

BEKEZELA BHEBHE

And

PRINCE MDUDUZI NDEBELE

And

BHEKINKOSI BHEBHE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 16 JULY 2020

Bail Pending Appeal

H Shenje, for the applicant
K Ndlovu, for the respondent

KABASA J: At the conclusion of the hearing of this matter I handed down an *ex tempore* judgment and dismissed the application.

Notwithstanding that none of the parties has asked for written reasons I decided to furnish them nonetheless.

The applicants appeared before a provincial magistrate charged with a total of six counts, three counts of unlawful entry and 3 counts of theft as defined in sections 131 and 113 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. They all pleaded guilty to the charges and were sentenced to a total of 9 years, with 2 years suspended on condition of good behavior and 1 year suspended on condition of restitution.

The facts of the matter are that on 6th March 2020 at around 0005 hours the three applicants, using a donkey drawn scotch cart as their mode of transport, went to Mganwini Primary School in Filabusi and used an iron bar to force open the headmaster's office. They thereafter took property which included a desktop computer and a solar booster, all valued at

\$33 380. They loaded the property into the donkey drawn cart and hid it in the bush. The three then proceeded to Ilanga General Dealer at Mcondo Business Centre and broke the padlocks securing the shop before gaining entry. They proceeded to take property valued at ZAR 13 570 which they again loaded onto the donkey drawn cart. They then proceeded to Mgwangwa bottle store at the same business centre, used an iron bar to break the padlocks securing the front door and gained entry. They proceeded to take property worth \$10 465.

Following investigations the three applicants were arrested and most of the property was recovered.

In seeking bail pending appeal the applicants argue that a non-custodial sentence was appropriate and the court *a quo* misdirected itself by imposing a custodial sentence. The sentence is purely retributive and disproportionate to the offences and the offenders.

The state initially was opposed to the granting of bail but at the hearing of the application *Mr. Ndlovu* submitted that the state was no longer opposed to the granting of bail. State counsel was of the view that the plea of guilty, the recovery of the bulk of the stolen property and the applicants' status as first offenders could sway the appeal court to interfere with the court *a quo*'s sentence. The applicants therefore had a fighting chance on appeal.

It is accepted that the presumption of innocence no longer applies *in casu*. (*State v Kilpin* 1978 RLR 282, *State v Mangange* HH 01-03, *State v Poshai* HH 89-03, *State v Ncube and Another* HB 04-03)

The factors the court must consider in an application for bail pending appeal are:-

- a) The likelihood of the accused absconding in the light of the sentence imposed.
- b) The prospects of success
- c) The right of the individual to liberty.
- d) The likely delay before the appeal can be heard.

It is my considered view that where the appeal seeks to attack the sentence only and not the conviction, the applicants must show that there are positive grounds to admit them to

bail. This being so because an appeal court should not lightly interfere with the trial court's discretion.

In *State v Ramushu and Others* SC 25-93 GUBBAY CJ had this to say:-

“But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate.” (See also *State v Msindo and Others* HH 25-02).

In assessing sentence the court *a quo* considered that the applicants are first offenders who pleaded guilty and that there was need to temper justice with mercy.

In arriving at the sentence of imprisonment the court *a quo* considered that unlawful entry is a serious offence as it carries a potential of violence should the offender be discovered.

The facts show that the complainant whose bottle store was broken into lived at the same premises and she is the one who discovered the offence before alerting the others. The court *a quo*'s observation cannot therefore be criticised.

The applicants gained entry into three different premises in the dead of night. The manner in which the offences were committed attracted the following comment from the trial court:-

“This attest to the resolve and premeditation that went into the planning and execution of these offences.”

Such an observation finds support in the facts and cannot be described as exaggerated in the circumstances. The learned provincial magistrate considered the imposition of a fine or community service as inappropriate, making the observation that such a sentence would erode the public's confidence in the justice system.

In *State v Chari* S 230-95 the Supreme Court held that a first offender who stands convicted of multiple counts should not be treated as a first offender. A non custodial sentence in the form of a fine or community service would arguably not be suitable in those circumstances. Granted, the charges in *State v Chari* (supra) were theft of motor vehicles and

arguably more serious than the charges the applicants *in casu* stand convicted of. The point however is that the court *a quo* cannot be said to have misdirected itself when it held that the applicants breached the security of three commercial premises showing that “this cannot be work executed by mere armatures (sic) the first offenders falls away.” Equally so, the decision by the court *a quo* to hold that a non custodial sentence was therefore not appropriate cannot be criticised. Community service is rendered within the community. The applicants struck at a rural school and rural business centre. The nature of such communities is such that members of the community are likely to be wary of people who went on a spree of breaking into premises in the dead of night. What effect therefore will a community service order have with regards to the community’s confidence in a judicial system which sends such offenders back to work at public institutions within the community? The situation would have been different had the applicants been convicted of just one count of unlawful entry committed in aggravating circumstances. This is not the case *in casu*.

Can it therefore be said the appellate court is likely to interfere with the sentence imposed to such an extent that should the appeal succeed the applicants will be prejudiced as they would have served more time than deemed necessary?

In *State v Hudson* 1996 (1) SA CR 431 (W) the court stated that where a convicted person applies for bail pending appeal and there is no reason to be concerned about whether or not he will abscond, the question is not whether there is a reasonable prospect of success on appeal. If the appeal is reasonably arguable and not manifestly doomed to failure the lack of merit in the appeal should not be the cause of a refusal of bail. Furthermore, if the conclusion that the appeal is manifestly doomed to failure can be reached only after what is tantamount to or approximates a full hearing, the appeal should ordinarily for purposes of considering bail be treated as an appeal which is arguable. The question is not whether the appeal “will succeed” but, on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment. (See *1996 Bulletin of Zimbabwean Law No. 2* at p 48).

Whilst it may be argued that a total of 9 years even with part suspended on condition of good behavior and restitution may be on the harsh side, the point is, is such a sentence likely to be altered to such an extent that by the time the appeal is heard the applicants would

have served for a much longer period than that which the sentence as altered would have required them to? I think not.

Mr. Ndlovu submitted that the appeal is unlikely to be heard in the third term but most probably next year. It is highly unlikely that a year will lapse before this appeal is heard. Is it therefore in the interests of the proper administration of justice to admit the applicants to bail?

In *State v Tengende* 1981 ZLR 445 at 448, quoted with approval by GWAUNZA JA (as she then was) in *Russel Wayne Labuschagne v the State* SC 21-03, the court had this to say:-

“But bail pending appeal involves a new and important factor; the appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused.”

I find no positive grounds for the granting of bail *in casu*. This is a case which calls for the applicants to prosecute their appeal whilst serving their sentence. Their right to liberty must be looked at in light of all the other factors, the most important factor being the prospects of success.

From the foregoing I am of the view that a case has not been made for the relief the applicants seek.

In the result, the application for bail pending appeal is declined.

Shenje and Company, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners