

FANUEL CHIPINDA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MWAYERA J  
HARARE, 23 July, 2013

### **APPLICATION FOR BAIL PENDING REVIEW**

*T.Madondo*, for the applicant  
*E. Makoto*, for the respondent

MWAYERA J: The applicant approached the court with an application for bail pending review of proceedings which took place on 11 April 2013 at Kadoma magistrate court. The back ground to the application being that on 11 April 2013 the applicant appeared before Kadoma magistrate on a charge of contravening of s 3 (1) (a) of the Domestic Violence Act [*Cap 5:16*]. The applicant pleaded guilty to the charge, was convicted and sentenced to 16 months imprisonment of which 6 months imprisonment was suspended for 5 years on the usual conditions of good behaviour. The applicant was aggrieved and he noted an appeal following which he applied for bail pending appeal which application was dismissed by this court. The applicant then mounted an application for bail pending review.

An issue arose of the matter having already been submitted on automatic review and this court having confirmed the proceedings. It was apparent that the fact that the matter had already been forwarded on Automatic review was no bar for the applicant to mount another application for review as in essence the applicant will be seeking the withdrawal of the certificate of confirmation on basis of irregularity in the proceedings or existence new facts.

The applicant has approached the court for bail pending the fresh review mounted on the basis that the applicant was wrongly convicted under the Domestic Violence Act when he does not fall under the definition of the complainant as envisaged by the Act. The applicant presented argument that he did not stay at the said homestead with the complainant his brother by stayed in the same village. It is fairly settled that an attack on the conviction is

ordinarily remedied by way of appeal and procedural irregularly remedied by review. It is only in exceptional circumstances that a review procedure can be used to attack a conviction. The circumstances of these cases are clear that the applicant was convicted on his own plea of guilty to a violation of the domestic violence act whereby he assaulted his brother. The argument that the magistrate did not explain the meaning of complainant was canvassing essential elements cannot be held to be an exceptional circumstance warranting the attack of the conviction by way of review. To buttress this fact is the recorded of proceedings wherein the facts were read to the (then accused) applicant and he confirmed understanding and agreeing with the facts Annexure 1 to the applicant's papers the outline the of State case clearly shows that on the day in question the applicant and the complainant who are brothers were at home discussing family matters with the family members. It was during that meeting that a misunderstanding arose and the applicant assaulted the complainant by biting the complainant's ear. It was after that assault that he left the homestead. The outline of the state case clear complainant's *disputes a frana* of family members having occurred at the same homestead. The essential elements were properly conversed culminating in applicant confirming that his plea was a genuine admission of the charge, facts and essential elements of the offence of domestic violence para 2 of the same state outline clearly showed the brothers stayed at the same address.

The definition of complainant as given in the Domestic Violence Act Chapter 5:16 Section 2(1)(c) includes people living together at the time of commission of the offence. For the applicant to then turn around and as an after thought seek to attack a conviction on basis of alternative address given as 500 metres away and expect the magistrate to have guessed on such would indeed be merely a fishing expedition or gambling to try and evade justice in the wake of dismissal of the initial bail pending appeal. Now turning to bail pending review. I must hasten to say there are no exceptional circumstance submitted warranting the attack of the conviction on review.

In applications for bail pending review the court is enjoined to consider the following settled facts.

1. The likelihood of the accused absconding in the light of sentence imposed.
2. The prospects of success on review.
3. The right to individual liberty.
4. The likely delay before the review is heard.

Given the state outline and the record of proceedings whereby the court *a quo* properly explained and canvassed essential elements in compliance with s 271 (2) (b) of the Criminal Procedural and Evidence Act [*Cap 9:07*] and that applicant and complainant were living together there is no way one can say the complainant does not fall under the complainant definition as envisaged in the Domestic Violence Act. The accused admitted they stayed together and that following a Domestic meeting they had a Domestic dispute which culminated in the assault on the complainant at the same home where they stayed.

The plea of guilty tendered was a genuine plea after clear and proper explanation of facts and essential elements culminating in a conviction. There is nothing submitted giving an basis or justification of the attack of the conviction. Having said that it follows there are no prospects of success on review and given the nature of sentence the applicant will be incentivise to abscond and that would then prejudicial the interest of administration of justice. It is with these considerations that upon weighing the right to individual liberty and the interest of administration of justice and the fact that the applicant enjoys no prospects of success on review that the application for bail pending review is dismissed.

*Messrs Jarvis. Palframan*, applicant's legal practitioners