

SIMON MUDZINGWA TARANHIKE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 10 & 18 December 2019

Bail Pending Appeal

T. Magwaliba and R. Maphosa, for the applicant
T Mapfuwa, for the respondent

MUSITHU J: The applicant seeks bail pending appeal against both conviction and sentence for violating s 174(1) of the Criminal Law (Codification and Reform) Act¹ (the Act), that is criminal abuse of duty as public officer. The section reads as follows:

174 Criminal abuse of duty as public officer

“(1) If a public officer, in the exercise of his or her functions as such, intentionally–

(a) does anything that is contrary to or inconsistent with his or her duty as a public officer; or

(b) omits to do anything which it is his or her duty as a public officer to do;

for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for a period not exceeding fifteen years or both.

(2) If it is proved, in any prosecution for criminal abuse of duty as a public officer, that a public officer, in breach of his or her duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he or she did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person.

(3)

He was convicted and sentenced by a Harare Magistrate to:

“30 months imprisonment. Of this 30 months, 6 months is suspended on condition of good behaviour and 9 months on condition you retribute ZINARA in the form of 1 800 litre coupons via the Clerk of Court, Harare by the 31st of December 2019”

¹ [Chapter 9:23]

The application, which was resolutely opposed by the respondent, arose from the following factual background. The applicant was employed by ZINARA as Finance Director. On 1 April 2019, the Applicant instructed one Dennis Jaricha, a subordinate, to issue 1 800 litres of fuel coupons with serial numbers PR 402295292 to PR 402295381 to one Davison Vandira a journalist from the Zimbabwe Broadcasting Corporation (ZBC), without following proper procedure for the issuance of fuel to external stakeholders. ZINARA suffered prejudice of \$6 354.00, and nothing was recovered. The offence came to light when the then Acting Chief Executive Officer Mathelene Mujokoro received a call from a private number one evening around 6p.m., wherein she was informed that 1 800 litres of fuel coupons had been unprocedurally released from the transport section on the applicant's instructions. She called the administration manager, Mr Peter Boterere who confirmed having received a similar report from the transport clerk. The investigating officer, one Tarirei Chinomona of the Zimbabwe Anti-Corruption Commission told the court that the matter came to their attention through an anonymous caller.

In his defence to the allegations the Applicant denied any wrongdoing and blamed the false accusations to power struggles at the workplace. He alleged that he and Mathelene Mujokoro were vying for the substantive position of Chief Executive Officer which was vacant at the material time. Mathelene Mujokoro was therefore the brains behind these false allegations as she wanted him out of the race for that substantive position. The applicant also maintained that as Finance Director he was not involved in generating fuel requisitions or processing correspondence from entities such as ZBC requesting fuel. His department was not responsible for the initiation and authorisation of issuance of fuel, and accordingly to single him out as an accused person in the circumstances was reflective of political dynamics at ZINARA meant to push him out of that organisation. As Finance Director, he could however receive instructions from ZINARA's Board Chairman which he could relay to relevant stakeholders within the establishment for further management.

Applicant asserted in his defence that the fuel issued to Davison Vandira was at the instance of the Board Chairman, Mr Michael Madanha who instructed him to relay the message to internal stakeholders involved in the issuance of fuel, in respect of work done on behalf of the entity in March 2019. He conveyed that message to the people within the Human Resources department who had the mandate to authorise the release of fuel through

the generation of the relevant paperwork. It was not his duty to issue out fuel and he averred that for the State to then allege that he corruptly authorised the issuance of 1 800 litres worth of petrol coupons to Davison Vandira without following ZINARA procedures was highly misleading. Lastly in his defence, the applicant averred that he had created enemies within the organisation when he caused the arrest of 24 employees for vehicle licence fee leakages through a report that he had submitted to the Board Chairman.

Applicant filed a notice of appeal against both conviction and sentence with 8 grounds of appeal. I summarise them herein as follows: misdirection in finding that the applicant ought not to have acted on an unlawful instruction from the Board Chairman; misdirection in convicting the applicant on the basis of the unlawfulness of the instruction given to the applicant by the Board Chairman, which issue had not been addressed by both parties at trial; having found that the applicant was credible, the court erred in finding that the communication by the applicant of an instruction received from the board chairman to officers in the transport division amounted to conduct contrary to his duties as a public officer; having found that one Jaricha had acted under an instruction to issue the fuel to Vandira and impliedly therefore was not guilty of criminal conduct, the court was wrong in finding the applicant guilty having equally acted on the instructions of the board chairman; having discredited the evidence of key witnesses, the court grossly erred in finding the applicant guilty; the court erred in finding the applicant guilty of corruption when it was clear that the applicant did not personally benefit, financially or otherwise from the fuel given to Vandira; the court erred in ordering a custodial sentence where the effective sentence was below 24 months without considering a non-custodial sentence in the first instance; the sentence was so gross as to induce a sense of shock, including imprisonment and restitution where the applicant had not made a financial benefit from the instruction given to officers in the transport section.

In arguing prospects of success on appeal against conviction, it was submitted on behalf of the applicant that the court ought not to have found the applicant guilty, having found that he acted on the instructions of the Board Chairperson, Engineer Michael Madanha. Related to this submission was the attack on the decision of the court to convict the applicant on the basis of the unlawfulness of the instruction given to the applicant by the board chairman when the issue had not been addressed by counsel for both parties at the trial. Both

Counsel for the Applicant and the defence were agreed that the basis of the applicant's conviction was aptly captured by the learned magistrate on p 10 of his judgment, where he said²:

"I am prepared to accept that:-

- (1) The accused person or instructed that Vandira be issued with fuel, and
- (2) In his decision to do that he must have been acted on the inference (instructions) of the board chair.

But the question which cannot be avoided is:- What was this fuel for? This would also help in answering the question either the instruction was lawful or not. Neither the Defence nor the State addressed me on this"

The lower court went on to make the following observations: that according to the applicant, the board chairman's intention in seeking to muzzle the press was to avoid exposure particularly by the Tendai Biti led Public Accounts Committee which was sitting on them at the relevant time; whatsapp chats between the applicant and Vandira showed that they used to chat a lot on matters related to the need by the media to report positively on ZINARA in order not to expose the rot at ZINARA. The applicant and Vandira had become very close to each other to the extent that they would address each other informally as brother, young brother etc. The applicant even sent Vandira \$80 on his ecocash account so that he could enjoy a six pack of drinks: that Vandira drove all the way to ZINARA to collect the fuel coupons, and if these were indeed a gift (as alleged by Vandira), then the parties could have met somewhere for the applicant to pass on the coupons to Vandira: Vandira signed for the coupons at ZINARA on behalf of ZBC, showing that they could not have been a gift to him by the applicant. The court then concluded as follows:

"Accused, in my view, was aware that the instruction was not lawful. He was aware that what he was doing was illegal. He must have been aware that what he was doing was a corrupt act. He was part and parcel of the arrangement whereby 1 800 litres of coupons would be passed to Vandira the journalist so as to silence him and from the quantity it would appear that Vandira was not going to be the only beneficiary particularly if it talks of other people who had to be toned down. Also in the whatsapp messages he talks of what he termed "final push". Could it have been a push to completely silence fellow journalists or not. That act was corrupt. The State may not have spelt out the modalities for contravening this Act as came out during the trial but I believe that the accused person would not be prejudiced in any way if it were to be accepted that when he gave the fuel to Vandira it was a corrupt act"³

² Page 462 of the record of proceedings.

³ Page 12 of judgment and pages 464-5 of the record of proceedings.

Having analysed the grounds of appeal against conviction as set out in the notice of appeal, the issue for determination whittles to one question, which is whether acting on an unlawful instruction can justify a conviction for criminal abuse of office. Put differently the issue is whether the applicant committed an abuse of office, in the absence of the requisite *mens rea* as argued on behalf of the applicant. With regards to the sentence, the issue is on the appropriateness of the sentence in the event that the conviction is upheld.

The function of this court in applications of this nature was set out by MAFUSIRE J in *Peter Chikumba v State* where he said:

“In an application for bail pending appeal, it is not the function of the judicial officer to satisfy himself beyond any measure of doubt whether or not the grounds of appeal are doomed to fail. If the applicant has some fighting chance on appeal, then all the other relevant factors being neutral, the applicant must be entitled to relief.

In casu, counsel for both parties accept the test laid out in *S v Hudson*⁴. The question is not whether the appeal will succeed. The standard is much lower. It is **whether the appeal is free from predictable failure**. If that conclusion is reached, the applicant should be entitled to relief”⁵

In *State v Naidoo*⁶, the possibility of success on appeal was held to be sufficient in a consideration of bail pending appeal.

The investigating officer Tarwirei Chinomona, told the court that the gravamen of the charge was that “the accused person abused his office as a public officer by releasing the fuel unprocedurally because there is a procedure that has to be followed when fuel is being released from ZINARA and as such he acted contrary and inconsistently with his duties by forcing the release of fuel”. A legal officer who represented ZINARA as the complainant in the matter, Mr Hwenira told the Court that there were no standard operating procedures at ZINARA. He also told the court that anyone could be assigned tasks by the board chairperson. Mr Boterere, the administration manager told the court that the procedure for issuing fuel was not written anywhere and neither was it cast in stone. With regards to requests for fuel from external stakeholders, Mr Boterere told the court that such requests would come through the chief executive officer, and where she approved such a request, she would forward it to the director administration, who would in turn forward it to the

⁴ 1996 (1) SACR 43c (W)

⁵ HH 724/15 at pages 8-9 of the judgment.

⁶ 1996 (2) SACR 250 (W)

administration manager for processing. Mr Boterere also told the court that all directors at ZINARA could give instructions for fuel to be issued without the requisite paperwork, which would only be prepared at a later stage depending on the urgency of the matter.⁷ This position was also confirmed by the then acting finance manager Mr Mudodo.⁸

I have already highlighted that the court *a quo* found that the applicant must have acted on the instructions of the board chairperson. The court pointed out that neither the State nor the defence had addressed him on the lawfulness of the instruction⁹. It went on to find that the applicant must have known that what he was doing was illegal and a corrupt act. The Court went on to point out that even though the State “may not have spelt out the modalities of contravening this Act as came out during the trial”, the applicant would not be prejudiced in any way if it were to be accepted that when he gave the fuel to Vandira it was a corrupt act. Counsel for the applicant found this to be a misdirection. Counsel for the respondent on the other hand saw no misdirection. It was argued on behalf of the respondent that section 174 needed to be read together with section 269(c) of the Act, which defines instances when obedience to illegal orders affords a complete defence. The import of the respondent’s argument was that the fact that the applicant acted on an unlawful instruction did not absolve him of any wrongdoing under the circumstances. Section 269(c) provides as follows:

“269 When obedience to illegal orders affords complete defence

(1) Subject to this section, the fact that a person charged with a crime was obeying an illegal order when the person did or omitted to do anything that is an essential element of the crime shall not be a complete defence to the charge unless the following requirements are satisfied in addition to those specified in paragraphs (a) and (b) of section *two hundred and sixty-eight*–

(a) when he or she did or omitted to do the thing he or she was a member of a disciplined force engaged on active operations; and

(b) he or she would have been liable, or believed on reasonable grounds that he or she would have been liable, to disciplinary action if he or she had refused to obey the order; and

(c) the order was not so manifestly illegal that a reasonable person in his or her position would have refused to obey it; and

(d) his or her conduct was no more than was necessary to carry out the order.”

Counsel for the applicant argued that s 269 was not applicable to the present matter, but rather to members of the disciplined forces as defined under s 267 of the Act. I agree with the submission by counsel for the applicant. A closer reading of sections 267, 268 and 269,

⁷ Page 233 of the record of proceedings.

⁸ Page 165 of the record of proceedings.

⁹ Paragraph 3 on page 462 of the record, being page 10 of the judgment.

shows that the defence of obeying an unlawful order shall be complete if one satisfies the requirements set out in s 269(1), over and above those set out in paragraphs (a) and (b) of s 268. Section 268 reads as follows:

“268 Requirements for obedience to lawful orders to be complete defence

The fact that a person charged with a crime was obeying a lawful order when the person did or omitted to do anything that is an essential element of the crime shall be a complete defence to the charge if—

- (a) when he or she did or omitted to do the thing he or she was a member of a disciplined force; and
- (b) the order was given to him or her by a member of rank of a disciplined force, whether or not that person was a member of the same disciplined force.”

Section 267, is the interpretation section of part XVII of chapter XIV (General Defences and Mitigatory Factors) to the Act. The terms defined under section 267 are peculiar to the disciplined forces as defined under that part, or any other force which has as its main mandate the preservation of public security and of law and order in Zimbabwe. Section 174 cannot therefore be read together with s 269, as submitted by Counsel for the respondent. I however do not believe that a defence of obedience to a lawful or unlawful orders would exclusively apply to members of the disciplined forces alone. In the South African case of *Mostert v State*¹⁰ THERON J observed as follows on page 3 of the judgment;

“Obedience to orders is a recognised defence in our law. Obedience to orders entails "an act performed by a subordinate upon the instructions of his superior".¹¹ The defence of obedience to orders *usually* arises in the military context”

On p 4 of the judgment, the judge went on to state that:

“The fact that this defence arose from the military setting does not make its application exclusive to soldiers only.¹²

Be that as it may, it is clear from both parties’ submissions that the propriety of the applicant’s conviction, based on an unlawful instruction given by the board chairman, as found by the court *a quo*, is an issue that may not have been properly canvassed by the lower

¹⁰[2006] 4 All SA 83(N)

¹¹ **LAWSA. (2004), Second Edition, Vol 6, Para 66**

¹² See **LAWSA, supra**, where it is contended mat the defence also applies to other persons subject to authority, such as a child who obeys the order of a parent, guardian or more senior member of his or her family.

court. My understanding of the applicant's submission is that the applicant did not have the requisite *mens rea* to commit the offence once it was established by the court *aquo* that he acted on the basis of an unlawful instruction.

In the *Mostert v The State*, judgment, THERON J also had the following to say on p 10 of the judgment;

"The question which arises is whether or not the state has proved beyond reasonable doubt that the appellant had the requisite intention to assault the complainant. This issue was crisply put by SOLOMON JA in *R v Wallendorf and Others* 1920 AD 383 at 394:

"It is, however, a recognised principle, not only of English Criminal Law, but also of our own law and practice that 'ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent'."

The Appellate Division (as it then was) has expressly held that the test in respect of intention is subjective in that the court must try to imagine itself in the accused's position when he committed the act. Due to the fact that direct evidence of an accused's mind is seldom available a court will have to rely on inferences drawn from conduct.¹³ In *S v Mini* 1963 (3) SA 188 (AD) the court warned against adopting an armchair approach when determining the state of mind of an accused.¹⁴

In my view the effect of the unlawful instruction which found the conviction of the applicant is a debatable matter on appeal, and I am persuaded to accept that the appeal is free from predictable failure.

With regards to sentence the learned magistrate commented as follows in considering the seriousness of the offence:

"On the other hand though one may not lose sight of the fact that you committed a very serious offence and it is at a time when this nation must look back and check a decisive stand against corruption. There is no way our businesses are going to flourish when for example ZINARA commits financial malpractices and then people like you and Madanha decide to muzzle the press....." (Underlining for emphasis).¹⁵

¹³ See *R v Nsele* 1955 (2) SA 145 (AD)

¹⁴ Williamson JA, writing for the majority, at 196 E-F, said:

"In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems to me that a trier of fact should try mentally to project himself into the position of that accused at that time. He must of course also be on his guard against the insidious subconscious influence of *ex post facto* knowledge."

¹⁵ Paragraph 2 page 15 of the record of proceedings and page 20 of reasons for sentence.

I have already highlighted that the propriety of the applicant's conviction based on what he termed an unlawful instruction is at the core of the applicant's appeal. It stands to reason in my view, that if the appeal court is persuaded to reach a different conclusion on conviction, consequently it may do the same on sentence.

Resultantly, bail pending appeal is granted as follows:

- a) The applicant be and is hereby admitted to bail pending appeal in case No. HC CA 747/19, as prayed for in the draft order on the following conditions:
- b) The applicant shall reside at 22 Coronation Road, Greendale, Harare, until the appeal under case No. HC CA747/19, is finalised.
- c) The applicant shall deposit \$2000.00 with the Registrar of the High Court, Harare.
- d) The applicant shall surrender his passport with the Registrar of the High Court, Harare.
- e) The applicant shall report once every week on Fridays between 6am and 6pm at Rhodesville Police Station until the appeal is finalised.

Maposa & Ndomene, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners