

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
CRIMINAL CASE NO. 0084 OF 2007

JAYESH THAKKER ::::::::::::::::::::::::::::::: ACCUSED

**VERSUS**

UGANDA ::::::::::::::::::::::::::::::: RESPONDENT

**BEFORE: HON. JUSTICE J.P.M. TABARO**

**RULING:**

Jayesh Thakker the applicant stood trial for the charge of selling food unfit for human consumption C/S 6 of the Foods and Drugs Act (Cap 278 Laws of Uganda), before the Chief Magistrate’s Court, Nakawa at Mwanga II Road in Kampala. At the conclusion of the trial he was found guilty of the offence charged and sentenced to three months imprisonment and a fine of shs.2000/=. He has appealed to High Court against both conviction and sentence.

From the evidence at trial it is fairly clear that the appellant used to run a Supermarket at Entebbe Road but afterwards failed operate at the premises due to incapacity to pay rent for the shop. When he was evicted he transferred the merchandise to his residence at Bukesa Namalwa Zone in Kampala where he also owns and runs a bakery. It is the case for the prosecution that some items among the merchandise had expired and instead of destroying them he sold them to the public. When the police searched the premises in question they found some devices for inserting expiry dates on commodities. The explanation given by the appellant is that the devices were part of the stock-in-trade.

The applicant, through his Counsel Mr. S. Ali seeks to rely on a number of grounds stated in the notice of motion dated 3<sup>rd</sup> December, 2007 together with the accompanying affidavit, sworn by Roscoe Iga, one of the advocates for the applicant. Although there are 5 reasons stated in the motion as grounds engaged the attention of Court, namely:-

(a) **that bail is a constitutional right, based on the constitutional guarantee of presumption of innocence.**

(b) **The sentence is short and may expire before the appeal is heard.**

The other reasons strictly speaking do not qualify as grounds; they merely refer to the fact that the appellant was convicted of the offence in question, that the appellant is dissatisfied, and finally the fact that there were substantial sureties willing to guarantee his attendance, that is, stand for him; and that since his release on bail at the commencement of the trial he had honoured his bail.

Mr. Byansi, a state attorney opposed the application and prayed that the applicant be kept in prison pending the determination of the appeal.

It is true that the Constitution of Uganda guarantees presumption of innocence unless and until the accused is proved guilty or admits the charge – Act 28 (3) (a) of the Constitution. However, the words in which the right to bail is couched are beyond contention as regards the stage of proceedings – they refer to remand before trial. Act. 23 (6) (a) of the Constitution states:-

**Where a person is arrested in respect of a criminal offence the person is entitled to apply to the court to be released on bail and the court may grant that person bail in such conditions as the Court considers reasonable.**

23 (6) (b)

**In the case of an offence which is triable by the High Court as well as by a subordinate Court, the person shall be released on bail on such conditions as the Court considers reasonable of that person has been remanded in custody in respect of the offence before trial for one hundred and twenty days.**

(c) **in the case of an offence triable only by the High Court, the person shall be released on bail on such conditions as the court considers reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.**

There can be no contention as to what the above provisions of the constitution are meant to cater for – it is the period of remand before trial. Needless to state the situation before Court is

different; The trial has been concluded and what the applicant seems is bail pending hearing and determination of the appeal. The principles applicable, to applications for bail pending appeal, appear to me to be well settled. The case of **Girdher Dhanji Masrani Vs. R [1900] EA 320**, a decision of the High Court of Uganda (Sheridan J. as he then was) is directly in point. It was made amply clear that principles which apply before trial cannot be invoked after trial when the accused has been convicted. The Judge stated: at P. 321 para D.

**“Different principles must apply after conviction. The accused person has become a convicted person and the sentence starts to run from the date of his conviction.”**

It was added in the subsequent paragraph of the ruling, in the Masrani’ case that delay in disposing of the appeal in itself is not a good ground in itself for granting bail at this stage. The bail application was rejected.

There is authority to the effect that where is likelihood of success, that is, if the appeal is likely to succeed bail pending may be granted. Such an approach was followed in the case of **Raghibir Singh Lamba Vs. R [1948] EA 337** a decision of the then HM High Court for Tanganyika, Spry Ag. J (as he then J). According to the decision in Lamba’s case (supra) the principle to be applied is that bail pending appeal should only be granted for exceptional and unusual reasons; neither the complexity of the case nor the good character of the applicant; nor alleged hardship to his dependants can justify grant of bail pending appeal. However, if there is overwhelming probability that the appeal will succeed the application can be granted – Lamba’s case, as before.

Applying the above principles what should be the result in the case before Court? Unfortunately it is not indicated whether the matter is causerlisted before me for bail application alone or whether the hearing of the appeal will also be before me. The significance of this observation is that if the judge has come to the conclusion that the appeal is likely to succeed in my humble opinion, if the same judge presides over the hearing of the appeal may prejudice the appellant because in so doing he might express opinion as to whether or not the appellant is guilty of the offence charged. Be it is it may. After listening to both Counsel in the case it seems the applicant’s Counsel has not paid sufficient attention to circumstantial evidence in the case and has unduly relied on lack of direct evidence of the eye witnesses. It is well known that

circumstantial evidence can sustain a conviction if the test in **Simoisi Musoke Vs. R [1958] EA 715**, court of Appeal for Eastern Africa decision (Gould J.A.), is satisfied, that is, if inculpatory facts lead to only one inference – the inference of guilt.

Applying the above principles I am enable to say that the applicant has persuaded Court that he should be released on bail. On the facts of the case I cannot say that there is over whelming probability that the appeal will succeed. The application is therefore dismissed.

**J.P.M. Tabaro**

**Judge**

**6-12-2007**

Later in the afternoon

Appellant/applicant present

Mr. D. Ali for applicant

Mr. G.W. Byensi for Respondent

Ruling delivered

**J.P.M. Tabaro**

**Judge**

**6-12-2007**