NOEL NKOMO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 18 January & 4 May 2022

Bail Pending Appeal

Applicant in person
F I Nyahunzvi, for the state

MUNGWARI J: The applicant was tried by the High Court on circuit at Gweru on the 25th of September 2013. He was accused of having murdered his wife Grace Zulu in contravention of s 47 of the Criminal Law (Codification and Reform Act) [*Chapter 9.23*]. The Applicant who was represented at the time pleaded not guilty to the charge. After a full trial he was however convicted of murder with constructive intent and sentenced to 18 years imprisonment. Nine years into his sentence he applied for leave to appeal against sentence and to prosecute his appeal in person. The application was granted by the Supreme Court on the 15th of July 2021. He then approached this court seeking to be admitted to bail pending appeal.

The summarised facts of the matter are that the applicant, then a 32-year-old polygamist had an altercation with his first wife Grace Zulu. The misunderstanding occurred at night after the deceased had already retired to bed. Applicant had followed her into the bedroom locked the door and started assaulting her with booted feet and clenched fists whilst banging her head against the wall. His explanation for this behaviour was that he had been provoked by a telephone call which he had intercepted on the deceased's phone. He claimed that the call had been made by the deceased's paramour called Banda.

After a thorough analysis of all the evidence before it, the trial court was satisfied that the applicant's guilt had been proven beyond reasonable doubt. It accordingly convicted the applicant. That the conviction appears unassailable is supported by the fact that the applicant is not contesting it. His appeal is against sentence only. It comes 9 years into his 18-year sentence. The record of proceedings does not indicate any other earlier attempt to assert his right to appeal against the sentence. His notice of appeal which was filed in the Supreme Court on 24 September 2021and attached to support his application for bail pending appeal outlines the grounds as follows:

AD SENTENCE

"1. The court aquo erred when it sentenced the Appellant to 18 years imprisonment after convicting him of murder with constructive intent where the court aquo had admitted that there were extenuating circumstances.

2. The court aquo erred on a point of law and fact when it passed a manifestly harsh sentence which was secured on assumptions bases. In her trial judgement the trial judge stated that "the deceased was not sure that she was there to stay that is why maybe she was trying other people. "Considering this averment it clearly shows that the court aquo erred when it passed a retributively harsh sentence on an unproven fact. The fact that the deceased had bored a child with the appellant and had accepted staying with him, up to the time of her death, while he had another wife clearly shows that she was happy with her marriage despite the fact that they had quarrels.

3. Appellant concedes that indeed provocation is no defence to a murder case but a mitigatory factor. In that regard the court aquo erred on point of law when it failed to take note that even the so-called rationale thinkers in cases of this nature tend to lose their tempers. Appellant received a phone call from another man yet he was the official husband to the deceased. The court ought to have considered that tempers normally flare in such circumstances and there can be loss of control.

4. The court aquo erred on a point of law when it failed to consider mitigatory factors advanced on mitigation this is so because the court aquo is obliged to state and show the amount or period of sentence set aside on each factor considered but this did not suffice no period of sentence was set aside in the circumstances.

5. In as much as the court aquo took issues with the appellant's 1 year 8 months on the run the court aquo ought to have considered that the appellant pretrial incarceration. It's as if court aquo deliberately delayed the trial as a way of fixing Appellant. The court aquo ought to have considered the pre-trial incarceration and passed a lenient sentence.

Wherefore Appellant prays that the Appeal be allowed and sentence be reduced."

The grounds are long, rambling, repetitive, argumentative and in paragraph 5 clearly presumptuous. They lack precision. In their totality the grounds appear to be simply that the applicant seeks to impugn the sentence imposed on the basis that it is harsh, excessive and that a lesser sentence with a portion suspended should have been imposed.

In a written response to the bail application the state opposed the application and argued that the reasons for conviction and sentence supported the lengthy sentence that was imposed. They further contended that the applicant's appeal has no prospects of success. Lastly, they argued that the applicant is a flight risk because he previously demonstrated a propensity to flee when he went on the run for close to two years prior to the commencement of trial.

On 18 January 2022 I heard arguments from both parties after which I dismissed the applicant's application for bail pending appeal. I gave *ex tempore* reasons for my decision. I stated that the appeal against sentence by the applicant had no prospects of success. I held that the applicant did not even have a fighting chance.

On the 3rd of February 2022, I was requested through a letter from the registrar to avail written reasons for the dismissal of the application because the applicant intended to pursue an appeal in the Supreme Court. The following are my reasons:

The principles which are applicable in the determination of an application for bail pending appeal are settled. The considerations are mainly that:

1. An application for bail pending appeal presents new and important factors namely that:
    a) The applicant now stands convicted. The presumption of innocence provided under s70 of the Constitution of Zimbabwe, 2013 (the Constitution) no longer exists.
    b) the right to bail provided under s 50 of the Constitution where the prosecution is required to show compelling reasons why an accused must not be admitted to bail is no longer available.
2. What remains for the applicant is for him to request the court to exercise its discretion and restore his freedom pending the determination of his appeal. It is him/her who must show that it is in the interests of justice that he/she be admitted to bail.

From the above principles, an applicant must therefore show that:

i. there is a reasonable prospect of success on appeal
ii. He will not abscond considering the sentence imposed
iii. It is in the interests of justice that he be admitted to bail

I now turn to deal with each of these requirements

Applicant's Prospects of success on appeal

In proving this factor, the standard which is required of an applicant is very low. He must simply show that his appeal is free from predictable failure. As stated in *S v Hudson* 1996 SACR 431, the applicant is not expected to prove beyond any measure of doubt that his grounds are not doomed to fail. He must simply have some fighting opportunity on appeal. These prospects of success must necessarily be considered in relation to the grounds of appeal.

In doing so I note in *casu* that the first 3 grounds of appeal constitute a single ground as they are repetitive.

(2) <u>Ad Sentence para 1-3</u>

The applicant impugned the sentence on the basis that the trial court did not consider that he lost his temper because of the telephone call from his wife's paramour which he intercepted on the deceased's phone. A reading of the reasons for the sentence imposed by the court shows that the court indeed considered the accused's personal circumstances. It also considered the gravity of the offence and the interests of society. See the case of *S* v *Shariwa 2003 (1) ZLR 314 (H).* In attending to the personal circumstances, the cause of the dispute was taken into consideration. Defence counsel for accused in mitigation implored the court to look into the cause of the dispute whilst suggesting that it could have been because the deceased was having an affair with another man which made accused lose his temper. The trial court took heed and in its reasons for sentence alluded to the deceased "trying other people" because of applicants' confused life. Further, in mitigation the court found that there were extenuating circumstances and specific reference to the case of *Bezuidenhout* v *The State SC* 122-02 was made.

The *locus classicus* case on extenuating circumstances the case of *S* v *Mugwanda SC* 215/2001 and a plethora of other cases have defined extenuating circumstances as circumstances reducing the moral blameworthiness of the accused and not the criminal liability of the accused. *In casu* the factors were considered cumulatively. After accepting the existence of extenuation, the court imposed a sentence of 18 years.

It is worth noting that the effect of a finding of existence of extenuating circumstances does not mean an automatic and drastic reduction of sentence as implied by the applicant. It is mitigatory and no more. All this was taken into consideration by the court in arriving at the appropriate sentence. Conversely, no submissions were advanced by the applicant on the issue of reduction of the imprisonment sentence of 18 years and by which margin. No suggestion was made of the number of years he considered appropriate.

The grounds are therefore hopelessly lost and without merit.

<u>(B) Ad para 4</u>

Applicant also expressed strong optimism of the custodial sentence being significantly reduced or a portion thereof suspended. Section 358 As read with the 8th schedule of the Criminal Procedure and Evidence Act spells out the position at law. The section reads as follows;

"358. Powers of courts as to postponement or suspension of sentences

(1) ……

(2) When a person is convicted by any court of any offence other than an offence specified in the 8th Schedule, it may…

(3) ……

(4) ……

(5) ……"

The 8th schedule read in conjuction with the mentioned section reads:

"Eighth Schedule (Section 358)

OFFENCES IN RELATION TO WHICH POSTPONEMENT OR SUSPENSION OF SENTENCE, OR DISCHARGE WITH CAUTION OR REPRIMAND, IS NOT PERMITTED

1. Murder, other than the murder by a woman of her newly born child.
2. …….
3. …….

Without a doubt the law does not provide for the suspension of any portion of an imprisonment term in a murder case.

The case of *S* v *Pritchard Zimondi HH* 179/15 is also apposite. In the case MWAYERA J (as she then was) stated the following when sentencing the accused in the matter.

> "We will not suspend any portion of the prison term that we will impose. In any event s358 of Criminal Procedure and Evidence Act [Chapter 9:07], on powers of the court to postpone or suspend sentence outlaws suspension of sentences on murder. It is for obvious reasons that there will be no suspension of a sentence on an accused who has been convicted of murder with constructive intention"

The applicant's assertion that the imprisonment term ought to have had portions of it suspended is untenable when one considers s 358 ARW the 8th schedule of the Criminal Procedure and Evidence Act. As a result, the ground is equally hopeless.

(C) Ad para 5

The applicant also attacked the sentence on the ground that the trial court only paid lip service to his pre-trial incarceration of 1 year and 3 months. On the contrary, a reading of the reasons for sentence shows that indeed the applicant's pre-trial incarceration was considered. The trial court reasoned that it was entirely out of the accused's own making as he was denied bail by reason of having been on the run for 1 year 8 months. The court concluded that the delay in

the commencement of trial was not because of the sluggish criminal justice system nor the desire to fix him as suggested by the applicant but simply because by fleeing he deliberately excluded himself from benefitting from any delay that ought to have accrued from his stay in prison prior to the commencement of trial. For that reason, ground of appeal number 5 has no substance.

In conclusion therefore, there are no prospects of success on appeal. There is no possibility of the appeal court considering any other sentence other than imprisonment. A lengthy prison term was inevitable in the circumstances. That sentence was within the discretion of the trial court. No misdirection on the part of the trial court has been demonstrated by the applicant nor has there been any apparent on the record. In view of the brutal nature of the assault on the deceased, the sentence does not in any way induce a sense of shock. There is no chance that the appeal court will interfere with the sentence. In *Alfrenzi Nhumwa* vs *The State* SC40/88 at p 5 of the cyclostyled judgment KORSAH JA said:

> "It is not for the Court of Appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence imposed complies with relevant principles. Even if it is sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court."

(2) <u>The risk of abscondment</u>

In addition to discharging the onus that his appeal enjoys the prospects of success, the applicant also bears the responsibility to show that he is not a flight risk if admitted to bail pending the hearing of his appeal. See *S v Dzvairo* 2006 (1) ZLR 45. This factor however is inter-related to the issue of prospects of success. Where the prospects of success are minimal the risk of abscondment conversely increases. In the instant case, I have already demonstrated how weak the applicant's prospects are. If this is added to his self-confessed track record of having been on the run for 1 year 8 months prior to his trial for murder the remaining term of 9 years imprisonment prison hanging over him becomes a real inducement for him to abscond. The chances of the applicant submitting himself for the prosecution of his appeal and returning to serve the term of imprisonment are virtually non-existent. In essence there is a pronounced risk of abscondment by applicant because he is only appealing against sentence. The most he can hope for is a minor adjustment to his sentence. Consequently, this court cannot take a gamble by releasing the applicant on bail pending prosecution of his appeal in the Supreme court.

(3) The right of the individual liberty

The third factor is the right of the applicant to individual liberty. This right is automatically lost once a finding that there are low prospects of success on appeal is made. The need to ensure that the due administration of justice is protected becomes stronger. When asked to demonstrate that his release on bail pending appeal would not prejudice the interests of justice the applicant failed to give any meaningful response. Against that background, it is my considered view that the integrity of the justice delivery system will be prejudiced if the applicant is released on bail pending appeal. Society will be disappointed to see the applicant roaming about in their midst before completion of his sentence. Invariably confidence in the justice delivery system will be eroded. This is a typical case that screams for the applicant to prosecute his appeal whilst simultaneously serving his sentence.

Disposition

Clearly therefore, the applicant has failed to discharge the onus on him to establish that his admission to bail pending appeal is in the interests of justice. Accordingly, the application is hereby dismissed.

National Prosecuting Authority, respondents' legal practitioners