REPORTABLE (39)

Judgment No. SC 21/03
Crim. Application No. 107/03

RUSSEL WAYNE LABUSCHAGNE v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, 18 JUNE 2003

M Mahlangu, for the applicant

R Tokwe, for the respondents

Before: GWAUNZA JA, In Chambers, in terms of s 5(1) of Statutory Instrument 290/91

GWAUNZA JA: At the conclusion of the hearing of this matter, I dismissed the application – which was for bail pending appeal – and indicated the full reasons for the judgment would follow. These are the reasons.

The applicant was convicted in the High Court of murder with constructive intent. He was sentenced to fifteen years' imprisonment. He applied to the same judge for, and was granted, leave to appeal to this Court against his conviction and sentence. His subsequent application for bail pending the appeal was dismissed. He has now filed this application in terms of s 5(1) of Statutory Instrument 290/91. Given the provisions of ss 121 and 122 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the application is in effect an appeal against the refusal by the High Court to admit the applicant to bail pending appeal.

A consideration of the background to the application is pertinent. The applicant was charged with murder, it being alleged that he caused the death by drowning of Wilson Mudimba. After assessing the evidence placed before him

during the trial, the learned judge *a quo*, relying mostly on the evidence of the State witness, Siansole Muchimba ("Muchimba"), accepted as proved that:

(i) The applicant, who on the day in question was driving his speedboat along Sinamwenda River in Binga, came upon the deceased and his friend, Muchimba, who were in a fishing canoe in the middle of the same river, 35–40 metres from the riverbank and in water that was 9–10 metres deep.

(ii) The applicant then firstly cut the fishing nets previously set by Muchimba and the deceased, and then rammed his speedboat into the side of their canoe, capsizing it.

(iii) Muchimba and the deceased were thrown into the river, forcing the latter shortly thereafter to swim to the speedboat and cling with both hands to its side. With the assistance of his co-accused who held the deceased by one hand, the applicant used the oar from the capsized canoe to hit the deceased on and about the head and body, causing him to again fall into the river.

(iv) During the process in which the applicant was assaulting the deceased, one intended blow missed its target (the deceased) and landed on the speedboat, resulting in the oar breaking into two.

(v) The deceased swam to a tree stump in the river and clung to it. After unsuccessfully trying to catch Muchimba, who had started to swim towards the shore, the applicant drove the speedboat towards where the deceased was and rammed it into him.

(vi) The deceased lost his grip on the tree stump, shouted to Muchimba that he was "dying" and sank into the river.

(vii) The deceased did not emerge from the river. His body was, in fact, never recovered, the assumption being that he had drowned.

(viii) The applicant was seen by Muchimba seemingly, and briefly, searching for the deceased, after which he sped away.

The court *a quo* was satisfied on the evidence of Muchimba, Mwindo (the deceased's brother-in-law) and Makore, that after the applicant had sped away these three approached one Michael Shaw ("Shaw") for assistance. They wanted him to radio news of the deceased's disappearance into the river to the police at Binga. Mr Shaw was reluctant to accede to the request without first speaking to the applicant. He asked the trio to come back the following day. They duly did so early in the morning and observed, as they approached Shaw's house, the applicant leaving the same house. Having received no co-operation from Shaw, the three decided to go to the river and locate the deceased's body. They canoed to the tree stump to which the deceased had clung and all noticed traces of blood on it. After failing to locate the body, the three went to a place called Chibuyu to telephone the police at Siabuwa.

In the course of the next few days, when the police and the sub-aqua unit went to the river to examine the deceased's canoe and search for the deceased's body, a cap that the applicant had worn on the day in question, and which he had lost, as well as one part of the oar that had broken into two during the attack on the deceased, were recovered. The appellant was eventually arrested.

The learned trial judge was impressed by Muchimba as a witness. He found him to be consistent, honest and credible in his evidence, despite the lengthy cross-examination that he was subjected to. The learned judge also found that despite some minor differences – essentially matters of detail – in the evidence of Muchimba, Mwindo and Makore, their evidence had been credible. More importantly, the learned judge found the evidence of Mwindo and Makore, on the blood seen on the tree stump to which the deceased had clung, corroborated that of Muchimba.

The learned judge was not impressed with the evidence of Shaw, whom he described as a "reluctant" witness. He found, however, that albeit reluctant and obviously trying not to incriminate the applicant, Shaw had, perhaps without

meaning to, corroborated the evidence of Muchimba that the applicant had rammed into the deceased's canoe, capsizing it, and that of the two occupants of the canoe, only one had swum to the river bank and escaped. The one was Muchimba. Shaw's evidence was that this was what the applicant had told him.

Contrary to this evidence the applicant had tried to convince the court that the two, Muchimba and the deceased, had scrambled onto the riverbank and disappeared into the bush upon seeing him approach in his speedboat.

It is trite that in the absence of a misdirection on the part of the trial court, this Court will not interfere with the lower court's finding on credibility (see *S v Isolano* 1985 (1) ZLR 62 (SC)).

The applicant avers in effect that the learned trial judge misdirected himself in finding that Muchimba was a reliable witness, especially given the facts that the case against him had been based on the evidence of a single witness, i.e. Muchimba, and that there were "material" discrepancies between his oral evidence and that contained in the outline of the State case, his warned and cautioned statement to the police and the evidence of Mwindo, Shaw and Makore.

I am not persuaded by this averment.

Firstly, while Muchimba may have been a single witness, his evidence was corroborated in very material respects by the evidence of Mwindo, Makore and Shaw. The evidence of Mwindo and Makore that they saw traces of blood on the tree stump in the river supported the evidence of Muchimba, not only in respect of the deceased's having clung to that stump, but also in respect of his having sustained injuries from which he bled. The injuries, according to Muchimba, were inflicted on the deceased by the applicant, either when he hit him about the head with the oar or when he rammed into him as he clung to the tree stump. Muchimba's evidence was also corroborated, albeit unwittingly, by Shaw. As the learned trial judge found, Muchimba, Mwindo and Makore had no reason to lie against the applicant. Mr Shaw was, in fact, at great pains not to incriminate the applicant.

Other evidence to support Muchimba's evidence was the part of broken oar and the applicant's cap recovered not far from the scene of the attack. The broken oar served to disprove the evidence of the applicant that Muchimba and the deceased ran away upon seeing his boat approaching. I am satisfied that the totality of Muchimba's evidence, and the corroboration it received from Makore, Mwindo, Shaw and the recovery of the broken oar and the applicant's cap, left little or no room for doubt concerning the credibility of Muchimba's evidence.

I am, in the result, unable to find that the learned trial judge misdirected himself on his finding on the credibility of the State witnesses.

The applicant is clearly mistaken in his averment that he was found guilty of murder with constructive intent, bordering on culpable homicide. The evidence before me shows the applicant made the same submission in his application for bail pending appeal in the court *a quo*. The learned trial judge, in his ruling on the matter, made it clear such had not been his finding. He noted as follows on p 2 of his judgment:

> "The submission is clearly wrong. At no stage did the court find that the constructive intent bordered on culpable homicide. The State may have accepted the view held by the defence but that did not bind the court. So no such finding was made in the court's judgment. Instead the constructive intent in the matter is closer to actual intent than culpable homicide".

In the light of this statement, the applicant's submission that there is every prospect that this Court on appeal might acquit him of murder or impose a conviction of culpable homicide holds little merit.

The applicant submits further that even if the Court were to find he did ram his boat into the deceased as he clung to the tree stump, it is likely to conclude he had no intention to commit murder, especially in light of Muchimba's evidence that he had looked for the deceased after he fell into the river. The learned trial judge addressed this submission, and I find no fault with his conclusion, which was that the probabilities favoured a finding that the applicant had searched for the deceased in

order to further assault him. This, he found, was evidenced by the fact that the applicant was bent on harming, not rescuing, the deceased and Muchimba. He had assaulted the deceased while he clung to his (the applicant's) speedboat; he had chased after Muchimba and would have harmed him had he not made good his escape; and he had then rammed his boat into the deceased as he clung to the tree stump. I accordingly find to be unassailable the learned trial judge's conclusion that the evidence before the court supported a finding that rescuing either of his victims on that day was not uppermost in the applicant's mind, rather, the opposite.

The applicant also submitted that he had hitherto established a good record in terms of complying with his bail conditions and not absconding. He submitted that he "religiously and conscientiously" attended court and adhered to his bail conditions from December 2000 when he was admitted to bail; that he continued to do this even after he had been indicted for trial and also after his application for discharge at the close of the State case was dismissed.

The learned trial judge correctly pointed out that these submissions had clearly "lost sight" of the fact that the applicant now stands convicted of murder, and has been sentenced to a long term of imprisonment. He therefore, the learned judge noted, had enough reason to want to abscond.

The learned judge's finding finds support in the following dictum in *S v Tengende* 1981 ZLR 445 at 448, which I have relied on in reaching the decision I have in this matter:

> "… But bail pending appeal involves a new and important factor; the appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused".

The learned judge in *R v Mtembu* 1961 (3) SA 468 at 471 addressed his mind to the specific situation where, like in *casu*, leave to appeal had been granted, and noted:

> "The mere fact that leave to appeal has been granted does not, *per se,* entitle a convicted person to be allowed out on bail – it seems to me that the *onus* of establishing that justice will not be endangered and that there is a reasonable prospect of success, is upon the applicant".

Having considered all the evidence placed before me, and based on the authorities cited above, I do not find that the applicant has proved there are positive grounds for granting him bail pending appeal. I am also not satisfied he has discharged the *onus* of establishing that justice will not be endangered by his admission to bail, nor that he enjoys reasonable prospects of success on appeal. I would in this latter respect echo the words of the learned trial judge in the last paragraph of his judgment:

> "… I wish to reiterate what has been repeatedly stated by our courts and indeed by courts in other jurisdictions, that it is improper to allow people convicted of serious crimes to be walking in the streets instead of serving their sentences when the prospects of success are non-existent. Society would lose faith in the system and revolt. This is a proper case, in my view, where the applicant should prosecute his appeal while serving his sentence."

Hence my dismissal of the application.

James, Moyo-Majwabu & Nyoni, appellant's legal practitioners

Attorney General's Office, respondent's legal practitioners