HB 347-16
HCB 200-16
XREF HCA 171-16

CLIVE NDLOVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 25 NOVEMBER 2016

Bail Application

S Nkomo for the applicant
T Muduma for the respondent

MATHONSI J: Both the prosecution and magistrates appear impervious to the pronouncements of superior courts in this jurisdiction relating to considerations of community service as an option where the court has, in sentencing an accused person, settled for a term of imprisonment which is less than 2 years and the accused person meets the threshold for community service. If they were not, this court would not be inundated, as it is right now, with so many of these cases coming on appeal and as opposed bail applications which should not be opposed at all.

Owing to this intransigence on the part of magistrates who continue to studiously ignore the guidelines given by this court in respect of community service and a prosecution that will oppose anything, if for no other reason than for the sake of it, this court continues to traverse and plough through the same ground that would have been determined before. It is therefore time to remind them that this court, being a superior court, is not only a court of record but its decisions are binding on all inferior courts. They are binding on all the magistrates who are bent on ignoring them.

That is the basis of the time honoured doctrine of *state decisis* that loosely translates to-stand by previous decisions, a concept that is inculcated in the minds of first year law students. As to why practicing judicial officers would want to side-step it is not easy to understand what it means is that in this jurisdiction we abide by and uphold decisions of superior courts made on a

particular subject in the past. We do that in order to achieve consistency and certainty in the application of the law.

This is a bail application which the state had no business opposing at all, because this court has repeatedly stated that it is a misdirection for a trial court which has settled for an effective prison sentence of less than 24 months not to inquire into the suitability of community service as an alternative to such imprisonment. Where there has been a misdirection, the appeal court is at large to interfere with the sentence imposed even though sentencing is the discretion of the trial court. See *S* v *Gumede* 2003 (1) ZLR 408 (H); *S* v *Gumbo* 1995 (1) ZLR 163; *S* v *Antonio and Others* 1998 (2) ZLR 64 (H); *S* v *Mabhena* 1996 (1) ZLR 134 (H) 140 E; *S* v *Chireyi and Others* 2011 (1) ZLR 254 (H) 260D.

The applicant is a 30 year old married man who suspected that the complainant, a local business man at Habane Suburb in Esigodini, was having an affair with his wife because of the way he was calling his wife. He confronted the complainant at a bar in Esigodini leading to an altercation. He assaulted the complainant using open hands, clenched fists and booted feet. He also picked up a brick and struck the complainant on the left side of the forehead inflicting a deep cut.

The clinical officer who examined the complainant noted that severe force was used to cause serious injuries although there was no danger to life and no likelihood of disability occurring as a result.

For his jealous rant the applicant was arraigned before a magistrate at Esigodini on 10 November 2016 on a charge of assault in contravention of s89 of the Criminal Law Code [Chapter 9:23]. He pleaded guilty to the charge and was, upon conviction, sentenced to 12 months imprisonment none of which was suspended. The trial magistrate did not inquire into the suitability of community service and arrived at that sentence despite the strong mitigating factors that were drawn to his attention.

The application is a first offender who pleaded guilty to the charge. He genuinely believed that the complainant was having an affair with his wife. He is married with one minor child.

The applicant has since appealed against sentence only on the grounds *inter alia* that it induces a sense of shock and ignored all the mitigatory factors that exist. Pending the determination of the appeal the applicant has made this bail application. He asserts that his appeal has prospects of success and as such he would have no motivation to abscond.

The application is opposed by the state. The opposing papers are legendary by their brevity consisting, as they do, of barely five lines:

> "BE PLEASED to take notice that the respondent is opposed to the above application
>
> REASONS
>
> 1. There are no prospects of success on appeal against sentence. The appellant tendered a guilty plea and in my view the sentence is in accordance with real and substantial justice.
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> WHEREFORE respondent prays that the application for bail pending appeal be dismissed."

There is nothing to suggest that counsel for the state applied his mind at all to the issue at hand. If he had, surely he could not have submitted that there are no prospects of success on appeal. The concern of the court in an application for bail pending appeal is to ensure that the administration of justice will not be prejudiced by the absondment of the applicant. An applicant for bail who knows he is unlikely to succeed may be motivated to abscond in order to avoid serving a term of imprisonment. However where prospects of success are bright the likelihood to abscond is almost non-existent.

Let me repeat what I stated in *S* v *Mbizvo and Others* HB 258/16:

> "The moment the trial court settled for imprisonment of 12 months against first offenders, it was required to inquire into the suitability of community service as an option. If, following such inquiry it was of the view that community service was inappropriate, it should have recorded both the inquiry and the reasons for rejecting it: *S* v *Antonio and others* 1998 (2) ZLR 64 (H).
>
> The trial court did not conduct such an inquiry which was a misdirection. In addition the trial court did not consider the mitigating factors set out by the appellants at all. Instead it went on a tirade talking about things that were not raised by any of the parties (page 4).

Failure to have regard to mitigation is a misdirection calling for interference with the sentence."

I see no reason why I should depart from that pronouncement which I still stand by. In my view it applies with full force to the circumstances of this present matter. The appeal therefore enjoys very bright prospects of success. The applicant has made out a case for the relief sought.

In the result, it is ordered that:

1) The applicant be and is hereby admitted to bail pending appeal on the following terms that;

a) he deposits a sum of US$200-00 with the Assistant Registrar of this court;

b) he resides at 436 Habane Township Esigodini until the appeal is finalized.

c) he reports once a week on Fridays between 06:00 and 1800 hours at Esigodini Police Station until the appeal is finalized.

Mathonsi Ncube Law chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners