

MARTYN DARYL

v

THE STATE

HIGH COURT OF ZIMBABWE
CHINHOYI 20 -23 February 2023

Bail Application pending Appeal

Mr J. Samkange / Mr Pabwe, for the Applicant

Mr Damusi, for the Respondent

BACHI-MZAWAZI J; This is an application for bail pending appeal. The principles underlying an application of this nature are summarily, the likelihood of abscondment, prospects of success and the delay before the appeal is heard as outlined in the case of *S v Dzawo* 1998 (1) ZLR 556(S). These are counter balanced by the interests of the administration of justice and an individual's right to freedom. See, *S v Williams* 1980 ZLR 466(A). However, the rules are sterner for a convicted person than those who stands to be convicted as the latter has constitutionally entrenched rights to liberty and to be presumed innocent until proven guilty whilst the former loses those rights once convicted. See, *S v Munsaka* HB55 of 2016. Also, in favour of the application for bail pending trial over that of pending appeal is the dynamic shift of the burden of proof. Ordinarily in most common law criminal matters just as in the application for bail pending trial or the burden of proof rests with the state. In contradistinction, in an application such as this, there is a reverse onus on the accused who no longer enjoys the constitutional protection to prove his entitlement to bail and to rebut the like hood of abscondment. This also captured in S115 (C)(1)(b) of the Criminal Procedure and Evidence Act, [Chapter 9:07]. See,

In this case the applicant was charged and convicted of unlawful possession of 10 plants of dagga in contravention of section 157(1)(a) of the Criminal Law Codification and Reform Act Chapter 9:23. He pleaded guilty but was nevertheless, convicted after a full trial. He was sentenced to a total of 18 months imprisonment of which 6 were suspended on usual conditions. He is serving

an effective 12 months jail term. He appealed against both conviction and sentence citing several mis-directions on the part of the court aquo.

The notice of appeal is part of the record and I need not repeat the grounds of appeal outlined therein. The state is opposed to this application for bail pending appeal stating that there was no misdirection by the trial court against both conviction and sentence. They are also of the opinion that the applicant may be incentivised not to stand trial because of the conviction based upon overwhelming evidence.

The allegations are that on the 3rd of May 2021 the police acting on a tip off raided the applicants homestead in his absence and recovered 10 of dagga plants of various lengths. Seven were in pots on his balcony and three were uprooted within the vicinity of his gardener's place of residence in the same compound.

Overall, the state led evidence from two witnesses. One, is the alleged complainant and informer, the other a police officer who accompanied the actual investigating officer. Of note the investigating officer was not called to testify. It is on record that the first and key witness gave inconsistent evidence also noted by the trial court, as to how the offence came to light. It is clear from the facts on record that there is a version of a report made through a tip off and one after the key witness had been allegedly assaulted and unlawfully evicted from the premises which he shared with the accused herein applicant as his gardener. He narrated that the report was incidental to his assault report.

This main witness upon which the whole state case rested did not deny his bitterness and open hostility against the applicant over the unfair termination of his close to 7 years employment, without notice or benefits exacerbated by the action of hiring a lorry at the spur of the moment, without warning intending to eject him from the only place he called home. It is this witness's testimony that he was given the 'mbanje' or dagga seeds to plant and nurture by the applicant. Thus, his neglect to nurse them was the cause of the assault and all the attendant actions by the applicant.

He however, confirmed that the applicant was away from his place of residence for most of the time as his job as a Safari guide took him away from home several weeks on end. The 10 plants of dagga were recovered in his absence.

The second state witness's evidence was of little probative value as he kept referring to the investigating officer who was not called to testify as the man who had all the answers as he was in charge of the operation.

The accused person in his defence denied both knowledge and possession of the dagga plants and challenged the way the alleged exhibits were obtained and their unjustified non-production at the trial. His call for expert evidence to analyse the soil components of the recovered plant against his homestead soils so as to establish a link with him *viz a viz* possession fell onto deaf ears. His claim that if ever the plants had been recovered from him they had been planted to frame him was not followed through. His averment that if the complainant *cum* star witness was the one who planted and tended for the prohibited drug well knowing of that fact as per his testimony, made him equally guilty of the offence and an accomplice. In that respect, his evidence should have been treated with caution and the cautionary rule should have been applied.

From the above evaluation of the proceedings of the lower court, it is clear that the state did not discharge its onus of controverting all the issues raised by the applicant. It could not be safely said that it proved its case beyond reasonable doubt. The integral components of the offence of possession as outlined in the case of *S v Chieza* 789/22 and *S v Mpa* 2014, (1) ZLR 572 (H) should be canvassed, exploited and interrogated. Possession is in two forms the physical, actual or *corpus* and the mental state or *animus possidendi* aspects. See, *S v Mutyambizi* HH550/2022, *S v Munsaka* HB 4 /2020.

In *S v Mpa* above it was noted that a person has possession of something if they have knowledge of its presence or they can have actual or constructive possession, sole or joint possession. Constructive possession is when a person is not in physical direct control but has the power and the intention to take control over the thing. There is no evidence that the trial court explored these facets of possession when it arrived at the conclusion that the applicant was guilty of the offence charged against the quality of the evidence adduced.

Thus, it is this courts considered view, that the applicant has not only an arguable case but prospects of success on appeal. See, *S v Hudson* 1996(1) SACR 431 (W). The interests of the administration of justice demand even handedness on both the accused and the interests of the public. Whilst this court is alive to the global menace and scourge presented by the proliferation of drug and substance abuse cases and their devastating consequences on our youth and thus the future of our young generation, and the need for every citizen irrespective of their station in life to play

their role in curbing this cancerous threat to human existence, it is important to be guided by the concept of the interests of justice in any individual case. In the same vein, the interests of justice demand a less emotional adjudicating stance not swayed by the sensitivity of the subject. In cases where evidence is scanty courts should not hesitate to do justice. In this case it is clear that the motive behind the reports was to pay back all the wrongs or unlawful treatment that had been perpetrated on the star witness. The danger of false evidence and framing cannot be ruled out particularly when three plants were found right next to the witness's quarters without a tangible explanation yet he was conversant with that type of plant.

The application for bail succeeds, bail is granted in terms of the draft order.

Venturas & Samukange, for the Applicant

National Prosecuting Authority, for the Respondent.