EDWARD PEDZAI LORD SAMAKOMVA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 7 and 14 January 2005

Bail Application

Mr *Mapondera,* for applicant
Mr *Godzi*, for respondent

MAKARAU J: The applicant appeared before a Regional Magistrate at Harare facing one count of extortion, alternatively one count of contravening s3 (1)(a)(i) of the Prevention of Corruption Act [*Chapter 9:16*]. After contest, he was convicted on the alternative charge and sentenced to 5 years imprisonment with 1 year suspended for 5 years on conditions of good behaviour. He thereafter noted an appeal to this court against both conviction and sentence. He now applies to be allowed out on bail pending the determination of the appeal.

In his grounds of appeal, he seeks to attack the decision of the trial magistrate on the grounds that she erred in convicting him on the basis of accomplice evidence and further, that the sentence she imposed is so severe as to induce a sense of shock. The applicant has since amended his grounds of appeal to include an averment that his constitutional right to a fair trial was violated in that the court did not subpoena for his defence, two witnesses, namely Messrs. Chivhinge and Kahuni who were both employed by the Reserve Bank of Zimbabwe at the time of the offence.

The allegations giving rise to the conviction of the applicant are as follows:
He was employed by the Reserve Bank of Zimbabwe as an Investigator. As part of his duties, he was tasked to investigate the activities of the complainant, a local businessman who was suspected of illegally dealing in foreign currency and of conducting an illegal money transfer business. In that capacity, he came across information tending to incriminate the complainant. Using that information, he demanded money amounting to $100 000 000-00 as consideration for the favour of destroying a certain document that allegedly incriminated the complainant. The complainant paid him a total of $32 000

000-00 through one Luis Chabikira who was employed by the complainant as a Loss Control Manager. When the applicant demanded more money, the complainant made a report to the Governor of the Reserve Bank, leading to the arrest of the applicant.

At the trial of the matter, the State led evidence from the complainant and from Luis Chabikira and upon which testimony the trial court convicted the applicant. The complainant and Luis Chabikira were clearly accomplices of the applicant. In convicting the applicant on the basis of testimony from these two, the trial magistrate did caution herself that she was dealing with accomplice evidence as follows:

> " The court in analyzing the evidence could not overlook the fact that both witnesses were also involved in a criminal act in doing what they did. The issue for the court was on how much weight it should place on their evidence."

She then proceeded to find the witnesses credible and their respective testimonies safe to rely on.

It is trite that an appeal court is always slow to upset the findings of a trial court on the credibility of the witnesses that appear before it unless there are glaring inconsistencies and inadequacies in the testimony of such witnesses, which inconsistencies and inadequacies appear *ex facie* the record.

In the application before me, the applicant highlighted no such. I did not find any from my perusal of the record.

It may have been in realization of the absence of any inconsistencies and inadequacies in the testimony of the two State witnesses that Mr *Mapondera* shifted his attention to the amended ground of appeal as raising a potentially stronger ground to rely on in support of the application for bail pending appeal.

In the amended ground of appeal, the applicant submits that he was not afforded a fair hearing in that he requested the trial court to compel the attendance at court of his two witnesses. This, the court declined to do.

In my view, it is necessary to set out in detail the sequence of events giving rise to this assertion.

The applicant appeared before the trial magistrate on 5 October 2004. He was without legal representation. Trial commenced. On 4 November 2004 when he opened

his case, he indicated to the court his intention to call two witnesses whose names I have given above. After the testimony of the applicant, the trial was adjourned to 22 November 2004 presumably for the attendance and examination of the defence witnesses. At the resumption of the hearing, the prosecutor informed the court that both of the witnesses had declined the request to attend court. One of the witnesses, Mr Kahuni allegedly informed the prosecutor that he did not know anything about the case and was on his way to South Africa. The other witness, Mr Chivhinge declined the invitation to appear on behalf of the applicant on the basis that it was against the policy of the Reserve Bank of Zimbabwe where he is employed, for him to testify on behalf of the defence. In view of the information supplied to the court by the prosecutor, the court asked the applicant what should be done in the circumstances whereupon the applicant requested that the court compel the two to attend court. When the court suggested that the witness might turn out hostile to the defence if they were compelled to come to court, the applicant then suggested that the court conducts an inspection in loco at his house to establish whether his gate was black as alleged by one of the witnesses or was actually silver. The court then ruled that the applicant's request could not be granted and the reasons were to follow in the main judgement.

No such reasons followed in the main judgement.

On the basis of the above facts, the applicant alleges that the proceedings in the matter of his trial were so irregular as to violate his right to a fair trial and that there is a high chance of success on appeal on this basis. The respondent denies that the trial in the court a quo was an unfair trial and that it was attended with irregularities.

In making their submissions, both counsel were agreed that in considering this application, I must be satisfied that the applicant's appeal enjoy prospects of success and that in addition there are other positive grounds upon which bail must be granted. (See *S v Tengende and Others* 1981 ZLR 445 (S) and *S v Manyange* HH 1/03).

The issue that falls for my determination is whether the refusal by the court a quo to compel the attendance of the two defence witness violated the applicant's rights to a fair trial as alleged and/or was an such an irregularity as to warrant the setting aside of the appellant's conviction by a court of appeal.

I now turn to consider the content of the right of the appellant to a fair trial in respect of the right to be assisted by the court to compel the attendance of witnesses.

S 18(3)(e) of the Constitution of Zimbabwe provides as follows:
"(3) Every person who is charged with a criminal offence-
(a) ……..
(b) …….
(c) ……..
(d) ……..
(e) shall be afforded facilities to examine in person or, save in proceedings before a local court, by his legal representative the witnesses called by the prosecution before the court **and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and……"**(the emphasis is mine).

The content of the right contained in the above section was examined and debated in the case of *S v Beahan* 1989 (2) ZLR 20 (S).

Beahan, a British national resident in South Africa, was arrested in Botswana by Botswana police after fleeing this jurisdiction, (by swimming across the Zambezi River), where he was being questioned by the local law enforcement agents. He was handed over to the local police who charged him under the then Law and Order Maintenance Act [*Chapter 67*]. A statement was recorded from him and was taken before a magistrate for confirmation. At his trial in this court, the confirmed statement was adduced into evidence. He sought to challenge the admissibility of the confirmed statements on the basis that he had been ill-treated by the police in Botswana and thus his statement to the police in Zimbabwe was not made freely and voluntarily as he could not separate his maltreatment in Botswana from his maltreatment at the hands of the local police. He requested that the police from Botswana be called to testify as defence witnesses to enable him to discharge the onus on him that he had not made the extra curial statements tendered in evidence freely and voluntarily. He alleged that the absence of these witnesses would constitute a violation of his right to a fair trial.

The argument by Beahan that the absence of the witness he wished to attend court impaired his right to a fair trial did not find favour with the trial court nor with the Supreme Court on appeal.

In dismissing the appeal, the Supreme Court held at page 29 that:

> " An accused person who claims that his fundamental right to a fair hearing has been violated, in that he has not been afforded facilities to obtain the attendance of witnesses to testify on his behalf, guaranteed to him under s18 (3) (e) of the Constitution of Zimbabwe, must establish certain criteria. It is not sufficient for him merely to assert that he desires to call certain witnesses whose attendances at the trial is beyond the power of the Attorney-General and the court to compel. **He must make some plausible showing of how their testimony would have been both material and favourable to his defence. For this particular constitutional protection does not grant him the right to secure the attendances and testimony of any and all witnesses, only of those whom he seeks to testify on his behalf- that (is), witnesses in his favour."**(The emphasis is again mine).

It is my view that while the witnesses that Beahan sought to have compelled to attend his trial were beyond the jurisdiction and their attendance could not be compelled by process of this court, the legal principle upon which the decision in his case turned remains unaffected by the lack of jurisdiction of the court over the witnesses. It appears to me that the principle is this: a request to have defence witnesses compelled by the court cannot be had just for the asking. The applicant or accused must demonstrate that the testimony of such witnesses will be both material and will result in his acquittal.

The intimation of materiality of the witnesses is in my view amply borne out by reference to the American cases that the then Chief Justice GUBBAY cited with approval and relied upon in the Beahan case.

It is my view that in an application for bail on an allegation that the applicant was denied the right to fair trial in that he was denied access to witnesses, the applicant bears the heavy onus of proving that the testimony of the denied witnesses is both material and would have resulted in his acquittal. The onus on the applicant is in my view made more burdensome on appeal than at trial as the applicant has to show the materiality and probative value of the intended testimony against the evidence used to convict him. In other words, he has to show how the intended evidence would have destroyed or significantly reduced the cogency of the evidence on record. Where the intended testimony is remote or periphery to the charge, or is merely cumulative of the evidence already before the court, a failure by the court to compel the attendance of such witness does not appear to me to violate the right to a fair trial.

It further appears to me that the protection afforded an accused person by s18 (3)(e) of the Constitution of Zimbabwe is to be contrasted with the right of the accused to defend himself or herself. As was held by CHEDA J in *S v Muleya* 1992 (1) ZLR 68 (H), "the accused is entitled to present his defence no matter how unreasonable it may appear." In that case, the trial magistrate had stopped the proceedings after the State closed its case and proceeded to convict the accused without allowing the accused to present his defence.

While the right to present one's defence is absolute, the right to be assisted by the court to compel the attendance of witnesses has been interpreted by the Supreme Court and by the courts in America construing a similarly worded law, as being a qualified right, subject to the materiality and probative value of the testimony to be called.

It is my further view that the right to be assisted in compelling the attendance of witnesses is to be contrasted with the right to legal representation. In *S v Mushayandebvu* 1992 (2) ZLR 62 (S), MANYARARA JA (as he then was) held that a violation of an accused's right to legal representation as enshrined under s18 (2) (c) and (d) of the Constitution of Zimbabwe renders the trial incurably defective and for which there is no condonation. In that case, an unsophisticated woman had pleaded guilty to contravening the Firearms Act in the absence of her legal practitioner who was engaged elsewhere. The prosecutor, to who the legal practitioner had spoken before trial, neglected to inform the court that the accused was legally represented.

By his ruling above, MANYARARA JA was of the view that denial of legal representation on the facts of the matter before him constitutes a violation of one's right to a fair trial. The same Supreme Court has laid down certain criteria that must be satisfied before a denial by a trial court to compel the attendance of defence witnesses will amount to an unfair trial.

In casu, the applicant wished to call Mr Chivhinge as the custodian of the fax that the applicant allegedly destroyed after receiving a payment from the complainant. He also wished to have Mr Kuhuni called as this witness was still with the Reserve Bank of Zimbabwe when the investigations into the affairs of the complainant were commenced.

I have considered the application before me anxiously. From it, I am unable to discern the materiality of the testimony that the applicant intended to lead from the two witnesses nor that such testimony would have advanced the defence case. In arriving at this conclusion, I take into account the evidence that is on record against the applicant and the respective positions of the intended witnesses vis-a vis the allegations against applicant. Mr Kuhuni is alleged to have been with the Reserve Bank when the investigations into the affairs of the complainant commenced. His testimony would therefore be periphery to the charge. Mr Chivhinge is alleged to be the custodian of the fax that the applicant allegedly destroyed after being paid the sum of $10 million by the complainant. Again, I view the testimony of this witness as being remote from the charge and as not advancing the defence of the applicant. Evidence of the existence of the fax in the custody of the Reserve Bank of Zimbabwe does not destroy the cogency of the other evidence against the applicant.

I am further keenly aware that at this stage of the proceedings, I am not determining the merits of the appeal but merely examining the cogency of the evidence on record to determine whether the applicant enjoys prospects of having his appeal upheld on the grounds that he has raised. It is my view that the applicant enjoys no such prospects.

In the result, I make the following order:

The application for bail pending appeal is dismissed.

Mapondera & Company, applicant's legal practitioners
The Office of the Attorney-General, respondent's legal practitioners