

AUGUSTINE MBALEKWA TANAYE DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 8 AND 16 AUGUST 2007

T Hara for applicant
W B Dube, for the respondent

Application for bail pending appeal

NDOU J: The applicant, aged 60 years was convicted by a Bulawayo Regional magistrate of attempted murder. He was sentenced to seven (7) years imprisonment with three(3) years thereof suspended for five (5) years on conditions of good future behaviour. He has noted an appeal against sentence only. The respondent's sole objection to the granting of bail is that there are no prospects of success on appeal. The applicant was sentenced on 18 June 2007 and the trial magistrate's reasons for sentence are not yet transcribed. The applicant's current legal practitioner did not represent the applicant at the time of sentence so he is obviously not privy to those reasons. Equally, I am not privy to the said reasons. Mr *Dube*, for the respondent, listened to the tapes and confirmed that indeed the reasons were given on the day in question. There is no explanation for the dilatoriness.

In this case, it is common cause that the applicant is not a flight risk. He was on bail until the date of sentence. Of that period, some of it was after conviction and awaiting sentence. Another issue relevant to this application is that complainant applied for compensation and the applicant did not object to the compensation. The public prosecutor sought assessment of the quantum of compensation. This issue would have been relevant on the quantum and maybe the nature of the sentence. The payment of compensation would have been a strong mitigatory factor. It would have spared the victim the enormous costs of suing the applicant in a civil court. If this issue had been pursued to its logical conclusion, it is possible that the effective

sentence may have been reduced to an effective imprisonment of 24 months. In that event the applicant would have at least been entitled to be considered as a possible candidate for the option of community service. The trial magistrate, in her wisdom, decided to sentence the applicant when the victim was still busy trying to quantify his damages. The trial magistrate did so out of sheer convenience as she was about to leave the service. This convenience denied the applicant an opportunity to present a strong mitigatory factor. The effect of this decision may be found to be a misdirection by the appeal court. This factor, plus the fact that the applicant is not a flight risk and the unexplained two months delay in transcribing the reasons for sentence cumulatively constitute positive grounds for granting the applicant bail pending appeal – *S v Ncube & Anor* HB-4-03; *S v Ramushu & Anor* SC-25-93 and *S v Nhumwa* 540-88.

Accordingly, it is ordered that the applicant be and is hereby released on bail pending appeal on the following conditions:

1. That the applicant pays the sum of \$5 000 000,00 with the Deputy Registrar of the High Court, Bulawayo.
2. That the applicant resides at number 50221/10 Mpopoma, Bulawayo until the finalisation of the matter.
3. That the applicant reports once every week on Mondays between the hours of 0600 hours and 1800 hours at Western Commonage Police Station.

T Hara and Partners, applicant's legal practitioners
Attorney-General's Office, respondent's legal practitioners