

MANDLA SIKHOSANA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 20 NOVEMBER & 11 DECEMBER 2003

H Shenje for applicant
Mrs M Moya-Matshanga for the respondent

Bail Pending Appeal

CHEDA J: Applicant was convicted of housebreaking and theft, the value of the goods was \$1 000 000 which was recovered. He pleaded guilty and was sentenced to 48 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual conditions.

The brief facts which give rise to this appeal are that, complainant was a girlfriend to applicant's friend. On 2 July 2003 complainant secured her house by closing all the windows and locking the doors and the gate before she left for work. Applicant jumped over the gate, broke the lock of the door of the house using an iron bar and hence gained entry. On entry, he stole a colour television and a VCR valued at \$1 000 000 which property was recovered.

Mr *Shenje* for applicant has argued that the trial magistrate did not properly consider the mitigating factors in this matter, namely that the value of \$1 million in the present circumstances is not much bearing in mind the inflationary trends prevailing in the country, more so that it was all recovered. He further argued that the trial court should have considered a non-custodial sentence bearing in mind that he

is a first offender and that he pleaded guilty. He is, therefore, of the opinion that another court is likely to come up with a different sentence most probably a non-custodial one.

Mrs *Moya-Matshanga* for respondent has argued that applicant should not be granted bail pending appeal because there is no chance of his appeal against sentence succeeding.

In determining bail pending appeal, it is necessary to take into account the severity or otherwise of the sentence imposed by the court *a quo* in relation to the general sentences imposed on such cases, bearing in mind of course, that each case always presents its own different circumstances.

Housebreaking on its own is a serious offence, it is more serious if coupled with theft. These courts have always viewed it in that light. This has always been the court's trend. In *S v Truter* HB-47-91 an 18 year old with two other youths broke into a house and stole property worth \$12 000 most of which was recovered. They were sentenced to 5 years of which 2 years were suspended, was on review reduced to 18 months of which 12 months imprisonment was suspended.

In *S v Chirera & Others* HH-170-90, three accused aged 19,22 and 27 broke into a store and stole property worth \$6 100 of which \$2 400 worth of property was recovered. They were sentenced to 2 years imprisonment. On review the sentence was found to be inappropriate. It was held that accused should have been sentenced to 3 years imprisonment with half suspended in the case of the 2 young accused and 1 year suspended in the case of the older accused per REYNOLDS J and EBRAHIM J.

In view of the sentence passed on the two cases for amounts which are far less than in *casu*, it is my opinion that applicant's chances of success on appeal against

sentence are dim indeed. In view of this, it will be improper to release him on bail when all the facts clearly show that he should be in prison anywhere.

Sentencing is the discretion of the trial court and it should not be easily interfered with or disturbed for the simple reason that another court may have a different view. The onus is on the applicant to show on a balance of probabilities that he has reasonable prospects of success on appeal or review which prospects will encourage him to await the outcome of his appeal, see *S v Williams* 1981(1) SA 1170. I wish to deal with what is meant by reasonable success on appeal. In my opinion an appeal can be said to have good prospects of reasonably succeeding if:

1. a sentence other than imprisonment is likely to be imposed; or
2. it is likely that a wholly suspended term will be imposed; or
3. that the sentence of imprisonment will be reduced to such an extent that the accused will be prejudiced if it is expected of him to commence serving his sentence pending appeal, because any reduced sentence will have expired before the appeal is disposed of – see *S v Beer* 1986(2) SA 307.

If applicant fails to so prove any of the above, then bail pending appeal should be refused.

It is my conclusion therefore that applicant's chances of success on appeal are very slim and accordingly this application is dismissed.