REPORTABLE (13)

Judgment No. SC 20/17
Crim. Appeal No. 73/11

THE ATTORNEY-GENERAL v PAUL SIWELA

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 2, 2011
JUDGMENT RELEASED ON 26 FEBRUARY 2017

F I Nyahunzvi, for the appellant

L Nkomo, for the respondent

Before: CHIDYAUSIKU, CJ, In Chambers

This is an appeal against the decision of NDOU J granting the respondent bail pending trial.

After hearing submissions by counsel, the appeal was dismissed with no order as to costs. I indicated that reasons for judgment would be handed down in due course. These are the reasons.

In this appeal the appellant, the Attorney-General, seeks the setting aside of the order of the court *a quo* and prays that the respondent be remanded in custody.

In granting bail, the High Court ordered that –

1. The respondent should deposit US$2 000 with the Registrar of the High Court, Bulawayo;

2. The respondent should reside at number 15, 14th Avenue, Woodvale, Bulawayo, until the matter is finalised;

3. The respondent should report at Bulawayo Central Police at the CID Law and Order three times a week on Mondays, Wednesdays and Fridays between 6 am and 6 pm;

4. The respondent should surrender his passport to the Registrar of the High Court, Bulawayo;

5. The respondent should not interfere with any State witnesses or evidence;

6. The respondent should not leave a forty kilometre radius of Bulawayo Post Office without the leave of a Bulawayo magistrate;

7. The respondent should not attend political gatherings.

The Attorney-General appealed against the High Court determination upon the following grounds:

"(a) The court *a quo* did not give due weight to the State's fears that the respondent was likely to pursue his agenda through unconstitutional means. This fear is founded on the premise that –

(i) Thousands of fliers are said to be awaiting distribution of Mthwakazi Liberation Front;

(ii) These fliers have not been recovered by the police;

(iii) The respondent once released on bail is likely to cause them to be released to members of the public;

(iv) That the respondent has a pending case of a similar nature, i.e. contravening s 19(1)(a) of POSA [*Cap 11:17*] Regional Court Bulawayo Number CRB 71-2/04 HB No. 33731/04 wherein he circulated the 'fourteen page document' wherein he was advocating for the creation of the 'Province of Matabeleland by the Ndebele speaking people fighting with spears and arrows against the government and Shona speaking people';

(v) That it is not in the interests of justice and State security to admit them to bail;

(b) The learned court *a quo* misdirected itself in dismissing the totality of the messages in the fliers as not being treasonous and therefore insinuating that the case was not serious. It is not an element of the crime of treason that the people who received the fliers acted on them or not or whether they took them seriously or not. The messages in the fliers have the potential to incite people to rise or revolt against a constitutionally elected government."

The facts of this case are aptly set out in the respondent's Heads of Argument and may be summarised as follows.

The respondent, jointly with two co-accused persons, was charged with the crime of treason as defined in s 20(1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (hereinafter referred to as "the Code").

The circumstances leading to the charge as set out in the Request for Remand Form 242 (hereinafter referred to as "Form 242") are that:

"On March 2011 at Office 3, Princess Court, Park Mansion, Bulawayo, the accused persons conducted an executive meeting together with seven others who are still at large. During the meeting they arrived (at) and agreed on ways of influencing people to rise and demonstrate against the government which would result in creations (*sic*) of a separate State of (the) Republic of Mthwakazi. (The) accused agreed to distribute fliers of which (*sic*), amongst

> others, had the following message '*rukani njengabantu buse Ethiopia, Sudan, Egypt and Tunisia. Ngabantu labo njengathi belegazi bo*' (literally translated to mean 'rise up like the people of Ethiopia, Sudan, Egypt and Tunisia. They are people like us and have blood as well'."

It was further alleged that:

> "1. All three accused were found in possession of Mthwakazi Liberation Front fliers and calendars.
>
> 2. There are minutes of the meeting in which (the) accused persons and others agreed to distribute fliers.
>
> 3. Pamphlets were recovered from accused number one."

The respondent and his co-accused appeared for initial remand at the Bulawayo magistrate's court on Tuesday 8 March 2011. They objected to and challenged the State's request for remand. By a ruling of magistrate John Masimba, delivered on Friday 11 March 2011, the respondent and his co-accused were placed on remand in custody at Khami Maximum Prison pending trial.

The respondent and his co-accused applied for bail pending trial at the High Court, Bulawayo. The State opposed the granting of bail. The High Court granted bail. The terms and conditions of admission to bail pending trial granted by NDOU J on 24 March 2011 are set out above.

The appellant invoked s 121 of the Criminal Procedure and Evidence [*Chapter 9:07*] upon the handing down of the judgment. The appellant thereafter filed an application for leave to appeal against the judgment in terms of s 44 of the High Court Act [*Chapter 7:01*]. The application for leave was opposed by the respondent and his co-accused.

NDOU J dismissed the State's application for leave to appeal against the granting of bail to the respondent's two co-accused. He, however, granted leave to appeal against that part of the judgment granting bail to the respondent pending trial.

I have already set out above the grounds of appeal.

Essentially this Court is being asked to determine whether NDOU J misdirected himself in the following respects –

(a) by failing to give due weight to the State's fears that the respondent was likely to pursue his agenda of removing the government through unconstitutional means. Put differently, by rejecting the contention by the State that the respondent is likely to commit similar offences if granted bail;

(b) by dismissing the messages in the fliers as not being treasonous and therefore not serious.

The power of this Court to interfere with the decision of the court *a quo* in an application for bail is limited to instances where the manner in which the court *a quo* exercised its discretion is so unreasonable as to vitiate the decision made. See *S v Ncube* 2001 (2) ZLR 556 (S). Another ground for interference with a decision of a court *a quo* is the existence of "a misdirection occasioning a substantial miscarriage of justice" by the court *a quo* – *S v Makombe* SC 30/04.

In granting the applicant leave to appeal, the learned Judge, correctly in my view, found that there was a possibility that this Court might reasonably arrive at a determination that the respondent may commit a similar offence whilst on bail contrary to the learned judge's conclusion.

The learned Judge drew a distinction between the respondent and his two co-accused because of the two further allegations against him, which did not relate to his co-accused, namely –

(a) that some fliers were recovered from him; and

(b) that the respondent had a pending case under POSA.

These factors, the appellant contended, established that the respondent was likely to commit similar offences if admitted to bail.

The first question that falls for determination is whether the court *a quo* misdirected itself in concluding that the appellant had failed to establish that the respondent had a propensity to commit similar offences and was therefore likely to commit similar offences if granted bail.

The following cases have considered the issue of when bail should be denied on the ground that the accused is likely to commit similar offences whilst on bail.

In *R v Phillips* 1947 32 CR App R 47 a twenty-three year old accused had a bad record. In addition it was accepted that he had previously committed nine similar offences whilst on bail. The applicant was granted bail pending an appeal by the court *a quo*. The appeal court was of the view that the accused should have been denied bail. I respectfully agree with the conclusion of the appeal court. Nine previous commissions of similar offences while on bail is overwhelming evidence that an accused is likely to commit similar offences while on bail if bail is granted. The commission of nine similar offences while on bail, coupled with a bad record of previous convictions, clearly shows that an accused has no respect for the rule of law and the administration of justice. Such an accused should not be admitted to bail pending trial.

In *S v Fourie* 1973 (1) SA 122 (D) it was held that an accused should not be denied bail merely because it appears that he may commit a crime if released from custody. It was held that one previous conviction and an unsubstantiated suspicion against the accused are insufficient evidence that an accused was likely to commit further crimes if released on bail. It was held further that an accused's past record and his conduct whilst out on bail on another case are relevant considerations for the granting or refusal to grant bail.

In *Attorney-General v Phiri* 1987 (2) ZLR 33 (H) the accused was placed on remand on allegations of committing twenty-two crimes involving dishonesty. Whilst on trial he was arrested for committing more crimes involving dishonesty. The accused was refused bail on the basis that he was likely to commit similar offences whilst on bail. The evidence before the court was that the accused

had already committed further offences whilst on bail. It was held that the mere possibility of the accused committing further crimes, standing alone, would not be sufficient to outweigh the accused's right not to be deprived of his freedom. However, when added to a bad criminal record are added allegations, on credible evidence, that the accused committed similar crimes whilst on bail, the matter becomes highly persuasive and cogent and bail should be denied. The reasoning was that a person who commits crimes whilst on bail shows a disregard for the rule of law and contempt for the administration of justice. Once commission of similar crimes has been established, the *onus* shifts to the accused to satisfy the court that there is no likelihood of repetition whilst on bail.

The test established by this Court in *S v Tsvangirai* 2003 (1) ZLR 650 is "whether there is a real danger or a reasonable possibility that the due administration of justice would be prejudiced by bail being granted". In that case the applicant was on remand on allegations of treason. He applied for bail. The State opposed the application on the ground that he might commit a similar offence whilst on bail. It was found that on the evidence led by the State the State's fears that the applicant might commit similar offences whilst on bail was totally unfounded and bail was granted.

In *S v Rudolph* 2010 (1) SALR 262 (SC) the appellant attacked his wife with a carpet knife at her place of employment a month after she had been granted a protection order in terms of the Domestic Violence Act. He cut her throat, poured petrol over her, and attempted to set her alight. When he was restrained by her colleagues he tried to cut his own throat. When this happened, the accused was

on bail on charges of rape and attempted murder of his former wife. After the incident, the accused suffered two heart attacks and a stroke. The accused was charged with attempted murder of his wife. Section 60(11)(a) of the Criminal Procedure Act, 51 of 1977, placed the *onus* on the accused to satisfy the court that exceptional circumstances existed which permitted his release in the interests of justice. The accused failed to place evidence before the court to meet the State case that he had attempted to murder his wife with barbarous violence. He had no explanation for his attack on his former wife. The accused was found to have a propensity for violence and his release on bail was prohibited by s 67(4)(a) of the Criminal Procedure Act. It is clear from this case that the propensity must be for offences of a similar nature and that the *onus* shifts to the accused once evidence establishing the propensity is placed before the court.

An analysis of the case law set out above will show that the principles that govern admission to bail of an accused who is alleged to have a propensity to commit similar offences whilst on bail may be summarised as follows –

(a) the credibility and substance of the evidence establishing the propensity to commit similar crimes;

(b) the offences must be of a similar nature in their essential elements;

(c) the offences need to be more than one or two; and

(d) the accused is incorrigible or unrepentant.

Once the State has established the above, the *onus* shifts to the accused to show that there is no likelihood of the accused committing similar offences and that the interests of justice would not be prejudiced by his admission to bail.

In cas*u*, as part of its case, the State alleges that contravention of s 20(1)(b) of the Code is similar to contravention of s 19(1)(c) of the Public Order and Security Act [*Chapter 11:17*] (hereinafter referred to as "POSA"). I am not persuaded by this submission for the following reason.

Section 20(1)(b) of the Code reads:

"**20 Treason**

(1) Any person who is a citizen of or ordinarily resident in Zimbabwe and who –

(a) …

(b) incites, conspires with or assists any other person to do any act, whether inside or outside Zimbabwe, with the intention of overthrowing the Government;

shall be guilty of treason and liable to be sentenced to death or to imprisonment for life."

Section 19(1)(c) of POSA reads:

"**Gatherings conducing to riot, disorder or intolerance**

(1) Any person who, acting together with one or more other persons present with him in any place or at any meeting –

(a) – (b) …

(c) utters any words or distributes or displays any writing, sign or other visible representation –

(i) with the intention to engender, promote or expose to hatred, contempt or ridicule any group, section or class of persons in Zimbabwe

> solely on account of the race, tribe, nationality, ethnic origin, natural or ethnic origin, colour, religion or gender of such group or class of persons; or
>
> (ii) realising that there is a risk or possibility that such behaviour might have an effect referred to in subpara (1);
>
> shall be guilty of an offence and liable to a fine not exceeding level 12 or to imprisonment for a period not exceeding twelve years or to both such fine and imprisonment."

Section 19 of POSA was repealed by the Code and an offence of a similar genre was introduced in s 42 of the Code. This new offence was not listed as a permissible verdict to treason under the Fourth Schedule of the Code.

I am satisfied that s 19 of POSA is substantially and materially different from the offence of treason as defined in s 20 of the Criminal Code. The essential elements of the two offences are different. Under POSA the *mens rea* is to promote hatred, whereas under treason the *mens rea* is intending to overthrow the Government of Zimbabwe. Under POSA the *actus reus* is to utter any words or display any writing, whereas under treason the *actus reus* is not defined. As is noted above, the penalties are substantially different – life imprisonment or death in respect of treason and a fine or twelve years' imprisonment in respect of a contravention of s 19 of POSA.

The State conceded that the respondent was removed from remand in the case before the Regional Court in which he was alleged to have violated POSA. That case is no longer pending as alleged in the remand form. The appellant advised the Court that the State is unlikely to pursue that case, especially since the section of

POSA under which the respondent was charged has since been repealed and that, due to the effluxion of time, it is unlikely that the charges will be resuscitated. I find therefore that the respondent has no pending case.

I now turn to consider the evidence of propensity to commit a similar offence which the State placed before the Court.

I have found that the two offences of treason and contravening s 19 (the repealed section) of POSA are not similar. I have also found that the case against the respondent in the Regional Court Bulawayo is no longer pending, the respondent having been removed from remand. The respondent has sworn on oath that he has no intention of committing similar offences whilst on bail.

I am satisfied that the evidence in this case does not justify the State's fears that the respondent will pursue his agenda of removing the Government through unconstitutional means.

Turning to the contention of the appellant that the learned Judge misdirected himself by failing to consider the messages in the fliers, the evidence is to the contrary. At pp 4-6 of the cyclostyled judgment the learned Judge expressed the view that after considering all the messages in the fliers the question of whether the messages in the fliers were treasonous or not was for the trial court to decide. This quite clearly shows that the learned Judge applied his mind to the fliers and came to a conclusion.

The State failed to establish that its fears could not be catered for by appropriate bail conditions.

In the result, I find no misdirection on the part of the court *a quo* which warrants interference by this Court. The judgment of NDOU J of 24 March 2011 is unassailable and is hereby upheld.

The respondent, after being granted leave to appeal, filed an affidavit, in which he swears positively, under oath, that he has no intention of committing similar offences whilst on bail.

The affidavit filed by the respondent is replete with invective language similar in effect to the language referred to in the dissenting opinion of MALABA DCJ in *Jonathan Moyo & Ors v Austin Zvoma & Anor* SC 28/10 at p 60 of the cyclostyled judgment. This is what the learned DEPUTY CHIEF JUSTICE had to say about the use of invective language in affidavits filed in Court proceedings:

> "There is need to discourage the use of such invective language in court proceedings."

The respondent's affidavit contains invective language which accuses the Attorney-General of "misrepresenting facts", "grave injustice", "misleading contentions", and "the Attorney-General is using the criminal justice system perversely as a weapon of political oppression against me".

I am inclined to follow the route taken by MALABA DCJ in the case of *Moyo supra* that the Court should decline to award costs to parties who use such language which:

> "… offended its sense of fairness and justice for the Court to be put in a position in which it had to read through all the papers containing some of the impolite and discourteous language."

Counsel for the respondent apologised to the Court for the language, after being challenged by the Court. It is my view that the apology, since it came only after the Court had already been put in the position of reading the impolite language, came too late.

The appeal is dismissed with no order as to costs. The judgment of NDOU J of 24 March 2011 is upheld and the respondent is admitted to bail on the same conditions therein.

Cheda & Partners, respondent's legal practitioners0