JOHN MASEDZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE 3 October 2023

Application for bail pending review

Mr *N Mushangwe*, for the applicant
Mr *T Kangai*, for the respondent

MANYANGADZE J: This is an application for bail pending review. It arises out of proceedings conducted in the Regional Magistrates' Court, sitting at Harare, in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. On 6 September 2023, the applicant was convicted, on his own plea, of the crime of theft as defined in s 113(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:023*]. The property stolen was a motor vehicle. He was sentenced to 3 years imprisonment of which 1 year imprisonment was suspended for 5 years on condition of good behaviour.

The brief facts of the matter are that on 29 April 2023, the complainant parked his motor vehicle at the Mashwede Complex, which is along High – Glen Road, Glen Norah. It was a Honda Fit, Registration No. AEQ 1210. The accused, using a duplicate key, unlocked the car, started the engine and drove off. Acting on information received, police detectives recovered the car from the accused in September 2023, in Epworth.

Following his conviction and sentence, the applicant filed an application for review, which is pending in this court under Case No. HCH 6165/23. In that application, he seeks to have the proceedings conducted by the Regional Magistrate set aside, alleging that they were marred by gross irregularities.

Pending the said application for review, the applicant lodged the instant application, wherein he prays that he be released on bail.

The applicant avers that the court *a quo* misdirected itself by not clearly and adequately explaining the essential elements of the offence with which he had been charged. The court

also failed to consider the applicant's complaint against the police, which was that he was assaulted, and that assault had a bearing on the guilty plea that he tendered in court.

In its brief response, the State does not oppose the application for bail pending review. It agrees with the applicant that the essential elements of the offence of theft were not clearly explained to the applicant, and this irregularity has the effect of vitiating the proceedings leading to the applicant's conviction on the charge of car theft.

The court is unable to uphold the application, notwithstanding the concession by the State.

Both counsel agree, correctly, that the principles considered in an application for bail pending review are the same with those in an application for bail pending appeal. In para 6 of his application, the applicant lists 4 factors that should inform the court's decision. These are:

a) Likelihood of abscondment
b) Prospects of success
c) The right to liberty
d) The likely delay before the review is determined.

In this regard, reference was made to the cases of *S* v *Dzawo* 1998 (1) ZLR 536 (S) and *S* v *Dzvairo* 2006 (1) ZLR 20 (H), among others.

Of the factors listed, it seems to me the paramount consideration is that of prospects of success on appeal or review, in the instant case review. The question is whether the court *a quo* seriously misdirected itself in convicting the applicant on the charge of theft of a motor vehicle. The gravamen of the applicant's complaint, it appears, is that the charge was not clearly and comprehensively explained. He did not understand what he was pleading guilty to. In particular, the question of whether he intended to deprive the complainant permanently of his motor vehicle was not specifically put to the applicant. It was contended that the applicant is an unsophisticated 21-year-old young man who does not understand the legal concept of ownership.

It must be borne in mind that the principles governing an application for bail pending trial are distinct from those governing bail pending appeal or review. In the latter situation, the accused has been convicted and sentenced. The presumption of innocence has fallen away, more particularly in the instant case, where he has been convicted on his own plea of guilty. He bears the burden of showing, on a balance of probabilities, that his conviction was improper

and he has prospects of success on review. Highlighting this distinction, ZHOU J had this to say in the case of *Munyaradzi Kereke* v *Samuel Mwaramwidze,* at p 3 of the cyclostyled judgment:

> "Bail pending appeal is a procedure by which a person who has been convicted and sentenced to an imprisonment term can petition the court to allow him to enjoy his liberty while he or she awaits the prosecution of the appeal noted against the conviction and/or sentence. The principles applicable to an application for bail pending appeal are settled in this jurisdiction. They differ significantly from those which apply where admission to bail is sought pending trial. That distinction is apposite given the fact that where bail is sought after conviction and sentence the presumption of innocence which is encapsulated in s 70(1) (a) of the Constitution of Zimbabwe no longer applies. Also, s 50 (1) (d) which gives an arrested and detained person the right "to be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention", equally has no application. In the case of *S v Tengende* 1981ZLR 445(S) at 448, BARON JA said:
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> > "But bail pending appeal involves a new and important factor; the appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused."
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> See also *S* v *Labuschagne* 2003 (1) ZLR 644(S) at 649A-B; *S* v *Williams* 1980 ZLR 466 (AD)."

The record of proceedings, which is attached to the application, shows that the applicant was asked several questions by the magistrate. The learned trial magistrate asked these numerous questions in a bid to satisfy himself that the applicant's plea of guilty was genuine. It is not necessary to repeat these questions as they fully appear on record. Suffice it to indicate that all the questions were unequivocally answered in the affirmative.

The applicant admitted the facts as they are stated. The magistrate went further and asked the applicant how he took complainant's vehicle. The applicant told the court that he used a duplicate key, obviously having left his home at night for that mission. He was asked what he intended to do with the vehicle, to which he responded that he intended to use it as *mushika – shika,* the colloquial term for an unregistered, illegal pirate taxi. The admitted facts show that the vehicle was taken in April 2023, and recovered in September, about half a year later. The recovery was only after the police acted on information received. He was further asked whether he foresaw that the complainant would be deprived of control and possession of his vehicle, to which he again, answered in the affirmative.

The applicant takes issue with the fact that the word "permanently" was not used in canvassing the essential elements of the offence. In canvassing the essential elements for theft, magistrates quite often use language that is easily understood by accused persons to indicate an intention to deprive the complainant permanently of his or her property, without necessarily using the word "permanently". Provided that what the accused admits is clearly and inescapably reflective of such an intention, failure to use that word is not necessarily fatal to the proceedings. In the present case, the accused never gave even the slightest hint of the defence he now seeks to advance in his application, which is that he never took the complainant's vehicle and that when he was arrested, he was simply leaning against the vehicle enjoying a soft drink. The police just pounced on him before the owner of the vehicle returned. Had the magistrate been given such an explanation, or something to that effect, he most certainly would have altered the accused's plea of guilty to that of not guilty. If the court disregarded that explanation and proceeded to convict the accused, the plea proceedings would indeed have been irregular.

A magistrate before whom an unrepresented accused person appears on a plea of guilty undoubtedly bears the onerous task of thoroughly explaining to the accused what constitutes the offence concerned. This does not however, mean that he/she launches into an academic and formalistic definition of the charge. The use of clear, simple, straightforward and probing questions can elicit responses that lay bare the accused's intention. The magistrate can safely convict when the answers given unequivocally establish both the *actus reus* and *mens rea* for the offence in question. In this context, I share the sentiments expressed by MUNAMATO J in *Noel Ndlovu v The State* 522/23. The learned judge made the following remarks, at pages 8 to 9 of the cyclostyled judgment:

> "The trend which has developed as evidenced by most records of proceedings submitted for review is that the magistrate adopts the textbook definition of the crime charged and repeats it to the accused before he/she pleads. The magistrate then asks the accused if they have understood the charge. More often than not the accused's answer is in the affirmative. Once that happens he/she is then asked to plead. Such route has resulted in the reinvention of the guilty plea procedure. The requirement for the magistrate to explain the charge to the accused must be approached pragmatically rather than formalistically. The formalistic approach is not only problematic but is the source of the logistical nightmares which magistrates and everyone concerned are grappling with daily. In the end it becomes a savage desecration of the tried and

> tested method advocated for by the Supreme Court and this court for over decades. An explanation of the essential elements of any crime amounts to an explanation of the charge as envisaged by s 271(2) (b) of the Code. The explanation of the charge is therefore to be found in the` rolled up approach in which each essential element of the charge is explained by asking from the accused questions which directly speak to that element. It certainly does not mean or require the court to define the offence to an accused and thereafter to explain each essential element. If it did it would obviously result in unnecessary and offending repetition of the same issues. Putting questions to an accused is not the only method of explaining a charge and its essential elements. There could be others but there is little doubt if any that it is effective and greatly assists an unrepresented accused to understand the constituent parts of the charge he/she faces."

In casu, it seems to me the magistrate was not provided with a reasonable basis for doubting the genuineness of the accused's plea of guilty. No explanation of an exculpatory nature was proffered by the accused in answer to all the questions put to him. In my view, even though the word permanently was not expressly used, the applicant has a tall order persuading the review court that his plea of guilty was not genuine and that the proceedings in question should be set aside. The probabilities are heavily staked against him. The pending review has little if any prospects of success. It is my considered view that the applicant has failed to discharge the onus resting on him that he should be released on bail pending review.

In the circumstances, it is ordered that: -

The application for bail pending review be and is hereby dismissed.

Mushangwe and Company, legal practitioners for the applicant
National Prosecuting Authority, legal practitioners for the respondent