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Judgment No. SC 3/04

Crim. Appeal No. 324/03

ROWAN DUBE v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 2, 2004

E T Matinenga, for the appellant

R Tokwe, for the respondent

Before: CHIDYAUSIKU CJ, In Chambers

The appellant in this case was charged with and convicted of contravening s 4(a) of the Prevention of Corruption Act [*Chapter 9:16*] as read with s 15(2)(c) of the same Act, alternatively attempting to defeat or obstruct the course of justice. He pleaded not guilty on both charges, but was convicted on the main charge and sentenced to four years' imprisonment with labour of which one year was suspended on certain conditions.

The appellant applied for bail to the High Court sitting at Bulawayo. CHEDA J heard the bail application and dismissed it.

The appellant now appeals against that refusal to grant him bail. It would appear from the appellant's statement in terms of r 5(1) of the Rules of this

Court that the following are the grounds of appeal –

1. The learned judge declined to look into the prospects of success when he considered the question of bail.

2. The learned judge misinterpreted the provisions of s 25(2)(e) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

3. The learned judge misdirected himself by failing to consider the appellant's prospects of success on the question of sentence.

The allegations against the appellant are set out in some detail by the learned judge in the court *a quo* in judgment no. HB-93/03. There is no need to repeat the facts in any great detail. Suffice it to state the following –

It is alleged, and was accepted by the trial court, that the appellant was asked by the South African police to track down certain suspects in a case involving armed robbery at the Johannesburg International Airport in South Africa, where cash and jewellery amounting to R117 million was stolen. Amongst the suspects was one Kulekani Ncube ("Ncube") whom, after he (Ncube) had been referred to him by another police officer, he did not arrest as he should have done.

It was argued in the court *a quo* that the appellant be granted bail because he had good prospects of success on appeal. It was argued that the appellant was likely to succeed on appeal because the robbery was not a continuing offence and therefore the appellant was not legally obliged to arrest Ncube for a robbery that took place outside Zimbabwe.

The learned judge in the court *a quo* dealt with this argument as follows:

> "It was argued on the appellant's behalf that his prospects of success on appeal are indeed high in view of the supposed misdirection by the trial court. While this argument is indeed sound, it appears to be based on the appellant's belief that he was not under any legal obligation to have arrested the suspect (Khulekani Ncube) because the South African authorities wanted him for robbery committed in South Africa which, of cause (course?), fundamentally is not a continuing offence and that no extradition proceedings had commenced. This argument, in my view, seems to have lost sight of the legal duty on the appellant under s 25(2)(c) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which reads:
>
> 'Any peace officer may, without any order or warrant, arrest –
>
> (c) any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or reasonable suspicion exists of his having been concerned in, any act committed at any place outside Zimbabwe which, if committed in Zimbabwe, would have been punishable as an offence and for which he is, in terms of any act relating to extradition or fugitive offenders or otherwise, liable to be arrested or detained in custody in Zimbabwe.'
>
> I, however, do not wish to comment much on the appellant's basis for his appeal as it is pending in the Supreme Court. *In casu*, suffice (it) to deal with bail pending appeal. These courts' approach to bail are adequately laid down, see *S v Tengende* 1981 ZLR 45; *S v Kilpin* 1978 RLR 282; *S v Benatar* 1985 (2) ZLR 205 (HC)."

It is quite clear from the above that the learned judge did consider the issue of prospects of success on appeal and came to the conclusion that, while there may be merit in the submission that robbery is not a continuing offence, the appellant had a legal obligation to arrest the suspect in terms of s 25(2)(c) of the Criminal Procedure and Evidence Act. This approach of the learned judge cannot be faulted.

It is also clear from the judgment that the learned judge placed more reliance in reaching his conclusion on the likelihood of the appellant absconding than on any other factor. That is not to say he did not consider any other relevant factors. I am satisfied there was no misdirection in this regard.

As regards the prospects of success on appeal against sentence, it is correct that the learned judge may have overlooked it. This is understandable because the appellant's counsel does not appear to have argued that point either. In my view, there are no prospects of success on appeal in respect of the sentence. The submission that the appellant should have been allowed the option of a fine has no substance. I was not referred to any cases that suggest that the sentence was not in line with sentences imposed in similar cases.

In the result, I am satisfied that there was no misdirection except perhaps in respect the failure to consider the prospects of success of an appeal against the sentence. In my view, such a consideration is immaterial.

The appeal is accordingly dismissed.

Calderwood, Bryce Hendrie & Partners, appellant's legal practitioners