Judgment No. HB 135 /10
Case No. HCB 158/10
Xref No. CRB W/C 748/10
Xref No. HCA 194/10

MAJOR MHLANGA **APPLICANT**

AND

THE STATE **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 26 OCTOBER 2010 AND 28 OCTOBER 2010

Mr C. P. Moyo for applicant
Mr T. Makoni for respondent

Bail Application

MATHONSI J: This is an application for bail pending appeal against sentence. The Applicant was convicted by the magistrates court sitting at Western Commonage, Bulawayo of drunk driving in contravention of section 55(2) of the Road Traffic Act, [Chapter 13:11] (the Act) and sentenced to 24 months imprisonment. He was further prohibited from driving motor vehicles other than a commuter omnibus or a heavy vehicle for 6 months and from driving a commuter omnibus or heavy vehicle for life.

Before imposing that sentence the trial magistrate, acting in terms of section 85(2)(a) as read with section 88A of the Act, inquired into the existence of special reasons as would entitle the applicant to a sentence other than the mandatory one prescribed in the Act.

After failing to find special reasons, the trial magistrate sentenced the Applicant to the mandatory minimum sentence of 2 years. In doing so she pointed out that she had taken into

account the compelling mitigatory factors of the Applicant but finding her hands tied, she preferred to restrict the sentence to the bearest minimum.

Aggrieved by the sentence the Applicant noted an appeal to this court against sentence only on essentially two grounds namely that the sentence imposed is so manifestly excessive as to induce a sense of shock and that the court a quo erred in not finding special reasons in order not to impose the mandatory sentence.

It was argued on behalf of the Applicant that the appeal has high prospects of success firstly because the magistrate did not make a proper inquiry into the existence of special reasons thereby ending up with a wrong conclusion and secondly that having decided on an effective imprisonment term of 24 months, the trial magistrate should have considered sentencing the Applicant to community service.

The facts are that on the 19th August 2010 the Applicant was driving a commuter omnibus registration no. ABN 5586 along Khami Road when he stopped in the middle of the road near the railway line flyover and started calling for passengers to embark on his commuter omnibus. He was then arrested and taken to Bulawayo Central Traffic Section where a breath test was conducted on him. He was found to have an alcohol/blood level of 179 mg alcohol per 100ml of blood. This led to the presumption, in terms of section 55(3) of the Act, that he was incapable of keeping the vehicle under proper control.

In response to the inquiry into the existence of special reasons why the mandatory sentence could not be imposed the Applicant submitted that he had been stressed after his

wife had taken their child to hospital after the child had eaten a flower. He went on to say that he was trying to go to his employer to ask for time off in order to attend to the sick child.

I am not persuaded that the Applicant has an arguable case in respect of the existence or otherwise of special reasons. In terms of section 55(1) of the Act, special reasons are:

> "special circumstances surrounding the commission of the offence concerned but does not include special circumstances peculiar to the offender."

The Applicant will have serious difficulties in convincing the appeal court that his voluntary decision to drink alcohol, drive a commuter omnibus and then call for passengers in the middle of the road had anything to do with his child having swallowed a flower.

However, it is the second argument relating to the failure by the court to consider community service after it had settled for an effective imprisonment sentence of 24 months which presents the Applicant with prospects on appeal. The trial magistrate weighed the mitigating factors which persuaded her to settle for 24 months. In my view, it does not matter that the statute provides for a mandatory sentence. Once the effective sentence falls within the community service grid, the trial court is enjoined to consider community service as an option to that mandatory sentence.

The sentencing policy of our law is that courts are enjoined to consider community service where the effective prison term they arrive at is 24 months or less. See *S v Mabhena* 1996(1) ZLR 134(H); *S v Majaya* HB 15/03; *S v Shariwa* 2003(1) ZLR 314(H) at 322F.

In an application for bail pending trial the main determining factors are the Applicant's prospects of success on appeal and the interests of justice, that is to say, whether the release of

the Applicant on bail will not prejudice the administration of justice. *Masunda and Other v The State* HB 48/10 at page 3. Having come to the conclusion that the Applicant has an arguable case on appeal, I have no reason to believe that the administration of justice will be prejudiced by the release of the Applicant on bail. He is therefore a good candidate for bail. In the result, I make the following order, that:

(1) The Applicant be and is hereby admitted to bail pending appeal.

(2) The Applicant shall deposit a sum of US$ 100-00 with the Assistant Registrar of the High Court in Bulawayo.

(3) The Applicant should reside at No. B5573 Old Pumula, Bulawayo until the appeal is finalised.

Messrs Moyo and Nyoni, applicant's legal practitioners
Criminal Division, *Attorney General's Office*, respondent's legal practitioners