

WARREN HAZVIENZANI KATIRO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 28 March and 25 April, 2018

Bail application

L Dube, for the applicant
T Mapfuwa, for the State

CHITAPI J: I reserved judgment after argument by counsel in this application. I have considered the papers filed in support of the application and the State's response as well as the further arguments by counsel.

The applicant was employed as a prison officer stationed at Chikurubi maximum Farm Prison. He was convicted by the senior magistrate at Harare on 14 March, 2018 for contravening s 4 of the Firearms Act, [*Chapter 10:09*] (unlawful possession). The charge sheet averred that on 18 May, 2016, the applicant unlawfully transferred 9x19mm live bullets or rounds of ammunition to one Allen Matemachani without a valid licence to do so. Apparently the said Allen Matemachani was an ex-convict whom the accused had come into contact with whilst the former was serving a prison term. It was alleged that the said Allen Matemachani used the ammunition to commit a number of robbery and attempted murder cases within the environs of Harare. The police in their investigations arrested the applicant as the person who had supplied the ammunition to Allen Matemachani and his accomplice Rodwell Joe.

The applicant pleaded not guilty to the charges but was convicted after a full trial. The applicant was sentenced to 12 months imprisonment with 4 months suspended on conditions of future good behaviour relating to fire arms transfer and sale.

The applicant through his legal practitioners filed an appeal against both conviction and sentence. In respect of conviction the applicant's grounds in summary were firstly, that the magistrate erred in accepting inadmissible evidence in the record. Such a ground of appeal is

not a valid ground of appeal because it does not inform as to what such evidence was. A generalized ground of appeal does not comply with the requirements of r 22 (1) of the Supreme Court (Magistrates Court) Appeals Rules 1979 which requires that grounds of appeal should be clear and specific. See *State v McNab* 1986 (2) ZLR 280(5).

Secondly, the applicant seeks to impugn the magistrate's judgment on the ground that she erred in law in not ordering a trial within a trial in the light of clear evidence that the applicant had been severely assaulted and tortured by the police to confess to the offence. The purport of the argument is that the magistrate should not have relied on the confession as evidence against the applicant.

Thirdly, the applicant attacks the magistrate's judgment on the basis that she erred at law in disregarding the evidence of witnesses Prince and Rodwell Joe.

Fourthly and lastly, the applicant impugns the judgment on the basis that the magistrate relied on circumstantial evidence and reached an inference of guilt which was not the only reasonable inference arising from the facts.

Against sentence the applicant attacks the magistrate's sentence on the generalized grounds that the magistrate did not give due weight to the fact that the applicant was a first offender and to "various mitigatory factors which applied to the appellant". There cannot be any worse nonsensical expression than "various mitigatory factors" if the factors are not listed. An appellant cannot expect an appeal court to make sense of an expression that in essence complains that the magistrate did not consider a multifarious or plethora of factors without listing the same. A court does not possess magical powers to read into a litigant's mind. The applicant also impugns the sentence on the ground that the trial court failed to consider the imposition of community service as an alternative to imprisonment. Reading the grounds of appeal against sentence in their totality, criticisms of their inexactitude as pointed out aside, the applicant's argument appears to be simply that he considers the sentence imposed under the circumstances as being too harsh and excessive and that a lesser sentence should have been imposed.

The State opposed the application on the basis that the applicant appeal against both conviction and sentence has no prospects of success. State counsel argued that the magistrate relied on a confirmed warned and cautioned statement whose production in evidence in terms of s 256 (2) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] is permissible on the

mere production by the prosecutor. The State argued that the warned and cautioned statement was produced by consent.

A consent by the applicant at his trial to the production of the warned and cautioned statement without raising issues must be taken to imply that the applicant had no qualms with its contents, how it was extracted and its confirmation. The ground of appeal that the magistrate should not have admitted the statement but instead held a trial within a trial is without merit. It shows a total misunderstanding of procedural law by the applicant's counsel. A challenge to a confirmed warned and cautioned statement does not require to be resolved through a trial within a trial. Once confirmed and there is no challenge to the confirmation proceedings, the confirmed statement is produced as evidence by the prosecutor. However, in terms of the *proviso* to s 256 [2] the court shall not use the produced statement as evidence if the accused proves that the statement was not made by him or that he did not make it freely and voluntarily. The issue is an evidential one to be determined by evidence given during the defence case with the prosecutor having a right to re-open the State case to deal with the issues raised by the accused in challenging the statement on its authenticity or the voluntariness of its making.

Despite the misconception on the law exhibited by the applicant's counsel in relation to challenging a confirmed warned and cautioned statement, I am on the record persuaded to find some reasonable argument on conviction which can be advanced with some prospects of success on appeal. The applicant gave a lengthy defence outline which he adopted as his evidence in chief. In the defence outline, he gave numerous reasons for giving his statement to the police. The reasons ranged from torture to persuasion by police to make a false statement upon a promise by the police that the applicant would not be prosecuted because the interest of the police was to nail the robbers who used the ammunition and not the applicant.

The magistrate made a positive finding that there was no direct evidence of whether or not the applicant supplied ammunition to the person mentioned in the charge because that person was dead. His accomplice Rodwell Joe did not testify either. There was no evidence led or contained in the applicants' statement as to the source or origin of the ammunition. The bullet heads recovered from the scenes of crime were not traced to the Prison Armoury. The applicant was convicted on his word that he supplied bullets to the persons alleged to have engaged in robberies. The magistrate treated as a strong circumstantial fact against the applicant the fact that the applicant communicated by phone with the alleged robbers. The question is whether it can be said that there is a bar against a prison officer communicating

with an ex-convict who has served his sentence and is back in society. There cannot be such a law. The applicant explained his reasons for the communication as that he had advanced some money to the ex-convict or convicts for their bus fare on release from prison and wanted to recover this money. In the absence of such benevolence being proved to be an impermissible act, it cannot be held without anything further that the applicant's explanation of the motive for the communication was proven positively to be false beyond a reasonable doubt by the State.

The other difficulty which I faced was that it did not appear that the magistrate properly dealt with how a confession should be treated before a conviction based upon it can be returned. In terms of s 273 of the Criminal Procedure and Evidence Act, a conviction based upon a confession is only competent where the offence charged is proved by other competent evidence other than the confession to have actually been committed. It is this other evidence of the transfer of the ammunition other than the confession which I failed to pick from the record. The absence of such evidence would therefore arguably render the confession insufficient to found a conviction.

In respect of sentence, there are no prospects of success regard being had to the seriousness of the charge and the position of the applicant as a member of the disciplined forces charged inter alia with use, safeguarding arms and ammunition. The applicant also appreciated the dangers caused by the uncontrolled transfer, possession or use of live ammunition. A prison sentence was inevitable under the circumstances.

In view however of the doubts I have expressed in relation to whether the magistrate was properly directed to s 273 of the Criminal Procedure and Evidence Act in convicting the applicant on his confession, I must hold that the applicant has good prospects of success against conviction. The applicant is accordingly admitted to bail pending appeal No. CA 185/18 in terms of the draft order as amended to the extent that the bail deposit is increased to \$300-00 from the offered \$100-00 and the deletion of paragraph 4 requiring the applicant not to interfere with State witnesses.

Kwiriwiri Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners