

ZENZO DUBE
and
REVERENCE DUBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 27 SEPTEMBER 2017 AND 26 OCTOBER 2017

Bail Application

S Mawere for the applicants
S Ndlovu for the respondent

MOYO J: The applicants were convicted by the magistrate at Gwanda on a charge of stocktheft. They were accordingly sentenced to fifteen years imprisonment with 3 years suspended on the usual conditions and a further 3 years suspended on restitution. This left the appellants with 9 years effective.

Dissatisfied with both conviction and sentence they launched an appeal to this court, which appeal is still pending. They now seek bail pending that appeal. The grounds of appeal as given in the notice of appeal are as follows:

Ad conviction

1. The court *a quo* erred in its assessment of the evidence by concluding that the appellants were the ones seen driving complainant's cattle.
2. The court *a quo* misdirected itself by totally ignoring the discrepancies between state witnesses' testimony on material issues.
3. The court *a quo* misdirected itself by simply referring to the third state witness as unreliable without giving reasons.

4. The court *a quo* erred in ignoring the possibility of mistaken identity by Cosmas Shoko in view of the evidence of the complainant and that of Peter Ncube.
5. That the court *a quo* erred in finding that the state proved its case beyond reasonable doubt.

It is trite that in an application for bail pending appeal, the court should consider if the applicant is likely to await the conclusion of the appeal and if there are reasonable prospects of success. In the case of *Benator v S* 1985 (2) ZLR 205 (HC) it was held that in deciding whether the administration of justice will be prejudiced if bail is granted pending appeal, the court should take into account the seriousness of the offence, the stiffness of the penalty imposed and the prospects of success on appeal.

In the matter before me, there are following pertinent facts in the court record. The complainant at page 21 of the record of proceedings was asked during cross-examination that:

“In paragraph 7 of your statement you said Cosmas Shoko told you that he had met peter Ncube, Reverence and Nhlanhla driving cattle fitting the description of yours?

A: True

At page 22 of the court record the complainant was asked

Q: At the time Cosmas Shoko told you he only knew Peter Ncube and did not know the 2 (two) accused.

A: yes”

At page 27 of the court record Cosmas Shoko admits that when he gave a statement to the police he mentioned Peter and his two friends whom he did not name despite knowing the accused person for six years. He simply mentioned that it was Peter and his friends whom he did not name. It would appear the identity of the two applicants may not have been satisfactorily dealt with in the court *a quo*. It is not clear whom Cosmas Shoko reported to the complainant as being Peter’s friends, although he says he saw the 2 (two) accused very well the problem is that the court record does not even canvass the aspect of the distance at which he saw them.

Peter Ncube is already serving, he has nothing to gain by exonerating the two accused persons but he nonetheless chose to exonerate them. His evidence is part of the state case, it leaves the state case with two versions. The police officer says he arrested the two applicants not because of Cosmas Shoko’s pointing at them but because of Peter Ncube implicating them.

Peter Ncube denies ever implicating them but instead implicates another person. Cosmas Shoko seems to have been called to the police only when the two applicants had been arrested.

I find that in this matter there are reasonable prospects of success on appeal and I accordingly hold that the two applicants are suitable candidates for bail pending appeal.

The application for bail pending appeal succeeds and an order is so issued in terms of the draft.

Morris-Davies & Company, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners