Judgment No. HB 102/10
Case No. HC 135-8/10
Xref No. HCA 159-12/10
Xref CRB B 965-968/09

NOMSA KANYOKA **1ST APPLICANT**

AND

PRICHARD NDLOVU **2ND APPLICANT**

AND

PHATHISANI NKALA **3RD APPLICANT**

AND

ANTHONY MUMBA **4TH APPLICANT**

AND

THE STATE **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 2 SEPTEMBER 2010 AND 9TH SEPTEMBER 2010

Mr. G. Nyoni for applicants
Mr. W. Mabhaudi for respondent

Application for bail pending appeal

MATHONSI J: The four Applicants along with two others were charged with theft as defined in section 113 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The allegations against them were that on the 19th August 2008 at the 40km peg along the Beitbridge – Masvingo road, they, along with others, had cut down 9 wooden electricity poles. After doing that they stole copper wire measuring 8,1km which they rolled up in preparation for transportation.

The four Applicants are alleged to have been travelling in a South African registered Toyota Hilux motor vehicle registration number JNT 904GP which was red in colour. At the time of the arrest of the four Applicants, they were seated in the said motor vehicle at a laybye 40km from Beitbridge presumably waiting for their accomplices who were busy cutting and rolling the copper wire a short distance from where the vehicle was parked.

The Magistrates Court sitting in Beitbridge convicted the Applicants of theft on the 30th July 2010 and sentenced all of them to 8 years imprisonment. The first Applicant who is a 40 year old woman was treated the same as her male colleagues after the Court took the view that she was the leader of the event. They have now appealed against both conviction and sentence arguing, inter alia, that the conviction was "based on circumstantial evidence that was not corroborated" and that the state case was incredible and full of "material inconsistencies (which) protruded quite glaringly"

Pending the appeal hearing they have applied for their release on bail and *Mr Nyoni* who appeared for the Applicants strongly argued that the appeal has high prospects of success not only because the State witnesses were unreliable but also that the police must have planted the evidence of the Toyota Hilux's tyre marks at the scene of the crime after they had requested to be shown how the anti-hijack system of the vehicle operates. On sentence, *Mr Nyoni* submitted that the trial Magistrate failed to arm himself with sufficient pre-sentencing information as a result of which the appeal court will be at large to interfere with the sentence.

Mr Mabhaudi for the Respondent contested the application urging me to dismiss it as the evidence led on behalf of the State was overwhelming and that the Applicants were

properly convicted. Regarding sentence, *Mr Mabhaudi* took the view that the Applicants must consider themselves lucky that they were sentenced to 8 years imprisonment for theft because the correct charge they should have faced was contravening section 60(A)(3)(b) of the Electricity Act, [Chapter 13:19]. Had they been convicted under that provision they would have been sentenced to a mandatory 10 years imprisonment.

An application for bail pending appeal is different from one made pending trial in that while in the latter situation the presumption of innocence favours the Applicants, in the former the Applicant having been convicted of the crime, he/she no longer enjoys the benefit of the presumption of innocence. See *S v Kilpin* 1978RLR 282(A) 285 H and 286 A where MacDonald CJ said:-

> "The principles governing the grant of bail before conviction are entirely different from those governing the grant of bail after conviction and the difference is even more marked when the guilt of the accused is not in issue and the usual sentence for the offence is an effective prison sentence of substantial duration. It is wrong that a person who should properly be in goal should be at large and nothing is more likely to encourage frivolous and vexatious appeals than the attitude adopted by the Magistrate in the present case."

Indeed the main determining factors in an application of this nature are the prospects of success on appeal and the interests of justice that is, whether the release of the Applicant pending appeal will not prejudice the administration of justice. The test usually boils down to an inquiry whether the Applicant will not abscond as it is accepted that the motivation to flee is increased by the dim prospects of success on appeal.

In this particular case, while the Applicants were convicted essentially on circumstantial evidence, the law on that is very clear. In that regard I can do no better than defer to the

learned authors L H Hoffman and D Zefferties The South African Law of Evidence, 4th Edition, Butterworths 1992 at page 589-590 where they say:-

> "In *R v BLom* (1939AD288) WATERMEYER JA referred to 'two cardinal rules of logic' which govern the use of circumstantial evidence in a criminal trial
> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

At about 01:00 hours on the day in question, a group of people were cutting down electricity poles and stealing 8,1km of copper wire used in transmitting electricity. They had, as a result, caused a black out in the area which prompted State witness Sithole (a security officer in the area), to investigate. The copper wire was rolled and carried to a spot which was 30 metres from where the four Applicants had parked their red Toyota Hilux motor vehicle which motor vehicle had twigs hanging from the front bumper suggesting it had been driven through some bush and had distinct scratches on the sides consistent with driving through bushes.

The culprits who had cut the wire and carried it to that spot were expecting to load it onto a vehicle but could not do so because the vehicle in question had disappeared which disappearance coincided with the arrest of the four Applicants. On being accosted by State witness Sithole, the Applicants could not satisfactorily explain why they were parked at that place at such ungodly hour. They also had with them a weapon in the form of an axe and some sacks which they could not satisfactorily explain.

In addition to that, not only were tyre marks similar to those of the Toyota Hilux observed at the scene of crime, but also receipts and invoices for the sale of copper cables in

South Africa, were found in Applicants' vehicle suggesting that someone using that vehicle was involved in selling copper cables.

With respect, there could only be one inference to be drawn from those proved facts especially as all four Applicants were not resident anywhere near the place of their arrest. The evidence against the Applicants is therefore pretty strong and their prospects of success on appeal are very slim indeed.

Considering that they have already been sentenced to a lengthy term of imprisonment and the prevalence of the crime of theft of electricity cables, the motivation to abscond is also very high. I am therefore not persuaded that Applicants are good candidates for bail or that their release would best serve the interests of justice.

Accordingly, the application by the four Applicants is hereby dismissed.

Mathonsi J.....

Messrs Moyo & Nyoni applicants' legal practitioners
Criminal Division, *Attorney General Office*, respondent's legal practitioners