

ISHMAEL CHOKURONGERWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZEJ
HARARE, 24 June & 13 July 2015

Bail Application

T Takaendesa, for the applicant
T Mapfuwa, for the respondent

MAWADZE J: On 24 June 2015 I dismissed the applicant's application for bail pending appeal and gave my reasons *ex tempore*. On 10 July 2015, I was served with a copy of a letter from the applicant's new legal practitioners dated 30 June in which they requested to be furnished with the written reasons for refusing bail in this matter. I now proceed to give the reasons.

The applicant was convicted by the magistrates court sitting at Harare of contravening s 36 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to public violence.

The charge is framed as follows:

"In that on 30 May 2014 and at Budiriro 2 Park, Harare Ishmael Chokurongerwa acting in concert with John Mutasa, Jona Murawa, Alexio Chinhema, Clement Chimutso, Madzimure Madzimure, Tavengwa Gwenzi, Tihafa Madyegora, Johannes Makumbe, Cabson Chandavha, Darlington Mambayo and Charles Matenga who have since appeared in court unlawfully and forcibly disturbed peace, security and order of the public to a serious extent by throwing stones, wooden sticks and other missiles at Police Officers, Zimbabwe Broadcasting Cooperation Journalists and Apostolic Christian Council of Zimbabwe delegates who were on or near Madzibaba Ishamel's shrine in Budiriro 2 Park, Harare."

The applicant is 44 years old and resides at No 17087 Budiriro 4 Extension Harare. He is said to be the leader of Johanne Masowe Echishanu (Madzibaba Ishmael Sect) Budiriro 4 Extension Harare.

The allegations against the applicant can be summarised as follows as per the state

outline;

On 30 May 2014 one Archbishop Ndanga of the Apostolic Christian Council of Zimbabwe (ACCZ) led a delegation of about 15 people, 26 Police Officers and journalists from the Zimbabwe broadcasting Cooperation (ZBC) and private media to the applicant's shrine at Budiro 4 Harare with the intention of suspending the operations of applicant's sect over allegations of child and women abuse. They found the congregants seated. One Bishop Matsveru asked for the applicant to be called as the congregants were singing ignoring Archbishop Ndanga's delegation. It is said the applicant was told of the purpose of the visit and that Archbishop Ndanga started to read a document in English but was challenged by applicant to use Shona. It is said Archbishop Ndanga continued to read the document and ordered applicant's arrest for interfering with the proceedings. As a result applicant is said to have stood up and started to sing a song called "Umambo wepfumo neropa" and other congregants joined charging towards the delegates armed with sticks. The state alleges that the applicant acting in common purpose with other congregants already convicted assaulted members of the ACCZ, journalists and Police Officers with sticks. As a result nine police officers were injured all over their bodies and a ZBC journalist Relax Mafurutu sustained fractures on both hands and an ACCZ delegate Langton Muchena had a fractured arm. The front windscreen and rear windscreen of a ZBC van Registration No ABR 9830 and a tripod camera stand valued at US\$1 350-00 were damaged. The applicant was only arrested eight months later on 2 January 2015.

The applicant pleaded not guilty and in his defence outline he gave an alibi that he was not at the scene of crime on the day in question but had attended to prayer outside Harare. Applicant did not state where exactly he had gone but said he only returned to Harare in August 2014. All applicant said is that whatever transpired at the scene of crime happened in his absence. Applicant said he was not even aware that he was wanted by the police in connection of the matter until at the time of his arrest. In a rather vague manner applicant said he incorporated proceedings in CRB 5901/14 as part of his defence outline without specifying what exactly he was incorporating in those criminal proceedings.

It is necessary at this stage to summarise the evidence which he was led by the state and by the applicant. The state called five witnesses and the applicant called also five witnesses. I will start with the evidence led by the state.

1. Stanley Tafireyi

He is a police officer based at Budiro and said he was well known to the applicant who used to visit the police station. He was at the shrine on the day in question.

He testified that before reading the document Archbishop Ndanga conversed with the applicant and that it is the applicant who asked Archbishop Ndanga to use Shona instead of English and that Archbishop Ndanga ordered applicant's arrest. He said the applicant then stood up and started to sing the song called "Umambo hwepfumo neropa" after which all congregants joined in. He said the congregants started to assault the members of the delegation using the staves or sticks. Stanley Tafireyi indicated that the applicant was present and that he saw applicant despite that he did not see the applicant participate in the assault.

Under cross-examination Stanley Tafireyi insisted that he knew the applicant well and that applicant was present at the shrine on the day in question. He maintained this stance.

2. Chipo Chironga

She is a police officer and was at the shrine on the day in question. She did not know the applicant prior to the day and first saw the applicant on the day in question. She said it is applicant who asked Archbishop Ndanga to read the statement in Shona rather than English and that it is the applicant who first stood up to sing the song in issue of "Umambo hwepfumo neropa." She maintained under cross-examination that applicant was at the scene of crime on day in question.

3. Lameck Chitope

He is 72 years old and chairman of ACCZ. He testified that he had known applicant since 2013 when he, Lameck Chitope once visited the same shrine. He was with Archbishop Ndanga on this day in question. He said it is applicant who stood up and protested when Archbishop Ndanga read the statement. He said it is also applicant who started to sing the song which sparked the violence by members of the congregants.

Lameck Chitope said as he tried to move away he was assaulted by the applicant on the back and that more congregants joined in the assault. He sustained a broken arm. Lameck Chitope insisted that the applicant was present and went on to identify applicant on a picture in the *Daily News Newspaper* for 1 June 2014 by circling applicant's picture. He also identified himself in the picture in the *Zimbabwe Mail Newspaper* in which he was soaked in

blood (see exh(s) 2 and 3). He further went on to identify the applicant in a video clip played in court, exh 4.

Lameck Ciptope was subjected to lengthy cross-examination and was taken to task about his evidence in previous proceedings CRB 5901/14. He remained adamant that it is the applicant who started the song and that applicant also assaulted him. As regards his evidence in CRB 5901/14 he said he only commented on the accused persons who were in court during those proceedings as applicant was not among them. He indicated that accused 18 in CRB 5901/14 also assaulted him. He seemed to say that Archbishop Ndanga did not know the applicant.

4. Langton Chasaira

He is the protocol officer with ACCZ and said he had always known the applicant. His evidence was that it is the applicant who started to sing the song in issue and that he witnessed applicant assaulting Lameck Chitope. He too was assaulted by other congregants.

Under cross-examination he said he had known applicant for a very long time and that he knows the applicant very well. He further said that it is applicant who asked Archbishop Ndanga to read the document in Shona and that it is applicant who started to sing the song that sparked the violence.

He contradicted Lamek Chitope by saying applicant assaulted Lameck Chitope in the front rather than the back. He seemed to say he was also assaulted by the applicant. He identified the applicant on exh 2 being a picture in the *Daily News Newspaper*.

5. Archbishop Johannes Nyamwa Ndanga

He testified that prior to that day the applicant had visited his offices twice and therefore he knew the applicant very well.

As regards the events of the day in question he said on arrival he did not see the applicant but later saw the applicant as he read the document in English and applicant asked him to read it in Shona. He said the applicant stood up and approached him asking him about freedom of worship. In response Archbishop Ndanga said he told the applicant to visit his offices within 21 days. He said the applicant then started to sing the song and police officers advised Archbishop Ndanga to leave the shrine and he immediately drove off.

Under cross-examination Archbishop Ndanga was taken to task just like other state witnesses why he had not referred to applicant's role in CRB 5901/14. His response was that

the applicant was not among the accused in those proceedings and he therefore did not refer to him. He dismissed the allegations that he has political differences with the applicant.

I turn to the evidence led by the applicant.

In his evidence the applicant said that on the day in question he was in Hurungwe and not Harare. Applicant said he is not the person in the *Daily News* picture and the video clip but one Nesbert. Applicant admitted that he was known to Archbishop Ndanga as he had visited Archbishop Ndanga's offices previously. Applicant said Archbishop Ndanga had asked him during that visit to support Archbishop Ndanga politically. The applicant said that the state witnesses were mistaking accused 22 on CRB 5109/14 for the applicant and that the same state witness had alleged in CRB 5109/14 that it is accused 18 who did all what they now allude to the applicant. The applicant insisted that in CRB 5/09/14 none of the state witnesses made reference to him.

Under cross examination the applicant admitted that both Lameck Chitope and Archbishop Ndanga knew him before the day in question. The applicant was not able to give any reason as to why Police Officers who testified would falsely implicate him.

He denied that he was on the run after the commission of the offence and indicated that he does not read newspapers or listen to the radio hence he was not aware that he was wanted by the police. The applicant admitted that he had heard about the assault of police officers at the shrine but was not aware he was implicated or wanted by the police.

The witnesses called by the applicant had this to say;

1. Nesbert James Jayi

He testified that he was at the shrine on the day in question and that he is the person identified by the state witnesses on the video clip as the applicant. He indicated that he looks like the applicant but that he can be distinguished by the dark colour of his beard and thickness of his lips. He maintained that the applicant was not at the shrine on the day in question. He however, said he was not among the 37 accused arraigned under CRB 5901/14.

2. Bongani Magwenzi

The thrust of his evidence was that the applicant was not at the shrine on the day in question.

3. Takavengwa Gwenzi

He was part of the 37 accused who were arraigned under CRB 5901/14 and was accused 18. He is now a serving prisoner. He testified that the applicant was not at the shrine on the day in question. He however did not admit during his trial that he had caused violence on the day in question but rather pleaded not guilty to the charge.

4. Joseph Emmanuel Sande

He resides in Hurungwe and said that in mid May 2014 he saw the applicant in Hurungwe who left some of his goods at Joseph Emmanuel Sande's home as the applicant went to a mountain to pray. He said the applicant only returned to collect the goods in August 2014. It is not clear why this apparent detail is not part of the applicant's defence outline. Further Joseph Emmanuel Sande was not able to explain why he would recall 30 May 2015 date of alleged offence.

5. Spartewell Obey Marewo

He testified that the applicant was not at the shrine on the day in question and that the applicant is being falsely implicated for political reasons.

The Law

In an application for bail pending appeal the major consideration is whether there are prospects of success on appeal. The court has also to strike a balance between the interests of the administration of justice and the need to uphold the liberty of the individual. Further, it is also important to note that unlike an application for bail pending trial, the presumption of innocence would have fallen away. In the case of Robert Martin *Gumbura v The State* HH231/14 Musakwa J at p 11 of the cyclostyled judgement referred to a plethora of cases which outline the law applicable in cases of this nature which include; *S v Manyange* 2003 (1) ZLR 21 (H); *S v Labushagne* 2003 (1) ZLR 644(S); *S v Benatar* 1985 (2) ZLR 205 (H); *S v Tengende & Ors* 1981 ZLR 445 (S); *S v Williams* 1980 ZLR 466 and *S v Kilpin* 1978 RLR 282 (AD).

The applicant's notice of appeal outlines twelve grounds of appeal in respect of conviction but in my view these can be simply reduced to three grounds of appeal which are;

1. The relevance of the proceedings in CRB 5901/14 to the present case in view of the

findings made by the court *a quo*.

2. Whether the court *a quo* properly assessed the credibility of the state witnesses.
3. The veracity of the applicant's alibi.

In respect of the sentence imposed the applicant simply alleges that the sentence induces a sense of shock.

I now turn to look at these grounds of appeal to ascertain whether the court *a quo* misdirected itself.

It is not clear what specifically the applicant incorporates in the proceedings in CRB 5901/14 as the applicant's defence outline is vague in that respect. Does the applicant incorporate all the evidence led for and against the 37 accused persons in those proceedings or refers to specific aspects? If the applicant is referring to specific aspects which are those and why? The court *a quo* addressed its mind to this issue or aspect and came to the conclusion that the proceedings in CRB 5901/14 were irrelevant in determining the applicant's guilt or otherwise. I also note that the record of proceedings in CRB 5901/14 is not before me and was not produced during the trial in the court *a quo*. All I noted is that the state witnesses were cross examined on different aspects of their evidence in CRB 5901/14 and the defence witnesses were also asked to comment on proceedings in CRB 5901/14 by the defence counsel. I am therefore unable to appreciate how the court *a quo* is said to have misdirected itself in respect of the proceedings in CRB 5901/14. The applicant will have a mountain to climb in convincing the appeal court in this regard.

In respect of the assessment of the credibility of the state witnesses it is trite that in general terms the assessment of the credibility of witnesses is within the province of the trial court and that the appeal court can only interfere with such discretion if the trial court's findings defies reason and common sense. See *S v Mlambo* 1994 (2) ZLR 410 (S).

In his reasons for judgment the court *a quo* summarised the evidence of all the state witnesses and came to the conclusion that they all implicated the applicant despite the minor differences in relation to the perception of the events by the various state witnesses. All but one of the state witnesses knew the applicant prior to the day in question. All the state witnesses indicated that the applicant was present at the shrine. Despite minor differences they were consistent on what the applicant did.

They all indicated that the applicant protested that Archbishop Ndanga should read his statement in Shona and that when this failed the applicant sang the song which ignited the

violence. In fact Archbishop Ndanga was very clear that he engaged in a discussion with the applicant before police told Archbishop Ndanga to leave the shrine. The court *a quo* discounted both the pictures in the *Daily News Newspaper* and the video clip as these were not clear. In other words no probative value was placed on those exhibits by the court *a quo*.

The narrow issue which the court *a quo* correctly considered was whether the applicant was at the shrine on the day in question. The occurrence of public violence at the shrine in that particular day is not issue and in my view the court *a quo* properly answered the question of the applicants' presence and the role he played in the public violence. This incident happened in broad daylight when visibility was very good. It remains unclear as what would motivate all the state witnesses to falsely implicate the applicant if he was not at the shrine. Some vague references to political machinations were made in respect of Archbishop Ndanga but not in respect of other state witnesses. The applicant himself admits that he was known to some of the state witnesses prior to this day. I am of the view that the court *a quo* properly assessed the credibility of the state witnesses and find no misdirection in that regard.

The veracity of the applicants *alibi* was addressed by the court *a quo* which came to the conclusion that it was false. As already said the applicant in his defence outline was very vague as regards where he was on the day in question except to say he was out of Harare. In the defence outline the applicant did not say when he had left Harare, what his destination was and when he returned to Harare where he resides. These are material omissions which the applicant made and the court *a quo* rightly drew adverse inferences. I also find no plausible reason why the applicant would have failed to mention these material aspects in his defence outline. The applicant's witnesses did not add value to the applicants *alibi* as the applicant had not given a clear and concise *alibi* as he said he only returned to Harare in August 2014. The court *a quo* assessed the evidence of the applicant's witnesses and properly came to the conclusion that they were not being truthful.

I find that there was no misdirection in the part of the court *a quo* as it properly assessed the evidence placed before it. I therefore see no prospects of success on appeal in respect of the conviction on a charge of public violence.

In respect of the sentence the applicant was sentenced to 5 years of which one year was suspended on the usual conditions of good behaviour. There are no meaningful reasons advanced by the applicant as to why the appeal court would interfere with the sentence. It is clear that this offence of public violence was committed in aggravating circumstances as

defined in s 36 (3) of the Criminal Code [*Chapter 9:23*]. This was an attack on police officers who were on duty and in uniform. A journalist and members of the ACCZ were severely injured, some sustaining broken hands. The applicant's role in these barbaric acts was articulated by the state witnesses. There was damage to state property. It was therefore incumbent upon the court *a quo* to send a loud and clear message that such conduct would not be tolerated. I therefore do not doubt that a 5 year sentence was proper and as a result I do not believe that the appeal court would interfere with the sentence.

In conclusion I am satisfied that there was no misdirection on the part of the court *a quo* and consequently there are no prospects of success.

In the result, the application for bail pending appeal is hereby dismissed.

O Machuwaire Attorneys at Law, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners