

THE ATTORNEY GENERAL

Appellant

Versus

ROBERT ALLAN BONNEL

1st Respondent

And

DOUGLAS ZVENYIKA N.O

2nd Respondent

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 4 FEBRUARY 2011 AND 10 FEBRUARY 2011

K. Ndlovu for the appellant
S. Mguni for the respondent

JUDGMENT

MATHONSI J: The 1st Respondent is facing 2 charges. The 1st one is contravening Section 33(2)(b) of the Criminal Law Code, Chapter 9:23. The 2nd one is contravening Section 36(1)(b) of the Immigration Act, chapter 4:02.

He was arrested in Gwanda on 13 January 2011 and arraigned before a magistrate in that town on 17 January 2011 and remanded in custody. On 26 January 2011 he made an application for bail pending trial arguing that he was a good candidate for bail especially in light of the fact that in terms of Section 34 of the Criminal Law Code, he could not be prosecuted without authority being granted by the Attorney General. That authority had not been sought and the AG's office in Bulawayo had intimated that it would be several months before the matter is considered by the AG.

In addition to that, it was submitted on 1st Respondent's behalf that the offences that he was facing were not serious and that even if he was convicted he would be sentenced to a fine. For that reason there was no incentive for abscondment.

In respect of the 2nd charge under the Immigration Act, it was revealed to the Court that the Immigration Department had already dealt with the matter and fined the 1st Respondent for over staying his welcome before extending his stay by a further 30 days (page 7 of the record). That being the case, the 1st Respondent was now legally in the country and the 2nd charge would naturally fall off as he could not be prosecuted twice for the same offence.

In opposition to the bail application, the state was unbelievably brief. This is what public prosecutor Dube had to say:

“ The state is opposed to bail. Accused is a foreigner. Even if stringent conditions are put in place there is no guarantee that the accused will remain in the country. Also we do not have the local address of the accused. We only have his SA address. That the process of getting the consent is a long one, it may take some months before we get. Thats all.”

The magistrate was not impressed by the opposition and concluded that the interests of justice demand that the 1st Respondent be granted bail. He reasoned that it did not make sense that the accused person be kept in custody pending the decision of the Attorney General whether to prosecute or not. He was of the view that at the end of the day the AG may well decide not to prosecute in which case, the accused would have been in custody for a lengthy period for no reason. In saying that he was obviously fortified by the concession made by the state that the process was a long one. He was therefore surprised that the state was opposed to bail even against that back ground.

The magistrate also went on to conclude that it was never the intention of the legislature to keep accused persons in custody awaiting the decision of the AG whether or not to prosecute.

He considered the argument by the state that the accused will abscond and rejected it because the state had not shown “why it says accused will slip back to his country and will not come back to stand trial if released on bail” (page 14)

The state has now appealed against the decision to admit the 1st Respondent to bail on the following grounds:

“(i) The learned Magistrate erred in not taking into account that the Respondent is a South African National who has no ties to the country.

(ii) The Learned Magistrate erred in failing to appreciate that the above reason could be enough inducement for the Respondent to abscond.”

Essentially therefore this is one ground of appeal, i.e that because the 1st Respondent is a foreigner that affords him an opportunity to abscond. No evidence was submitted to establish the claim that the 1st Respondent was a flight risk even as he faces charges where he is unlikely to be incarcerated if convicted. I totally agree with the magistrate that the state has failed to establish this claim.

Section 34 of the Criminal Law Code provides:

“No proceedings shall be instituted or continued against any person in respect of a crime in terms of this Chapter, other than proceedings in respect of the crime of possessing a dangerous weapon or unlawfully possessing or wearing a camouflage uniform or for the purposes of remand, without the authority of the Attorney General.”

Clearly no further action in this matter can be taken until the AG has given authority. This, together with the admission that the AG takes several months to consider such matters means that the 1st Respondent may be kept in prison for a long time. In my view this was a very relevant consideration in determining whether or not to grant bail.

I do not agree that there was any misdirection whatsoever on the part of the magistrate. He properly exercised his discretion in favour of the 1st Respondent.

I therefore come to the conclusion that this appeal is completely devoid of merit. Accordingly it is hereby dismissed.

*R. Ndlovu & Company, Appellant's Legal Practitioners
Criminal Division, Attorney General's office, Respondent's legal practitioners*