

NJABULO TSHUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 9 -10 AND 15 OCTOBER 2015

Bail Pending Appeal

T. Make for applicant
K. Ndlovu for respondent

MAKONESE J: The applicant, a soldier with the Zimbabwe National Army was tried and convicted in the Regional magistrate court facing two counts of contravening sections 131 of the Criminal Law (Codification and Reform) Act [Chapter 9:23], unlawful entry into premises (count 1) and section 93 (1) (b) of the Criminal Law Code, “kidnapping”. Applicant was sentenced to undergo 3 years imprisonment in respect of count 1 and 10 years in count 2. Of the total 13 years imprisonment 5 years was suspended on condition of good behavior, leaving the applicant with an effective sentence of 8 years imprisonment. The applicant noted an appeal against both conviction and sentence arguing that that the court *a quo* erred in finding that the state had proved its case beyond reasonable doubt. In particular the applicant alleges that the court erred in admitting the evidence of a confession and in relying on the evidence of identification of a single witness. The applicant alleged that the sentence is too harsh and induces a sense of shock in all the circumstances of the case.

The facts of this matter are fairly simple and most of the issues are common cause. The state alleged in the first count that on 2 June 2015 at around 2340 hours at Plot 954 Aussie Road, Kensington, Bulawayo the accused wrongfully and unlawfully entered Denis Mpofu’s house by forcibly opening the door. Once inside the property, the applicant for a reason which has never been known, picked up a young girl aged 6 years old from a sofa where she was sleeping and bolted out of the house. The young girl, obviously terrified, screamed for help and in doing so

alerted her parents who ran after the applicant. The applicant later dropped the young girl and disappeared. The complainant's father who was shaken by the incident took back the girl into the house. A black and purple bag containing a Zimbabwe National Army pay slip which had been dropped by the applicant as he fled, led to his arrest. In his defence, applicant swore that he never committed the offences. He stated that on the day in question he was off duty. He went home after 10:00pm after having spent the evening drinking at a bar in Kensington at Njiva Lodge. He said from there he sat by the path by the side of the road. He lit a cigarette, smoked and slept there. He said he was too drunk to walk home. When he woke up an hour later his bag had gone missing. He got home around 11:00pm and he slept. He did not inform his wife about the events of that night. At around 3am, the same day the police came knocking on the door and arrested him on allegations of unlawful entry into premises and the kidnapping of a child. The applicant went on to say that the allegations against him had been fabricated by the complainant's father because of hatred. The trial magistrate dismissed the applicant's story as false. The story sounds unbelievable and at the hearing of the bail pending application I enquired from applicant's counsel, Mr *Make* to explain the existence of applicant's bag at the scene of the crime. He failed to give any sensible explanation, save to say that the bag could have dropped there by someone. Counsel for the state, Mr *K. Ndlovu*, correctly pointed out in his written submissions that the conviction and sentence is unassailable.

The test for prospects of success on appeal are articulated in the South African case of *S v Hudson* 1996 (1) SALR 431(W), where it was stated that the appeal should reasonably be arguable and not manifestly doomed to fail from the outset. In other words where the evidence of guilt is overwhelming there are greater chances that a convicted person might abscond. However, if there is a room for difference of opinion in the law, evidence and the facts and circumstances of the particular case regarding the conviction of the accused, there would be reasonable prospects of success.

On the facts as outline above the chances of the conviction being set aside are so remote as to being non-existent. The trial court's approach to the assessment of the evidence cannot be faulted. The applicant was linked to the offence by the discovery of his bag outside the complainant's house. There was no evidence of bad blood between the applicant and the complainant's parents. The trial court properly rejected the applicant's defence.

As regards sentence, counsel for the applicant conceded that in the event that the conviction was upheld on appeal it was highly unlikely that a non-custodial sentence would be substituted. In the case of *Manyangwe v The State* HH 01/03, the court pronounced the position as follows:

“It is trite that bail is a matter for the discretion of the court. In exercising its discretion the court considering an application for bail pending appeal must be satisfied that there are prospects of success on appeal and the granting of bail will not endanger the interests of justice.”

In the circumstances, I hold the view that the appeal against both conviction and sentence do not carry any prospects of success. In the event that there is a reduction in the sentence on the kidnapping charge the applicant is unlikely to be sentenced to a non-custodial sentence. As such, granting the applicant bail pending appeal will clearly jeopardise the interests of justice as the likelihood of the applicant absconding is a real possibility.

I, accordingly dismiss the application for bail pending appeal.

Messrs Ndove, Museta and Partners, applicant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners