December 28, 2009

THE PEOPLE

vs.

FREDRICK CHILUBA, FAUSTIN KABWE AND AARON CHUNGU

JUDGEMENT DELIVERED

by

J. CHINYAMA, PRINCIPAL RESIDENT MAGISTRATE

Opinion

PRELIMINARY STATEMENT

Fredrick Chiluba was charged with six counts of theft by a Public Servant contrary to sections 272 and 277 of the Penal Code, Chapter 87 of the Laws of Zambia. He was president of Zambia when the alleged thefts were committed. The magistrate acquitted Frederick Chiluba on the grounds that although the monies used by Chiluba to pay his lawyers and children came out of the ZAMTROP Government account and could be traced back to the Ministry of Finance, the prosecution had failed to prove that the

monies were not his own monies put in a government account The Magistrate accepted Chiluba's explanation that he had private monies in the Zamtrop account and he, Chiluba, believed that it was those monies which were used to make the relevant payments. Effectively, holding that Chiluba did not dishonestly use government monies. The Magistrate was not convinced that Chiluba did not have any monies of his own in the ZAMTROP Government account. In coming to this conclusion, the trial Magistrate relied on an unsworn statement that Chiluba made in which he, without disclosing the sources of those monies, claimed that he had a large amount ($8.5 million) of private monies in the ZAMTROP Government account (**JP 242**). The trial magistrate erred in law in finding that an unsworn statement was sufficient in itself to rebut evidence established on oath. Even assuming that private money was deposited in the Government account, there was no evidence to show that Chiluba was the intended beneficiary and there was no evidence to show that the money was paid in to the Zamtrop account for a purpose other than a government purpose. The necessary inference, in the light of government regulations concerning the use of government accounts and the status of money in them, is that the payments relied on by Chiluba were for a government purpose and/or intended for government beneficially. There was no evidence to displace that inference; Chiluba's unsworn statement, unsupported by evidence, was not capable of giving rise to an inference that the monies might be personal monies and/or intended for Chiluba beneficially. The Magistrate misdirected himself on the law relating to: the evidential value of unsworn statements; inferences in criminal cases; on the evidential burden of proof and on his treatment of members of the Task Force as witnesses with an interest to serve and therefore biased.

Argument I

The magistrate, having found Chiluba with a case to answer, erred in not finding him guilty and in relying on an unsworn statement by Chiluba as evidence that he had money in a government account. An unsworn statement is not regarded as evidence in law as it is not given on oath and is not subject to cross examination. It cannot prove facts that are not otherwise proved by evidence.

Section 206 of the Criminal Procedure Code provides that "if at the close of the evidence in support of the charge, it appears to the court that a case is not made against the accused person sufficiently to require him to make a defense, the court shall dismiss the case, and shall forthwith acquit him. The Magistrate found that there was a *prima facie* case made out by the Prosecution, and found Chiluba with a case to answer and put him on his defense. In *The People vs. Japau (1967 ZR 16)* Judge Evans stated that a submission of no case to answer may properly be upheld if an essential element of the alleged offence has not been proved or when the prosecution evidence has been so discredited by cross-examination, or is so manifestly unreliable that no reasonable tribunal could safely convict on it. In law therefore a *prima facie* case is one in which the prosecution case is complete and all elements of the offence are present and sufficient in the sense that a reasonable trier of facts could find that the evidence comes up to proof beyond reasonable doubt. The magistrate in finding that Chiluba had a case to answer must have satisfied himself that there was sufficient evidence in respect of each ingredient of the relevant offences to support the counts on the indictment. While not denying that he took money from the ZAMTROP accounts for his personal purposes, Chiluba purported to set up a defense that the money he took from the ZAMTROP account was his **(JP 242)** and/or that he believed it was his money which was used to

discharge his liabilities.. In *Mwelwa v. The People* (Supreme Court, Zambia (1975 ZR166 Baron DCJ stated, "Once a special defense is set up the onus is on the prosecution to negative it. But it must be set up; the court is not called upon to consider purely speculative defenses in respect of which there is no evidence whatsoever." In this case Chiluba, without disclosing the sources or giving particulars of that money, gave an unsworn statement in which he advanced the argument that he had a large sum of money approximating $8.5 million **(JP 242)** in the ZAMTROP Account. In his statement he claimed that his friends assisted him **(JP 241)**. This is clearly mere assertion or a speculative statement not backed by any evidence. He did not identify his friends; none of the deposits in the ZAMTROP account named him as beneficiary; he led no evidence from these third parties to show that payments by them were intended to benefit Chiluba personally and/or that such payments were not intended for government and/or to explain why such payments were made into a government account if they were intended for Chiluba personally and not for government; and he produced no documentary evidence to support any of his assertions. In other words, his mere assertions in an unsworn, untested statement were unsupported by any or any credible testimony. Further the claim is in conflict with the Zambian law as explained by the Auditor General, who testified that under the Finance (Control and Management) Act (**JP 121**), which governs the management of government funds, it was not permissible to put private money in a government account and where this is found to have taken place the money is confiscated and becomes public funds **(JP 255 & 194)**. The argument accepted by the Magistrate, in addition to being in total disregard of Zambian law as stated by the Auditor General, proceeds on a preposterous premise, namely that the accused was entitled personally to

profit from his position as Head of State without accounting for payments made to him and that he was entitled to pay or cause those payments to be made into a Government account and in so doing mix them with Government monies. Quite apart from being an incredible assertion in the light of the Finance Regulations, this would provide the very route for State corruption.

Salmon J. in *R. V. Spurge* (1961) 2 All ER 193 held that "if the accused's explanation leaves a real doubt in the mind of the court he is entitled to be acquitted." These words pinpoint the crucial principle. It is not enough simply to put forward a special defense; it must also be explained. Lord Devlin in *Rv. Sharpmpal Sigh* 1962 AC 188 said where the accused did not explain how his wife's throat was cut: "a not incredible explanation given by the accused in the witness box might have created a reasonable doubt. But there is no explanation. How did he come to squeeze his wife's throat? When the prisoner, who is given the right to answer this question, chooses not to do so, the court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculation upon what the accused might have said if he had testified." There is no doubt that the Magistrate in the present case treated the unsworn statement as evidence. He stated in his judgment that "such a statement is not dismissed out of hand or the issues in it ignored just because the statement is not given on oath. There must be evidence to entitle me to dismiss the statement or any issues raised in the statement, otherwise all that is said is taken into account and maybe believed if there is nothing to rebut it" (J**P 244 &245**). The approach of the Magistrate was wrong. The question is whether there was evidence before him which was corroborative of the

unsworn statement such that he could give consider it and not whether there was evidence entitling him to dismiss it; the Prosecution had already established a prima facie case and the evidential burden of proof had shifted to Chiluba to lead admissible evidence to discharge that evidential burden. Clearly the Magistrate erred in law in treating the unsworn statement as evidence and attaching any weight or, alternatively, the weight that he did, to the unsworn statement of the accused and further in allowing that statement to displace admissible evidence which had established to his satisfaction a *prima facie* case against Chiluba. A Magistrate cannot rely on an unsworn statement without more as this Magistrate did, in order to exculpate an accused. Further, as pointed out earlier there was no evidence whatever to support Chiluba's assertion that he was beneficially entitled to any money in the ZAMROP account.. It was an error in law to treat the unsworn statement as "evidence or a factor.'

Argument II

The magistrate misdirected himself on the evidential burden of proof and standard of proof and in his failure to test the veracity of the accused's unsworn statement.

While the legal burden of proof in criminal trials throughout the trial remains with the Prosecution, the evidential burden (which may shift during the course of the trial) necessarily shifted to the accused to adduce some admissible evidence to rebut the case advanced by the Prosecution once the Magistrate was satisfied that the thee accused had a case to answer. The evidence must be of a sufficient quality in order to meet that evidential burden. In *Pesulani Banda v. The People* (SCZ Judgment No. 14 of 1979), the Supreme Court held that when an accused person elects to make an unsworn statement he

is not subject to cross-examination by the prosecution and neither is he subject to questioning by the court; except to elucidate unclear details or to clarify ambiguities. In *Pensulani Banda v. The People,* the trial judge relied on the evidence elucidated through his questions during an unsworn statement by the accused. The Supreme Court considered this a misdirection in law. Similarly, Section 207 and section 191 of Criminal Procedure provide that unsworn testimony is permissible but that due to rules against self-incrimination it is not subject to cross-examination. The Magistrate, after correctly stating the law on unsworn statements as follows: "in defense A1 made an unsworn statement; in law such a statement is not regarded as evidence as it is not given on oath and is not subject to being tested in cross-examination" (**JP. 54**). The magistrate then inexplicably went on to contradict himself and state: "however I will take it into account in arriving at my decision in the judgment" (**JP.54).** Indeed later in the judgment he proceeds wrongly to treat the unsworn statement as evidence. He states: "In relation to A1, I adopt the submission by the learned defense counsel regarding the view of the law of statements not given on oath. Such a statement is not dismissed out of hand. It must be considered in the light of other evidence available. Its impact is dependent on the availability of other stronger testimony" (**JP: 204**). He said: "there must be evidence to entitle me to dismiss the statement," clearly holding wrongly that the unsworn statement was evidence and implying that he needed contrary evidence to outweigh this unsworn testimony of the accused. Both Witness 46 on page 145 and witness 7 on page 255 plainly state that money placed into the government account becomes government money. This is strictly contrary to A1's contention that "his money was in the account." Based on the trial magistrate's claimed weighing of evidence, this should outweigh the

unsworn testimony. The management or handling of the funds in the ZAMTROP account was determined by the Finance Charter of 1970; that,however, expressly does not permit its use other than in accordance with the law. As the evidence demonstrated, all monies put into a government account belong to the Government. The law does not allow private persons to put money into government accounts. In light of the Magistrate's findings with respect to counts 1, 2,3,4, 5 and 6 that (1) monies received were government money and 2) that money was paid out of the ZAMTROP account to Chiluba's lawyers and children and 3) when the payments were made the ZAMTROP account had money received from the Ministry of Finance (**JP 262**), the only issue left to the magistrate was the accused's state of mind.

What then was the evidence adduced by the accused as to his state of mind to discharge the evidential burden of proof? Two basic principles should be kept in mind whenever evidence is evaluated: (a) evidence must be weighed in its totality, and (b) probabilities and inferences must be distinguished from conjecture or speculation. In *Miller v. Minister of Pensions* (1947, 3 All Er 372) Lord Denning observed on the question of proof of guilt that is required in a criminal trial that "proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt." In the present case the prosecution proved that each of the sums of money in the twelve accounts was traceable

back to the ZAMTROP account and the remittances from the Ministry of Finance through the Bank of Zambia, and the court accepted this fact **(JP 262)**.

While the accused person has a right not to testify in his trial, it follows that in such a situation the court is really only called upon to decide whether the uncontradicted *prima facie* case of the prosecution must harden into proof beyond reasonable doubt or not. Where there is direct *prima facie* evidence implicating the accused in the commission of the offence, the accused's failure to give evidence, whatever his reason may be for such failure, in general *ipso facto* tends to strengthen the state's case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability. In *Griffin v. California* 380 US 609 (1965), the California court of appeals held that the accused's constitutional right to silence cannot prevent logical references. In *S v. Boesak* (2001) ISACCR CC 24, the South African constitutional court held that the fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to the decision to remain silent during trial. If there is evidence calling for an explanation, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Although generally it is improper for a court to draw inferences against an accused for his failure to give evidence (*R v. Bathhurst* 1968 2QB 99), courts have repeatedly held as in *R v. Mutch*, 1973 57 Cr. App. R. 196 that such an inference may nonetheless be drawn where uncontested or clearly established facts call for an explanation from the accused.) In this case facts were clearly established: that Chiluba had taken monies from the ZAMTROP

account to pay for his personal needs such as his children's tuition and that ZAMTROP was a government account.

Argument III

Once the prosecution had established that ZAMTROP was a government account and that monies were taken from that account by the accused, the evidentiary burden to prove that there was private money in the ZAMTROP account shifted to the accused. The court erred in failing to rule accordingly and contradicted its earlier ruling at the "case to answer" stage that clearer evidence on the sources of the allegedly private monies was required to be furnished.

The burden of proof refers to the obligation of a party to persuade the trier of facts by the end of the case of the truth of certain propositions. But the evidentiary burden refers to one party's duty to produce sufficient evidence for a judge to call upon the other party to answer; the term also encompasses the duty cast upon a defendant to adduce evidence in order to combat a *prima facie* case made by his opponent. It is a fundamental principle of the law that in a criminal trial the burden of proof rests on the prosecution to prove the accused's guilt beyond a reasonable doubt. This burden will rest on the prosecution throughout the trial. At the outset of the trial, in tandem with the burden of proof, the state must also discharge an evidential burden. It will do this by establishing a *prima facie* case against the accused. Once a *prima facie* case is established the evidential burden will shift to the accused to adduce evidence in order to escape conviction. However, the burden of proof will remain with the prosecution. In his unsworn statement Chiluba, without any particularization whatsoever, claims that some of the money in the ZAMTROP Account is his. Despite the fact that the Magistrate had determined in his case-to-answer ruling that clear evidence on the sources of the allegedly private monies in the ZAMTROP account was required to be furnished, Chiluba ,as above, provided no

particulars of the source of the money; no explanation of why unidentified donors should have paid him so much money at all and/or at the times they did; no explanation of why the monies were to be treated as payments to him beneficially as opposed to payments to government or to him as Head of State in that capacity; no explanation as to why Chiluba should not account to government for such receipts rather than treat them as personal payments to him when, as Head of State, he owed a fiduciary duty to the Republic to account for payments received by virtue of his position as Head of State Remarkably, given that he had an evidential burden to lead sufficient evidence to cast doubt on the Prosecution case, he led no supporting evidence from third parties, most notably the alleged donors, and no supporting documents to corroborate his assertion that the monies credited to the account were intended for him beneficially. The magistrate seems to take Chiluba at his word that "someone" gave him money to put in the account. The Magistrate does this in spite of the fact that none of the deposits in the account name Chiluba as beneficiary, that the Magistrate himself on **JP 140** acknowledged that "there are other contributors to ZAMTROP account who are not readily distinguishable or the purpose of their funds explained" and despite the clear effect of government regulations.

The Magistrate erred in law in failing to test the credibility of the accused's unsworn, untested assertion that the monies were his and/or that he believed the monies were his. It is the duty of the Magistrate to test the evidence and not to simply accept it without further proof (particularly when on its face it is an incredible assertion) (Lord Denning in R. v. Sharpmpal Sigh 1962 AC 188). The Magistrate in testing the assertion of the accused could have had regard to the following factors:

- The accused's lawful emoluments (in the entire 10 years in office his total salary amounted to US $105,000). It is a matter of which judicial notice could and should have been taken as it is published and Zambia is a poor country.
- There was no evidence of personal wealth and it is common knowledge that the accused is from a humble background.
- A bald assertion that the credits to the ZAMTROP account relied upon were personal payments from "well wishers" did not disclose the identity of the well wishers; why when and where were payments made? What is the evidence that any of these payments were intended as payments beneficially to the accused? What is the evidence to displace the inference from the admissible evidence that payments into a government account are deemed to be for government beneficially?. What could be the basis or possible justification of such payments to a Head of State?
- The accused was in the position of a fiduciary. He must be taken to know that he is not entitled personally to profit from his position and to know that he is accountable as a fiduciary.
- The total absence of any documentary record or other witness (including the alleged donors) to corroborate his assertion.
- If it was all so innocent, what did the accused have to fear from tendering himself for cross-examination and calling witnesses who could speak as to the legitimacy of the payments, their non-governmental nature and his entitlement to the monies?

Further, in testing the accused's unsworn assertion that he had substantial personal

monies in the ZAMTROP account, the trial Magistrate should have considered the relevance of the Finance Regulations of Zambia, which govern government finances. Given that those Regulations establish that in law and in fact all the monies in the ZAMTROP account were Government monies (a matter confirmed by the Auditor General in her testimony **(JP 255)**, and given the accused's knowledge of them (it is to be inferred as a fact that he knew his own Regulations, and there was no evidence that he did not), the accused could not have honestly believed that he was entitled to use any monies from that account, whatever their original source and whatever the intention of the donor may have been.

Argument IV

Without specifying the objective facts on which to base the inferences, the Trial court wrongly held that two inferences could be drawn from the Evidence, one of which was that there were monies in the ZAMTROP account that belonged to Chiluba.

The trial court wrongly held that inferences could be drawn from Chiluba's unsworn statement that some of the money in the ZAMTROP account could be Chiluba's personal money (**JP 281**). The trial Court, citing *Mutale and Phiri v. The People* (1973) **(JP. 281)**, stated that where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one which is more favorable to the accused if there is nothing in the case to exclude such inference. The Magistrate proceeded to rule that "in all the nine counts, the possibility of at least two inferences is there. I have adopted the inference that the monies were paid from private funds in the ZAMTROP account" (**JP 281)**. The Magistrate wrongly concluded that there were two possible inferences on the evidence before him. No objective facts were

established and no sources of money were revealed. Even assuming that private money was deposited in ZAMTROP, there was no evidence before the court regarding who the intended beneficiary of those monies might be. None of the alleged private deposits ever designated an individual beneficiary. This was found as a fact by the court **(JP 140, 142 &143)**. Further, the law and evidence before the Magistrate is clear that all money in a government account is government money. The magistrate himself held that money in counts 2, 5, 3, 6, 7, 8 and 9 was from the ZAMTROP account and was traceable to the Ministry of Finance and that these monies were used to discharge personal obligations of the accused (**JP 219**). It is not in dispute that ZAMTROP is a government account. In *Caswell v. Powell Duffryn Associated Colliers Ltd* (1939 AER 722), the court stated that there can be no proper inference unless there are objective facts from which to infer other facts the court seeks to establish. In *De Wet v. President Versekeringsmaatskappy Bpk* (178 3 SA 495 (c) 500, the court observed that if there are no positive proved facts from which the inference can be drawn, the method of inference fails and what is left is mere conjecture or speculation. The court must stay within the four corners of the proven facts. It is not entitled to speculate as to the possible existence of other facts. In addition the inference the court seeks to draw must be consistent with all the proven facts. In this case the proven facts were that the accused had taken money from the ZAMTROP Government account and used the money to discharge personal obligations. There was no sworn evidence adduced to show grounds for a reasonable belief on the part of the accused that monies credited to the ZAMTROP account beneficially belonged to him or could be used to discharge a personal obligation of his. None of the allegedly private deposits ever designated Chiluba as the beneficiary (**JP 141, 141 &143**). The judge does

not require the level of sophistication and competence of Chiluba that should be required of a head of state when he allows Chiluba's testimony that he did not understand exactly how the account worked (**JP 243**). In any event, the relevant Finance Act and regulations provide that:

- third party monies are not to be mixed with Government monies.
- Monies in a Government account are deemed to belong to Government

ZAMTROP account was a Government account. It was opened on 8 December 1995, on the same day that the old ZAMTROP account—which had been established during the Presidency of President Kenneth Kaunda—was closed. The signatories were the Director General of ZSIS, Xavier Franklin Chungu, and a senior officer at the Zambia High Commission in London. Also, the account was subject to the Finance Charter of 1971, which concerned accounting matters of ZSIS; in consequence it was subject to the scrutiny only of the Head of State, the Director General of ZSIS and the Auditor General.
It is against this backdrop that the accused's state of mind and his unsworn statement in respect of it is to be evaluated. Given the nature and extent of the admissible evidence which led the Magistrate to conclude that the Prosecution had established a prima facie case, there was no evidence from which the Magistrate could properly infer that Chiluba reasonably believed that any of the money in the Zamtrop account was his beneficially.
In effect, the Magistrate allowed a proper and legitimate inference that payments by third parties into this government account which were unexplained were government monies (an inference drawn principally from the evidence as to the status of monies credited into a government account and government's treatment of them) to be displaced by a mere

unsworn, unparticularised, untested statement wholly unsupported by any admissible evidence. In the circumstances, there was in law no inference to be drawn from Chiluba's unsworn statement, let alone one which could displace the perfectly proper inference that these were government monies and Chiluba must have known it.

Argument V

The magistrate erred in law in characterizing Task Force witnesses as persons with an interest to serve and therefore not to be believed in absence of collaboration.

On **JP 200** the magistrate makes a completely unjustified statement against Task Force witnesses. He states: "I doubt this," in response to the witness's testimony that things were investigated thoroughly. The judge gives no credible reason for his expressed doubt. Further, on page **JP 60** the Magistrate states over and over again that the Task Force officers who investigated the case were biased toward the state and seems to discount their testimony. The Supreme Court of Zambia, citing English authorities *R. v. Prater* (1961 1v AER 298) and *R. v. Russell* (1968 52 Cr. App. R 147), has held in *Mulupi v. The People* (Zambia Supreme Court 1978) that the critical test for determining whether a witness is a person with an interest to serve is whether the witness can reasonably be suggested to be serving some purpose of his own in giving false evidence. State investigators such as members of the Task Force or the police cannot be said to have an interest of their own to serve purely on the ground that they work for the state. The Magistrate clearly erred in so holding.

Conclusion

The prosecution proved its case beyond reasonable doubt, and the Magistrate, having found that Chiluba had a case to answer, erred in law in not finding him guilty in the absence of proof to the contrary. At the end of the day, all the Magistrate had before him to rebut the Prosecution case which *prima facie* established the guilt of the accused was a mere unparticularised, uncorroborated, unsworn, untested assertion which, if true, would represent a gross breach of his fiduciary duty and itself raise the specter of corruption. The unsworn evidence made by Chiluba was not evidence in law and the court erred in relying on it to disprove the cogent evidence produced by the prosecution that 1) monies were taken by the accused from ZAMTROP, a government account, and 2) by law money in a government account is deemed to be government money.

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Author

Muna Ndulo, Professor of Law Cornell University Law School and Director Cornell University's Institute for African Development. He is also Honorary Professor of Law, Faculty of Law, University of Cape Town.