

TUNGAMIRAI MADZOKERE
and
YVONNE MUSARURWA
and
LAST MAENGEHAMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 18 August 20 17 and 15 September 2017

Bail application

C Kwaramba, for the 1st and 2nd applicants
T Biti, for the 3rd applicant
Mrs B Mtetwa, for the respondent

BHUNU J: The 3 applicants were convicted of murder with actual intent and sentenced to the minimum mandatory sentence of 20 years imprisonment for the murder of a police officer inspector Petros Mutedza who was on duty at Glenview 3 Shopping Centre on 29 May 2011. The minimum mandatory sentence was imposed in terms of s 47 of the Criminal Law codification and Reform Act [*Chapter 9:23*] as amended.

They now belatedly apply for bail pending appeal. The appeal is based on points of law only. That being the case, the factual findings of this court are deemed to be admitted. Despite having been sentenced on 12 December 2016, they only approached this Court for bail pending appeal more than 5 months later on 24 May 2017. That cannot be the conduct of applicants who have confidence in the merits of their application.

The explanation proffered by Mr *Kwaramba* for the inordinate delay is that lead counsel for the defence Mrs *Mtetwa* was of the opinion that there is no point in applying for bail pending appeal. She is inclined to push for the early hearing of the appeal rather than apply for bail. Indeed she appears to have succeeded in this respect because Mr *Biti* indicated that the appeal is likely to be heard this term.

The 3 applicants therefore, appear to have deliberately resolved not to apply for bail on account that they had no confidence in the merits of their application for bail pending appeal.

They appear to have only plucked up courage to apply for bail pending appeal when Mr *Biti* counsel for the third applicant, who hitherto had not been involved in the trial conjured up new defences not raised and determined by this Court during the course of the main trial. For that reason Mr *Kwaramba* counsel for the first and second applicants chose to take a back seat and ride on the submissions of Mr *Biti* without making any meaningful submissions of his own.

The applicants' conduct in refraining from applying for bail until the day of reckoning is imminent raises the irrevocable suspicion of an intention to abscond. For that reason they have lost the court's trust that the interests of justice will not be compromised if they are granted bail.

The applicants were convicted of murder with actual intent in terms of s 47 of the Criminal Law Codification and Reform Act. As already stated above, the factual basis upon which the convictions are founded are not in dispute on appeal. The undisputed facts found proved beyond any reasonable doubt are that the 3 applicants actively participated in the murder of the deceased with the common purpose of resisting police orders to disperse. They were observed by credible eye witnesses committing the crime.

It is a fact found proved that all the applicants were part of a group of MDC-T members celebrating their T-shirt visibility day. When ordered by the police to disperse, they violently resisted the order to disperse by attacking the police with stones and other missiles. The mob was heard shouting party slogans and urging each other to kill the police of which the deceased was a member. See p 5 of the judgment appealed against.

Tungamirai Madzokere and Yvonne Musarurwa were observed by Inspector Nyararai who knew them well actively participating in the commission of the crime with the common purpose of resisting police orders to disperse. See p 13 of the judgment appealed against.

Last Maengehama was observed by Constable Mushananga actively participating in the commission of the crime with the common purpose of resisting police orders to disperse. See p 18 of the judgment. When arrested he did not give any defence of an alibi but proffered a fake alibi at his trial long after his arrest. In my view giving a fake defence in a criminal trial is wholly inconsistent with an innocent frame of mind.

The applicants were found guilty on the basis of their direct participation in the commission of the murder. The doctrine of common purpose was merely roped in as an evidential tool. The net result is that with or without the doctrine of common purpose the applicants were liable to conviction on account of their direct participation in the commission of the offence. Their direct participation in the commission of the crime made them *socius criminis* that is to say, associates in crime. See pages 4 to 5 of the judgment appealed against. In other words they were accomplices to the commission of the offence.

On those facts the applicants have appealed to the Supreme Court against both conviction and sentence. It was submitted on their behalf that they are good candidates for bail because they have good prospects of success on appeal.

The applicants being convicts, they have lost the presumption of innocence. For that reason they now bear the onus of proving their entitlement to bail in terms of s 115C (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as amended which provides as follows:

“115c (2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail –

- (a) ...
- (b) after he or she has been convicted of the offence, he or she shall bear the burden of showing on a balance of probabilities, that it is in the interest of justice for him or her to be released on bail.”

The primary considerations in an application for bail pending appeal were laid down by GUBBAY CJ in the case of *S v Zawo* (1) ZLR 536 (S) at p 539E and may be summarised as follows:

1. The likelihood of abscondment.
2. The prospects of success in respect of both conviction and sentence.
3. The right of the individual to liberty.
4. The potential of a lengthy delay before the appeal can be heard.

Undoubtedly the crucial issue for consideration in any bail application is the likelihood of abscondment which may compromise the ends of justice. Both counsel for the defence in their main addresses have not made any submission on this vital issue of the

application. The applicants have chosen to discharge that onus by simply saying in their bail statement they are unlikely to abscond because they have bright prospects of success on appeal. Mere bright prospects of success without more, is in my view no assurance against abscondment. A co-accused of the applicants, Lazarus Maengehama was acquitted in absentia after he had absconded trial.

The applicants also sought to rely on their previous observance of bail conditions prior to their conviction and sentence. While their previous good behaviour is commendable, the circumstances have since changed following their conviction and sentence. Considering that they have now tasted the rigors and hardships of prison life, this might prompt them to abscond. The onus was therefore on the applicants to prove on a balance of probabilities that despite the changed circumstances if granted bail they will not abscond. This they have failed to do.

Turning to the applicant's prospects of success on appeal, Mr *Biti* has no quarrel with the Court's assessment of the facts and interpretation of the law. His complaint on appeal, that they ought to have been acquitted at the close of the state case is absurd in the face of direct credible damning eye witness evidence which is not being challenged on appeal.

The main thrust of his argument is however, that in convicting the applicants the court erroneously relied on the doctrine of common purpose which is no longer part of our law. It was his argument that the common purpose doctrine is a common law principle which has since been repealed and outlawed by s 3 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. The section reads:

“3 (1) The non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on the 10th June, 1891, as subsequently modified in Zimbabwe, shall no longer apply within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law”

I understand the above section to mean no more than that the unwritten common law of Zimbabwe shall only apply to the extent it has been modified or repealed by statute. What this means is simply that where common law has been modified by statute it shall be applied only to the extent it has been modified. In my view the section is not a wholesale repeal of all uncodified common law in Zimbabwe. It simply restricts the application of common law to the extent it has been modified by statute. Nowhere does the Criminal Code expressly make a whole sale repeal of common law as alleged by Mr *Biti*.

In his argument he has not convincingly shown to what extent the common law doctrine of common purpose has been modified by statute. If it has been modified he has not shown where the Court erred by contravening or breaching the modification.

This is a novel argument which was only raised after conviction and was not considered by the court when convicting the applicants. The issue was only half-heartedly raised in mitigation after conviction. By that time the court was already *functos officio* with the result that the raising of the issue in mitigation of sentence had no effect on the extant judgment.

In his argument in these proceedings, Mr *Biti* sought to distinguish the position in Zimbabwe from other jurisdictions which still retain the doctrine of common purpose. Almost all the cases he cited uphold the common purpose doctrine albeit in a restricted or modified form.

All the local cases he cited uphold the common purpose doctrine as part of our law without exception.

The validity of common law in Zimbabwe is however entrenched by s 176 of the Constitution which provides that:

“176

The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution. (My emphasis.)

If common law was no longer part of our law it would be absurd for the constitution to confer the superior courts with inherent powers to develop it. Thus in my view s 176 of the Constitution makes common law an integral part of our law, any other law to the contrary is invalid in terms of s 2 of the Constitution which provides that:

“2 (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.”

The validity of the common law doctrine being founded on the Constitution, it is highly unlikely and not in the least probable that the appellants will convince the appellate court that the common purpose doctrine is no longer part of our law.

As a parting shot in his written submissions, Mr *Biti* bitterly complains that the applicants were convicted of a non-existent offence presumably because of the application of the common purpose doctrine. There is absolutely no logic in that submission for the simple but good reason that the applicants were not convicted of common purpose which is not an offence but of murder as defined in s 47 of the Criminal Code.

As regards the mandatory sentence of 20 years imprisonment, it is being challenged on appeal on the basis that mandatory sentences are unconstitutional in that they are an affront to the doctrine of separation of powers. This constitutional issue was never raised before this court. Consequently it was not determined by this court. The applicants propose to raise the issue for the first time in the appellate court. It is however inconceivable that the appellate court will entertain the issue considering that it is not a court of first instance.

The sentence being attacked on appeal is however within the range of sentences routinely passed by this court for offences of this nature. For that reason alone, I do not see the appellate court upsetting the sentence whatever the outcome of the constitutional challenge on appeal may be. It is therefore in the interest of the due administration of justice that the applicants should continue to serve their respective sentences while awaiting the outcome of their appeal.

In my view it is highly unlikely that the appellate court will upset the impugned judgment on the basis of discredited legal defences and issues which were not placed before the trial court for determination. No fault can be attributed to this court for crafting its judgment and sentence purely on the basis of the issues and defences placed before it. The applicants cannot raise new issues and defences in the Supreme Court because it is not a court of first instance.

For the foregoing reasons I have come to the conclusion that the applicants have dismally failed to discharge the onus:

1. That they will not abscond.
2. That they have reasonable prospects of success on appeal.
3. That there is any likelihood of delay in the appeal being heard.

That being the case, the application for bail pending appeal is accordingly dismissed.

Mbidzo, Muchadehama 7 Makoni, 1st and 2nd applicants' legal practitioners

Tendai Biti Law, 3rd applicant's legal practitioners

The Prosecutor General's Office, respondent's legal practitioners