JOSEPH PHIRI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE MPOKISENG J
BULAWAYO 24TH SEPTEMBER 2024

APPLICATION FOR BAIL PENDING APPEAL

Mr S. T Farai for the applicant
Mr K.M. Guveya for the State

INTRODUCTION

DUBE J: This is an application for bail pending appeal made in terms of section 123(1)(b)(ii) of the Criminal Procedure and Evidence Act [Chapter 9:07] The Principles underlying an application of this nature are trite viz; the likelihood of abscondment, the prospects of success on the actual appeal and the delay before the appeal is heard. These are weighed against the interests of the administration of justice and the individual's right to freedom. In the matter of *S* vs *Kilpin* 1978 RLR 282 (A) it was held that the principles governing the granting of bail after conviction were different from those governing the granting of bail before conviction.

Where a person has not yet been convicted, he or she is still presumed innocent and the courts will lean in favour of granting him or her liberty before he or she is tried. On the other hand, where the individual has been convicted, the presumption of innocence falls away. Section 115C (2)(b) of the Criminal Procedure and Evidence Act *supra* provides that where an accused person who is in custody in respect of an offence applies to be admitted to bail after having been convicted of the offence, he shall bear the burden of showing on a balance of probabilities that it is in the interests of justice for him to be released on bail. (see *S* v *Williams* 1980 ZLR 466A @ 468.

THE FACTS

The Applicant in the present matter stands convicted of a charge of robbery in contravention of section 126 of the Criminal Law Codification and Reform Act[Chapter 9:23]. He together, with two others who are not before this court are serving an effective 8-year jail term for the offence, after having been sentenced by the Regional Court sitting at Gwanda Magistrates' Court. Applicant appealed against both conviction and sentence. His grounds of appeal add up

to ten (10) in total. They are repetitive, argumentative and surely lack precision. For that reason, I shall not repeat them.

In the matter of *Stanley Kasukuwere and Another* vs *Oliver Mutyambizi and Another* HH 704-22, my sister Judge Bachi-Mzawazi J had this to say;

"*In consideration, I also observed that the applicants' grounds of appeal as borne by the record are convoluted, long and winding. Precisely they are not clear and concise. It is difficult to discern what exactly they are attacking on the judgment of the court…."*

In that matter the court cited with approval the matter of *Chikura N.O. and Another* v *AL Sham's Global Pvt Limited* SC 171/17 thus;

"*It is not for the court to sift through several pages of grounds of appeal in order to determine the real issue. The real issue for determination should be easily ascertainable on perusal of the grounds of appeal"*

In the present matter what compounds the problem is that the grounds of appeal are generic to all accused persons who were convicted and sentenced by the court *a quo* together with the Applicant herein. They do not apply specifically to the present applicant as I shall demonstrate below. The grounds can be summarised as follows.

AD CONVICTION

1. That the court *a quo* misdirected itself by taking judicial notice of the supposed Covid 19 Curfew hours which turned out to be erroneous in that there was an existing statutory instrument which placed a cap on night travel hours at10 pm as opposed to 6 pm as noted by the Learned Magistrate.

2. That the court *a quo* relied on circumstantial evidence to convict the Applicant when all its requirements were not met.

3. That the court *a quo* denied Applicant a fair trial.

AD SENTENCE

4. That the court *a quo* erred at law when it failed to take into account the value of the alleged robbed gold.

5. That the court *a quo* misdirected itself when it relied on a medical report of the complainant, for purposes of sentencing, which report was an exaggeration.

6. That the court *a quo* erred at law by failing to individualise the sentences of each individual offender.

The Applicant states through his counsel that he is not a flight risk, and that he enjoys very high prospects of success on appeal. He argues further that he will be prejudiced if he waits out prosecution of his appeal while serving his prison term.

The State opposes Applicant's release on bail mainly on one reason, namely that his prospects of success are dim. The State contends that the Applicant does not have even a fighting chance.

Analysis of the Facts.

AD CONVICTION.

This court is of the view that the argument on the Covid 19 regulations does not help the present applicant. It is not his defence that he failed to return to Kwekwe in fear of breaching Covid 19 regulations. That in fact was the defence of Accused 2 and 3 who were in charge of a motor vehicle later found close to the scene of crime. Applicant before court could not have travelled as he was already apprehended at the scene of the offence.

The Applicant's defence in the court *a quo* was that he once worked at the complainant's mine. He was suspended. He received communication from the now deceased Cuthbert Gumani to the effect that complainant required them back at work. He was just picked up by a vehicle from Kwekwe to Shangani. In the vehicle there was the now deceased, one Handsome Ndlovu, one Simbarashe and his co-offenders 2 and 3. It is important to note that Applicant in his defence never disclosed who had hired or arranged for this vehicle. It is not clear who paid for the cost. Applicant portrays himself as a person who was just ferried without any prior arrangement with the transporters. He sought to distance himself as far as possible from his co-accused.

Be that as it may the crux of his defence is that he was at the mine for an innocent purpose i.e. to work. It is only this point that the court aquo discredited. The court aquo found that Applicant could not have been at a mine for employment purposes at around midnight. This court is of the view that this finding is logical and based on common sense. Issues of employment are administrative. One does not visit his employers current or former at mid night to negotiate terms of engagement. In his defence outline the Applicant stated at paragraph 2, that;

"…. He was one of the people who were wanted for some work at his former workplace being New Eclipse Mine."

Applicant claims to have obtained this information from Gumani. Surely if the communication did not come directly to him, he could not have been certain if indeed his former employer wanted him back. If he did, for what type of work and on what terms? These issues required formal office hours to first iron out. His Counsel argues that at the mine since work is done under ground it does not matter whether it is day or night. This argument holds for those who are already employed. Does counsel suggest that the mine owner does not sleep? This argument is not found to be convincing by this court.

To make matters worse for the Applicant, unrefuted testimony on record is that he was caught red handed right inside the carbon room which was previously locked. He was caught *in flagrante delicto* by his former colleagues who knew him very well. He was illuminated by torch and he was screaming, begging them not to assault him. That is not consistent with a person who came for employment purposes.

Under cross-examination, the Applicant did not fare any well. In his defence outline he stated that

"……. *Curthbert Gumani proceeded to the mine owner who suddenly fired a gun shot at Curthbert Gumani". (sic)*

This statement gives an impression that he was watching when all this happened. Under cross examination he however claims that he did not witness the shooting. He claims he just heard the sound and a cry from the said Gumani. If that is the case why then in his defence outline; did he claim the shooting to be sudden? How would he have known if there was a prior scuffle leading to the shooting?

Applicant in this matter could not tell with exact clarity where he was seated. Was it by the mine shaft as per his defence outline or close to the residential flats as he later claimed under cross examination? Such failure to give a consistent narration gives credence to the State's assertion that he was caught in the carbon room after it was broken into. More so the State witness Last Ndlovu gave a clear testimony as to how Applicant was involved in the meetings in Kwekwe in which commission of the offence was planned. This witness was not at all discredited.

There are numerous other inconsistencies in Applicant's defence in the court *a quo*. At some point his legal practitioner was reprimanded by the court *a quo* while attempting to signal answers to him. That is how bad he fared under cross examination. This court finds therefore that the court *aquo* correctly convicted the Applicant.

No one claimed that the Applicant carried a weapon. Instead it is said Cuthbert is one of the people who carried weapons. Whatever weapon was tendered as an exhibit or not does not in any way affect the court *a quo's* finding on the guilt of this Applicant.

The argument on the doctrine of common purpose was relied upon by the court *a quo* only to convict Accused 2 and 3. After the court *a quo* found that Applicant was on the mine for a criminal enterprise it then relied on the doctrine of common purpose to convict the other two.

From the record of proceedings in the court *a quo*, this court fails to find any misdirection that could be said to have deprived Applicant a fair trial. He was represented through out the trial. At no given time did his counsel identify witness who came to testify as having been sitting in court during evidence of other witnesses. To try and infer this from answers of one witness is surely an attempt at raising a red herring.

AD SENTENCE

In the present matter the Applicant was sentenced to ten (10) years imprisonment of which two (2) years were suspended on the usual condition of good behaviour. He was left with an effective prison term of 8 years. I do not understand why such a sentence on a conviction of robbery can be said to be manifestly excessive as to induce a sense of shock.

In the matter of *The State v Wallace Kufandada and Another HH233-24* my sister judge Muremba J, with my brother judge Mutevedzi J concurring; it was held as follows:

"*Robbery is a very prevalent offence in this jurisdiction. The prevalence of a particular crime in a jurisdiction can influence sentencing, as higher rates of certain crimes may lead to calls for more stringent penalties to serve as a deterrent."*

The Honourable Judges cited an article in the local newspaper, the Sunday Mail of the 9th of October 2022 wherein it was reported that:

"*Data from Zimbabwe National Statistics Agency (ZimStat) shows there were 9364 cases of robbery (931armed) in 2020 and 9515 similar cases (1120 armed) were recorded the following year. This translates to an average of about 25 cases of robbery occurring daily."*

Surely courts country wide are reacting to this rise in armed robberies. In the present case the Learned Court *aquo* held as follows;

"*What however sticks out is the fact that there was pre-planning and prior meditation which raises the level of moral blameworthiness*."

The court *a quo* certainly did not weigh the Applicant's blameworthiness against the value of the property stolen nor on the injuries sustained by the complainant. It is therefore misplaced for counsel for the Applicant to hold that the value stolen and injuries sustained by the complainant influenced the court *a quo's* mind. If anything, the learned Magistrate held thus;

"*There has been a spate of armed robberies in this jurisdiction. The court thus must pass a sentence which shows its displeasure to such conduct and which will serve as a deterrent mechanism to likeminded persons"*

Counsel for the Applicant even went to an extent of filing a civil court application to obtain a medical report for the Complainant Bitone Ncube (see page 219 of the bail application). The document shows that indeed he suffered two scalp lacerations each measuring 3cm, consistent with being struck with a sharp object. The force used is said to be moderate but resulting in serious injury. This confirms that violence was applied on the complainant to force him to relinquish control over his property which was indeed taken from the carbon room only to be abandoned elsewhere in the yard after a gun shot. Clearly the facts prove a complete robbery as defined in the Code. The sentence imposed is justifiable, if not on the rather lenient side.

This court does not find any misdirection on the part of the court aquo.

Application of the law to the above facts

In the matter of *Zimbabwe Consolidated Diamond Company (Pvt) Limited* v *Adelcraft Investments (Pvt) Limited CCZ 2/24* it was held that:

"*The test for reasonable prospects of success postulates an objective and dispassionate decision, based on the facts and the applicable law, as to whether or not the applicant has an arguable case ……. The prospects of success must not be remote but must have a realistic chance of succeeding. In this respect, a mere possibility of success will not suffice. There must be a sound rational basis for the conclusion that there are prospects of success in the main matter. In short this Court must be satisfied that the applicant has an arguable prima facie case and not a mere possibility of success."*

In *casu* Counsel for the Applicant went to great lengths attacking the court *a quo's* findings on both fact and law in general terms without zeroing in on findings made specifically in respect of the Applicant herein. For that reason, it was not demonstrated to this court that the Applicant standing alone has reasonable prospects of success viewed objectively and dispassionately.

In an earlier decision of the South African Apex court, in the matter of *Smith* v *S 2012(1) SACR 567 (SCA)* para 7, it was equally held thus:

"*What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore the appellant must convince this court on proper grounds that he has prospects of success on appeal that are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal, or that that the case cannot be categorised as hopeless. There must in other words, be a sound rational basis for the conclusion that there are prospects of success on appeal."*

In casu the court finds that Applicant has failed to discharge the evidential burden placed on him to show on a balance of probabilities that it is in the interests of justice to release him on bail pending appeal as envisaged by section 115 C (2)(b) of the Criminal Procedure and Evidence Act (Chapter 9:07). See *Taurai Chikwazu v The State HH-396*-17 & *Davison Mutizwa* v *The State 419/18.*

I find the prospects of success in this matter dim. It is accordingly ordered as follows

In the circumstances, the application for bail pending appeal be and is hereby dismissed.

Farai and Associates Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners