

ITAI MOTSI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 24 September and 1 October 2013

BAIL APPLICATION

P. Nyeperai, for the accused
L. Muchini, for the state

MUSAKWA J: This is an application for bail pending appeal following the applicant's conviction for attempted murder and unlawful possession of a firearm. In respect of the attempted murder charge he was sentenced to four years imprisonment of which one year was suspended for five years on condition of good behaviour. In respect of the second count of unlawful possession of a firearm he was sentenced to twelve months imprisonment of which five months were suspended for five years on condition of good behaviour.

This case in material respects demonstrates how not to prosecute a case involving the discharge of a firearm. The first count arose following the trailing of the complainant by unidentified persons in a Toyota Harrier vehicle from the city centre to Christon bank. Having done his shopping in the evening the complainant, almost intuitively drove away at high speed. Nonetheless he noticed that two vehicles were trailing him one of which did not persist. The Toyota Harrier did not relent.

Notwithstanding his passage through a toll gate the complainant did not bother to report his suspicions. By then the Toyota Harrier was not in sight. However when he turned right into Christon Bank area he noticed the same vehicle trailing him. Notwithstanding the threats posed he drove for some distance and then stopped in the middle of the road and switched on the hazard lights. This of course did not deter the pursuers who soon arrived. When the Toyota Harrier came abreast his vehicle the complainant noticed the barrel of a firearm protruding and he took off. In the process his vehicle was shot at three times. He

explained that one bullet struck the rear right passenger door and must have proceeded to lodge behind the driver's seat. Another bullet struck the vehicle's boot. The third bullet struck the left tail light. The complainant went and made a U-turn and returned to the scene. By then the assailants had disappeared.

The complainant lodged a report at a local Police Base and together with two Police officers, they proceeded to the scene of shooting. Using illumination from the complainant's vehicle lights as well as a torch they managed to retrieve three spent cartridges and two bullet heads. Of the bullet heads one was in the vehicle boot whilst the other was amongst the groceries. The complainant said it was lodged in a loaf of bread. Nonetheless, these exhibits were subsequently submitted for ballistics examination. At that stage they did not match any scene of crime.

The applicant and others were subsequently arrested. More importantly, the applicant was arrested on implication by one Dreka Katena. This was because of a spate of armed robberies which were committed within Harare. The applicant was arrested whilst at his uncle's residence in Mayambara, Seke. He was thereafter taken to his residence which was close by. A search was conducted and during that search Police officers claimed to have recovered a CZ pistol inscribed BSAP 423. The applicant through the spirited defence of Mr Nyeperai contested this evidence. He challenged the production of a page from the investigating officer's diary on which it was claimed he signed acknowledgement of the recovery of the firearm. The applicant's contention was that he was coerced through assaults. On the other hand the applicant's uncle who also appended his signature and testified as a defence witness claimed he signed in order to stop further assaults on the applicant. Despite these objections the trial court ruled that the diary extract was admissible. Test cases fired from the recovered pistol matched the spent cartridges recovered from the Christon Bank scene.

The trial court highlighted a number of unsatisfactory features in respect of the testimony of several of the sate witnesses. For example, the complainant's statement regarding the accused persons stated that he knew them by name. This was despite the fact that the statement was recorded before the applicant and co-accused had been arrested. In addition, the complainant had not identified any of his assailants. When the complainant was quizzed on this aspect during cross-examination he conceded that the names had been included by the Police officer who recorded his statement.

Then there was Constable Chikwasa who, in explaining anomalies between his statement and oral evidence stated that his oral testimony was more accurate than what he stated in his statement. He had in the course of being cross-examined, chosen some aspects of his statement as being accurate whilst disowning other portions. This was despite the fact that the statement was written when events were still fresh.

The same doubts were raised in respect of Detective Assistant Inspector Jachi's testimony. This was more poignant in respect of the circumstances surrounding the applicant's arrest. This is because Police officers claimed that the applicant had been arrested earlier than the deceased Gerald Mugabe. The trial court did not find Detective Assistant Inspector Jachi's contradictions on this aspect convincing. It also dismissed the assertion that the applicant's uncle witnessed the recovery of the firearm.

The trial court also raised questions why the Police officers would walk some 200 metres from the applicant's uncle's residence to the applicant's residence. This was on account of the fact that they had a vehicle and they were in the company of the applicant. It seemed the more logical thing would have been to drive to the place. This then raised the possibility that they wanted to raid the applicant. It raised the possibility that the applicant had not indicated where to find Gerald Mugabe. It also meant that Gerald Mugabe was arrested earlier than the applicant.

There was also what the trial court termed a late disclosure by Detective Sergeant Maigeta whilst under cross-examination that they recovered two firearms from the applicant. The court found this witness's explanation incredible. It also noted the contradictions between this witness and the complainant regarding the number of bullet heads that were recovered from the shot vehicle.

The trial court also noted that Assistant Inspector Dube conceded that in his ballistics examination, he did not come up with the specific characteristics on which he based his conclusions regarding the recovered cartridges, bullet heads and the CZ pistol. The trial court actually stated that this made it difficult for it to appreciate how the witness came to his conclusion.

Both Mr *Nyeperai* and Mr *Muchini* expressed divergent views on whether there were prospects of success on appeal. Mr *Nyeperai* was of the firm view that once the trial court expressed doubts on the credibility of the witnesses or sufficiency of the evidence, then it should have returned a verdict of not guilty. He highlighted the various contradictions and shortfalls in the testimony of the state witnesses and in particular highlighted that it was not

sufficient for the ballistics expert to simply state his conclusions without illustrating and producing the actual exhibits. Mr *Nyeperai* cited the cases of *R v Sibanda* 1963 (4) SA 182 and *S v Nyamayaro* 1967 RLR 228.

Whilst acknowledging these shortfalls Mr *Muchini* was adamant that the trial court was correct in convicting the applicant. He submitted that if the applicant was found in possession of a firearm within a short period of it having been used in the Christon Bank shooting, then the inference is that he is the one who was involved in the shooting. He also cited *S v Williams* 1981 (1) ZLR 1170 [ZAD]. in his submission that even if there may be prospects of success on appeal in respect of the attempted murder charge, the court may still deny the applicant bail on account of the nature of the charges.

In stating the law on bail pending appeal FIELDSEND CJ had this to say in *S v Williams supra* at 1172-1173:

“Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as *R v Milne and Erleigh* (4) 1950 (4) SA 601 (W) and *R v Mthembu* 1961 (3) SDA 468 (D) stress the discretion that lies with the Judge and indicate that 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. Clearly, the two factors are inter-connected because the less likely the prospects of success are 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.”

Mr *Muchini* also submitted that the court should consider the overall cumulative nature of the evidence led as opposed to particular aspects of the evidence that were singled out by Mr *Nyeperai*. Such an approach would leave no doubt that the applicant committed the offences.

Notwithstanding Mr *Muchini's* submission, the court will have to consider the individual aspects of evidence highlighted by Mr *Nyeperai*. This is because ballistics evidence is the only evidence that linked the applicant to the attempted murder charge.

In *R v Nyamayaro* supra the appellant was convicted of housebreaking with intent to steal and theft. The offence had been committed by breaching a wire mesh screen through cutting it with pliers. The appellant was linked to the crime through a pair of pliers that was found in his car some nineteen days later. A comparison of the mesh screen that had been cut matched the pair of pliers.

BEADLE CJ held that 'tool' mark evidence should be treated in the same manner as expert evidence on handwriting. To this I would add evidence on fingerprints. Citing the earlier decision in *R v Sibanda* (2) 1963 R & N 601 BEADLE CJ further stated that before a court relies on 'tool' mark evidence on its own, it must be satisfied that it is safe in the circumstances to convict.

In that case the expert who testified on the tool marks produced two photographs which depicted the comparisons by way of highlighting the points of similarity. BEADLE CJ further referred to GREENBERG JA's remarks in *Annama v Chetty and Others* (5) 1946 A.D. 142 in which at 155 the following was said about the expert witness on tool marks:

"His function is to point out similarities or differences in two or more specimens of handwriting and the court is entitled to accept his opinion that these similarities or differences exist, but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors."

I have gone to some length in analysing the evidence that was led in the present matter. It suffices to note that the trial court did not see for itself the points of similarity which the expert witness relied on. The matter was compromised by the trial or set down prosecutor's failure to appreciate the essence of ballistics evidence. It can be noted from the prosecutor's questions posed to Constable Baraka, one of the details who attended the scene of shooting. Having stated about picking up some spent cartridges, the prosecutor asked the following-

"Q. What are these cartridges, really?"

A. Used firearm bullets.

Q. The real bullets?

A. Yes, the used bullets.”

Although I am not dealing with the actual appeal it is self-evident that the evidence on the examination of the exhibits was inadequate. Therefore the appeal against conviction for attempted murder has prospects of success. As regards the conviction for unlawful possession of a firearm, this appears to be tainted with allegations of assault levelled against the arresting officers. There is also lack of clarity on the sequence of events taking into account the contradictions in the evidence of the Police officers involved. I will also take into account the effective sentence the applicant is likely to serve on this charge after factoring in remission on good behaviour.

I have also considered that although the first count is inherently serious there is nothing to show that the admission of the applicant on bail will jeopardise the interests of justice. This particularly so when there is no evidence that the applicant was difficult to arrest or that he attempted to undermine the course of justice.

In the result the application for bail pending appeal succeeds and is granted in terms of the draft order. The bail amount is increased to US\$500-00 and in addition the applicant is ordered to surrender his travel document to the clerk of court, Harare Magistrates Court.

Costa & Madzonga, applicant’s legal practitioners