WISDOM VUMANI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 18 JULY 2022 & 28 JULY 2022

Application for bail pending appeal

Mrs. A. Mbeure for the applicant
K.M. Guveya for the respondent

DUBE-BANDA J:

1. This is an application for bail pending appeal against conviction and sentence. The applicant was arraigned before the Regional Magistrates' Court for the Western Division sitting at Bulawayo. He was charged with two counts.

2. In count 1 he was charged with the crime of attempted murder as defined in section 189 as read with section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 18th November 2021 he unlawfully attempted to cause the death of the complainant by punching him with a fist once on the left cheek, hitting him once with a stone on his back and hitting him several times with a knobkerrie on the head.

3. In count 2 he was charged with the crime of theft as defined in section 113(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that he unlawfully took cash worth USD300. 00 belonging to the complainant.

4. The applicant pleaded not guilty to both counts. After a contested trial he was found not guilty and acquitted in respect of the theft charge, and he was convicted in respect of the attempted murder charge. He was sentenced to 5 years imprisonment of which 2 ½ years imprisonment were suspended on the usual conditions.

5. Aggrieved by the conviction and sentence on the attempted murder count he noted an appeal to this court. The appeal is pending under cover of case number H.C.A. 65/22. The applicant seeks to be released on bail pending the finalisation of his appeal.

6. In support of this application the applicant filed a bail statement. In his statement he contends that he has prospects of success on appeal. The conviction is attacked on the basis that the trial court placed much reliance on the medical evidence as corroboration of the complainant's version of attempted murder. It is contended further that the trial court misdirected itself in convicting the applicant of attempted murder yet the evidence on record could sustain a conviction for the crime of assault. The trial court is further criticised for rejecting the applicant's defence of provocation. It is submitted further that the trial court misdirected itself in invoking the provisions of section 232 of the Criminal Procedure and Evidence Act [Chapter 7:09] (CPE Act) to call a witness to present evidence which the State had failed to cover through its witnesses

7. In respect of sentence it is submitted that the sentence imposed on the applicant is too severe and induces a sense of shock. The trial court is further criticised for refusing to sentence the applicant to community service.

8. This application is opposed. Regarding conviction the respondent contends that the applicant has failed to show that he has prospects of success on appeal. Regarding sentence the respondent contends that the trial court did not commit a misdirection and there are no prospects of success on appeal.

9. Section 115 C (2) Criminal Procedure and Evidence Act [Chapter 7:09] (CPE Act) saddles a convict with the *onus* of showing on a balance of probabilities that it is in the interests of justice for him to be released on bail at this stage. The admission to bail pending appeal is not for the asking, applicant is enjoined to discharge the *onus* cast on him by the operation of s 115 C (2) (b) of the CPE Act. This is so because the presumption of innocence no longer operates in his favour. He has been convicted by a court of law. Therefore he must must show that it is in the interests of justice that he be released on bail pending appeal.

10. In considering whether it is in the interests of justice to release him on bail pending appeal, the court will be guided by the following principles: prospects of success on appeal; likelihood of abscondment in the light of the gravity of the offence and the sentence imposed; likely delay before the appeal is heard and the right of an individual to liberty. See: *S* v *Dzawo* 1998 (1) ZLR 536; *S* v *Bennet* 1985 (2) ZLR 205 (HC); *S* v *Ncube & Ors* HB 04-03. The court has to factor in all the relevant considerations, and determine whether individually and cumulatively they constitute circumstances which would qualify to admit a convicted and sentenced person to bail. It can be said that it would not be in the interests of justice to deny bail pending appeal to an applicant who has demonstrated good prospects of success on appeal. See *S* v *Kilpin* 1978 RLR 282. An applicant who is able to demonstrate on a balance of probabilities that his appeal enjoys good prospects of success, is unlikely to abscond and would rather present himself to clear his name. Such applicant's right to liberty should be given effect to, this safeguards against the risk of having an otherwise innocent person languish in prison in respect of a case for which he might end up being cleared by the appeal court leading to an 'empty victory.'

11. In an application for bail pending appeal against conviction and sentence an absence of reasonable prospects of success on appeal may justify refusal of bail. See *S* v *Beer* 1986 (2) SA 307 (SE). Admitting to bail a person who is unable to show an arguable case or good prospects of success on appeal poses a risk to the interests of justice. Such a person may be refused bail at this stage merely because he or she would not have discharged the *onus* as required by section 115C of the CPE Act.

12. It is on the basis of these legal principles that this bail application must be viewed and considered.

Does the applicant have prospects of success on appeal?

13. The trial court found that there was overwhelming evidence that the applicant used a knobkerrie to assault the complainant in the head. It found that the complainant sustained injuries, and his evidence was corroborated by the second State witness and was

confirmed by the medical doctor. The court said the applicant used a dangerous weapon on a vulnerable part of the body. The findings of the trial court are supported by the evidence on record. I say because the complainant testified that he was punched on the left eye. He was hit with a castle lite beer can. He was struck with a knobkerrie on the head. He went to hospital where he was sutured seven stiches on the head. The second State witness saw complainant seated and bleeding from the head. He testified that the knobkerrie the applicant used to strike the complainant broke into two pieces. The evidence of Dr. Fredrick Nyabadza was that he examined the complainant and observed a head injury and bleeding on the nose. He opined that the injury was caused by a blunt object, the degree of force used to inflict the injury was very severe and the injury itself was very serious.

14. The evidence of the Dr. Nyabadza corroborates that of the complainant and the second State witness on a material issue, i.e. complainant was struck with a knobkerrie on the head. The medical report also shows that the complainant was struck with a blunt object. The injuries were very serious and the degree of force used to inflict the injuries was severe. There was potential danger to life and permanent disability i.e. dizziness and nose bleeding was likely to occur. The net effect of the evidence was that the applicant used a dangerous weapon on a delicate part of the body, i.e. the head. Therefore the contention that the trial court placed much reliance on the medical evidence as corroboration of the complainant's version of attempted murder has no substance.

15. The contention that the injuries observed by Dr. Nyabadza might not have caused by the applicant is just a red *herring*. The evidence of the complainant is straightforward on this issue, that he was treated for the injuries caused by the applicant. The medical report on record speak to the injuries suffered by the complainant and the force used. The argument that the medical report was of "no force or effect" is unsustainable. It is of no moment.

16. I take the view that the evidence on record supports the conviction of the applicant for the crime of attempted murder. The applicant used a lethal weapon, i.e. a knobkerrie several times on a delicate part of the body. For the purposes of this application my view is that the contention that he should have been convicted of assault has no merit.

17. The trial court is criticised for rejecting the applicant's defence of provocation. The trial court did not reject the defence of provocation, it simple did not consider it because it was not placed for it as an issue for consideration. In his defence outline the applicant said he was irked by the complainant's behaviour who after receiving money from his wife became evasive. The dictionary definition of the word "irked" is annoyed or irritated. He was merely irritated not provoked. In cross examination he said the complainant insulted him by calling his wife a prostitute. This does not appear in his defence outline and was not adduced in evidence in chief and it was a new version coming for the first time in cross examination. Mr *Guveya* counsel for the respondent argued that there is nothing on record which shows that a defence of provocation was advanced which warranted the trial court to be ceased with the issue. I agree.

18. It was submitted further that the trial court misdirected itself in invoking the provisions of section 232 of the Criminal Procedure and Evidence Act [Chapter 7:09] to call a witness to present evidence which the State had failed to cover through its witnesses. In terms of the law a trial court has a wide discretion in terms of section 232 of the CPE Act. The discretion must be exercised judicially. The court has a duty to exercise the power to call a witness where it is necessary to attempt to discover the truth in order that substantial justice is done between the accused and the prosecution. See: *S v Van den Berg* 1996 (1) SACR 19 (Nm); *R v Hepworth* 1928 AD 265 @ 277. The trial court called the Investigating Officer (I.O) and his evidence was that he recorded a statement from the applicant and recovered knobkerrie which was broken into two pieces. The two pieces of the knobkerrie were produced by consent. The trial court considered the evidence of the I.O. essential to the just decision of the case, and it is very unlikely that the appeal court will interfere with such a discretion. The fact that the prosecution had initially attempted to call the I.O. and failed is of no moment.

19. On the basis of the evidence on record, the factual findings made by the trial court and the application of the legal principles, the verdict of the trial court is unlikely to be vacated on appeal. The trial court took into account all factors surrounding the offence

before convicting the applicant. There are therefore no reasonable prospects of success on appeal against conviction.

20. In respect of sentence it was submitted that the sentence imposed on the applicant is too severe and induces a sense of shock. The trial court is further criticised for refusing to sentence the applicant to community service. The law is clear that in every appeal against sentence the court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court. An appeal court should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test under is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. See: *S v Rabie* 1975(4) SA 855 (AD) at 857 E.

21. I *casu* I take the view that the trial court factored into the sentencing equation all the relevant factors, i.e. the personal circumstances of the applicant, the mitigating factors and the aggravating factors of the case. It is very unlikely that the appeal would interfere with this sentence.

Whether or not the applicant is likely to abscond in view of the sentence imposed?

22. In my view, the applicant has a high probability of absconding considering that he has no reasonable prospects of success on appeal. The principle that the lesser the prospects of success the higher the risk of abscondment is applicable in this case. In *S* v *Kilpin* 1978 RLR 282 (A) it was pointed out that a court may well consider that the brighter the prospects of success, the lesser the likelihood of the applicant to abscond and *vice versa*. The applicant was sentenced on 16 May 2022. He has experienced the rigours of imprisonment for over two months. He still has a long way to go as he was sentenced to an effective 2 1/2 years in imprisonment. The remaining sentence is likely to cause him to abscond if he is released on bail pending appeal. He is a flight risk and not a good candidate for bail pending appeal.

23. In the absence of reasonable prospects of success on appeal and the high probability of absconding, factors relating to the right to liberty and the delay before the appeal can be heard recede to the remote background.

24. In the circumstances of this case, I am satisfied that it is not in the in interests of the administration of justice that the applicant be released on bail pending appeal.

In the result, I order as follows:

The application for bail pending appeal be and is hereby dismissed.

Majoko & Majoko applicant's legal practitioners
National Prosecuting Authority respondent's legal practitioners