Judgment No. HB 171/04
Case No. HCB 81/04

ABEL NGWENYA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 OCTOBER 2004 AND 20 JANUARY 2005

S S Mlaudzi for applicant
P A Mpofu for respondent

Bail Application

NDOU J: The applicant and his co-accused, Nkosinathi Masuku were jointly charged with three(3) counts of armed robbery. They were convicted by a Regional Magistrate, Western Division, sitting in Bulawayo. The first charge was that on 29 January 2003 and at Hillside Teacher's College, Bulawayo the accused persons robbed Cresta Ngwenya of $615 000,00. The allegations were that the applicant executed this robbery in the company of Clifford Dube, Bekhayeli Mpofu, Learnmore Sibanda and Nkosinathi Masuku. The applicant and Masuku were accounted for by the police while the other three are still at large. Two pistols and two gate-away vehicles were used in the commission of the robbery. The second charge is that on 26 March 2003 at 2100 hours the accused persons drove the applicant's vehicle to Zack's Place along Robert Mugabe Way in Bulawayo. Upon arrival they confronted one Brayn Kalunga and robbed him of his Isuzu Twin Cab vehicle registration number 583-449H at gun point. The vehicle was later abandoned at Colleen Bawn some 150 kilometres from Bulawayo. However, before the vehicle was abandoned at Colleen Bawn, its owner had been dumped at a dark spot in Bulawayo. The vehicle's canopy was abandoned at Pumula suburb. The third charge

was tat on 27 March 2003 the applicant and his co-accused persons, armed with pistols and using the stolen vehicle Isuzu vehicle in the second charge, proceeded to Namex Mine, Filabusi. Upon arrival they approached the Mine Manager, Clodius Hungwe and robbed him of cash amounting to $1 800 000,00. The applicant and Masuku were arrested on 27 March 2003 leading to the recovery of the stolen Isuzu vehicle and cash amounting to $1 600 000,00. The applicant and Masuku pleaded guilty before the Regional Magistrate to the first and third charges and were convicted. They had pleaded guilty to the second charge but their plea was altered to that of nor guilty after they told the court that they had no intention of permanently depriving the owner of the vehicle, of his car. They were then remanded for trial on the second charge and they later hinted that they wanted to change their pleas of guilty in the first and third charge. The reason being that they were assaulted by the police. A formal application was made by their legal practitioner in that regard but they were unsuccessful. They were tried and convicted on the second charge. They were then sentenced to 12 years imprisonment on each count with 10 years suspended on conditions of good behaviour. It is the conviction and sentence that the applicant intends to appeal against and in the meantime he wants to be out on bail. The record of the proceedings in the court *a quo* was annexed to this application. The pleas of guilt on counts 1 and 3 appear proper and genuine and there was no miscarriage of justice in accepting them. The pleas seem to have been voluntarily and unequivocally made. Where an appellant seeks to withdraw his unequivocal plea of guilty he is required to show on a balance of probabilities that the plea was not voluntarily and understandingly or correctly made – *S* v *Nyajena* 1991(2) ZLR 175(SC) at 177.

In this case when the pleas were entered into the applicant was specifically whether he had any complaints against the police and he answered that he had no complaints against the police. When the essential elements were canvassed by the trial magistrate in counts 1 and 3 the applicant did not use words (in his response) which raise a defence to the charge thus necessitating the court to changing his pleas of guilty to that of not guilty. That the trial court was alive to the provisions of section 271(2)(b) of the Criminal Procedure Act [Chapter 9:07] is evinced by his approach in the second charge where he altered the plea of guilty to one of not guilty when the words of the applicant constituted a legal defence to the charge – *Kurainona & Ors* v *S* 1993(2) ZLR 354 at 356 and *Patrick* v *R* 1963 R & N 893. On the second charge the matter went to trial. The court *a quo* made an adverse finding against the applicant.

On the question of sentence, these are serious armed robberies executed by a gang. The above facts reveal proper planning and execution of the robberies. The sentences imposed are not out of line with the trend in such cases – *S* v *Nduna & Anor* HB-48-03. It is unlikely that the appeal will be heard after completion of the sentence imposed. Overall there are no prospects of success on appeal against both conviction and sentence. For bail pending appeal to be granted the applicant must show that there are prospects of success on appeal – *S* v *Kilpin* 1978 RLR 282 at 286 and *S* v *Tengende & Ors* 1981 ZLR 445(S). The onus is on the applicant to show that he should be admitted to bail. He has failed to discharge this onus – *Mahachi* v *S* HB-111-04.

Accordingly, the application for bail pending appeal is dismissed.

Samp Mlaudzi & Partners applicant's legal practitioners
Criminal Division, Attorney-General's Office respondent's legal practitioners