

GERALD FORCE KANYUNGWE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 29 NOVEMBER 2007

M Ndlovu with T Sibanda for the appellant
W Mabhaudhi for the respondent

Bail Pending Appeal

NDOU J: On 2 April 2006 and at number 21 Hamilton Road, Famona, Bulawayo the complainant was robbed of his Toyota Hilux double cab motor vehicle at gunpoint. The same day of the robbery the appellant was arrested driving the stolen vehicle in Rutenga, more than 350 kilometres from the place of crime.

It is trite that, having been found in possession of a recently stolen vehicle the doctrine of “recent possession” is applicable to the facts of the case. Indeed during the trial the appellant tried to convince the court that his possession was innocent. He stated that he did not know that the vehicle was stolen. The learned trial magistrate did not buy his story resulting in his conviction and being sentenced to 10 years imprisonment of which 3 years was suspended on the usual conditions of good future behaviour.

The respondent opposes the application for bail on two grounds, *viz*,

- a) there are no reasonable prospects of success in the appeal against both conviction and sentence; and
- b) the likelihood of abscondment.

It is trite that in an application for bail pending trial, the presumption of

innocence is no longer operative. Therefore, for the applicant to succeed, he or she must show in the application that there are positive reasons why he or she be granted bail. In the absence of positive grounds, bail should be denied – *S v Ncube & Anor* HB-4-04; *S v Manyange* HH-1-03 and *S v William* 1980 ZLR 466.

Prospects of success on appeal

As alluded to above the appellant was arrested in possession of a recently stolen vehicle. The pith and marrow of his explanation was that one Innocent Chiuri asked him on 1 April 2006 to travel from Durban in South Africa to Masvingo in Zimbabwe to drive the stolen vehicle to his garage in South Africa. In fact, the vehicle had not yet been stolen. Admittedly 1 April is what is colloquially termed “Fools Day” the appellant took the request seriously. He travelled to Zimbabwe to collect a vehicle that has not even been stolen. The vehicle was only stolen some twenty-four (24) hours after he said Innocent Chiuri sent him to Zimbabwe. The trial court, in the circumstances, dismissed the appellant’s story that he travelled all the way from Durban to Zimbabwe to drive the vehicle. The trial court reasoned out that the only way the appellant would have been in such recent possession of the stolen vehicle is if he was involved in the hi-jacking. The appellant was unable to state the nature of the mechanical problem that would have necessitate a mechanic to come all the way from South Africa to drive the vehicle. From the facts evinced in the record such reasoning by the trial court cannot be faulted. The question of the alleged flawed identification parade is neither here nor there because the appellant was found in possession of the recently stolen vehicle. In the circumstances there are no prospects of success on appeal.

Likelihood of abscondment

That the appellant is a flight risk is beyond dispute. He is ordinarily resident in South Africa where he operates a business of some sorts. Further, at the time of his arrest he was found in possession of a Malawian passport under the name of Jerald Mwanza. In the circumstances his true identity is difficult to ascertain. It is not clear whether he is Zimbabwean or Malawian.

In the circumstances it would be wrong to grant the appellant bail pending appeal. In *S v Kilpin* 1978 RLR 292 (a) at page 286A MACDONALD C J had this to say in a similar scenario:

“... it is wrong that a person who should properly be in goal should be at large and nothing is more likely to encourage frivolous and vexatious appeals.” See also *Attorney-General, Zimbabwe v Phiri* 1987(2) ZLR 33 (H) and *S v Ndhlovu* 2001 (2) ZLR 261 (H).

Accordingly, the appellant has failed to discharge his onus to show that there are positive grounds for granting him bail and his application for bail is dismissed.

Cheda & Partners, appellant's legal practitioners

Criminal Division, Attorney General's Office, respondent's legal practitioners