HB 71-17
HCA 09-17
XREF HC (CRB) 168-16

MODRICK MATIKI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 17 MARCH 2017 AND 30 MARCH 2017

Opposed Application

T Kamwemba for the applicant
K Ndlovu for the respondent

MATHONSI J: This is an application for leave to appeal to the Supreme Court against sentence only. The applicant appeared before me while I was on circuit in Gweru on 27 January 2017 charged with the murder of Abraham Moyo at Vungwi Business Centre under Chief Mazvihwa in Zvishavane on 22 August 2011. He pleaded not guilty to the murder charge but tendered a limited plea of guilty to culpable homicide.

Upon that limited plea being tendered the state graciously accepted it. A statement of agreed facts was then submitted to the court. After examining the statement of agreed facts the court was satisfied that the concession by the state in accepting the plea of guilty to culpable homicide was proper. We duly acquitted the applicant of the murder charge but convicted him of culpable homicide. He was sentenced to 9 years imprisonment of which 2 years imprisonment was suspended for 5 years on condition of future good behaviour leaving him with an effective imprisonment term of 7 years.

The applicant, who may have expected the lighter sentence of community service if the submissions made by *Mr Kamwemba* are anything to go by, was distraught and aggrieved indeed. He has expressed his grief by launching this application for leave to appeal against sentence. I must say that when the sentence was pronounced on 27 January 2017 both the applicant and his legal practitioner held their peace. They did not apply for leave as provided for by law. This application was only lodged on 7 February 2017.

There are consequences for that turn of events. Although *Mr Kamwemba* submitted that the application is made in terms of s44 (2) (b) of the High Court Act [Chapter 7:06] it is apparent that the section in question does not provide the procedure for making such an application. It is what can be called a right-endowing provision granting unto a convicted person the right to appeal to the Supreme Court albeit with the leave of the court. In so far as the procedure for making the application for leave to appeal is concerned, Order 34 rules 262 and 263 of this court's Civil Rules, 1971 have a say.

I shall recite those rules herein:

"262. Criminal Trial: oral application after sentence passed
Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed. The applicant's grounds for the application shall be stated and recorded as part of the record. The judge who presided at the trial shall grant or refuse the application as he thinks fit.

263. Criminal Trial: application in writing filed with registrar
Where application has not been made in terms of rule 262, an application in writing may in special circumstances be filed with the registrar within twelve days of the date of the sentence. The application shall state the reasons why application was not made in terms of rule 262, the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted." (The underlining is mine.)

After receiving the application I directed that it be heard in open court. What is striking however is that having missed the train after sentence was pronounced, the applicant could only jump on in terms of r263 which requires that reasons for failure to apply orally in court be given but he has not given any reason in his application. In addition, the proposed grounds of appeal have not been attached.

It is apparent therefore that the application is defective as it does not meet the dictates of the rules. Be that as it may, I intend to consider the merits of the application to see whether even on the merits he could have a shouting chance. This is because the parties did address me on the merits.

According to the statement of agreed facts, the applicant was aged 24 while the deceased was aged 38 at the material time. They resided at Majoni village in Zvishavane. In the afternoon

of 22 August 2011 the deceased proceeded with his friend to Vungwi Business Centre to drink beer. They joined the applicant at Hasienda Bottle Store. He was in the company of his friends drinking beer. They drank beer together.

During the drinking session they would change bars. On one such change of bars, the deceased left the applicant behind at Hasienda Bottle Store. Upon his return the applicant accused him of leaving without buying him beer. He grabbed him by the collar and violently shook him. The deceased did not offer any resistance as he appeared very drunk.

As they moved out of the bottle store, the applicant tripped the deceased to the ground and proceeded to kick him with a booted foot once in the stomach. He then rushed to the local clinic to seek help. The deceased was then pronounced dead at the scene leading to the applicant's arrest.

According to the post mortem report compiled by Dr S Pesanai, a pathologist at United Bulawayo Hospitals, which was produced at the trial in terms of s278 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07], the marks of violence he observed consisted of "blood stains on the frontal region, bruises on the left face (2 x 1cm) (2 x 1cm) frontal region left (2 x 1cm). The doctor remarked that the post mortem was consistent with asphyxia secondary to aspiration in an alcoholic intoxicated person who was assaulted causing him to vomit. He concluded that the cause of death was:

"i) Asphyxia
ii) Bronchoaspiration
iii) Acute alcoholic intoxication."

I have now been called upon to decide, even after assessing sentence and imposing it, whether a higher court might arrive at a different sentence from the one that I imposed. It is a cross which judicial officers, in the nature of their duties, have to carry from time to time in order for those who appear before them to find justice and at times merely to exercise their right to recourse before a higher tribunal. Invidious though it is as expressed by THOMPSON AJA in *R* v *Muller* 1957 (4) SA 642 (A) 645 E-G for a trial judge to disabuse his mind of his own findings, the judge must still apply the mind to the question whether there are reasonable prospects that the appeal court will take a different view.

The test to be applied in an application for leave to appeal was stated by EBRAHIM JA in *S* v *Mcgown* 1995 (2) ZLR 81 (S) 81H, 82A as:

> "In my view, in whatever way one wishes to formulate the test it comes to much the same thing. Clearly it would be appropriate to refuse an application that has little or no prospects of success or one that is frivolous. But where there is substance in the argument, there must *ipso facto* be a reasonable prospect of success."

That test was clarified further though in a slightly different contest by PATEL JA in *S* v *Gumbura* 2014 (2) ZLR 539 (S) at 541 B – C where the court, quoting *S* v *Hudson* 1996 (1) SACR 431 (W) said:

> "The test to be applied in this regard is relatively uncomplicated: is the appeal 'reasonably arguable and not manifestly doomed to failure.?'"

In order to decide whether the appeal enjoys some prospects of success it is imperative to have regard to the fact that generally sentencing is the discretion of the trial court. The appeal court is loathe to interfere with the sentencing discretion of the trial court except where there has been a misdirection in the exercise of that discretion. See *S* v *Chiweshe* 1996 (1) ZLR 425 (H) 429D; *S* v *Nhumwa* S-40-88.

In this jurisdiction respect of the exercise of discretion has always been salutary. In fact the Supreme Court was prepared to go as far as to say, in *Crouch* v *Dube* 1997 (1) ZLR 427 (S) at 437 C-D:

> "When a particular discretionary power has been found to be of the character which places it in the first category (i.e those matters which are essentially to be determined by the court of first instance like sentencing), the court of appeal has no jurisdiction to substitute its own exercise of discretionary power for that decided upon at first instance unless it has been made to appear that the exercise of the power at first instance was not judicial. That can be done by showing that the court of first instance exercised the power capriciously or upon a wrong principle or with bias or without substantial reasons."

See also *Sommer Ranching (Pvt) Ltd v Commissioner of Taxes* 1999 (1) ZLR 438 (S); *S* v *Tengende* 1981 ZLR 445 (S); *S* v *Mutasa* 1988 (2) ZLR 4 (S).

The question which arises therefore is whether in the exercise of the court's sentencing discretion, the trial court arrived at a sentence which was injudicious or without substantial reasons. To answer that question one has to have regard to the penal provision for culpable

homicide. That is found in s49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] as amended by Act No 3 of 2016 which provides;

> "Any person who causes the death of another person –
>
> (a) negligently failing to realize that death may result from his or her conduct; or
> (b) realizing that death may result from his or her conduct and negligently failing to guard against that possibility;
> shall be guilty of culpable homicide and liable to imprisonment for life or any definite period of imprisonment or a fine up to or exceeding level fourteen or both."

It is within the sentencing discretion of a court convicting a person of culpable homicide to impose a life imprisonment sentence or any definite period of imprisonment. In the exercise of that discretion and having regard to the factors stated in the reasons for sentence in *S* v *Matiki* HB30/17, I settled for an effective imprisonment term of 7 years. It cannot be said that the discretion was not exercised judiciously.

Clearly therefore the appeal that the applicant intends to launch is not reasonably arguable. In fact it is manifestly doomed to failure. In my view it would be highly irresponsible for me to unleash the applicant on the Supreme Court under circumstances where his sojourn to the apex court is doomed before it has started. Such an appeal would only achieve one goal, to massage the applicant's ego, while wasting the appeal court's time.

In the result, the application for leave to appeal against sentence is hereby dismissed.

Tavenhave & Machingauta, c/o Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners