IN THE MAGISTRATES COURT OF ZIMBABWE **CRB NO:449/13**
FOR THE PROVINCE OF MATABELERLAND
HELD AT BULAWAYO

In the matter between: **THE STATE and BERTHA SIBANDA ACCUSED**

ACCUSED'S CLOSING SUBMISSIONS

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1. The accused was facing a charge of violating section 77(1) (a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23) - Public Indecency, it being alleged that on the 14th of February 2013 at Z.R.P Bulawayo Central Courtyard, accused Bertha Sibanda unlawfully and indecently exposed herself by taking off her blouse and skirt and remained wearing panties in public in the view of public officers and other people who were crowded at Z.R.P Bulawayo Central Courtyard.
2. The accused pleaded NOT GUILTY and in her defence outline insisted that she had removed her skirt and blouse after she heard police officers who were standing close to her shouting a command "*bvisa bvisa*" which she understood to mean she was being required to undress and remove some of her clothing items for purposes of detention.

THE STATE EVIDENCE

3. The state case was premised on the evidence of two witnesses who are police officers going by the names Janet Nhenjana and Virginia Mtabeni. Both witnesses confirmed having observed the accused undressing to her undergarments at the police station.
4. However what they could both not positively testify to are the circumstances that led to the accused undressing. Indeed under cross –examination both of them admitted that they are not aware of the exact circumstances that led to the accused undressing.
5. Neither of them could deny that some of their colleagues could have uttered the words *"bvisa bvisa*" to the accused which then led her to undress.
6. Essentially their testimony suffers a major handicap in that whilst it confirms the physical act of undressing yet it failed to disprove her defence that she had been instructed to do so by the police officers who were standing close to her.
7. These witnesses, because of the distance that they were standing at in relation to where the accused was, could also not conceivably have heard the brief conversation between the accused and the police officers. This is more so bearing in mind that there were about close to 200 people that were singing at the courtyard.
8. In essence therefore their evidence merely confirmed the obvious. That is the mere fact that the accused undressed to her undergarments at the station. That was never in dispute at any point in time. What was material however was not the mere physical act of undressing but rather the surrounding circumstances that occasioned her undressing. The evidence led by the state should have countered the accused's defence that she undressed following a perceived instruction from police officers.
9. The state however, dismally failed to contradict that defence and that was fatal to its case as none of the two witnesses could positively refute it.

THE DEFENCE CASE

10. The defence in its case called the evidence of four witnesses including the complainant herself. In her evidence in chief including under cross – examination she stuck to her

version of events. She insisted that at the central police station courtyard some police officers who were standing close to her shouted a command "*bvisa bvisa"* and she then enquired them from saying '*ndibvise here'* meaning should I remove my clothes to which they persisted in their command shouting "*bvisa bvisa*".

11. She advised the court that she had earlier been informed by some of her fellow colleagues in WOZA that when people are being detained following arrest they are compelled to remove some of the items of clothing so as to be detained. This position was also confirmed by one of the state witness Virginia Mtabeni who also took time to explain to the court that indeed upon detention an accused would be required to remove some items of clothing.
12. It must be appreciated that the accused herself had never been arrested before as she stated that she was operating under the impression that she was being instructed to undress for purposes of detention basing on what her fellow colleagues had advised her. The accused therefore genuinely and honestly interpreted the police command "*bvisa bvisa*" to mean she and others must undress so as to be detained. This was even buttressed by the fact that she went on to enquire from those police officers as to whether she should undress or not to which they responded by continuing to bark the instruction *bvisa bvisa* and therefore she in all innocence dutifully obliged.
13. It must be borne in mind that the accused is a simple unsophisticated elderly woman who was having a brush with the law for the first time with totally no previous experience of arrest. As she explained it in her evidence, she felt obliged to obey the perceived instruction from the police since she was under arrest and felt duty bound to obey police orders.
14. This is further corroborated by the other defence witnesses namely Joyce Ndebele and Hleziphi Ndlovu who also confirmed that they had as well felt duty bound to follow the instruction to undress since they had an obligation to submit to police instructions given they were under arrest. They confirmed that but for the intervention of Magodonga Mhlangu they also would have undressed.
15. This court is therefore dealing with a situation of an unschooled accused who was under the genuine belief that the police had issued a particular instruction to undress and which she felt she had a duty to obey as she was in the custody of the police.
16. One might wonder that despite the fact that the command was apparently issued as a general command not specifically directed at her why she was the only one who had to undress.
17. This was candidly answered by the two defence witnesses who confirmed that they also had heard the command and were about to undress when Magodonga Mahlangu intervened and stopped them from doing so. If therefore follows that indeed the other ladies who had been arrested with the accused would also have complied with the instruction but for the intervention of Magodonga Mahlangu.
18. Magodonga Mahlangu in her undisputed evidence also confirmed that indeed the other two defence witnesses were about to undress when she quickly intervened and stopped them.
19. The four defence witnesses corroborated each other in material respects that is:
    i) That when they were at Central Police Station on the day in question police officers shouted at the ladies "*bvisa bvisa*" which they understood to be an instruction to undress for purposes of detention.
    ii) That at that juncture the accused responded by asking "*ndibvise here*" thus asking the officers whether or not she should proceed to undress.

iii) That the officers in response continued barking the command "*bvisa bvisa* " whereupon the accused undressed to her undergarments.

iv) That were it not for the intervention of Magodonga Mahlangu the other two state witnesses Hleziphi Ndlovu and Joyce Ndebele would also have obeyed the instruction and proceeded to undress.

20. The defence case at the end of the day stood unchallenged and even after cross – examination the state could not punch holes into it and thus it remained intact.
21. All the defence witnesses were credible and gave their evidence with absolute confidence indicating they were completely sure of the events of the day in question.

ANALYSIS OF THE LAW

22. Section 77 (1) (a) of the Criminal Law (Codification and Reform) Act provides as follows: *"Any person who indecently exposes himself or herself or engages in any other indecent conduct <u>which causes offence to any other person</u> on or near a public place or in a private place within the view of such other person shall be guilty of an offence"* (my emphasis)
23. It is apparent from the section in question that the charge requires a four pronged approach. In other words four circumstances must exist in order for the offence to be committed.
    - The first consideration is whether or not an individual indecently exposed themselves or engaged in indecent conduct.
    - The second factor is that the exposure or conduct in question must cause offense to any other person.
    - Thirdly that must be in a public or private place.
    - It must be within the view of that person.
24. Therefore in addition to considering the conduct itself a court must then consider whether or not the conduct caused offence to any other person.
25. What is emphasized here is that the exposure in question ought to cause offence to any other person and not the general public at large. The state therefore ought to allege and prove that the exposure caused offence to some person or persons and not just the general public. In that regard the state therefore ought to lead evidence to demonstrate that a particular person or persons were offended by such exposure.
26. It is not for the court or the state to assume that generally indecent exposure would cause offence to the public at large. Such statement must come from a particular witness or witnesses who would testify to the effect that they were indeed offended by the exposure in question.
27. It would be mere conjecture for the court to then assume or speculate that the exposure must have offended the public without anyone testifying to that effect. In the absence of a witness confirming that they were offended, the requirements of the statute to create the offence would not be satisfied.
28. In the matter *in casu* none of the state witnesses confirmed having been offended by the exposure. They merely testified to observing the act of exposure. The failure on the part of the state to lead evidence to confirm that the witnesses were offended by the exposure was a fundamental flaw that left the state case fatally defective and incurably unsustainable.
29. If indeed the legislature intended that the offence could be established by the mere fact of exposure then it would not have included the requirement that the exposure must cause offence to any other person. Further if the legislature intended that the offensiveness of

the conduct could be assumed from the mere fact that such exposure may cause offence to the general public then it would not have made it a specific requirement that the conduct must as a matter of fact cause offence to any other person.

30. Given the foregoing the state case was therefore deficient and lacking in a material respect necessary to establish the offence of public indecency. In that respect the state therefore did not prove its case against the accused beyond a reasonable doubt as it was obliged to do so.

ANALYSIS OF THE ACCUSED'S DEFENCE

31. The accused mentioned in his defence that she had heard police officers chanting an instruction to undress. Following further enquiry the instruction was repeated and she as such obliged and undressed. The issuing of such instruction was not disputed by any of the state witnesses.
32. Whatever the intention or motive those police officers who shouted *bvisa bvisa* had, the accused *bona fide* believed it to be a genuine instruction to undress from a competent authority with the powers to issue such instruction since she and her fellow colleagues were under their charge. If that was not the intention of the officers in shouting "bvisa bvisa" the accused was then laboring under a mistake of fact in proceeding to undress as she believed that was the intended instruction.
33. Feltoe G, in **A Guide to the Criminal Law of Zimbabwe** at page 25 explained the requirements of the defence of mistake of fact as follows:

    Common law crimes

    For this defence to succeed, these requirements will have to be satisfied:

- *The mistake must be one of fact.*
- *The mistake must be in respect of a material or essential element of a crime.*
- *The test to determine whether the mistake was essential is to ask whether X would have committed the crime charged if the facts had been as X believed them to be.*
- *The mistake must be genuine (honest, bona fide).*
- *With crimes of intention the mistake does not have to be reasonable, although the unreasonableness of the mistake may be taken into account in deciding X did genuinely make that mistake. (But if the mistake was grossly unreasonable this may lead the court to conclude that the mistake was not genuine. However, if the court decides that, although the mistake was grossly unreasonable it was nonetheless a genuine mistake, it must acquit X).*

Statutory Crimes

Logically and consistent with the basics principles, the same basic requirements should apply to statutory offences. Thus the mistake would have to be one of fact and a material mistake.

34. In the matter *in casu* the accused genuinely and reasonably believed that a legitimate instruction had been issued for them to undress and she proceeded to comply. If the police had intended something else in chanting "bvisa bvisa" then they created in the mind of the accused an impression that they were requiring them to undress and this is what would have led to the mistake of fact as she and her colleagues bona fide misconstrued the command by the police.
35. Since this is a crime of intention the error does not have to be reasonable and as such even if the court finds that the error was unreasonable it must still acquit the accused. As explained by **G. Feltoe** *supra* if this Honourable Court feels that the error was grossly unreasonable it must still acquit the accused all the same as the mistake was genuine.

36. This is more so bearing in mind that the person who complied with the command is an unsophisticated and unschooled elderly woman. This is buttressed by the fact that she went on to ask the police if she should comply with their instruction and they purportedly gave her the go- ahead. Even more so, other women who were with her had also intended to comply with the same perceived command had they not been stopped.
37. This therefore demonstrates the genuineness with which they approached this issue as they in all honesty perceived that a legitimate command had been issued and they had no option but to oblige. The cardinal question that arises now is whether or not the state has managed to prove its case beyond a reasonable doubt. It is submitted No!
38. The state for starters failed to prove an essential element of the charge being the requirement that the exposure must result in offence to any other person. In addition all the state witnesses could not contest the fact that that an instruction for the accused to undress had been given by their fellow police officers.
39. Furthermore the accused offered a plausible explanation for her undressing which explanation the state literally failed to shoot down. As such it remained uncontradicted. In the premises given the foregoing it cannot by any stretch of the imagination be said that the state managed to prove its case against the accused beyond a reasonable doubt. It is trite that the state must prove its case beyond a reasonable doubt. The accused attracts no onus. If there is a reasonable possibility that his version, in the context of all the evidence, is true he must receive the benefit of the doubt ,see **S v Munyai 1986 (4) SA 712 (SC) at 716**. It is submitted that the state totally failed to prove its case beyond a reasonable doubt.
40. The Appellant gave a reasonable explanation of why she undressed . That explanation cannot be rejected out of hand. As was said in **S v Kuiper 2000(I) ZLR 113 (S) at 118 B-D**:- "The test to be applied before the court rejects the explanation given by an accused person was set out by GREENBERG J in **R V Difford 1937 AD 370. At 373**, the learned judge said:-

'no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is a reasonable possibility of his explanation being true, then he is entitled to his acquittal …'

Similarly, in **R v M 1946 AD 1023**, DAVIS AJA said the following at 1027 : *'And, I repeat, the court does not have to believe the defense story; still less have to believe it in all details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true…"*

Those comments apply to the present case with equal force.

38. At law the court can only reject the accused's version only if it had been shown to be false beyond a reasonable doubt. See **S vs Chindunga SC 21/02**. The court in this case is faced with a plausible explanation for the accused's conduct and there is no apparent reason why the appellant's defence should be rejected. See **S vs Petrus 1995 NR 105 (HC**).
40. **Feltoe G** in **Criminal Defenders' Handbook** states at page 113 that:
'The State is required to prove the guilt of the accused beyond reasonable doubt. Proof beyond reasonable doubt requires more than proof on a balance of probabilities …' He goes on to say,

…. '*Where there is proof beyond reasonable doubt no reasonable doubt will remain as to the guilt of the accused. If a reasonable person would still entertain a reasonable doubt as to whether the accused is guilty, the accused is entitled to be acquitted.*

It is submitted that given the circumstances of the case and the accused's explanation for her conduct which explanation was unchallenged it would not be safe to convict. This is a clear case where the accused must be given the benefit of the doubt and acquitted.

WHEREFORE the accused prays for her acquittal

DATED AT BULAWAYO THIS 3rd DAY OF OCTOBER 2013

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KOSSAM NCUBE & PARTNERS
ACCUSED'S LEGAL PRACTITIONERS
2ND FLOOR BARCLAYS, BUILDING
L. TAKAWIRA AV/ FIFE STREET
BULAWAYO (KN/tc

TO: THE CLERK OF CRIMINAL COURT
Magistrates Court
BULAWAYO

AND TO: THE PUBLIC PROSECUTOR
Court 3
Tredgold Building
BULAWAYO

Date stamped by Tredgold Magistrates Court