IN THE SUBORDINATE COURT OF THE FIRST CLASS ISPA/048/2017

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

V.

HAKAINDE HICHILEMA AND 5 OTHERS

BEFORE:	**MAGISTRATE G. MALUMANI (SENIOR RESIDENT MAGISTRATE)**
FOR THE PEOPLE:	MS. CATHERINE L. PHIRI (DEPUTY CHIEF STATE ADVOCATE)
	MRS. M. B. MATANDALA (DEPUTY CHIEF STATE ADVOCATE)
	MR. ZIMBA (PRINCIPAL STATE ADVOCATE)
	MR. R. MWANZA (PUBLIC PROSECUTOR)
	ALL OF NATIONAL PROSECUTIONS AUTHORITY
FOR THE ACCUSED:	MR VINCENT MALAMBO – STATE COUNSEL AND MR. M. HAIMBE BOTH OF MESSRS MALAMBO AND CO.
	MRS. NELLY MUTTI AND MR KASHUMA MUTTI OF LUKONA CHAMBERS
	HON. JACK MWIMBU AND MR. CHADI OF MULEZA, MWIMBU AND CO.
	DR. H. MBUSHI OF H. B. M. ADVOCATES
	MS. MARTHA MUSHIPE OF MUSHIPE AND CO.
	MR. L. MWANABO OF L. M. CHAMBERS
	MR. KEITH MWEEMBA OF KEITH MWEEMBA ADVOCATES

MR. N. INAMBAO OF I. C. M. LEGAL PRACTIONERS

MR. G. KATUPISHA AND MR. MILNER KATOLO OF MESSRS MILNER AND PAUL LEGAL PRACTIONERS

MR. S. SINKALA, MS. NCHIMUNYA N. MWANGE OF MULEZA, MWIMBU AND CO.

MR. ROBERT SIMEZA STATE COUNSEL OF SIMEZA, SANGWA AND CO.

FURTHER RULING ON PRELIMINARY MATTERS

CASE LAW REFERRED TO:

1. Edward Jack Shamwana v. The People (1985)ZR (SC)
2. Tiyesenji Phiri v. The People ZR
3. Thomas Sanford Sharpe v. The People (1970) ZR (HC)
4. Moonga v. The People (1969) ZR (HC)
5. Nyalungwe v. The People (1976) ZR (CS)
6. The People v. Hakainde Hichilema 2017/HP/0606 unreported.
7. Attorney General v. Shamwana and others (1981) (HC)
8. Joseph Nkole v. The People (1977) ZR (SC)

LEGISLATION REFERRED TO:

1. Section 43 of the Penal Code Cap 87 v. 7 of the Laws of Zambia.
2. Articles 15 and 18 of the Republican constitution.
3. Section 11, 33, 213, 230 and 274 of the Criminal Procedure Code Cap 88 v. 7 of the laws of Zambia.
4. Section 3 of the interpretation and General Provisions Act Cap 2 v. 2 of the laws of Zambia

OTHER WORKS REFERRED TO:

1. The archbold criminal Pleadings, Evidence and Practice (1954)
2. Black's law dictionary 8th Edition.

This is a ruling to determine a number of preliminary issues raised on 18th and 19th April, 2017 which could not be attended on mini rulings so far delivered.

This is a matter in which the 6 accused persons stand jointly charged with 3 counts of:

Count 1: Treason Contrary to Section 43(1) (a) of the Penal Code Cap 87 of the Laws of Zambia. The particulars of offence allege that Hakainde Hichilema, Hamusonde Hamaleka, Muleya Hachinda, Langton Mulilanduba, Pretorius Haloba and Wallace Chakawa on unknown date but between 10th October, 2016 and 8th April, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting ogether with other persons unknown did prepare and endeavour to overthrow by unlawful means the Government of Edgar Chagwa Lubngu as by law established.

Count 2: Disobedience of lawful orders Contrary to Section 127 of the Penal Code Cap 87 of the Laws of Zambia. The particulars of offence allege that Hakainde Hichilema, Hamusonde Hamaleka, Muleya Hachinda, Langton Mulilanduba, Pretorius Haloba and Wallace Chakawa on 8th April, 2017 at Limulunga District in the Western province of the Republic of Zambia jointly and whilst acting together with other persons unknown did disobey an order or command duly made by No. 12453 Inspector Ndalama in his capacity and duly authorised to give way to the Presidential motor cade which you wilfully disobeyed.

Count 3: Use of insulting language Contrary to Section 179 of the Penal Code Cap 87 of the Laws of Zambia. 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 the police officers who were executing their duties by saying you are dogs, mother fuckers, idiots and asshole which was provocative and likely to cause breach of public peace.

Plea could not be taken as the first charge is only triable by the High Court. On the two triable by the Subordinate Court an objection was raised on the manner of charging preferred by the prosecution. This is actually one of the preliminary issues. I will deal with this one at the outset because it turned out to be non-contentious.

The lead defence counsel Mr. Vincent Malambo state counsel argued that counts 2 and 3 which are misdemeanours can only be preferred together if they are founded on the same facts. He referred this court to section 135 of the Criminal Procedure Code Cap 88 Volume 7 of the Laws of Zambia which governs joinder of counts in a charge or information. The gist of the defence's submission is that the 3 counts on this charge are not founded on the same facts as such it was erroneous to jointly charge the accused. In buttressing the submission, Mr. Keith Mweemba one of the defence counsel urged the court to order separation of trial of the 2 counts pursuant to section 135(3) of the Criminal Procedure Code on the ground that the joint charge would prejudice or embarrass the accused. He supported the submission with article 118(1) (b) of the Republican Constitution.

In response Mr. Zimba the Principal state advocate from the National Prosecutions Authority on behalf of the prosecution indicated that they were not averse to the application.

I must state that counsel Zimba was very objective because the law on joinder of counts poses no ambiguity. In terms of section 135 of the Criminal Procedure Code, offences can only be charged together if they are founded on the same facts, form or are a series of offences of the same or similar character. This is intended to avoid embarrassing the accused in his defence.

On the matter before me, the 1st Accused person would undoubtedly be embarrassed because the particulars of offence on the 2 misdemeanours demonstrate no relationship with the treason charge.

In the light of the foregoing, I find it desirable to direct that trial on count 2 and 3 be separate from the treason charge. It is ordered that counts 2 and 3 being triable by this court, plea will now be taken.

I now turn to the following complaints:

1) The accused are being denied privileges of reading materials like books, newspapers on the pretext that it is a security risk. The defence counsel submitted that reading materials would help occupy the mind of the accused at the place of their confinement. Mr. Malambo S.C reminded the court that the accused were not the first treason accused in this country to be treated in the manner they were without decency. He cited a treason case of 1989 in which there has

always been recognition even in the very difficulties of years of a one party state. He urged the court to intervene.

2) Torture: Mr. Jack Mwimbu of Messrs Muleza, Mwimbu and company wholly endorsed state counsel's submission on the above item. He however brought it to the court's attention that on 10/04/2017 police subjected accused numbers 2, 5 and 6 to degrading punishment by way of spraying pepper spray on their private parts, mouth and ears and heavily battered them. It was alleged that the assailants were masked as such they do not know if they were Zambia police or not.
3) Visit by a strange person to A1's detention room at Lilayi. It was alleged that a strange person was allowed to enter the first accused's room as such this ought to be investigated. The defence seems to contend that he could have been a danger to the accused.
4) Application for Preliminary Inquiry. When arguing the question of the validity of the manner of charging the accused with offences not founded on the same facts, counsel Mweemba submitted that if their application to severe the other counts was not tenable, they would insist that a Preliminary Inquiry be held under Section 223 of the Criminal procedure Code. He submitted that to hold a Preliminary Inquiry is mandatory. This submission is on page 29 of handwritten proceedings.
5) Application to quash the indictment for being bad at law.

State counsel Vincent Malambo moved this court on a motion to quash the charge of treason on the ground that it lacks the essential element of overt

acts. It was argued, that this court has inherent jurisdiction to examine the charge on the face of it and determine whether it is properly particularised. It was submitted that treason is a special charge which goes beyond merely setting out particulars of offence. The charge must contain overt acts. These are details of the actual conduct if when proved amount to treason. That the particulars of offence must state in clear words what each accused did, how they did prepare, how they endeavoured to overthrow the Government.

It was emphasised that these details of the overt acts would enable them instruct counsel.

State counsel supported his submissions with the archbold Criminal pleadings, Evidence and practice 1954 Edition, paragraph 2074 page 1142 to 1144 on the manner of charging a treason charge which has always been followed dating back to the first treason charge of 1357 in England, that there is a requirement that the acts be pleaded. That in the absence of Overt acts the charge is incompetent.

I was urged to hold that this is not a properly laid charge.

Counsel Mweemba Keith elected to adopt state counsel's submissions but chose to elongate the strength of the submissions. He cited the case of Edward Jack Shamwana and others v The People (1) which was a treason charge under section 43(1)(a) of the Penal Code Cap 87 of the Laws of Zambia. He said the Supreme Court put it very clear that Overt acts must be there. Adding that the charge before me was incompetent in the extreme

whose only purpose is not to advance the course of justice but to perpetrate injustice.

Counsel cited article 18(2)(b) of the Republican Constitution to essentially buttress the argument on the rights of an accused to a fair trial. In pointing out the charge, counsel brought it to the attention of this court, that on the particulars of offence the accused are alleged to have prepared or endeavoured to overthrow the Government of Edgar Chagwa Lungu. He submitted that there is no Government of Edgar Chagwa Lungu in the country. It is not the person in office.

It was submitted that this court has power on a charge not triable by it to discharge on the authority of Tiyensanje Phiri v. the People (2). And that where an indictment fails to give reasonable information to the accused it is a bad charge not defective. It was insisted that a bad charge or indictment cannot be cured.

Counsel went on to belabour on what constitutes a bad charge as a charge where essential ingredients are missing. The authorities of Thomas Sanford Sharpe v. The People (3) and Moonga v. The People (4) were cited in support. This is on the premises that this court has power to quash the indictment and discharge the accused, which according to counsel is also exercised by the High Court pursuant to Section 274 of the Criminal procedure Code Cap 88 volume 7 of the laws of Zambia.

I was invited to meticulously consider the defence's submissions and grant the prayer in order to do justice which must not only be done but seen to be done.

In response to the defence, Mr. Zimba the Principal state Advocate from the National Prosecutions authority conceded that a charge of treason must indicate the overt acts. But submitted that the charge as it stands is not bad at law as it can be amended without occasioning any prejudice to the accused persons. He said the charge would have been bad at law if considering any amendment it would not stand.

The prosecution counsel acknowledged the argument on the issue of Overt acts said to be missing upon which an accused would properly instruct counsel. He applied that the charge be amended under section 213 of the Criminal Procedure Code to bring it to what treason provide for.

In reaction counsel Mweemba cited the authority Nyalungwe v. The People (5) buttressing the earlier submission that a bad charge is not amenable to amendment, that only a defective charge can be amended.

The prosecution further brought to the court's attention a recent ruling by the High Court in the case of the People v. Hakainde Hichilema on cause No. 2017/HP/0606(6) before Madam Justice G. C. Chawatama (unreported) (6).

- A copy was given to the court. This was a *habeas corpus* motion in which the court held *inter-alia*, that only the trial court can pronounce itself on the validity of a charge.

On earlier issues highlighted, counsel Matandala the Deputy Chief State Advocate submitted that on the authority of Shamwana v. the People (1) the duty of this court is merely to record the complaint(s). she said they were not invited to respond.

In reaction state counsel Malambo made a rigorous submission that the Subordinate Court before whom the accused is brought is not gagged to simply record. He said it has jurisdiction to order for investigations.

In sum total, these are the Preliminary issues and oral submissions from both defence and prosecution counsel being addressed.

I have very carefully addressed my mind to the task before me. I will first deal with the Preliminary issues attaching to complaints numbers 1, 2 and 3, that the accused were being denied reading materials, torture and alleged bizarre visitation to A1's detention room.

It is not in dispute that when the accused were apprehended they were in custody of Zambia Police. Quite obviously they were vulnerable as such Zambia Police were responsible for their welfare. The law prescribes a very clear procedure on what follows after the accused is apprehended and what their rights are during investigations and at trial before a court of competent jurisdiction. The judges rules require strict adherence to the rights of a suspect during investigations.

Admittedly, this court is not competent to interpret the Republican constitution. Notwithstanding, I will not hesitate to recognize that legally, the rights of suspects and accused persons are envisaged under article 18 of

the Constitution. This is on account of the presumption of innocence. Based on this presumption the law prohibits extra judicial punishment. In fact article 15 of the Republican constitution completely outlaws torture, or inhuman and degrading treatment.

In addition, Section 33 of the Criminal Procedure Code Cap 88 of the laws of Zambia requires that a person taken into custody without a warrant appears in court as soon as it is practicable and once he appears, in this case before the subordinate court being the court where all accused first appear even for cases not triable by it, the court cannot ignore their rights. They are entitled to be heard on whatever complaint. On the matter before me, Ms. Matandala the Deputy Chief State Advocate submitted that the role of the Subordinate court is merely to record the complaint(s) based on the case of The People v. Shamwana. Infact the point in *casu* relates to the holding in the case of Attorney General v. Edward Shamwana, valentine shula Musakanya, Mundia Sikatana, Godwin Yoram Mumba, Underson Kambwali, Mbulo, P. Mkandawire, M. Liswaniso, T. Mulewa, Godfrey Miyanda, D. Syamba, A. Chimbalile and Rodger Kabwita (7). The Principle established in this authority is quite instructive, that an accused person charged with any offence not triable by the Subordinate court is entitled to be heard on any complaint and the court to record what is said *inter alia*.

The question I have had to ask myself is, what is the meaning of being entitled to be heard. Did the high court intend that all the subordinate court could do is record the complaint. I do not find the answer in the affirmative. In legal parlance, being heard connotes the right to seek relief.

It is trite that a court has inherent jurisdiction to take steps in the interest of justice. The court is not precluded to inquire into alleged abuse of accused persons. In an appropriate case investigations can be ordered.

On the matter in *casu*, I find it desirable to order that Zambia police through the Officer commanding Lusaka division institute thorough investigations to the alleged bizarre visit to accused number one's detention room while at Lilayi police post, I also order investigations on the alleged torture of accused numbers 2, 5 and 6. I further order that accused be allowed reading materials while in custody subject to inspection by the correctional facilities officer in-charge. It is a complete misunderstanding of the law to say reading materials are a security risk.

I now turn to the application for a Preliminary Inquiry. The perusal of the record shows that the prosecution did not respond to this motion. Anyhow I have a duty to deal with it.

Counsel Mweemba submitted that under section 223 of the Criminal procedure Code, it is mandatory to hold a Preliminary Inquiry. He was on firm ground. This provision is couched in clear mandatory form, it states: section 223(1) Criminal procedure Code,

"Whenever any charge has been brought against any person of an offence not triable by a Subordinate Court, or as to which the High Court has given an order or direction under section ten or eleven, or as to which the Subordinate Court is of opinion that it is not suitable to be disposed of upon summary trial, a Preliminary Inquiry shall be held according to the Provisions hereinafter

contained, by a subordinate Court, locally and otherwise competent." It is observed that the legislature in its own wisdom decided that such matters are dealt with expeditiously before Subordinate Courts.

This motion is granted.

I now turn to the question of quashing the charge/indictment on the ground that it lacks the essential element of Overt act(s) and therefore not disclosing an offence.

I took time to examine the authorities cited. Am indebted to all counsel for the industry exhibited on the strength of their submissions.

I can state with certainty that the law is well settled that an accused can only plead to a charge which discloses an offence. Where the charge on the particulars omit fundamental and essential ingredients, it is no charge at all as no offence is disclosed. This is termed as bad charge which is not curable. This was illuminated in the leading authority of Thomas Sharpe v. The People(3) as well argued by the defence. This is on the premises that a charge which does not disclose an essential element results in a miscarriage of justice as affirmed in the case of Moonga v. The people(4).

In the case of Attorney General v. Edward Shamwana and others (7) the same principle was echoed when the court had this to say, *"the indictment must disclose an offence. It is a principle of fair play that an accused should know on what charge he is being committed for trial."*

A charge of treason from what can be deciphered from Section 43 of the Criminal Procedure Code Cap 87 which create it is premised on overt act(s)

as state counsel Malambo stated in his spirited submissions. Those acts must be clearly particularised. The archbold Criminal pleadings, Evidence and Practice which I had sight of is instructive on drafting of a treason charge. This requirement has been subject of judicial interpretation in our jurisdiction in the case of Shamwana v. The People (1). Invariably, I agree with state counsel when he states that overt acts must be pleaded and properly so, in devoid of the pleading, the charge is undoubtedly incompetent.

On the matter before me, the prosecution agree that a charge of treason must indicate the essential element of overt acts as hitherto alluded. But tend to argue that the charge in its present state is not bad. They have proceeded to apply to amend it in terms of Section 213 of the Criminal Procedure Code which also have the option of a substitution. Now, I must state that counsel is contradicting himself here. If the charge as it is, is not bad and capable of being amended, why not point out the essential elements on it. What are the overt acts on it.

I took time to examine section 213 of the Criminal Procedure Code Cap 88 cited by the prosecution. In terms of literal interpretation, this provision poses no ambiguity. It allows only a defective charge to be amended. The powers of a court to amend a charge do not extend to a bad charge. The legal pedigree to this interpretation is that a bad charge is no charge at all as hitherto alluded.

Section 213(1) states: *"Where, at any stage of trial before the accused is required to make his defence, it appears to the court that the charge is*

defective, either in substance or in form, the court may, save as in section two hundred and six otherwise provided, make such order for the alteration of the charge, either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case." As can be observed, there is no power in the court to amend a bad charge. A defective charge is a charge with minor errors which do not prejudice or embarrass the accused as affirmed in the case of Joseph Nkole v. The People (8). In this case there was an incorrect section in the statement of offence which the Supreme Court considered to be defective not bad charge and therefore capable of amendment . There was no omission of an essential element.

The prosecution's submission undoubtedly lack legal support. It is non-sequitur. I expected prosecution counsel to argue on the basis of an authority which bestows power in the court to amend a bad charge.

On this indictment the particulars of offence on count one read: *"Hakainde Hichilema, Hamusonde Hamaleka, Muleya Hachinda, Laston Mulilanduba, Pretorius Haloba and Wallace Chakawa, on unknown dates but between 10th October, 2016 and 8th April, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did prepare or endeavour to overthrow by unlawful means the Government of Edgar Chagwa Lungu as by law established."*

Now there is no dispute that this statement does not in any way disclose what the accused did whether individually or severally. There is nothing to

show how they prepared or what they did in preparing or endeavouring to overthrow the Government. Let me also point out that its unfortunate that on what the prosecution called particulars of offence, they described the Government in relation to the name of the head of state His Excellency President Edgar Chagwa Lungu. They ought to have known that a Government has a meaning assigned to it in terms of section 3 of the Interpretation and General provisions Act Cap 2 volume 2 of the laws of Zambia as ably submitted by counsel Mweemba. Under the said provision, the term Government means the Government of Zambia. So the accused can only be alleged to have prepared or endeavoured to overthrow by unlawful means the Government of the Republic of Zambia.

Further, from what the prosecution called particulars of offence, the only thing that can be deduced is that the prosecution seems to allege that the accused persons may have said or done something on 10th October, 2016 and/or 8th April, 2017 or in between which acts have not been disclosed. Whatever it was, what the prosecution ought to bear in mind is that what constitutes an overt act to prove the felony of treason goes far beyond mere acts or omissions in conduct as demonstrated in the leading authority of Edward Jack Shamwana and others v. The People(1). This is the precedent the prosecution could have carefully studied before framing the charge. I need not belabour the legal principle that in a fully fledged legal system like ours, the prosecution are not expected to have challenges on matters of this nature because we have precedents which make the law predictable. By use

of precedents you can know whether you have an arguable case or not and give a legally supported opinion.

On the Shamwana case, there was one count of treason contrary to section 43 (1)(a) of the P. C Cap 87. The accused were alleged to have prepared and endeavoured to overthrow by unlawful means the Government of the Republic of Zambia as by law established by eleven specified overt acts. At page 64 of the Supreme Court Judgment, there is an authoritative guide that the alleged treason must be proved by overt acts expressly stated in the indictment. There was evidence in form of documents and oral testimonies by which the accused were proved to have arranged for the diversion of a presidential aircraft at a meeting held at A1's house, Mr. Shamwana now the deceased. There was evidence of meetings held in planning a well set out plan to capture the then head of State President K. D. Kaunda. These were secret meetings. My purpose by highlighting all this is not to trespass into/or usurp the trial court's jurisdiction but to demonstrate and illustrate the legal position that it is not anything you can call an overt act to support the felony of treason on an indictment.

In the light of the foregoing, the purported charge exists in a vacuum. However, the only legal barricade to grant the defence's motion to quash the indictment at this stage is the definition of a trial court on a matter not triable by the subordinate court. In terms of section 11(2) of the Criminal Procedure Code, a charge of treason is only triable by the high court.

Black's law dictionary 8th edition at page 1543 defines a trial court the same as bench trial which is a court before whom formal examination of evidence and determination of legal issues is had in an adversarial system.

In the case of Thomas Sanford Sharpe v. The People (3) which is very instructive on the authority of a court to quash an indictment on grounds of lacking fundamental and essential ingredients, the charge was triable by the court before whom the accused was convicted. The High Court quashed the conviction.

So, as can be observed the law does not place power in the Subordinate court to quash the indictment on such a charge. The power of the subordinate court on a matter not triable by it, is restricted to the holding of a Preliminary Inquiry pursuant to the provisions of sections 223 to 230 of the Criminal Procedure Code Cap 88. Under this provision, the Subordinate Court has power to discharge the accused if at the close of the case for the prosecution or after hearing any evidence in defence, it is of the opinion that the charge has no substance to warrant committal for trial.

In the light of the procedure adumbrated above, I come to the inescapable conclusion that the motion to quash the charge is untenable and declined. The power to quash a charge of treason is repository in the high court.

The concomitant recourse is that am inclined to allow the prosecution to proceed with substitution in the interest of justice and fair play in the dispensation of justice. This will help the ultimate justice of this case even in the light of the porous state of the charge.

Ordered accordingly.

HON. G MALUMANI ESQ

SENIOR RESIDENT MAGISTRATE

26/04/17