STEPHEN NDLOVU`

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 12 AUGUST 2022 & 5 JANUARY 2023

Application for bail pending appeal

K. Ngwenya with J. Ndubiwa & A. Ndlovu for the applicant
K. M. Guveya for the respondent

TAKUVA J: This is an application for bail pending appeal in terms of section 123 (b) (1) of the Criminal Procedure and Evidence Act (Chapter 9:07) as read with Rule 90 (4) (e) of the High Court Rules 2021.

Background Facts

The applicant was arraigned before a Western Division Regional Magistrate sitting at Tredgold Magistrates' Court in Bulawayo facing a charge of Criminal Abuse of Duty as a Public Officer as defined in section 174 of the Criminal Law (Codification and Reform) Act, (Chapter 9:23). It was being alleged that on the 9th of September 2021 and at Bulawayo Magistrate Court, Tredgold Building, Bulawayo the applicant in his capacity as a magistrate as such charged with the duty of adjudicating over criminal matters and coming up with a single and decisive ruling and contrary to his duty as a pubic officer unlawfully and intentionally issued two contradictory court orders on an application made by Noah Wambe for the release of an exhibit held, and signed a draft order granting the release of the same motor vehicle in respect of the same application thereby showing a favour to Noah Wambe an act contrary to his duties as a public officer and realizing that there is a real risk or possibility that justice delivery will be so compromised.

The applicant pleaded not guilty to the charge but was convicted and sentenced to three (3) years imprisonment of which one year imprisonment was suspended for five years on condition applicant does not within that period commit an offence involving criminal abuse of office as a public officer for which upon conviction would be sentenced to imprisonment without the option of a fine.

Dissatisfied with his conviction and sentence, the applicant filed an appeal under case number HCA 77/2022 against his conviction and sentence on 1st July 2022. The grounds of appeal are contained in the notice of appeal. The appeal is pending before this court.

Applicant hereby applies to this court to be admitted to bail pending hearing of his appeal.

The Law

Section 123 (1) (b) (ii) of the Criminal Procedure and Evidence Act (Chapter 9:07) (the Act) empowers a court to admit a convicted person to bail pending appeal. The section states:

1. Subject to this section a person may be admitted to bail or have his conditions of bail altered –
   (a) …
   (b) In the case of a person who has been convicted and sentenced by a Magistrates' Court and who applies for bail –
      (i) …
      (ii) Pending the determination by the High Court of his appeal; or
      (iii) …
      by a judge of the High Court or by any magistrate within whose area of jurisdiction he is in custody."

As regards onus, section 115C (2) (b) of the Act provides that where an accused person who is in custody in respect of an offence, applies to be admitted to bail after having been convicted of the offence he shall bear the burden of showing on a balance of probabilities, that it is in the interests of justice for him to be released on bail. See also *S* v *Williams* 1980 ZLR 466A where the appeal court adopted the approach followed in the South African cases of *Rex* v *Milne and Erleigth* (4) 1950 (4) SA and *R* v *Mtembu* 1961 (3) SA 468, and echoed that:

> "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 *Milner Erleigh* (4) 1950 SA 601 (W) and *R* v *Mtembu* 1961 (3) SA 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 interconnected 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."

In *S* v *De Abreu* 1980 (4) 94 (W) the court remarked that: "the prospects of success on appeal also forms a factor to be taken into account in an appeal against the refusal of bail [pending appeal]. If for example the view of this court should be that the appeal … is hopeless, this court would probably be reluctant to alter a judgment refusing bail."

As regards the test for prospects of success on appeal John van der Berg in his book titled; *Bail: A Practitioner's Guide*, 3rd Edition, Juta & Co. Limited at page 220 states;

> "This test required no more than an 'arguable case on appeal one which was not manifestly doomed to failure'. This with respect is a reasonable threshold and indeed not one that is difficult to cross." See also *S* v *Hlabangana & Others* where the court had this to say;
>
> The question is not whether the appeal will succeed" but on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment."

Put differently prospects of success on appeal against conviction and sentence exit where such conviction is demonstrably suspect.

The requirements for an application of this nature as synthesised from the above principles were laid bare in *S* v *Dzawo* 1998 (2) ZLR 4 (SC). In order to succeed, applicant must discharge the onus to be admitted to bail pending appeal by attending to the following factors;

(a) Prospects of success on appeal
(b) Likelihood of applicant absconding
(c) Likelihood of delays before appeal is heard
(d) Right of applicant's liberty, pending determination of his appeal.

Application of the law to the facts

In order to finally appreciate the issues, it is necessary to briefly outline the background facts in chronological manner.

1. Police at Mzilikazi were investigating a case of theft and money laundering under CRB BYO P 1237/21 wherein one Sylvester Chitandawata (Sylvester) is the accused person. When the police were in the process of recovering the stolen money, it became apparent that Sylvester had purchased the following items using the stolen money;
   (i) A BMW motor vehicle registration number ADU 2480
   (ii) An itel A56 cell phone
   (iii) A Honda Fit motor vehicle registration number AEI 6085
2. The police seized the above-mentioned items as exhibits. This included the Honda Fit which is the subject of this case.
3. One Noah Wambe (Noah) then filed an application to have the Honda Fit released to him within 48 hours of the granting of the order. In other words he wanted the seizure of the motor vehicle set aside.
4. The applicant received the application on the 25th day of August 2021.
5. The application was opposed by the State on the grounds that Noah's application was a sham act designed to obstruct or defeat the course of justice with respect to the criminal case involving Sylvester.
6. The applicant proceeded to hear Noah's application and on 7th September 2021 a clerk of court dispatched a court order dated 25 August but date stamped 7 September 2021 to Noah. This was on applicant's instruction.
7. On 7 September 2021, Noah in the company of his legal practitioner one Batholomeow Mhandire approached Mzilikazi Police Station armed with the draft order mentioned in paragraph 6 above demanding the release of the Honda Fit to Noah. The police became suspicious and started investigations leading to the arrest of the applicant after it turned out that he had on the same date i.e. 7th September 2021 dismissed Noah's application for the release of the same vehicle on the same facts.
8. These facts led to the prosecution and conviction of the applicant despite his defence that he signed the draft order in error. The court *a quo* found his defence to be false and convicted him. However, before reaching its verdict the court *a quo* made the following comments on facts it found not to be in dispute;
   "(a) That the accused was employed as a magistrate by the Judicial Service Commission and he qualifies to be a public officer as defined in section 169 of

the Criminal Law Code and he was stationed at Bulawayo Magistrates' Court as a Provincial Magistrate during the alleged commission of the offence.

(c) It is also not in dispute that in the exercise of his functions as a magistrate he presided over an application for the release of a motor vehicle which was held as an exhibit in terms of s59 of the Criminal Procedure and Evidence Act.

(d) It is also not in dispute that he came up with two conflicting orders, one granting the release of the exhibit within 48 hours, herein after the daft order and the other dismissing the application herein after referred to as [the ruling].

(e) It is also not in dispute that the [applicant] Noah Wambe collected the draft order and proceeded to Mzilikazi Police Station and produced it for the purposes of seeking the release of the said motor vehicle.

(f) It is also not in dispute that after Noah Wambe's attempt to have the vehicle released it was discovered that there was another written ruling whose contents state otherwise.

(g) It is also not in dispute that after the matter came to light the accused was summoned to the Provincial Magistrate's office to explain the two conflicting orders in the presence of the Provincial Magistrate in charge, the Provincial Public Prosecutor and the Senior Regional Magistrate.

(h) It is not in dispute that the accused indicated that he had made an error by signing the draft order before hearing the submission by the State and that the correct ruling was the one written in long hand.

(i) It is also not in dispute that there was a consensus that the error must be corrected by referring the record of proceedings to a High Court Judge for review.

(j) It is also not in dispute that the record of proceedings ended up being placed before a Judge at the instance of the Provincial Magistrate in charge and not the accused person." (my emphasis)

In his bail statement, applicant contented that his appeal is arguable, therefore has good prospects of success in that:

1. "The court *a quo* erred in law by convicting applicant when the State had failed to discharge the onus as required by section 18 (1) of the Criminal Law (Codification

& Reform) Act to prove beyond a reasonable doubt "two of the essential elements of the offence charged, namely the requisite intention and the showing of favour" to Noah as alleged in the state outline.

2. The court *a quo* erred in law by convicting him when his defence of error in signing the draft order on the 25th of August 2021 before the State had filed its response to the application placed before him, was not found to be improbable and false beyond a reasonable doubt.
3. The court *a quo* erred in law by convicting him when at the end of the trial there was a serious discrepancy between the material allegations in the State Outline and the totality of the evidence adduced and the discrepancy was never explained nor the State Outline amended thereby entitling the applicant to the benefit of the doubt and to an acquittal.
4. In the alternative, the court *a quo* grossly misdirected itself as it injudiciously and improperly exercised its discretion on the law applicable to sentencing of first offenders by concluding that it is not proper to impose a non-custodial sentence on applicant and no reasonable court faced with the same circumstances could have arrived at the same conclusion." (my emphasis)

I must stress that the court *a quo's* judgment shows that it dealt with the above issues extensively. The reasoning therein shows no misdirection. The conclusions arrived at are supported by the credible evidence led by the State and applicant's admissions. As regards intention, the court correctly identified the issues as whether the *actus rea* was inconsistent with the applicant's duty as a public officer and that the conduct constituting abuse of office was intentional – see page 180 of the record of proceedings where the court, after considering the provisions of s174 of the Criminal Law Codification and Reform Act and authorities like *S* v *Simon Mudzingwa & Ors* HH-222-18 and *S* v *Kasukuwere & Ors* HH-532-19, concluded thus;

> "The issues which lie for determination are whether the *actus reus* is inconsistent with the accused's duty as a public officer and that the conduct constituting abuse of office was intentional. It emerges therefore that the state of mind required to commit an offence provided for in section 174 is intention. In terms of section 13 of the Criminal Law Code, "where intention is an element of a crime the test is subjective and is whether or not the person whose conduct is complained of intended to engage in the conduct or to produce the consequence he did. The motive or the underlying reason for the *actus reus* is immaterial unless specifically provided for by an enactment".

In other words the *actus reus* must be deliberate, calculated or purposeful. In *R* v *Duthkam* 1979 (2) O B 722 … cited with approval in *S* v *Taranyika* HH-220-18 "the court held that in order to arrive at a decision that there was abuse of office, the neglect or the abuse complained of must be wilful not merely inadvertent. The conduct impugned must be meant to injure public interest so as to call for condemnation and punishment. In *Northern Territory Australia* v *Mengel* 1995 (CCR) 307, the court held that it is the absence of an honest attempt to perform the functions of the public office that constitutes an abuse." (my emphasis)

Further, the court *a quo* specifically addressed the issue of intention on page 181 in the following terms;

> "Now I will turn to examine the accused's state of mind as presented by the State's evidence. Did the accused intend or purport or deliberately conduct himself to produce the consequence which happened? In other words, did he intend to abuse or act inconsistent with his duties for the purpose of showing favour or disfavor?
>
> Intention is concerned with the internal subjective state of mind of an accused. Proof of intention is not straight forward. There can be no direct evidence of intention except where an accused admits to having intended to or held the required intention. Otherwise intention is inferred from the circumstances and all other available evidence to determine what it is that the accused "must have" been thinking …"

The court then relied on the legal principles in *R* v *Blom* 1939 AD 188 at 202 – 203. The court *a quo* then properly applied these principles to the facts and found that the applicant's conduct of producing two conflicting decisions over the same matter fell within the pegs of an inconsistence with his duty as required by the law. See record page 181. The court with tremendous precision and care interrogated the State's evidence *vis-à-vis* the genuineness of applicant's defence as regards the unlawfulness element of the offence. This is not only significant or relevant but is critical in that the applicant's ignorance or mistake must not be feigned. It must be honest or *bona fide*.

At page 183 of the record of proceedings, the court *a quo* thoroughly analysed the evidence in the following manner;

> "… It is also mind boggling to note that the written ruling in long hand is dated 7 September 2021 and said to have been handed down to the parties on that day. The written ruling is the one which dismissed the application. If indeed it was handed down on that day as it appears on the date stamp affixed onto it in the presence of all the

> parties as is the norm. Why would the applicant Noah Wambe and his legal practitioner Mr Mhandire seek for a draft order which grants an application that was dismissed." In my view it is probable that on 7th September 2021, the written ruling was not in the record and was not handed down as suggested by the date stamp affixed on it … and Noah Wambe uplifted the draft order which was the order in the record. It is also probable that the written ruling may have found its way into the record that very day, but after Noah Wambe had collected the draft order authorizing the release of the vehicle. It is also probable that someone must have advised Noah Wambe that the draft order was signed. The only person who knew that the draft order was signed and the effect of that order is the only person who kept the record which contained the draft order and that only person could have been the one who advised the client Noah Wambe to pick the order and that person is the accused person." (my emphasis)

In my view, this reasoning is sound, logical and consistent with the evidence in that the applicant deliberately signed the draft order, left it in the record, did not warn the clerk of court and more importantly did not cancel the draft order. The applicant's reliance on section 39 of the Magistrates' Court Act is misplaced. The court *a quo* dismissed the applicant's explanation for signing the draft order. Its reasoning was that;

> "I am however no convinced that the error of signing the draft order was human enough. In his defence the indicated that the signed draft should have gone to typing pool or typing before he could issue it out as a court order. The bottom line is the draft as it is found its way to the police to demand the release of the vehicle. His assertion that he signed the draft order without carefully considering the application leaves a lot to be desired for a public officer of his experience. Had both the draft and the written ruling been signed and stamped on the same day the defence of error would be probable. If he signed the draft order on the 25th of August 2021 why did he not cancel it since it was within his power to do so, just as he had written to the clerk of court cancelling the order? Did he notify the State or his superior about this error?"

I agree entirely with such reasoning. All I can add is that in my view, not only was the applicant's explanation unacceptably superficial but it is also evident that he failed to take into consideration factors relevant for purposes of the inquiry in question. In either case, and bearing in mid the principle in *R* v *Blom* 1939 AD 370 and 373. I agree with the court *a quo's* conclusion that the explanation was not only improbable but beyond a reasonable doubt false. I say so because the applicant did not say what caused the mistake. Put differently what was he mistaken about? Certainly the mistake was not based on ignorance because we are dealing here with a "Provincial Magistrate" a senior administrator of justice dealing with a simple and straight forward court application. Was he mistaken as to the nature of the document he was about to sign? Did he sign it in mistake for something else? Did he sign it by mistake that is by accident or inadvertently?

In his defence outline the applicant referred to the issue of the "error" in one sentence. It is stated, "He however erroneously signed the draft order which was attached to the application". Further, the following exchange occurred between applicant and his legal practitioner;

> "Q - At what stage did you then realize that you signed the draft order erroneously?
> A - Very few courts were operating during that period and I was seized with a lot of other matters because I believe at that time there were only two magistrates on duty. The other magistrate was doing civil cases only and I was doing all criminal courts and there were a lot of documents that were moving between offices. I only came to know that I signed a draft order as well made a ruling dismissing the application on the same matter on the 10th of September 2021". See pages 97-98 of the record."

When specifically asked what circumstances made him to erroneously sign the draft order applicant shifted to the events of the 10th September 2021 instead of talking about the events of the 25th August 2021.

Another unsatisfactory feature of applicant's explanation is that he contradicted himself on when he realized that he had erroneously signed the draft order. On one hand he said this was on the same date i.e 25th August 2021 (see page 104). He said after this realization he decided to hold on to the application in order to give the State an opportunity to respond. Yet on the other he said, "It came to my attention on the 10th of September 2021 late in the afternoon." The reason for the prevarication is clear to me the applicant did not have an answer to the obvious question why if he realized the error on 25th August, he did not cancel the` draft order and direct the applicant to file a "clean" draft order.

Applicant blames pressure of work for his error. However, sight should not be lost that the applicant was up to that time a magistrate for 12 years and 11 of those as a Provincial Magistrate. It goes without saying that every judicial officer appreciates the significance of his or her signature on a court order. *In casu*, applicant read the application, understood it, picked up a pen and signed the draft order after endorsing the date on it.

In my view, the court *a quo* properly dismissed his defence of mistake. Besides, should the decision of the court *a quo* be dismissed, it needs little imagination to envisage the number and the types of defences with which the criminal courts would be faced whenever persons are

charged with contravening this type of legislation. I take the view that this would open the floodgates to a multiplicity of putative defences. As regards sentence, my view is that the court *a quo* judiciously exercised its discretion in sentencing applicant to 3 years imprisonment of which 1 year was suspended on the usual conditions. Applicant's case is a very serious offence as properly highlighted by the court *a quo* in its reasons for sentence. In my view, the *boni mores viz* is the legal convictions of the community are that judicial officers should not willy-nilly grant court orders without applying their minds as this would ultimately extinguish the rule of law. This is why the penalty that those found guilty as public officers shall be liable to a fine not exceeding level thirteen or imprisonment for a period not exceeding fifteen years or both. Therefore there is no misdirection by the court *a quo* which warrants that an Appellate Court vitiates its decision. If the court *a quo* erred, it erred on the side of leniency.

In the result, the applicant has failed to show by positive grounds that he has good prospects of success on appeal. As regards the likelihood of applicant absconding it should be noted that applicant has already been convicted and sentenced to a term of imprisonment. Further, his appeal against both conviction and sentence has no prospects of succeeding. The reality of being incarcerated is likely to induce him to abscond.

The likely delay before the appeal is heard is not considerable as appeals are now being set down expeditiously.

In my view, applicant has failed to discharge the onus resting upon him.

Accordingly, the application for bail pending appeal is hereby dismissed.

T. J. Mabhikwa & Partners, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners