THOKOZANI DUBE

And

THEMBANI NYATHI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 22 FEBRUARY & 17 AUGUST 2023

Application for bail pending appeal

T. Tashaya for the applicants
C. Mabhena for the respondent

TAKUVA J: This is an application for bail pending appeal. Applicants appeared before a Regional Magistrate sitting in Bulawayo facing a charge of theft as defined in section 113 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). See Annexure A and B being the charge sheet and state outline respectively. Briefly the facts are that on the 13th of October 2022, the applicants were seen cutting and rolling armoured copper cables at Steam Loc National Railways of Zimbabwe. This occurred around 0300 hours. Applicants were arrested by NRZ security guards who found them in possession of five rolls of armoured copper cables weighing 120.1kg and valued at US$2 800,00.

The applicants pleaded guilty to the charge but applied to change their plea of guilty to that of not guilty. Their application was dismissed and they were then convicted and sentenced to 10 years imprisonment of which 2 years imprisonment suspended on the usual condition of good behavior. Aggrieved by the conviction and sentence the applicants noted an appeal on the 16th of November 2022. They now want to be admitted to bail pending that appeal.

Section 123 (1) (b) (ii) provides that a person may be admitted to bail or have his conditions of bail altered pending the determination by the High Court of his appeal. In an application of this nature, the standard guideline is that the granting of bail pending appeal turns on the inter-related factors of prospects of success on appeal and whether or not the granting of bail will jeopardise the interests of the administration of justice. See *S* v *Mutasa* 1998 (2) ZLR 4 (SC).

The test was laid out in *S* v *Hudson* 1996 (1) SACR 431 (w) where the court said that;

> "If the appeal was reasonably arguable and not manifestly doomed to fail, the lack of merit in the appeal should not be a cause for refusal of bail. The question is not whether the appeal "will succeed" but on a lesser standard whether that appeal is free from predictable failure to avoid imprisonment." See also *Kosamu* v *The State* HH-807-20, *Peter Chikumba* v *The State* HH-724-15.

Application of the law to the facts

It is apparent from the grounds of appeal and the whole bail statement that applicants believe that they have good prospects of success because the court *a quo* erred in dismissing their application to change their pleas from guilty to not guilty. Alteration of plea is governed by the provisions of section 272 of the Criminal Procedure and Evidence Act. It provides;

> "272 Procedure where there is doubt in relation to plea of guilty
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> If the court, at any stage of the proceedings in terms of section two hundred and seventy-one and before sentence is passed –
>
> (a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or
> (b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or
> (c) is not satisfied that the accused has no valid defence to the charge;
> the court shall record a plea of not guilty and require the prosecution to proceed with the trial.

The accused has no onus cast on him before his wish to change his plea can be granted. All that the law requires him to do is to give a reasonable explanation of why in the first place he has tendered a plea of guilty to the offence changed. It is only when the court is satisfied that the explanation tendered by the accused is beyond reasonable doubt false that the court can refuse to alter the guilty plea to one of not guilty. See *S* v *Marare* 1993 (2) ZLR 88 (SC).

In casu, it is not the applicants' contention that they incorrectly admitted the essential elements as put by the court but that they were influenced or threatened by the police to so admit. The reason for alteration appear in para 12 of the application on page 14 of record as;

> "12. In this case, the accused where (*sic*) unduly influenced by the police to plead guilty there being promised a lighter sentence and where (*sic)* told that they do not have a defence. Upon being counselled in (*sic)* came out the accused where (*sic*) recruited by the 3rd accused person who had been hired by one Stancillous Dehwa to help carry

> his goods from the gate at NRZ premises. They did not know that the goods they were made to carry where (*sic*) stolen property. He 3rd accused person even showed the police his communications with the said person. It is on that basis that the accused now understand that they have a defence to the allegations."

I must point out that in paragraph 6 of the same application the reasons are given as;

> "The legal and factual basis of this application is that firstly, the plea of guilty was not made voluntarily by the three accused persons as they had been intimidated and assaulted by both the police and security personnel of the complainant. Upon appearing in court the perpetrators of the assault were also in court sealed hence accused were scared of denying the allegations yet they had been told to admit."

The contradiction is clear for anyone to see. In my view, this is an after-thought meant to vex the court. This is a fabrication created at the 11th hour in order to create an impression that the plea was not freely and voluntarily tendered. The court *a quo* considered what was said by the applicants in mitigation and concluded that the pleas were genuine and that the court was not in doubt at all. In mitigation, when asked why they committed the offence, the three gave different reasons of a personal nature. First applicant said he wanted money to pay rent, while the 2nd applicant said his mother was not feeling well and that his wife was expecting.

In rejecting the applicants' version that they were assaulted/intimidated or induced to plead guilty, the court *a quo* stated;

> "Can these replies from the accused persons be consistent with people who were induced to plead guilty when they did not commit the offence? One can also ask, is this consistent with people who allege that they were hired by Stancillous Dewa to carry the goods they did not know were stolen? There is no link whatsoever between the allegation that they did not know that the property was stolen to reasons given by the accused persons for committing the offences. In the court's view the accused persons are not being honest with this court."

This reasoning was strongly criticized by applicants' legal practitioner who argued that the court ought not to have gone that far as the mitigation itself was a result of the undue influence. I disagree for the reason that it is trite law that if during mitigation an accused says something that suggests that they may have been a defence like provocation or intoxication, the court is required to alter the plea to not guilty.

By parity of reasoning if an accused says something in mitigation that tends to support the plea of guilty that information may be considered to rebut an allegation that the plea was not voluntarily tendered. See *S* v *Bvunda* HH-278-90.

In my view, the court *a quo* did not refer to the merits of the case but to "statements" made by applicants in mitigation. The merits refer to the evidence required to prove the state case beyond a reasonable doubt. If for example the court had commented on the fact that the applicants had a hopeless case because they were caught *in flagrante delicto*, this in my view would have been improper.

I take the view that the explanation given by the applicants is not only unreasonable but false. On a balance of probabilities, one would find it highly improbable for the police to assault a suspect brought by an eye witness carrying stolen goods found on the suspect's possession? As for the alleged promise to do community service, the question remains why perform community service when you know that you are innocent. It is illogical and improbable.

If the mere *ipsi dixit* of an applicant is accepted by the courts, the efficacy of the bail system and the plea procedures in our law will be harmed in that anyone who wishes to alter their plea will be successful. In my view there has to be something more to support such allegations against the police. I say so because in most cases it has become fashionable for accused persons to throw all sorts of allegations on the police's door step.

Accordingly, I find that the explanation given by the applicants is not genuine. It is actually false and on the facts they have no *bona fide* defence to the charge. It follows that they have no prospects of success on appeal. Applicants are likely to abscond as they now know the severity of the sentence.

In the result, the application for bail pending appeal is dismissed.

Sengweni Legal Practice, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners