

THE ATTORNEY GENERAL

APPELLANT

AND

NQOBANI NDLOVU

1ST RESPONDENT

AND

SIBONGILE MSIPA N.O

2ND RESPONDENT

IN THE HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 25 NOVEMBER 2010 AND 2 DECEMBER 2010

Miss N. Ndlovu for appellant

Mr J Tshuma for 1st respondent

Judgment

MATHONSI J: The Respondent is facing a charge of Contravening Section 31(b) (ii) (c) of the Criminal Law Code, that is, publishing or communicating false statements prejudicial to the state, it being alleged that on 14 November 2010 he published in the Standard Newspaper, a story that the police had cancelled their promotional examinations to allow retired officers and war veterans to take up posts in the police force.

In the alternative, he is charged with criminal defamation in breach of section 96(i) (a) and (b) of the Criminal Law Code in respect of the same article.

He appeared on initial remand before a magistrate and applied for bail pending appeal which was opposed by the state. In opposition, the state led evidence from the investigating officer, Detective Assistant Inspector Bhoora whose evidence was to the effect that the state feared that the Respondent will abscond given the seriousness of the offence. His only other

reason for opposing bail was that it had not been easy to arrest the Respondent as the police had gone looking for him at his work place and found him absent. He however conceded that the Respondent had voluntarily surrendered himself to the police in the company of his lawyer when he heard that the police were looking for him.

Detective Assistant Inspector Bhoora also alluded to the fact that the Respondent's co-accused, the Editor of the Standard, one Never Matanhire was still at large suggesting that if Respondent was admitted to bail, he will also run.

The trial magistrate was not impressed by the state's reasons for opposing bail which she promptly rejected. On the fear of abscondment, she concluded as follows:

"On the point of the accused being a flight risk that point does not stand because the accused person surrendered himself to the police in the presence of his defence. If accused really wanted to flee the jurisdiction he would have done so soon after having heard that Dumisani Sibanda had been interviewed and accused was supposed to surrender himself to the police for questioning."

Regarding the seriousness of the offence as a ground for opposing bail the trial magistrate observed:-

"The second point of the seriousness of the offence is not a good enough ground to refuse an accused person bail if not supported by other reasons or grounds for denying accused person bail."

Having satisfied itself that the Respondent was a good candidate for bail, the court a quo granted him bail on the following conditions:

1. That he pays a bail deposit of US\$100-00.
2. That he resides at house number 7547 Pumula North until the matter is finalised.
3. That he does not interfere with state witnesses.

Aggrieved by that bail ruling the Attorney General has appealed to this court on the following grounds:

- “(i) That the Magistrate erred in not considering the seriousness of the offences the Respondent is charged with, with the attendant terms of imprisonment upon conviction coupled with the fact that the Respondent’s actions are likely to lead to loss of confidence in the Police force by the general public.
- (ii) The Magistrate erred in failing to appreciate that the above reasons could be enough inducement for the Respondent to abscond.”

In terms of Section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07] an accused person is entitled to bail pending trial unless it is in the interest of justice that he or she should be detained in custody. Subsection (2) of that Section provides that it shall be in the interest of justice to deny bail where it is established that there is a likelihood that if granted bail, the accused will endanger public safety, will not stand trial, will attempt to influence witnesses or will undermine the proper functioning of the justice system.

It is not necessary to discuss all the other factors given that the state is relying on the ground that the Respondent will not stand trial owing to the seriousness of the charge.

I do not agree with the claim that the magistrate did not consider the seriousness of the offence. She actually did and came to the conclusion that it is not a good ground to deny bail. She went on to say that, in any event contravening Section 31 of the Criminal Law Code is not so serious an offence as to deny an accused bail.

In fact the penalty for breaching that section is a fine up to or exceeding level 14 or imprisonment for a period not exceeding 20 years or both. It is trite law that where a statute

provides for a penalty of a fine and an alternative penalty of imprisonment, the sentencing court must give effect first and foremost to the sentence of a fine.

Accordingly, I do not agree that there was any misdirection on the part of the magistrate in that regard. She properly exercised her discretion in favour of the Respondent.

The last part of the first ground of appeal betrays the real reason why this appeal has been launched and why Section 121 of the Code was invoked. To say that the Respondent's actions are likely to lead to loss of confidence in the police force by the general public, even before the Respondent has been convicted, not only negates the presumption that an accused person is innocent until proven guilty, it also shows an improper desire to penalise the Respondent by incarceration before he has been tried.

I am unable to find any misdirection in the magistrate's finding that there was no risk whatsoever of abscondment. She arrived at that conclusion, correctly in my view, having regard to the fact that the Respondent had surrendered himself to the police signifying his desire to stand trial.

I therefore come to the inescapable conclusion that this appeal is clearly without merit and borders on abuse of process betraying an improper motive of penalising the Respondent before he has been tried and convicted.

Accordingly it is ordered as follows:

1. That the appeal be and is hereby dismissed.

2. That the decision of the magistrate to grant the Respondent bail pending trial stands to wit, that the Respondent is granted bail on the following conditions;
- (a) he deposits a sum of US\$100-00 with the Clerk of the Magistrates Court Bulawayo.
 - (b) he resides at house number 7547 Pumula North, Bulawayo until the matter is finalised.
 - (c) he does not interfere with state witnesses.

*Attorney General's Office, Criminal Division, appellant's legal practitioners
Webb, Low and Barry, 1st respondent's legal practitioners.*