ACCUSED'S RIGHTS AND ACCESS TO PROSECUTION INFORMATION IN SUBORDINATE COURTS IN ZAMBIA

Sunday B. Nkonde SC and William Ngwira[1]

Introduction

The Zambian criminal justice system in the Subordinate Court[2] is notorious for delays in the disposing of cases. The frequency of adjournments is alarming, and this is usually blamed on defence lawyers. But very few defence lawyers 'stand up to the accusing finger' by explaining that the frequency in adjournments blamed on defence lawyers – and which inevitably contribute to delays in the disposal of cases – is mainly due to the infamous 'trial by ambush', i.e., lack of disclosure of evidence prior to trial in the Subordinate Court.

A defence lawyer who is ambushed during trial with complex documentary evidence has a choice to either seek an adjournment to study the evidence, sometimes disguised as 'seeking further instructions from the client', or to proceed and suffer the possible embarrassment of appearing unprepared for cross-examination of a prosecution witness.

Despite being detested, this type of trial by ambush still survives in the Subordinate Court, with its embedded injustices and unfairness. But should the denial of evidence to the defence prior to trial in the Subordinate Court still have a place in the Zambian criminal justice system?[3]

In order to put the injustices and unfairness of trial by ambush in the Zambian Subordinate Court into perspective, the justification for pre-trial non-disclosure of evidence is reviewed and a criticism of the Zambian approach is made by reference to procedures in other African jurisdictions.

1 Sunday B. Nkonde SC and William Ngwira are partners in SBN Legal Practitioners, a law firm that is active in human rights cases in Zambia.

2 Subordinate Courts are defined in the Subordinate Courts Act, Cap 28 of the Laws of Zambia, as courts which are subordinate to the High Court in each district, including a subordinate court of the first class to be presided over by a Principal Resident Magistrate, a Senior Resident Magistrate, Resident Magistrate, or a Magistrate of the first class; a subordinate court of the second class to be presided over by a Magistrate of the second class; and a subordinate court of the third class to be presided over by a Magistrate of the third class.

3 The accused's rights and access to prosecution information were intensely discussed at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Protea Hotel, Chisamba, Lusaka, Zambia, on 27 and 28 February 2014.

Justification for pre-trial non-disclosure of evidence

In *People v Kasonkomona*,[4] the prosecution put it as follows:

> While we note that under the Constitution in article 18(1) of Chapter 1 of the Laws of Zambia, a person arrested and charged for a criminal offence is entitled to a fair hearing, there is no corresponding provision either in the Constitution itself or the Criminal Procedure Code … which obligates the prosecution in the Subordinate Court to extend, provide or exchange the witness statements or exhibits which the prosecution are likely to avail before court.[5]

In addition:

> It is trite law that the burden of proof in criminal cases rests on the prosecution and the Accused has no burden to prove his innocence ... *Muwowo v The People* (1965) ZR 91 (CA) one of the many cases in which this well settled principles of law has been repeated ... In the same vein neither the Constitution nor the Criminal Procedure Code … has provision where the Prosecutions [*sic*] is obligated to give witness statements or exhibits to the defence before trial commences.[6]

Article 18 (1) of the Constitution of Zambia referred to above, and also article 18(2)(c) and (e), are relevant to this discussion. They state:

> 18 (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with a criminal offence -
>
> …
> (c) Shall be given adequate time and facilities for the preparation of his defence.
>
> …
> (e) Shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

Dismissing the application by the defence to refer the question of whether failure by the state to provide the defence with witness statements contravened the provision of article 18(1) of the Constitution of Zambia, the Subordinate Court in its ruling[7] cited (as authoritative on the issue) the Supreme Court case of *Miyanda v Attorney General*,[8] which dealt with a summary trial and is

4 *People v Kasonkomona* CR No. 9/04/13 (SubCt). All pertinent case documents are available at http://www.southernafricalitigationcentre.org/cases/ongoing-cases/zambia-activist-defends-right-to-freedom-of-expression/. This case is discussed in full in SB Nkonde "Judicial Decision-Making and Freedom of Expression in Zambia: The Case of *People v Paul Kasonkomona*" in this publication.

5 Written response on 30 April 2013 from the prosecution to a request by the defence for witness statements and exhibits to be supplied before trial in *People v Kasonkomona* CR No. 9/04/13 (SubCt).

6 The state's submission opposing the accused's request for constitutional reference on the question of pre-trial disclosure of witness statements and exhibits in *People v Kasonkomona* CR No. 9/04/13 (SubCt), Prosecution's Submission on a Preliminary Issue Raised by the Defence (Accused) for Constitutional Reference 3-4.

7 *People v Kasonkomona* CR No. 9/04/13 (SubCt) Ruling on Preliminary Issues for Constitutional Reference.

8 (1986) ZR 58 (SC).

not directly pertinent to the issue under discussion. The Court in *Kasonkomona*, therefore, held:

Trial at the Subordinate Court is still summary. The prosecution is under no obligation to provide the statements and that is settled law.[9]

Criticism of the Zambian approach and comparative discussion

As can be seen from the example cited above, there is seldom exhaustive argument and corresponding judicial examination of an accused's protected rights in the Subordinate Court. The cited case of *Miyanda* is far from helpful in this respect. The case was decided on the premise that the appellant was wrongly questioning before the Subordinate Court his committal for summary trial in the High Court, when the offence he was facing, unknown to him, was reserved by statute to be tried by the High Court. The case is therefore not settled authority for the proposition that the denial of access to evidence prior to trial is constitutional.

The procedure of supplying witness statements and exhibits to the accused is observed in the High Court and there is no reason why it should not be the same in the Subordinate Court. As was well put in the Namibian High Court case of *S v Lucas*:[10]

> There is not a different brand of fairness in the lower courts in comparison to that applicable in any of the superior courts. After all, it is in the magistrates' courts that most members of the public come into contact with the law and, on the strength of their experience there, they form their perceptions of justice and fairness. The same rules of evidence and procedure apply, with certain exceptions, in all courts of law. Where there are distinctions it concerns practice rather than rules that are designed to ensure fairness and justice to all parties.[11]

It becomes a serious concern, however, if a narrow interpretation of the accused's constitutional rights to a fair trial – including having access to the evidence against him – is attributed to the need to avoid judicial activism.[12] Courts in jurisdictions near to Zambia, when confronted with the problem under discussion, have in fact tackled it with exemplary boldness.

Botswana

In the case of *Ahmed v Attorney General*[13] (decided by Collins J), the applicant, while awaiting trial in a Magistrates Court, made requests to the state for copies of the various documents in the police docket to be released to him, to enable him to prepare his defence and instruct his lawyers effectively. The state refused to hand over copies of state witness statements and other relevant documents to be used in the prosecution. The applicant made an application to the High Court contending that the refusal to hand over documents was in breach of his rights under section 10 of the Constitution of Botswana, which guaranteed him a fair hearing; that he was not being given

9 *People v Kasonkomona* CR No. 9/04/13 (SubCt) Ruling on Preliminary Issues for Constitutional Reference R5.

10 1997 (9) BCLR 1314.

11 *Id.*

12 Discussion with some judges on the sidelines of the Judicial Colloquium on the Rights of Vulnerable Groups, held at Protea Hotel, Chisamba, Lusaka, Zambia, on 27 and 28 February 2014.

13 2002 (2) BLR 431 (HC).

adequate facilities for the preparation of his defence [section 10(2)(c)]; and that he was not being given facilities to examine the witnesses called by the prosecution before the Court [section 10(2)(e)].

Except for the inclusion of the words "or recognised" after the word "established" in section 10(1), the wording of sections 10(1), 10(2)(c), and 10(2)(e) of the Constitution of Botswana, which was under consideration, is the same as the provisions of articles 18(1), 18(2)(c), and 18(2)(e) respectively of the Constitution of Zambia.

Collins J started by acknowledging that the applicable law was that:

> [P]rosecution witness statements are, generally, privileged ... But if that law offends against any of the protective provisions ... of the Constitution ... then any aggrieved person is entitled to ask the court to hold that such law offends his or her entrenched rights.[14]

The judge then went on to refer to Aguda JA in *Attorney General v Dow*,[15] in which this observation was made:

> I wish to take judicial notice of that which is known the world over that Botswana is one of the few countries in Africa where liberal democracy has taken root. It seems clear to me that all the three arms of government - the Legislature, the Executive and the Judiciary - must strive to make it remain so, except to any extent as may be prohibited by the Constitution in clear terms. It seems clear to me that in so striving, we cannot afford to be immune from the progressive movements going on around us in other liberal and not so liberal democracies such movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understandings as well as in the respectable and respected voices of our learned brethren in the performance of their adjudicatory roles in other jurisdictions.[16]

Collins J therefore, *inter alia*, held:

> [1] That there was no general duty on the part of the prosecution to disclose witness statements to an accused person.
>
> [2] There was no reason to interpret section 10 restrictively so as to bring it in line with the common law.
>
> [3] While the word 'facilities' was not clear and unambiguous, it had to be given a generous interpretation.
>
> [4] The issue at stake was to redress the imbalance in a criminal trial, given the advantages the State enjoys: it was not to balance an accused's rights to a fair trial against the interests of the State.
>
> ...
>
> [6] The applicant was entitled to an order compelling the State to provide him or his legal representative, within seven days of the order, with copies of all the State witnesses' statements,

14 *Id* 439.

15 (1992) BLR 119 (CA). This case is also cited in RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" and L Mushota "International Law, Women's Rights, and the Courts: A Zambian Perspective" in this publication.

16 *Id* 168.

> as well as documentary evidence in possession of the State and/or the police pertaining to the charges against the applicant.[17]

Conscious of the effect of his judgment, Collins J also said:

> There will be those who consider that this judgment ... marks a radical change from criminal procedure and the common law docket privilege which has served us well for the past 30 years or so ... I wonder whether it is really radical at all. To the extent that the prosecuting authorities (the police in particular) will need to sharpen their skills, their wits and their pencils in order to improve upon existing procedures and techniques is undeniable but that is a good thing and will result in a more efficient system of criminal justice over time. Perhaps we have been ignoring the essence of that system for too long and have reached a point where fair combat in our adversarial approach has been undermined by a creeping ethic of winning at all costs. It is neither a healthy nor productive development. It creates suspicion and mistrust which in turn governs the manner in which the State in particular conducts itself, i.e. to win. That is wrong. Criminal justice in a democracy has a broader and more pervasive objective. It is to punish the guilty but equally to ensure that the innocent go free. Once the State ascribes to the concept of 'winning' as its pre-determinant role then it forgets its social responsibility and prosecuting function as a seeker for truth.[18]

As expected, the state appealed to the Court of Appeal against the judgment – *Attorney General v Ahmed.*[19] In its landmark judgment, the Court of Appeal held:

> [1] In the absence of any specific limitations in section 10(2), no implied restriction should be read into that section.
>
> [2] It was the duty of the prosecution to lay before the court all the evidence which was relevant to the issue, whether favourable to the prosecution or favourable to the defence. It was a further duty of the prosecution to comply with the provisions of the Constitution, which entitled an accused person to a fair hearing and adequate facilities for the preparation of his defence. Any action to the contrary would be a dereliction of duty.
>
> [3] The word "facilities" when used in section 10(2) was apt to cover the acquisition by the defence of statements from witnesses and the acquisition of copies of any documents relevant to the charge. The only person in a position to authorise the supply of such statements and documents was the prosecutor and the prosecutor had to supply them.
>
> [4] In order to ensure a fair hearing and the provision of adequate facilities for the preparation of the defence, the prosecution should disclose to the defence all witnesses' statements and the documents on which the prosecution intends to found.
>
> [5] Every accused person is presumed to be innocent until the contrary is proved. The innocent accused should not be deprived of his constitutional rights because some villains may take improper advantage.
>
> [6] The word "adequate" applied to both time and facilities in section 10(2) and, accordingly, the

17 *Ahmed v Attorney General* 2002 (2) BLR 431(HC) 432.

18 *Id* 460.

19 2003 (1) BLR 158.

> provision was not absolute. If the prosecution could show that they had good reason to exercise privilege and that such exercise of privilege would not hamper the accused in the preparation of his defence, they may withhold the statement. The general rule was, however, disclosure. Privilege was the exception.[20]

The Court of Appeal further cautioned that:

> [I]t is useful to remember the role of the State in the prosecution of a criminal charge. It is not the function of the prosecution to obtain a conviction by any means fair or foul. It is not their function to conduct proceedings in such a way that the accused is ambushed and kept in the dark about critical issues until the last possible moment, whereby his ability to prepare a proper defence is severely hampered. It is not their function to conceal from the defence evidence in their possession which might be of assistance to the defence.[21]

Kenya

The issue was also well aired in the Kenyan High Court case of *Juma and Others v Attorney General.*[22] This was a constitutional reference arising from the charging of the applicants with certain criminal offences, whereupon the applicants applied to the trial court, before the commencement of the trial, for orders that the prosecution supply to the applicants copies of the statements made by the would-be prosecution witnesses, and also copies of exhibits on which the prosecution would rely at the trial. The trial court turned down the application and eventually the applicants went to the High Court, complaining that their rights under sections 70, 77(1), and 77(2) of the Constitution of Kenya were in danger of being violated by not being allowed to have access to the statements and exhibits of the prosecution witnesses.

Sections 70, 77(1), and 72 of the 1969 Constitution of Kenya relate to being afforded a fair hearing within a reasonable time by an independent and impartial court established by law, being given adequate time and facilities for the preparation of one's defence, and being given facilities to examine witnesses against one in a criminal case. These provisions are similar to the provisions of articles 18(1), 18(2)(c), and 18(2)(e) of the Constitution of Zambia.

The Court agreed that the applicants were entitled to pre-trial disclosure of the prosecution witnesses' statements and exhibits, after discussing the meaning of 'facilities' in the following passages:

> [F]or a hearing to be fair a person charged with a criminal offence must be afforded among other things 'facilities for the preparation of his defence' and 'facilities to examine the witnesses called by the prosecution and to obtain the attendance and carry out the examination of witnesses to testify on his behalf'. He must be given and afforded the facilities to do those things. In practical terms his constitutional edict is satisfied only if an accused person is given and allowed or afforded everything which promotes the ease of preparing his defence, examination of any witnesses by the prosecution and securing witnesses to testify on his behalf. He must be given and afforded that which aids or makes easier for him to defend himself if he chooses to defend the charge. In general

20 *Id.*
21 *Id.*
22 (2003) AHRLR 179.

> terms it means that an accused person shall be free from difficulty or impediment and free more or less completely from obstruction or hindrance in fighting a criminal charge made against him. He should not be denied something the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall his case and defence or lessen and bottleneck his fair attack on the prosecution case.
>
> We say so because we believe that the framers of our Constitution intended the expression 'facilities' in this section to be understood in its ordinary everyday meaning, free from any technicality and artificial bending of that word. In its ordinary connotation that word means the resources, conveniences, or means which make it easier to achieve a purpose; an unimpeded opportunity of doing something; favourable conditions for the easier performance of something; means or opportunities that render anything readily possible. Its verb is to 'facilitate' and means to render easy or easier the performance or doing of something to attain a result; to promote, help forward, assist, air or lesson [*sic*] the labour of one; to make less difficult; or to free from difficulty or impediment ...
>
> The fullest possible pre-trial access to information held by or in the control of the prosecution helps the accused or his advocate to determine precisely what case the accused has to meet, to prepare for cross-examination, to determine what witnesses are available to him, to make further inquiries if necessary and generally to explore such other avenues as may be available to him. Obviously the constitutional right to be represented by a lawyer of one's choice would be meaningless if it did not mean informed representation. Moreover, an accused's right to adduce and challenge evidence cannot be exercised properly unless he can determine from the statements and exhibits of the prosecution's witnesses whether there are any witnesses favourable to him who can be either those who had already made statements to the police or others who were mentioned in such statements.[23]

In the course of the judgment, the Court observed that:

> In an open and democratic society based on freedom and equality with the rule of law as its ultimate defender such as ours the package constituting the right to a fair trial contains in it the right to pre-trial disclosure of material statements and exhibits. In an open and democratic society of our type courts cannot give approval to trials by ambush and in criminal litigation the courts cannot adopt a practice under which an accused person will be ambushed. Subject to the rights of every person entrenched in the Constitution of Kenya and including the presumption of innocence until proved guilty beyond reasonable doubt, the fundamental right to a fair hearing by its nature requires that there be equality between contestants in litigation. There can be no true equality if the legal process allows one party to withhold material information from his adversary without just cause or peculiar circumstances of the case.[24]

Uganda

In Uganda, the Constitutional Court addressed this issue in *Kim v Attorney General*.[25] The reference to the Constitutional Court emanated from the charging of the applicants before the Magistrates Court with several offences under the Penal Code Act. Before pleading to the charges,

23 *Id* at paras. 10-11, 17.

24 *Id* at para. 14.

25 [2008] UGCC 2.

their counsel applied to the Trial Magistrate for an order that the Director of Public Prosecutions supply the applicants with copies of all statements made to the police by potential witnesses for the prosecution, as well as copies of all exhibits that the prosecution would rely on at the trial – to enable the applicants to prepare their answers, and also defences to the charges. The application was made under articles 28(1)(3)(a), (c), (d), and (g) of the Constitution of Uganda. The determination of the application necessitated interpretation of those provisions of the Constitution. The following question was referred for determination:

> Whether within the plain, natural and practical meaning of article 28(1)(3)(a), (c), (d) and (g) of the Constitution of the Republic of Uganda 1995, an accused person in a Magistrates Court is entitled to disclosure of:
>
> (a) Copies of statements made to police by persons who will or may be called to testify as witnesses for the prosecution and
>
> (b) Copies of documentary exhibits which are to be offered in evidence by the prosecution before being called upon to plead the charges.[26]

Articles 28(1)(3)(a), (c), (d), and (g) of the Constitution of Uganda, which was under consideration, states:

> (1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.
>
> ...
> (3) Every person who is charged with a criminal offence shall:
>
> (a) Be presumed to be innocent until proved guilty or until that person has pleaded guilty;
>
> ...
> (c) Be given adequate time and facilities for the preparation of his or her defence;
>
> (d) Be permitted to appear before the court in person or at that person's own expense by a lawyer of his or her choice;
>
> ...
> (g) Be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.

In considering the provisions, the Court observed:

> What is in issue here is what constitutes "a fair hearing". Sub-article 3 of article 28 sets out the minimum requirements to constitute a fair hearing.
>
> These requirements include:
>
> (a) That a person who is charged with any criminal offence must be presumed innocent until he or she is proved guilty or until he or she has pleaded guilty.

26 *Id.*

...

(c) That such a person must be given adequate time and "facilities" for preparation of his or her defence.[27]

The Court, agreeing with the judgment of the Kenyan High Court in *Juma and Others*,[28] stated:

> We agree with the interpretation of section 77(1) and (2) of the Kenyan Constitution that the right to a fair hearing contains in it the right to a pre-trial disclosure of material statements and exhibits. We also agree that in an open and democratic society, courts cannot approve of trial by ambush. The right to a fair hearing envisages equality between the contestants in litigation.
>
> Similarly, our article 28(1) and (3) that guarantees the right to a fair hearing must contain in it the right to a pre-trial disclosure of material statements and exhibits. This is the only way to ensure equality between the contestants in litigation.[29]

The Court, therefore, held:

> Article 28(1)(3)(a), (c), (d) and (g) of the Constitution of Uganda in their plain, natural and practical meaning, *prima facie* entitle an accused person in a Magistrate's Court to disclosure of:
>
> (a) Copies of statements made to police by the would be witnesses for the prosecution.
>
> (b) Copies of documentary exhibits, which the prosecution is to produce at the trial.
>
> (c) The disclosure is subject to limitations to be established through evidence by the prosecution.[30]

Namibia

The Namibian High Court case of *State v Malumo and 112 Others*[31] also becomes relevant to the discussion to the extent that it was held that the late discovery of witness statements is tantamount to no discovery at all, and where this failure can reasonably be expected to limit an accused person's right to cross-examination and the opportunity of an accused person to present his case, evidence based on these witness statements may be excluded.

The Court also approved the use of foreign judgments from countries with similar constitutions, when interpreting domestic constitutional provisions – citing the South African Constitutional Court judgment of Kriegler J in *Bernstein and Others v Bester and Others NNO*,[32] that:

> Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision.[33]

27 *Id.*
28 (2003) AHRLR 179.
29 *Kim v Attorney General* [2008] UGCC 2.
30 *Id.*
31 Case No. 32 of 2001.
32 1996 (2) SA 751 (CC) 811-12.
33 *Id* at para. 133.

International Instruments

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, promulgated by the African Commission on Human and Peoples' Rights, includes as essential elements of a fair trial, equality of arms between the parties to a proceeding; and an adequate opportunity to prepare the case, present arguments and evidence, and to challenge or respond to opposing arguments or evidence.[34]

The United Nations Human Rights Committee, in its General Comment Number 32[35] on the right to equality before courts and tribunals, and to a fair trial, states:

> The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[36]

Conclusion

The Zambian criminal justice system should move with the times and emulate progressive trends in other liberal and even less liberal democracies – where prior-to-trial disclosure of material prosecution evidence has been held to be the rule, and privilege the exception. Denying the accused access to the evidence against him, which is currently the order of the day for procedures in the Zambian Subordinate Court, is the antithesis of justice and fairness. It is, in effect, a trial by ambush. It not only attracts scorn from the public who the criminal justice system is supposed to serve, but also greatly contributes to the extremely slow pace at which the wheels of justice currently turn.

34 Section 2(a) and (e), Resolution of the African Commission on Human and Peoples' Rights, 26th Ordinary Session (1999) available at http://caselaw.ihrda.org/instrument/fairtrial_g/.

35 Human Rights Committee, General Comment No. 32.

36 *Id* at para. 13.