

NEVER SHUMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 23 SEPTEMBER AND 22 OCTOBER 2015

Bail pending appeal

J. T. Tsvangirai for applicant
S. Ndlovu for respondent

MOYO J: The appellant was convicted of contravening section 368 (2) as read with section 368 (4) of the Mines and Minerals Act [Chapter 21:01]. (Prospecting for gold without a licence). He was sentenced to 2 years being the mandatory minimum penalty for that offence after the magistrate failed to find any special circumstances.

Dissatisfied with both conviction and sentence by the trial court, he then appealed against same.

He now seeks bail pending that appeal. The facts of the matter as presented in the state outline were that, the accused person on 23 of June 2015 along a stream at Yorks area Mberengwa, the accused prospected for gold without a licence. He was arrested by detectives who were on patrol whilst prospecting for gold. A shovel which the accused used was recovered.

The accused person at his trial denied these allegations and stated that in fact he was cooking sadza at the time the police approached. He further stated that in fact he was arrested while he tried to hide his mealie meal and relish and that he was holding a pot at the relevant time.

In order to properly assess the suitability to bail of an accused who is seeking to be admitted to bail pending appeal, the court has to consider that the interests of justice will not be jeopardised by an admission to bail of the appellant. In doing so, the court should establish if the applicant has shown that he does have prospects of success on appeal and that his admission to bail will therefore not prejudice the interests of justice. In this regard the applicant has an onus to discharge in order for the court to exercise its discretion in his favour.

Refer to the cases of *S v Tengende and Others* 1981 ZLR 445 (SC) and *Chivhango vs The State* SC 94/05.

In exercising the discretion on whether or not to grant bail pending appeal, the court must be guided by the existence or otherwise of prospects of success on appeal as well as the presence or otherwise of a risk that the applicant will abscond. The brighter the prospects of success, the stronger the likelihood that the applicant will await his trial, and the slimmer the prospects of success the greater the risk of abscondment, per *S v Tengende and Others (supra)*.

It would appear from the court record before me, that on the face of it, there is a problem with the rebuttal of the applicant's defence in the court *a quo*. I say so for the state witnesses alleged that he carried a shovel that he was using to extract gold ore.

Yet he says in fact he was cooking sadza and selling it to gold panners and therefore was carrying a pot and a lid when the police pounced.

Whilst the magistrate's findings in her judgment were that there is no evidence that applicant had a pot at the scene, a look at page 15 of the record of proceedings reveals the following:

A question was put under cross-examination by the accused to the second state witness who was a police officer as follows:

Q: I was holding my pet (sic) and lid when you arrested me.

A: Yes

The witness was asked if accused was holding a "pet" and lid when he was arrested and his answer was in the affirmative. This shows that the issue of the shovel is cast in doubt by this witness's answer. The next question is, if the accused was arrested carrying a pot and a lid, then what does that do to the state case which is to the effect that he was carrying a shovel? This

would mean that the applicant's defence cannot be dismissed as being unreasonable, impossible and untrue and the state case would be found wanting in that respect. It will be for the appeal court to deeply consider these issues but on the face of it, it cannot be held that prospects of success are non-existent in this matter. If there are prospects of success then the likelihood to abscond is minimised. Likewise the accused person would have shown that indeed there are positive reasons why he should be admitted to bail pending appeal. The state counsel submitted that, the aspect of the pot and lid and the affirmative answer from the witness should be a typographical error, but this court cannot make that finding as the trial magistrate certified the record of proceedings as being a true reflection of what transpired in the court *a quo*.

It is for these reasons that I am satisfied that the applicant has discharged the onus upon him and that this court is therefore of the view that it should indeed exercise its discretion in applicant's favour.

I accordingly grant the application as follows:

It is ordered that

- 1) Applicant be and is hereby admitted to bail on the following conditions:
 - a) That he deposits a sum of \$100-00 with the Clerk of Court Mberengwa Magistrates court.
 - b) That he resides at Village Geba, Chief Mataga, Mberengwa.
 - c) That he reports twice a week on Mondays and Fridays between 6am and 6pm, at Mberengwa Police station

Gundu & Dube, C/o Dube-Tachiona & Tsvangirai, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners