HB 127/16
HCB 30/16
X REF CRB 2959/15
X REF CRB REG 125/16

VINCENT SHAVA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 20, 23 & 24 MAY 2016

Bail Pending Appeal

B. Ndove for the applicant
T. Hove for the respondent

BERE J: The applicant was employed as a Public Prosecutor and based at Bulawayo Magistrates Court. On 11th of March 2016, and after having been tried of two counts of abuse of public office as informed by section 174 (i) (a) of the Criminal Law (Codification and Reform Act) [Chapter 9:23], he was convicted and sentenced to 5 years imprisonment of which 2 years were suspended for 5 years on the usual conditions of good future conduct.

Having been so convicted and sentenced, the applicant made an impromptu request for bail pending appeal which application was declined by the court *a quo*. The instant application seeks to have the applicant granted bail pending the prosecution of his appeal filed in this same court.

Before dealing with the application filed I wish to make certain remarks on the structure of the application for bail filed in this court. It is noted that the bail application itself, and as has become common in similar applications filed in this court is a combination of the written statement in support of bail application and heads of argument. It occurs to me that this approach is wrong and not supported by the rules which regulate such an application, *viz* High Court of Zimbabwe (Bail) Rules[1.]

1. High Court of Zimbabwe (Bail) Rules 1991

The Rules in question sufficiently speak to what must be contained in the statement for bail. They do not speak to having to combine that statement with heads of argument. If heads of argument have to be filed these must be separately filed to avoid contaminating the statement itself.

The statement for bail must be kept simple as dictated by the Rules that create it.

Having made this observation I wish now to deal with the application filed.

The broad considerations in an application for bail pending appeal are trite and the cardinal factors which must guide the court are basically the following ones:

(a) The likelihood of the applicant absconding in the event of him/her granted bail, and
(b) The existence or otherwise of reasonable prospects of success in the lodged appeal.

See *The State* v *Williams*[2]; *S* v *Benatar*[3] and *S* v *Manyange*[4], amongst a plethora of other cases.

As noted by FIELDSEND C J (as he then was) in the *State* v *Williams*,

> "In my view, to apply this test properly it is necessary to put in the balance both in the likelihood of the applicant absconding and the prospects of success. Clearly the two factors are inter-connected because the less likely are the prospects of success the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail".[5]

2. 1980 ZLR (1) 466
3. 1985 (2) ZLR 205
4. 2003 (1) ZLR 21
5. *S v Williams* (*supra)* page 468G - H

In its opposition to the application for bail pending appeal, the State has harped on the absence of prospects of success as the likely inducement for the applicant to abscond and I feel inclined to focus on this issue in this case.

It does seem to me that a perusal of the proceedings in the court *a quo* are stalked by the failure by the court to appreciate that in dealing with the evidence of the complainant, Vusumuzi Ndhlovu, the court was clearly dealing with the evidence of an accomplice. L. H. Hoffman and D T Zeffertt in their discussion on accomplices refer to an accomplice as basically "a person who has participated or assisted in the commission of a crime other than the perpetrator."[6] It is common cause that the complainant allegedly dealt with the accused secretly in giving him the first $100 dollars.

Section 267 of our Criminal Procedure and Evidence Act[7] speaks to the procedure that the court must follow in dealing with an accomplice witness. Although this issue was highlighted to the court *a quo* by the applicant's counsel, both the presiding magistrate and the prosecutor did not seem to understand this position. The result was that an accomplice witness was treated like an ordinary witness for the State. The view that I take is that the appeal court must be allowed to deal with refined arguments on this issue which was clearly not fairly dealt with in the lower court. This witness was central to the prosecution of the applicant and it is possible that failure to appreciate the legal status of this witness might be regarded as a misdirection that goes to the root of the whole proceedings.

It is quite doubtful that the appeal court will endorse the position adopted by both the magistrate and the prosecutor that the principle witness in this case was not an accomplice in the light of the specific provisions of the law regulating the conduct of proceedings in dealing with such witnesses. The situation gets worse when one notes that there was no attempt by the presiding magistrate to invoke the necessary precaution of warning himself against the danger of convicting the appellant upon the evidence of the complainant.

6. *The South African Law of Evidence* 4th Edition (Butterworths) pp 575 – 576
7. *Section 267 of Criminal Procedure And Evidence Act [Chapter 9:07]*

It is trite that where the court is dealing with the evidence of an accomplice.

> "The court should warn itself of the danger of convicting upon the evidence of an accomplice and show that it has heeded the warning by pointing to some factor which can properly be regarded as reducing the risk of convicting an innocent person." [8]

It was critical in the lower court proceedings for the prosecution to adequately deal with the issue of the recovery of the trap money from the applicant. The record of proceedings will show that there is no unanimity amongst the witnesses as to how the $100 was recovered from the accused at Edgars Stores. The applicant's position is that this money was planted on him by the arresting details. I. M. Makondora one of the key witnesses seems to concur with the applicant's position on this issue if the record of proceedings is anything to go by as evidenced by the following exchanges in the record of proceedings.

> "Question by DC to this witness
>
> Q the accused will say you manhandled, pushed and shoved by the man who dragged him outside and shoved in a vehicle and shown a $100 note?
> A nothing like that happened. We held him by the belt, <u>showed him the $100 note</u> and a photocopy of the money"[9] (*sic)*

On record page 26 I. M. Makondora gives yet another complicated or unclear version of what transpired. The witness, said the applicant cooperated and gave him the trap money in the presence of one Z. Mangizi, a Safeguard Security Officer. But alas! When Mangizi testified, he was clear that he did not witness money changing hands between the accused/applicant and the arresting officers. Contrary to the evidence of the arresting details, the witness testified that the officers struggled with the accused inside the shop and even left the shop without him having seen any money changing hands.

8. The South African Law of Evidence (*supra*) p 575

9. Record page 31

Alifanos Toringa, a sergeant in the ZRP, one of the arresting details did not speak with conviction when questions were put to him about whether or not he saw the complainant handing over the trap money to the applicant. Even the presiding Magistrate was satisfied that this witness was not candid with the court on this aspect. The record of proceedings will also show that the arresting details, being police officers and as such being persons in authority were allowed to utter otherwise inadmissible confessions by the accused in clear violations of what has become elementary procedure. See *S* v *Nkomo*[10], per McNALLY JA –

It will be noted that one of the pieces of evidence which tended to link the accused to the commission of the offences charged were the telephone exchanges between the applicant and the complainant. The accused gave a reasonably possible explanation for such telephone exchanges.

Finally, it occurs to me that the presiding Magistrate was correct in his interpretation of section 70(1) (i) of the Constitution. Perhaps what needs to be clarified is that an accused person who chooses to invoke this section at the close of the State case must be understood to be adopting his defence outline as his spoken evidence under oath. This would be so because when an accused person elects to give evidence at the close of the State case, what he will be doing is to expand on his defence outline already forming part of the record of proceedings.

The decision by an accused not to give evidence is simply an indictment to the prosecution to present its case in such a way that with or without the additional evidence of the accused other than his defence outline, the court must be able to secure his conviction. The State cannot wait for he accused person to give evidence, as it were, in order for it to secure a conviction. The State's case must be sufficient on its own and unaided by the accused person's evidence.

Given the manner in which the evidence was presented and assessed in this case, I am unable to come to the conclusion that the applicant's appeal is a hopeless one to the extent of holding it to lack prospects of success.

10. 1989 ZLR (3) p 117 (S)

The applicant's appeal is arguable.

As indicated before one may not be able to separate the likelihood of abscondment from the prospects of success. These two are interconnected. For these reasons I feel more inclined to grant the applicant bail pending appeal on the unchallenged terms outlined in the draft order to his application.

It is hereby ordered that:

1. The applicant be and is hereby granted bail pending appeal on the same bail condition as were in force under his bail pending trial under CRB 2959/15, X Ref CRB Reg 125/16, that is to say:
   (a) The Clerk of Court (Criminal) Magistrate Court, Bulawayo shall retain:
      (i) The US$500,00 bail deposit paid under CRB 2959/15 as the applicant's bail in this case.
      (ii) The applicant's passport also surrendered under CRB 2959/15 pending the finalisation of the applicant's appeal under HCA 41/16.

Messrs Ndove, Museta & Partners, applicant's legal practitioners
Prosecutor General, respondent's legal practitioners