorical "no". When shown a copy of his own report in his own handwriting, being the author as the investigations officer on all the 3 counts for which he arrested and charged the accused, he was confirming that he was at the accused's house on 10/4/2017 around 22 hours. Based

on inherent powers of a court to admit exhibits into record I got a copy of the said report. It is herein marked 'A'.

Upon examining the basis of the defence counsel's application and the response given by the witness, I was convinced the witness had intended to mislead the court and was liable for contempt of court pursuant to section 116 (1) of the Penal Code or perjury pursuant to section 104 as read with 107 of the Penal Code Cap 87. However, I exercised my discretion to pardon him after an apology was offered.

However, while recognizing the position of the law that a witness found to be untruthful on one point does not completely destroy his credibility per se as demonstrated in the case of **Haonga V. The people (2)**, it is my observation as the trial court that this witness is not an honest person. He failed to show that there is reason for the court to rely on him as a creditworthy witness.

He was determined to actually destroy the prosecution case, not only by evidence but by conduct. This is the only reasonable inference I draw which is within the province of the court. Anyhow, in continued cross examination, PW3 denied that the accused's house was stormed by hundreds of policemen on the night in question.

The witness again denied that he entered the accused's house around 22 hours on 10/4/2017 even when in his report he stated that he apprehended a number of suspects from there. And this is the lack of credibility I hitherto alluded.

How else can it be said, in one breath he states that he never entered the first accused's residence around 22 hours on 10/4/2017 in another he says he apprehended a number of suspects from there around the same time and date. What a contradiction and inconsistency.

Under cross examination by Counsel L. Mwanabo of messrs L.M. Chambers he reaffirmed his earlier disclosure, that he left Mongu Western Province at night on 8/4/2017 and was in Lusaka around 05 hours the following day.

On how he opened investigations on the 3 offences of treason, disobedience of lawful orders and use of insulting language he said he didn't know who assigned the docket to

him at service headquarters. And that from the time he took up the case no statement was recorded. But that he recorded statements from some members of the public. When asked who those members of the public were, he said it was Prime television and Zambia National Broadcasting Corporation (ZNBC), clearly implying that the witness was watching television, based on impressions he formed he proceeded to go to the accused's house. He then apprehended him. No statement taken from any witness from anywhere and made up his mind to arrest and charge him with the 3 offences of treason, disobedience of lawful orders and the charge of use of insulting language contrary section 179 of the Penal Code Cap 87 which is before me.

The witness however insisted that, he heard the accused call them idiots, dogs, mother fuckers and assholes at his residence. He could not however tell the exact words PW1 Musambachime is said to have used in reaction to the alleged insults.

After all this rigorous cross examination, all that was said in re-examination was that the police's purpose was to arrest Mr. Hichilema. He said he investigated the matter.

PW4 was OBLY HAMWEENE. His evidence is on "*all fours*" with that of other 3 fellow police officers in this matter. He testified that the accused insulted them using the alleged words while at his residence on the material date.

When asked on cross examination to state where he was when the insulting words were uttered he could not state. He said he didn't know. He claimed he was not an expert on distance. Now, I must state that I was prompted to record his demeanour because he made me form an impression he was concealing the truth. In ordinary course of things, one does not need to be an expert to approximate distance.

Further, contrary to what PW1 told the court infact contrary to what even PW3 said, this witness claimed the person in charge of operations at accused's house was PW1 Musambachime himself. It is on record that Musambachime said it was a Mr. Mukomongo an assistant commissioner of police.

He also admitted that they had no other evidence apart from what they orally claimed by word of mouth. He too agreed that they had not excluded the danger of false implication in their evidence.

PW4 admitted, that in his evidence he did not say anything about lodging a complaint at a police station on the alleged insults. And that he never wrote any report about it.

I must state that this revelation by the 4th prosecution witness tends to augment the argument by the defence that there was no complaint made about the purported insults. The witness tends to show me that he was just asked to come and testify. This is because no foundation was laid for not reporting the alleged insults.

This is the evidence as a whole in brief. At the close of the prosecution case, the accused was found with a first case to answer and placed on defence. Through the defence counsel he elected to remain silent and called no evidence.

I directed that final submissions be filed and both prosecution and defence filed written submissions. Am indebted to all the counsel for the industry displayed in their submissions which I have taken into account.

I have very carefully examined all the evidence on record. From the evidence adduced I find the following facts not in dispute:

In the night of 10/4/2017 many police officers visited the accused's house off Leopard hill road in Lusaka. They were there until they apprehended him in the morning of the following day 11/4/2017. All the 4 prosecution witnesses are police officers. They were present at the accused's house when he was apprehended. It is infact PW3 who is the Arresting officer. Apart from these police officers, there is no independent witness who testified. All there is in terms of evidence is oral evidence of what the police allege accused said against his denial.

Inspite of the claim that the offence of use of insulting language was reported to Kabwata police station, no police officer from that police station was called to testify in this matter. Neither was any evidence led or given to demonstrate that there was a formal investigation by way of a complaint being recorded in an Occurrence Book at the

police station and witness statements taken down by the arresting officer. It is not in dispute that PW1 Assistant Supritendant Mpazi Mbita is not only the arresting officer in the case of use of insulting language. He was the arresting officer on all the 3 counts that the accused were charged with which include treason and disobedience of lawful orders.

And from the evidence adduced, the arresting officer went to Mongu in Western Province on 8/4/2017 on security duties which had nothing to do with the offences the accused are facing. He left in the night of 8/4/2017 back to Lusaka. It is not in dispute that he never went back to Western Province to investigate these offences and never recorded any statement from there or from any person whatsoever. All he did is watch television, based on what he saw on television he arrested and charged the accused with the 3 offences he is facing. Of course he purports to have carried out investigations. But this claim has no veracity from what the evidence on this matter reveals.

Admittedly, it is within the powers of law enforcement agencies to originate any inquiry on suspected crime. It is not always that there is a complainant. Notwithstanding an arrest should only be made after positive investigations have been made. The investigations must yield positive results.

In **the case of Re Siuluta V. The People (3)**, the court condemned blatant abuse of police powers where a suspect is first detained and thereafter begin making inquiries. The Principle established is that police has no power to arrest for the purpose of making inquiries.

In **Daniel Chizoka Mbandangoma V. The Attorney General (4)** the government was condemned in damages arising from a criminal matter where the plaintiff was detained pending further investigations.

I find it desirable to highlight the law governing police investigations in the light of very frightening revelations made by the arresting officer in this matter. The evidence elicited for vide cross examination by the defence counsel tends to establish that the police detained the accused without any investigations carried out and thereafter

started looking for offences to charge them. And even after this no investigations were carried out. This paints a very gloomy picture of lack of professionalism by Zambia police in so far as the evidence reveal in this matter.

I make this observation because PW3 was the arresting officer in all the offences and made one report which the defence heavily attacked during cross examination. The prosecution counsel from National Prosecution Authority found it hard to rebuild the damage on re-examination much as they were equal to the task. No one can blame them. There is nothing to defend.

However, narrowing down to the case of use of insulting language before me the dispute is purely on whether the offending words were uttered by the accused person or not.

And as hitherto alluded, this dispute is essentially centered on the words of the police officers and the denial by the accused. Before I deal with the dispute I must state that there ought to be no doubt that the law is very clear and poses no ambiguity on what constitutes use of insulting language under section 179 of Penal Code Cap 87.

In their submissions, the prosecution were on firm ground to state that insulting words should not just be rude or offensive but insulting as held in the English case of *R. V. Ambrose* (5). They support the same view with the case of *Brutus V. Cozens* (6) in which the court held inter alia, that the meaning of an ordinary word of the English language is not a question of law but fact. I was also referred to the case of **Southard V. The DPP (7)** where the court set a principle that the words "*Fuck you*" or "*Fuck off*" are potentially abusive regardless of the person to whom they are addressed and may relate to the subject charge.

In attempting to counter the glaring contradictions, inconsistencies and outright lies told by prosecution witnesses, the prosecution counsel referred me to the two cases of **George Musupi V. The People (8)** and **Kambarange Mpundu Kaunda .V. The People (9)**. The gist of their submission is that the court should not entertain the argument of possible interest to serve on the part of the witnesses who testified being

all from Zambia Police because they were in course of duty. It has been argued that the accused uttered the offending words and the witnesses were offended.

I took time to examine these authorities but found no weight in the purported argument. The authorities largely augment the defence being raised by the accused. All through the evidence elicited vide cross examination, the defence counsel belaboured at great length to demonstrate lack of credibility, malice, falsehoods on the part of prosecution witnesses who are all police officers. I must state that if the prosecution were serious, they could have led evidence atleast from the police station where the complainant purportedly lodged the complaint of insults. No police officer was called from Kabwata police station, the puzzle I have is why. The O.B could have been produced in evidence to demonstrate consistency. To the contrary, the arresting officer who claimed to be a complainant also dealt with the whole process of the case. In a fully fledged justice system how can a public official act in his own cause. Where is the need for professionalism, is that ethical. You can't be a judge in your own cause unless you can point to a legal pedigree in support. It is like a Magistrate lodging a complaint at a police station. When the matter is brought before the court he accepts to sit as magistrate to try the accused.

PW3 purported that after investigations he made up his mind to arrest and charge the accused, how in devoid of any witness statements, without a complaint lodged at a police station.

In the case of **George Misupi V. The People**, the Supreme court set a principle that a court cannot convict without a warning where the evidence reveal a possibility of false implication. The same principle was echoed in the murder case of **Kambarange Mpundu Kaunda** and the accused was acquitted. The principle is intended to guide the court to exercise care where the only witnesses called by the prosecution are those of some relationship with the complainant in simple terms (or victim). In the **Kambarange Kaunda** case, the eye witnesses were relatives or friends of the deceased. The court found that they had a possible bias against the appellant, and as they were the subject of the initial complaint by the appellant. The Supreme court

found the high court Judge to have misdirected himself by not warning himself and dealt with that issue.

On the matter in casu, the witnesses are not only all police officers but people who have not shown to be creditworthy. PW3 the arresting officer as noted on a number of issues discounted himself from being reliable. He wantonly told lies about the manner he conducted investigations. Above all he claims to be a complainant on one hand. How then can he not have a possible bias.

As observed earlier, no investigations were infact carried out on all the offences he charged the accused. How then can it be said that he had no possible bias and interest. If he can tell lies on oath and apologies, how can a court place reliance on him. The prosecution have failed to convince me as to why I should believe these witnesses. They have failed to dispel the high risk of malice exhibited by the witnesses especially the arresting officer.

Invariably, I find that the prosecution witnesses had possible bias in this case. The danger of false implication cannot be ruled out.

The prosecution finally made reference to the case of **Machipisha Kombe V. The People (10)** arguing that the facts reveal evidence of something more by way of what they called odd coincidences. I was urged to deem as evidence constituting odd coincidences the assertion by PW3 that after offending words were uttered, lawyer Martha Mushipe confronted him with clenched fists. That he had to restrain himself. Now as respeatedly stated, PW3 is not a creditworthy witness. He made himself not reliable. What he said cannot be a basis for me to accept the foregoing argument.

As demonstrated by the defence counsel in their final submissions and infact as already alluded to, where no independent witness testifies there is need for the court to warn itself. In the absence of that there must be evidence of something more which was also stated in the case of **Emmanuel Phiri. V. The People (11)**.

I was referred to the case of **Abel Banda V. The People (12)** in support of a submission that where the prosecution know of some evidence or a witness who may

Speak in favour of the accused, the defence must be informed. It was buttressed that the state deliberately withheld such evidence in the investigations and arrest report which exposed some of the lies by PW3.

It was argued, that there could have been other evidence withheld by police and this offends the principle adumbrated above and echoed in the case of **John Nyambe Lubinda V. The People (13)**. I must state that the Lubinda authority will not apply in the absence of evidence that the defence knew of some other evidence favourable to the accused. The defence were speculating on this argument.

The defence further cited the case of **The People V. Peter Thomas London Tembo (HP/36/1999) (14) (unreported)** in which his Lordship Silomba Judge I had this to say: *"The behaviour of the police must be condemned; it is time they moved away completely from the notion that anyone brought to the police station is guilty of the crime complained of. They should always be wary of the fact that there are, in our communities, sadists who are interested in seeing others suffer even for crimes they did not commit. That certain complaints are filed with the police based on petty jealousies while others arise out of sheer vengeance. As a professional body, the police are encouraged to be objective in their investigations and only bring cases to court that merit prosecution. I believe that with an alert team of State Advocates the police would be guided a great deal in following up cases, especially where they are confident of securing convictions. In that way the number of cases before courts will be reduced as only deserving cases will be prosecuted and overcrowding in prisons will be curtailed"*. This was an orbiter dictum by Justice Silomba as he then was when condemning police of shoddy investigations. Very little more can be said. I addressed this point after I found that no investigations were ever carried out in this matter. PW3 took it upon him to be a complainant, police station and arresting officer. He has painted Zambia police with a gloomy picture of abuse of power which ought to be condemned.

Finally, the defence referred me to the case of **Phiri V. The People (15)** in which it was affirmed that courts are required to act on the basis of evidence placed before

them. If there are gaps in the evidence, they are not permitted to fill them. That if there is insufficient evidence to justify a conviction, there is no alternative but acquit the accused.

And if this takes place because evidence which could and should have been presented was not, a guilty man has been allowed to go free not by the courts but by the investigating officer.

I perceive this authority not debatable on the circumstances of the matter before me. Courts cannot bear the blame for the failure of law enforcement agencies to conduct fair and credible investigations. The police have a duty to bring before the courts all relevant information whether favourable or prejudicial to a suspect. This is what a fair and credible investigation is. This was inter alia established in the case of **Phiri and Others V. The People (16)**.

In the light of foregoing, I come to the inescapable conclusion that owing to glaring contradictions, inconsistencies, lack of credibility, malice and possible collusion exhibited by prosecution witnesses in this matter, there is a serious doubt on the prosecution case. The investigations were shoddy if they can be called investigations at all. This is a case where the investigations officers Mpazi Mbita was literally shot of saying he has no single grain of evidence against the accused persons on all the 3 offences of treason, disobedience of lawful orders and use of insulting language. Police action unequivocally lacked professionalism in the dispensation and administration of justice.

Now I must state that we have a fully fledged legal system in our country, as such our laws are not only clear but predictable.

That is the efficacy of precedents. You can tell well in advance what decision the court will make right at investigations stage. The prosecution should have foreseen this.

Article 18(2) (a) of the Republican Constitution poses no ambiguity. Every accused person who is charge with a criminal offence shall be presumed innocent until proved guilty before a court of competent jurisdiction. So, it is the duty of the state to prove

the guilt of the accused from the beginning to the end as held in the case of **Mwewa Murolo V. The People (17)** by the Supreme court of Zambia.

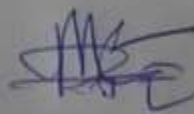
This has been the principle in all commonwealth jurisdictions as espoused by the court in the English case of **Woolmington V. DPP (18)**. This was a landmark decision by lord justice Viscount Sankey as he then was.

It is on this basis that an accused is not bound even to speak in his defence. Article 18 (7) of the constitution states: "***A person who is tried for a criminal offence shall not be compelled to give evidence at his trial***". This provision is augmented by section 207 of the CPC Cap 88 on rights of accused persons when found with a case to answer. They can choose to give evidence on oath, give an unsworn statement or remain silent.

Further, under section 99(1) of the CPC Cap 88, an accused facing a misdemeanour type of offence punishable with a fine or imprisonment of up to 3 months like in this case can even choose to dispense with personal attendance with consent of the Magistrate.

As illuminated herein, the burden is purely on the state to prove the guilty of the accused. The doubt occasioned can only be and is hereby accorded to the accused person. The prosecution have failed to prove the guilt of the accused beyond all reasonable doubt. I thus find him not guilty of use of insulting language contrary to section 179 ^{of the} Penal Code Cap 87 of the Laws of Zambia. I acquit him forthwith and set him at liberty in respect of this offence.

DELIVERED IN OPEN COURT AT LUSAKA THIS 15TH DAY OF MAY, 2017.



GREENWELL MALUMANI
SENIOR RESIDENT MAGISTRATE



REPUBLIC OF ZAMBIA

NOTIFICATION OF ACQUITTAL

***IN THE SUBORDINATE COURT OF THE REPUBLIC OF ZAMBIA.**

At **LUSAKA** **CASE NO. ISPA/O48/2017**

Holden at **NEW MAGISTRATE COURTS COMPLEX**

To: **WHOM IT MAY CONCERN: LUSAKA** Central Prison.

WHEREAS on **18TH** day of **APRIL, 2017** at
09:00 in the **FORE** Noon

I, HAKAINDE HICHILEMA Stood charged before this Court for that on the 11th April, 2017 at Lusaka did **USE OF INSULTING LANGUAGE** Contrary to Section 179 of the Penal Code Chapter 87 of the Laws of Zambia.

I, HEREBY NOTIFY you that he has been found **NOT GUILTY OF THE SAID CHARGE AND HAS BEEN ACQUITTED FORTHWITH.**

DATED AT LUSAKA THIS 15TH DAY OF MAY, 2017.

PHENNY .C. PHIRI

.....
**FOR/DEPUTY ASSISTANT REGISTRAR OR
CLERK OF THE COURT**



Delete where inapplicable

Herein insert name of accused

Herein insert details of charge including

Section and Act alleged to have been contravened. (GN No. 212 of 19)