REFIAS MASUNA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 11 AND 18 OCTOBER 2007

N Fuzwayo. for applicant
W B Dube, for respondent

Chamber application for bail pending appeal

BERE J: On 28 September 2007, applicant who is a serving member of the police force holding the rank of Assistant Inspector was convicted of contravening section 134 of the Criminal Law (Codification and Reform) Act Cap 9:23 (extortion) by Beitbridge Magistrates' Court and sentenced to thirty (30) months imprisonment of which six (6) months were suspended on the usual conditions of good behaviour.

Applicant has now filed an application for bail pending appeal against both conviction and sentence. The state represented by one *W B Dube* has indicated it is not opposed to the applicant's application for bail. It is worth noting that the state counsel's response to the 11 page application filed by applicant's counsel is contained in a one sentence which reads as follows:

> "Be pleased to note that the respondent is not opposed to the applicant being granted bail in terms of the draft order."

Against this scant response, it will be further noted that the learned magistrate in the court *a quo* had produced a fourteen page judgment were he sought to justify his reasons for returning a verdict of guilty against applicant. I will in this judgment come back to deal with this particular point.

There are basically two cardinal principles that guide the court in its assessment for an application for bail pending appeal. I find guidance in the case of *S* v *Williams* 1980 ZLR 466 where FIELDSEND CJ (as he then was) had this to say after an analysis of decisions from both local and other jurisdictions:

> "… The proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success."

The two basic considerations are interlinked. I understand the correct legal approach to be to cumulatively look at both the likelihood of applicant absconding and the prospects of success in the lodged appeal.

As is customary and as can be gleaned from his notice of appeal applicant's bail application is basically hinged on two factors; *viz* that he was convicted by the court *a quo* against the weight of evidence which screamed for his acquittal and secondly that because his roots are in this country the likelihood of him absconding if granted bail is non-existent.

I propose to deal first with applicant's prospects of success on appeal. The thrust of applicant's case is that the trap was illegally set up by the Central Intelligence Organisation and he expanded on this by raising other allied arguments flowing from the alleged illegality. It should be noted that there are numerous recommendations which should be followed where evidence of a trap is to be relied upon. However, as observed by Hoffman and Zeffertt in their book – *South African Law of Evidence*, third edition page 456:

> "… But failure to comply with these recommendations is not necessarily fatal, and provided they were not ignored for no good reason and that the trier of fact has

displayed proper caution a conviction will not be upset even if there were no corroborative evidence at all."

See also the case of *R* v *Boyd* 1947 (3) SA 43 (C) and *S* v *Mabaso* 1978 (3) SA 5 (O).

I am particularly impressed by the views of SNYMAN R in the case of *S* v *Azov* 1974 (1) SA 808 (T) at page 809 where the learned judge developed the evidence on traps by observing the following:

> "This court is not concerned with the approach on traps, whether it is a procedure that is to be lauded or disapproved of. The fact is that it is not unlawful to have set the trap; nor do I accept the proposition that traps must necessarily be treated in the manner that has been suggested in the appellant's heads of argument. It seems to me that traps are really of three kinds. There is the trap which most of us dislike so much where a traffic inspector puts a cord across the road and when you go over it too fast he traps you. There the traffic inspector has done nothing really to entice you to exceed the speed limit; he has merely set about trapping you … There is no reason why a trap of that kind should be treated with the disapproval which is suggested in general about traps.
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> Secondly, we have the sort of trap that we have where the accused person is not enticed into doing something wrong. She is suspected of selling liquor and she has liquor in her possession. All that the trap does is to go and buy it from her. He did not place the liquor in possession and he did not induce or entice her to keep liquor illegally; all he did was to trap her into selling it. This is the second type of trapping. Then the third type is the one which courts are very careful about; that is the type of trap that you have in gold and diamond trapping cases where you bring the gold or diamonds to the person and invite him to buy it. That sort of trap is very dangerous and open to abuse, and the courts have on numerous occasions expressed their disapproval of it, more particularly because the traps used in such cases are often persons of low repute, not necessarily police officers. The distinction must be drawn and borne in mind.
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> In the present this woman was not enticed or induced to start trading in liquor; she was suspected – presumably on reasonable grounds – of trading in liquor and all that was done was to go and buy some from her – to trap her in that fashion. The police used three policemen to trap her and whilst all evidence produced before a court of law must be treated with caution and care must be exercised in evaluating it, there is no particular reason why these three
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> policemen should be treated as if they were the villain or doing something unlawful."

In the case before me I have had the privilege of going through the whole court record of the court a quo. I am inclined to follow the reasoning in *S* v *Azov (supra)*.

Here is a case where law enforcement agents got wind of applicant having wrongfully and unlawfully demanded money from a Congelese national. A 'trap' was subsequently set up, not to induce or entice applicant into committing an offence (by his conduct applicant had already decided to commit one) but merely to confirm the criminal conduct.

The record clearly shows that the learned magistrate was fully alert to the danger of relying on the evidence of a trap by taking the necessary caution particularly when dealing with the evidence of the Congolese national. This was the position adopted by the court *a quo* despite the view that I hold that this case was not one of those cases where the "trap could be said to be dangerous and open to abuse". There is nothing on record to suggest the trap was illegal as passionately argued by applicant's counsel who incidentally had the privilege of representing applicant in the main trial. The record of proceedings speaks of itself.

Even if I am wrong in my assessment of the evidence (which is not accepted) and it were found that there was illegality in the setting up of the trap, it is clear to me that in the light of the authorities cited, coupled with the caution exercised by the learned magistrate, that per se would not render the proceedings fatal.

It is my well considered view in this case that there was a fair assessment of the evidence presented to the court *a quo* before verdict of guilty was returned. I am more than satisfied that the prospects of success on appeal are non-existent.

The court *a quo* has also been attacked on the sentence imposed. But again, this attack is most unfortunate. A perusal of the record of proceedings clearly show that the learned magistrate gave a fairly detailed account of his reasons for the preferred sentence. He considered other options and settled for a prison term.

Having accepted that there are no prospects of success on the appeal itself, the considerations of the likelihood of applicant absconding remain of academic interest. Suffice it to say that I found it rather curious that applicant, given his position as the Acting officer-In-Charge CID Beitbridge Police Station would want to convince the court that he has neither relations nor connections outside the borders of this country – even with his professional counter-parts across the border in South Africa! Consider applicant's alleged position given the accepted position that police officers sharing common boundaries within Southern Africa are supposed to compliment each other in their quest to combat cross-border crimes.

Let me now turn to deal with the response given by the state counsel to the application for bail pending appeal. I do so fully cognisant of the fact that of late this court has been inundated with similar responses from the Attorney-General's office.

For a start, it should be noted by all concerned that bail pending appeal is premised on the alleged misdirection by the court *a quo* in the main trial itself. To appreciate the issues at stake in such an application it is incumbent upon all concerned – applicant's counsel, the state counsel and even the court seized with such an application to acquaint themselves with the record of proceedings. It amounts to indulging in an irrational and injudicious exercise to either attack or support the

decision of the court *a quo* without familiarising oneself with the record of proceedings.

The response given by the Attorney-General's office in this case clearly goes against the conviction which the state's representative who prosecuted this matter with unmistakable vigour and urged the court sitting at Beitbridge Magistrates' Court to return a verdict of guilty against applicant. There is no explanation as to why the Office of the Attorney-General is unable to support the position taken by one of its officers from the lower court.

I am aware that the state enjoys its *dominus litis* status particularly in criminal matters, but I must qualify it and say that that unique position must be properly exercised.

Where the Attorney-General's office decides not to support the position taken by one of its officers in the lower courts, there must be an indication as to why this is so. The record of proceedings must show that the state counsel in the Attorney-General's office has made an effort to consider both the reasons for judgment in the lower court as well as the reasons prompting an application for bail pending appeal. There is no room for a lackadaisical approach by the Attorney-General's office.

I am satisfied that the concessions made by the representative of the Attorney-General's office in this matter was not properly given and I have no wish to be bound by it.

It is for these reasons that I deem it appropriate to dismiss the application made.

It is accordingly ordered:

That applicant's application for bail pending appeal be and is hereby dismissed.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Attorney-General's Office, respondent's legal practitioners