FARI MAGUWU
versus
THE STATE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 17 June 2010

Mr. Bere and Mr. Maanda, for the applicant.
Mr.Chikosha and Mr. Marewanhema.

BAIL APPLICATION

BHUNU J: The appellant is the executive director of the Centre for Research and Development, a registered trust entity stationed at Mutare. Acting on information the police arrested him on 3 June 2010 on allegations of publishing or communicating false statements prejudicial to the state as defined in section 31 (a) (ii) of the Criminal Law [Codification and Reform] Act [*Cap 9:23*]. The offence is punishable by up to 20 years imprisonment.

Upon investigations police recovered two documents containing the alleged false information. A document marked ECZ / FL 030 entitled, "March 2010 Progress Report was recovered from the appellant's residence at number 2301 Chikanga Phase 2, Mutare. That document reads in part:

"CENTRE FOR RESEARCH AND DEVELOPMENT

GRANT NUMBER: ECEZ / FL 030
CHIADZWA WATCH
MARCH PROGRESS REPORT

OBJECTIVES

- To identify victims of military and police brutality at Chiadzwa and record testimonies on affidavits as evidence of abuse.
- To identify perpetrators from the army and police who committed human rights abuse in Chiadzwa and create a data base for future prosecution.
- To obtain documents that proves that human rights abuses were committed in Chiadzwa. The documents include hospital records, post mortem reports and burial orders.
- To identify victims that needs treatment.

PLANNED ACTIVITIES"

- Victim identification.
- Perpetrator identification.
- Gathering documents.
- Treatment of victims.

PROGRESS ON THE PLANNED ACTIVITIES

1.1 Victim identification

In the month of February 15 victims were identified in Chimanimani, Chakohwa and Marange. Of these 15 victims 2 were bitten by dogs, 2 were shot by guns and 11 were assaulted. The CRD field officers interviewed the victims and recorded their testimonies on affidavits. The victims were abused heavily by police, soldiers and security guards in Chiadzwa.

1.2 Perpetrator Identification

The Centre for Research and Development interviewed the victims and eye witnesses of the Chiadzwa atrocities and came up with a list of perpetrators. These were mainly soldiers and policemen employed to guard the diamond fields but ended up killing and maiming civilians. Following are 8 names of some perpetrators of Chiadzwa atrocities we managed to track during our research.

- Constable Sam ZRP Marange 49-0731855 – 49, force number 060021P.

- Officer commanding Mutare Rural, O.C. Govo.
- Colonel Emmanuel Karande.
- Officer Commanding Nyanga District, Chief Supt Chani.
- Officer Commanding Chipinge District, Supt Jaboon.
- Constable Muza who is based at Chikurubi Support Unit.
- Supt Chipanda from the Support Unit.
- Senior assistant Commissioner Matutu."

The report goes on and on to talk about the treatment of victims at various hospitals and clinics. It also talks of the sighting of dead bodies of victims of the alleged abuse and atrocities at various mortuaries. The sighting of graves of victims, burial orders and so on and so on.

The second document is an e-mail which the state alleges contains evidence of the publication of the above documents to various people including one Tor-Hugne Olsen, Anton Dekker and Gabriel Shumba. The e-mail is addressed to the appellant Farai Maguwu and is copied to other three recipients. It appears to be a response to the above report seeking further clarification of the alleged abuses and atrocities.

The e-mail reads in part:

Dear Farai

Thank you very much for this report

I have some questions and comments that I hope you and your colleagues can answer and that these comments can be useful in future reports.

1. The report starts with information about a sharp increase in the number of people assaulted in the month of April. This is indeed interesting. From your description of the assaults, some of these seem to constitute torture. Have any of your team had any training in identifying what constitutes torture? Are you in touch with organisations that could help you differentiate between assault and torture? (CSu)

2. Further down in the introduction you inform there is a(n) increase of human rights violations against community members in three named communities can you provide figures compared to last month as you did with the assaults? (This later seems to increase to four, and I fail to understand how, see below).

3. You are using the terms human rights violations and human rights abuses and it is a bit unclear if you are distinguishing between the two. I understand it as you are describing here is mainly human rights violations as (as in committed by the state and its apparatus, i.e ZRP and ZNA) and not so much human rights abuses. (Committed by non state actors, individuals, terrorist groups etc) For example in the introduction you are using both terms which might be confusing, and in 1.2 the fourth brigade should clearly be a human rights violation and not abuse. I should think similarly 1.3…"

It is common cause that the above report in fact contains *prima facie* false statements as no one has suggested that the statements are true or has reason to believe that the statements may be true.

The appellant appeared for initial remand on 8 June 2010 before the presiding magistrate. At that hearing the defence unsuccessfully opposed the placement of the appellant on remand arguing that there was no prima facie case against the appellant. No appeal has been launched against that ruling. The magistrate's ruling thus became firm and binding. This Court therefore proceeds on the basis that the appellant has a case to answer.

At the same hearing the appellant unsuccessfully applied for bail. In dismissing his application for bail the trial magistrate correctly took into account the following factors:

1. Whether the applicant will stand trial if granted bail.
2. Whether the applicant will interfere with investigations and witnesses.
3. Whether the appellant will commit further offences while on bail.
4. Other considerations which the court deemed good and sufficient.

In determining the matter the presiding magistrate correctly appraised himself of the need to balance both parties' competing interests that is to say the appellant's right to liberty and the need to preserve the due administration of Justice.

Having carefully considered the facts before him the magistrate made the following determination:

"This court takes note that investigations are in this matter are still pending and this offence is of a serious nature. As a result the reliance on bail by the accused at this stage will not favour the interests of justice because investigations are not yet complete As such there is a risk that accused will interfere with investigations.

However, once investigations are complete I don't see the reason why accused should not be granted bail pending trial.

At this stage it is not in the interest of justice to grant the accused bail, but the state is urged to expeditiously wind up their investigations and on the next remand date bail is going to be considered again.

The application is hereby dismissed at this stage."

Upon a careful analysis of the magistrate's reasoning I can perceive no misdirection. An offence punishable by up to 20 years imprisonment is undoubtedly a serious one. The state alleges that the appellant makes a living out of publishing false information detrimental to his own country. That kind of behavior if proved is treacherous and abominable particularly in these times of national economic strife.

It is also self evident that investigations were still in there infancy. While it is trite that the police must not arrest to investigate, in this case the police are not guilty of that misconduct because they already have sufficient evidence to place the appellant on remand. All what they need to do is to complete their investigations without interference or the ends of justice being compromised.

The presiding magistrate has rightly urged the police to expedite their investigations to enable him to fairly consider the merits and demerits of granting the

appellant bail. Before this Court the parties were haggling over whether or not investigations were now complete. In my view this is an issue which should now be placed before the magistrate. It cannot be a subject of appeal because the trial magistrate has not determined the issue following his initial determination.

Apart from what I have said above there are one or two other issues which I need to comment on before putting the matter to rest. It was argued both before the magistrate and this Court that the appellant had been ill-treated, denied access to medical attention and unlawfully removed from remand prison by state agents. While the courts do not condone that kind of misbehaviour it would be wrong and injudicious for the courts to hastily move in and condemn one party or the other without a proper enquiry into the allegations and before everyone concerned has had a say. It must always be remembered that the *audi alteram patem* rule is the bedrock upon which our criminal justice system is founded. For that reason neither this Court nor the lower court could condemn either the police or the army upon the defense's mere say so without concrete evidence and before they have been heard.

Above all the mere alleged misbehaviour of some overzealous state agents cannot be the basis upon which the granting or denial of bail can properly be assessed Entitlement to bail has to be earned The adage that two wrongs do not make a right is appropriate. The presiding magistrate was therefore correct when he ordered an enquiry into the alleged acts of misconduct so that remedial action could be taken according to law.

The state was correct in conceding that the appellant be accorded medical attention forthwith and the magistrate was also correct in granting that order by consent. It was however wrong for the defence to take the issue on appeal to this Court when the issue had been determined in their favour and in the absence of any misdirection on the part of the lower court in respect of that issue. If the consent order had been disobeyed the magistrates' court is clothed with the necessary jurisdiction to regulate and enforce its own judgments and orders. The High Court is not an enforcement agent for the magistrates' court. The defence ought therefore to have invoked the procedures laid down by statutes rues and regulations.

I am not persuaded that the state case is weak as alleged by the defence having regard to the concrete documentary evidence I have adverted to elsewhere in this judgment. That evidence is in my view damning unless some witnesses turn hostile or are severely discredited as happened in the case of *The State v Bennet HH 79 – 2010.* The sufficiency of evidence is however, within the purview of the trial court .Suffice it to say at this stage the available evidence points to a strong case against the appellant.

It has been also argued that the state case is weak because the constitutionality of s 31 (a) (ii) of the Criminal Law [Codification and Reform] Act [*Cap 9:23*] is being challenged in the Supreme Court. I take the robust view that lower courts are not bound by decisions which though pending have not been made by the Supreme Court. It is my considered view that no one has the right to publish false information or statements to the detriment of others. If it were so that would make nonsense of the law of defamation and perjury.

In the result, having found no misdirection on the part of the presiding magistrate it is accordingly ordered that the appeal be and is hereby dismissed.

Bere Brothers, the Appellant's Legal Practitioners.
The Attorney General's Office, the Respondent's Legal Practitioners.