BELIEF DONGO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 9 MARCH 2021

Application for bail pending appeal

T. Runganga, for the applicant
B. Maphosa, for the respondent

DUBE-BANDA J: This is an application for bail pending appeal. It was filed with this court on the 12 February 2021. Respondent filed its response on the 15 February 2021. This application was considered on the papers filed by the parties without oral argument, in accordance with *paragraph* 4 of Practice Directive 2 of 2021 issued by the Chief Justice of Zimbabwe.[1] After I had completed writing this judgment, while it was awaiting to be taken to the Registrar's office for the allocation of a judgment number (HB number), I was then informed that applicant had filed a notice of withdrawal. The notice of withdrawal is dated 2 March 2021. I take the position that, on the facts of this case, in view of the fact that I had already written the judgment, the purported withdrawal is inconsequential, hence this judgment.

The applicant was arraigned before the Regional Magistrate's Court, sitting in Bulawayo, on a charge of contravening section 60A (3) (a) (b) of the Electricity Act [Chapter 13:19]. The allegations against him are briefly as follows: that on the 12 July 2019, at a bush along Lockview Road, near number 30 Lockview Road, Lockview, Bulawayo, applicant in the company of one Bukhosi Obvious Ndebele (Ndebele), tampered with apparatus for generating, transmitting, distribution or supplying electricity, or cut, damaged, destroyed or interfered with

[11]**Part III: Hearing of urgent chamber and bail applications** 4) With effect from **22 January 2021**, a Judge may consider and dispose of an urgent chamber or bail application on the papers without calling the parties to make oral representations or arguments.
Provided that in respect of bail applications, parties shall be at liberty to file Heads of Arguments with or immediately after filing their applications or opposing papers.

the apparatus used for generating, transmitting, distribution or supplying electricity, that is to say applicant in the company of Ndebele cut, damaged, or destroyed electricity overhead copper conductors by cutting electricity overhead copper conductors in contravention of the Act. Applicant pleaded not guilty, and after a protracted trial, he was convicted and sentenced to 12 years imprisonment of which 2 years were suspended on the usual conditions. Effective 10 years imprisonment.

Aggrieved by both conviction and sentence, applicant noted an appeal to this court and such appeal is still pending under cover of case number HCA 114/20. Applicant now seeks to be admitted to bail pending the finalisation of the appeal. The conviction is attacked on five grounds and the sentence on one ground which are all set-out in the notice of appeal. For completeness, in reproduce *in extensio* the grounds of appeal against conviction, are:

1. The court misdirected itself in making a finding that the State had proved its case beyond a reasonable doubt on the offence charged with all the witnesses exonerating the applicant on the offence charged.
2. The learned magistrate misdirected himself on the facts and the law when he accepted evidence that the state witnesses clearly identified the applicant at the scene of crime when there was overwhelming evidence to the contrary and no identification parade was conducted.
3. The learned magistrate misdirected himself on the facts by completely disregarding the evidence contained in the 2nd accused person's defence outline which stated that 2nd accused was the one driving the vehicle and applicant was not there which evidence clearly exonerate the applicant.
4. The learned magistrate misdirected himself on the facts and the law by adding evidence of applicant peculiar features of a pointed nose in the statement on Clive Ncube a state witness.
5. The learned magistrate further erred at law and the facts when he failed to take note that the state had failed to investigate and disprove applicant's defence of *alibi.*

The grounds upon which applicant seeks to be released on bail pending appeal are set out in his statement in support of this application. In his written application, applicant contends that he has prospects of success on appeal, because his guilt was not proved beyond a

reasonable doubt. In particular he avers as follows: that Ndebele, who was his co-accused at the trial, and defaulted upon dismissal of the application for a discharge at the conclusion of the state case, exonerated applicant. That there are no eyewitnesses to the offence charged, and all witnesses suggested a crime of possession, and not cutting copper conductors as alleged. All witnesses exonerated applicant on the offence of possession. All witnesses contradicted each other on material evidence. The description by the witnesses of the person they saw driving the getaway car, meets that of Ndebele, not applicant.

This application is not opposed. Respondent concedes that there are prospects of success on appeal. In its written submissions filed with this court, respondent avers that:

1. The applicant denied the charge saying he never drove the said vehicle on the night in question. He said the vehicle belongs to him for sure but was being used by his co-accused Ndebele on the day in question [see his defence outline on pages 22 to 23 of the record]. The co-accused Buhosi's defence outline is on page 23 of the record. He clearly exonerated the applicant admitting that he was the one who had the vehicle in question. This co-accused then skipped bail and is on a warrant of arrest.
2. The applicant was out on bail during trial. He never absconded.
3. There was no identifying parade that was conducted that led to the arrest of the applicant. He was arrested following the police's investigation in finding out the owner of the said vehicle.
4. It was then that the applicant was arrested and the two witnesses namely Clive Ncube and Njabulo Moyo told the court that they saw the applicant driving the said Honda Fit on the night in question.
5. It is respondent's view that the applicant has prospects of success on appeal since his identification at the scene is doubtful.
6. The applicant was exonerated by his co-accused who is on the run. I do not think that a prima facie case was established against the applicant during the trial.

In conclusion, respondent concedes that it is in the interests of justice that applicant be released on bail pending appeal.

The law

In *Gaillah Muroyi v The State* SC 111/20, the court said the purpose of the exercise of discretionary power vested in the court under section 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act") is to secure the interest of the public in the administration of justice by ensuring that a person already convicted of a criminal offence will appear on the appointed day for the hearing of his/her appeal. It is for that reason that the Act provides that upon sufficient evidence being availed to justify, a finding that a convicted person is likely not to appear for his/her appeal if released on bail is a relevant and sufficient ground for ordering his/her continued detention pending appeal. See: *Madzokere & Others v The State* SC 08/12.

The main factors to consider in an appeal against a refusal of bail brought by a person convicted of an offence are twofold. The first is the likelihood of the applicant's absconding. See *Aitken, (supra).* The second is the applicant's prospects of success on appeal in respect of both conviction and sentence. See *S v Williams* 1980 ZLR 466 (A) at 468 G-H; *S v Mutasa* 1988 (2) ZLR 4 (S) at 8D; *S v Woods* SC 60/93 at 3-4; *S v McGowan* 1995 (2) ZLR 81 (S) at 83 E-H and 85 C-E. Other factors to be taken into consideration are the right of the individual to liberty and the possibility of a lengthy delay before the appeal can be heard. *See Mungwira v S* HH 216/10. See: *Gaillah Muroyi v The State (supra); Milton Gomana v The State* SC 166/20.

Whether there are good prospects of success on appeal?

The applicant's contention against conviction is based on factual findings and evidential issues. The applicant argues that his identification was improperly established as there was no formal identification parade held. Identification parades are in general held under circumstances where the suspect is not known or is a stranger to the identifying witness. In such an instance a properly conducted identification parade can be of assistance to a court since it gauges the reliability of the identification. See: unreported judgment of the High Court of Namibia in *S v. Calvin Liseli Malumo and 119 Others* case CC 32/2001 delivered on 10.02.2005.

In *casu,* in respect of the first state witness, Clive Ncube, no useful purpose was going to be served by conducting an identification parade, I say so because, this witness testified that applicant was the driver of the getaway vehicle. During the hot pursuit, somewhere along Albert Hitman Road, the applicant stopped the vehicle he was driving. The witness also stopped the vehicle he was driving just behind that of the applicant. When the witness was just about to disembark from his vehicle to talk to the applicant, applicant took his head outside the window and started smiling. The witness noticed that applicant was light in complexion, with a pointed nose. He was putting on a black cap. The place was illuminated by the lights from the witness's vehicle, which was parked behind that of the applicant. This witness says he was five metres away from the applicant. Again, the witness told the court that he was employed by the National Railways of Zimbabwe (N.R.Z.), and one of his duties was to visit the workshops to check on costings there. After the first encounter, Albert Hitman Road, he visited the electrical section, and saw the applicant at that section. He alerted Criminal Investigations Department (C.I.D.) Minerals, a detective sergeant Ncube, that he had seen the person who was driving the Honda Fit registration number ADX 7665. There was no reason to hold an identification parade in respect of witness Clive Ncube, because he had already identified the suspect at the N.R.Z. workshops and informed the police of this fact. An identification parade was not going to serve any useful purpose under such circumstances.

The second state witness, Njabulo Ncube, identified the applicant and his co-accused in the dock. He identified applicant (who was accused 1 at the trial), as the driver of the vehicle they were pursuing some months back. Applicant attacks this identification. My view is that the real question in issue is not the admissibility of this identification but the evidential value to be placed thereon. Where a witness identifies an accused in the dock, it forms part of the evidential matter upon which the case must be decided and there is no reason in principle to exclude it solely due to it having been done in court. It primarily remains a question what weight the court should afford to the reliability of such identification. See: unreported judgment of the High Court of Namibia in *S v. Calvin Liseli Malumo and 119 Others* case CC 32/2001 delivered on 10.02.2005; *S v Mutsinziri* 1997 (2) ZLR 6 (HC). In *S v. Mthetwa 1972 (3) SA 766 (A) at 768 A – C,* the court summarised the factors which should be considered in assessing the weight to be accorded to evidence of an identifying witness. The court said it is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the

witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility, the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.

Njabulo Ncube testified that he was a passenger in the vehicle driven by the Clive Moyo, the first witness. The vehicle was pursuing the gate away car. He told the court that the gateway car was driven by the applicant. The getaway car stopped somewhere in Albert Hitman Road, applicant put his head out of the window and looked directly at the witness and Clive Moyo, and then speed off again. He said they took down the registration number, i.e. ADX 7665 of the getaway car to the police, and gave it to the police. He testified that applicant had a sharp nose. When cross-examined about visibility, the witness says, "our vehicle lights were on, i.e. ours and theirs."

According to the two witnesses the applicant and his companion (s) were travelling in a motor vehicle, the registration of which they had noted and which ultimately was supplied to the police. It is not seriuosly disputed that the vehicle, i.e. Hond Fit ADX 7665, was used in the commission of the crime. The two witnesses recorded the registration number of the Honda Fit which was ultimately supplied to the police and which was traced back to the applicant. The two state witnesses were all absolutely positive that the man they saw driving the Honda Fit is the applicant. They all said that they recognised his face at the time when they saw him driving the getaway Honda Fit. Clive Ncube said he saw applicant again at the N.R.Z. workshops, and recognised him as the person who was driving the Honda Fit the night of the commission of the crime. He informed the police, a sergeant Ncube. The description of the applicant by Clive Ncube was confirmed by the trial court, i.e. the court observed him and recorded that indeed he was light in completion. The fact that the police arrested applicant as a result of the Honda Fit registration number is of no consequence. It does not detract from the fact that Clive Moyo identified applicant at the N.R.Z. workshops, and informed the police.

Applicant contend that he was exonerated by the evidence contained in the co-accused's defence outline. The simply answer to this submission is that a defence outline is not evidence.

It is a statement made in terms of section 188 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The co-accused did not give evidence before the trial court, he absconded upon the dismissal of the application for a discharge at the close of the state case. It is erroneous to suggest that applicant was exonerated by the evidence of his co-accused. There is no such evidence before court. Again, applicant contends that all the state witnesses exonerated him in the commission of the offence, there is simply no such evidence of exoneration on record. Evidence may be direct or circumstantial, whatever it is, and it is its weight that matters. Furthermore, there is nothing on record which supports the applicant's submission that all state witnesses contradicted each other on material evidence. There is just no evidence that the description by the witnesses of the person they saw driving the getaway car, meets that of Ndebele, and not applicant.

Risk of absconding

The prospects of success and the possibility of abscondment are interconnected. The less likely the prospects of success, the more the inducement there is on applicant to abscond. In the circumstances, there is a real likelihood that the applicant will be tempted to abscond and not await to serve the prison term at the conclusion of the appeal. The fact that he has been convicted and has already experienced incarceration, and is fully aware of the sentence imposed, affords abundant incentive for him to abscond. There is, therefore, a high probability that he will abscond if he is released on bail pending appeal. In light of this, the appellant fails the second test as he is a flight risk.

In respect of sentence, applicant has been convicted of contravening section 60A(3)(a)(b) of the Electricity Act [chapter 13:19], which, in the absence of special circumstances peculiar to the case, carries a minimum imprisonment for a period of not less than ten years. The trial court made a factual finding that the applicant failed to establish special circumstances peculiar to the case. In the event the appeal against conviction fails, applicant will not avoid a long prison term of ten years.

The concession by prosecution that there are prospects of success on appeal was not well taken. The regional magistrate took into account all factors surrounding the offence before convicting the applicant. Applicant's defence amounted to a mere bare denial, which did not

score anything for him in this case. There are, therefore, no reasonable prospects of success on appeal against both conviction and sentence.

Disposition

In the result, I order as follows: the application for bail pending appeal is refused and applicant shall remain in prison.

Tanaka Law Chambers, applicant's legal practitioners
Prosecutor-General's Office, respondent's legal practitioners