SHEPERD SAMSON MOYO

And

PETER NARE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 25 April 2024 & 30 May 2024

Application for bail pending appeal

K. Ngwenya for the applicant
K.M. Nyoni for the respondent

Introduction

[1] This is an application for bail pending appeal. The applicants and a co-accused who is not part of this application stood trial at the Regional Court charged with the crime of robbery as defined in s 126(1)(a) as read with s 126(3)(A) and 126(3)(A)(B) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] ("Criminal Law Code"). It being alleged that the applicants and their accomplices intentionally used violence or threats of violence to subdue the complainants to relinquish control of their property, i.e., cash in the sum of USD3 579-00; a black Itel cell phone; a Samsung J6 plus; Gtel Infinity cell phone; an Itel tablet; a bunch of company keys and a padlock. After a contested trial the co-accused was discharged at the close of the State case and the applicants were convicted and each sentenced to ten (10) years imprisonment with three (3) years suspended on the usual conditions.

[2] The trial court found that it was common cause that on 10 March 2023 the applicants hired a motor vehicle i.e., a Honda Fit from one William Coneck. On 11 March 2023 there was a robbery at Fidelquip Company ("company"). The robbers were armed with a knife and a pellet gun. During the robbery one person was stabbed with a knife and sustained injuries. The robbers stole cash amounting to USD 2 600.00; four cell phones; company keys and a

black beg inscribed “Meyers accessors.” The robbers were not positively identified. The CCTV at the premises captured the vehicle used by the robbers as a getaway car, and it was the same vehicle hired by the applicants from William Coneck. The applicants were arrested a few hours after the robbery using the vehicle captured on CCTV as a getaway car.

[3] The trial court found it proven beyond a reasonable doubt that the applicants were the robbers. In convicting them, the court found that they were in recent possession of stollen property a few hours after the robbery and they failed to give an innocent explanation of such possession. The court further rejected their version as false, and rejected their *alibi* as an afterthought. It was on this basis that the applicants were convicted and sentenced as stated above. Aggrieved by the conviction the applicants filed an appeal to this court and such appeal is pending in case No. HCBCR1107/23. The applicants seek to be released on bail pending the finalisation of their appeal.

Submissions

[4] This application is premised on the argument of the existence of the reasonable prospects of success. Mr *Ngwenya* counsel for the applicants submitted that the State failed to prove beyond a reasonable doubt that they were the robbers. It was submitted further that the applicants were not identified as the robbers, and that the chain of custody of the exhibits was broken, and therefore the doctrine of recent possession was not applicable in this case. It was further submitted that the State did not show that the defence of the applicants was false beyond a reasonable doubt.

[5] The applicants’ submitted further that the interests of justice permit their release on bail pending appeal. It was submitted that the applicants are not a flight risk and, in that throughout their trial they adhered to the bail conditions and did not jeopardise the proper functioning of the criminal justice system. The other point raised was that they are Zimbabweans, family men and sole providers of their respective families. They are of fixed

abode and have no properties outside this country. It was submitted that the applicants have proved on a balance of probabilities that they are good and proper candidates to be admitted to bail pending appeal.

[6] This application is opposed. The respondent contends that there are no prospects of success on appeal. It was submitted that when the police arrested the applicants at Muneti Bar they were searched and the stolen property was recovered on them. It was submitted further that from the first applicant the police recovered a small Itel phone and cash amounting to USD300-00. From the second applicant the police recovered a small bag inscribed "Meyers" and cash in the sum of USD500-00. Inside the car next to the driver's seat the police recovered a bunch of keys with a holder inscribed "FEDELQUIP." It was submitted further that the police also recovered number plates they noticed on the CCTV video clip taken from the scene of crime. It was further submitted that the first applicant led the police to the recovery of a black cell phone belonging to the complainants. It was submitted that the State proved its case as required by the law and there are no prospects of success on appeal, and therefore, this application must fail.

The application of the law to the facts

[7] It is trite that the applicants bear the burden to prove that it is in the interests of justice that they ought to be admitted to bail. In our legal system, bail pending appeal is governed by the provisions of s 123 as read with s 115C (2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The applicants must persuade the court that it is in the interests of justice that they be admitted to bail. The primary consideration in an application for bail pending appeal should be whether the accused will serve his sentence if released on bail and his appeal fails. At this stage by virtue of the conviction the presumption of innocence has ceased to operate in favour of the applicants. In *State* v *Tengende & Ors* 1987 ZLR 445 the court held that the proper approach in applications for bail pending appeal is that in the absence of positive grounds for granting bail it will be refused. In the exercise of its discretion whether it would

be in the interests of justice to release a convicted and sentenced person to bail pending appeal the court would consider whether there are 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.

[8] Mr *Ngwenya* submitted that according to the evidence three assailants entered the premises and executed the robbery. They were all masked and could not be identified. Of the three one was identified as Zenzo Mhambi who was not before the trial court, and the second was identified a Japhet Kuziva who was also not before the trial court. Before the trial court they were three accused persons and the third accused was discharged at the close of the case for the prosecution. The net effect of counsel's submission was that if the two who were identified were not before the trial court, and the third accused was discharged it would mean that the applicants could not have been part of the three who entered the shop and carried out the robbery.

[9] Counsel's submission requires scrutiny. The evidence shows that three male persons entered the complainant's shop and executed an armed robbery. The assailants had covered their faces and they were not positively identified. A co-accused who was accused number three at the trial was discharged at the close of the State case. According to the evidence the discharged co-accused did not enter the complainant's premises, and was seen by the witnesses at the parking lot after the robbery. So, he was not amongst the three robbers who entered the shop. The evidence of the police is that the CCTV video clip showed that when the robbers walked out of the shop, a few metres into the pavement one assailant who is still at large removed his balaclava and his face was clearly seen. Therefore, of the three robbers who entered the shop the one who was identified has not been accounted for. The two were not identified. Therefore, the submission that the two applicants could not be part of the three robbers who entered the shop is not supported by the evidence on record.

[10] The police officers scrutinized the vehicle used by the robbers as a getaway car on the CCTV clip. They observed that the vehicle was a Honda Fit, it had no rear wiper, it had a spare wheel referred to as "biscuit wheel" at the back, and that wheel had a yellow tape. On the left side, between the two doors the police observed that there was a part that was missing. The police also observed the number plates of this getaway car. A few hours after the robbery the police found the two applicants in possession of the getaway vehicle, and "it still as it was observed in the video clip," only that it was now having a different set of number plates. The evidence shows that this vehicle was hired from its owner by the two applicants, and at the time the robbery was executed it had not been returned to the owner.

[11] At the time the applicants were arrested, the police officers carried out a search on the vehicle and recovered the number plates that they had noticed on the video clip and the keys with a holder inscribed "Fedelquip," a silver pad lock and cable tyres. Further, from the first applicant the police recovered Itel cell phone, and USD300.00 in one-hundred-dollar notes. From the second applicant the police recovered a small bag inscribed "Meyers" and cash in the sum of USD500.00, all in one-hundred-dollar notes. Thereafter the police recovered from the first applicant a black cell phone, which was hidden a few metres from his home gate in a small bush. The police made further recoveries.

[12] All the items recovered by the police were received in evidence with the consent of the applicants. Some of these items were stollen during the robbery or seen on the CCTV video clip during the robbery, e.g. number plates; bunch of keys, cell phones; balaclavas; hat; white tackies; pellet gun; jean trousers; silver padlock and a bag inscribed "Meyer accessories." Mr *Ngwenya* submitted that the chain of custody of exhibits was broken, and therefore the exhibits were inadmissible in evidence. Counsel relied on the case of *Ndlovu v The State* HB 240/23. For the purposes of this application, the submission about the chain of custody is not available to the applicants. These exhibits were received in evidence by consent. A litigant, in this case the State had no obligation to prove the chain of custody of exhibits received by consent. This case is distinguishable from the *Ndlovu* case, wherein the

appellant complained that he was excluded from the testing and examination of the pieces of ivory, thus placing in issue whether the items seized from him where the two pieces of ivory produced as exhibits in court. In *casu* the applicants consented to the production of the exhibits and nothing turns on admissibility of the exhibits.

[13] The applicants hired the vehicle that was used as a getaway car on 10 March 2023, and their case is that instead of using it for their trip to Inyathi left it in the possession and use of a third party. They contended that the reason they did not use the vehicle to Inyathi was because it was faulty and it did not have insurance. However, they rehired the same vehicle the following day 11 March 2023, according to their defence outline to go out for drinks and according to their defence case they re-hired it to go to their residences as it was late. The trial court rejected this version, and with cause.

[14] The evidence shows that the applicants were found in possession of property that had been recently stollen during a violent armed robbery. The applicants had an evidential burden to give a reasonable explanation for the possession of stollen property. They raised an *alibi*, indicating that at the time the robbery was committed they were not in Bulawayo, but at Inyathi. There is no burden of proof on the accused to prove his *alibi.* If there is a reasonable possibility that the alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of doubt. See *S v Malefo* 1998 1 SACR 127 (W) 158a-e. The law requires an *alibi* to be raised at the earliest available opportunity to enable the State to investigate it authenticity. In this case the applicants raised their *alibi* for the first time at the trial, and the trial court found that it was raised as an afterthought and rejected it. In the circumstances of this case, this finding cannot be faulted. The applicants have no prospects of success on appeal.

[15] The submission that they were admitted to bail pending trial and observed all their bail conditions is of no assistance at this stage. What stands out in this matter is the gravity of the sentence imposed against the applicants. They come before this court with drastically

changed circumstances. They are no longer presumed innocent until proven guilty. They have been convicted and are serving lengthy sentences. The propensity to evade serving their sentence is more accentuated by that sentence. On that score it will not be in the interests of justice to admit them to bail. Moreover, the applicants have failed to satisfactorily demonstrate the prospects of success on appeal. In my view, the lack of prospects of success on appeal and the prospect of a protracted prison term, coupled with the fresh experience of post-trial incarceration, affords abundant incentive for them to abscond. See *S v Gumbura* SC 349/14.

[16] In every case where bail after conviction is sought the *onus* is on the applicant to show why justice requires that he should be granted bail. See also *S* v *Kilpall* 1978 RLR 282 (A); *Kwenda & Anor* v *The State* HH-37-10; *S v Tengende & Ors* 1981 ZLR 445 (5) at 447 H-448C. The applicants have not discharged the *onus* of showing why justice requires that they be admitted to bail pending appeal. In all the circumstances, I am amply satisfied that the applicants are not good candidates for bail. Further, there is no prejudice if the applicants remain incarcerated. This matter will, in all probabilities, serve before the appeal bench of this division before the end of 2024. It is a few months from now and hopefully it will be brought to finality. Again, the personal circumstances of the applicants are not sufficient reasons to release them on bail pending appeal. All these considerations, in my view, seem to support the respondent's contention that this application must be dismissed. It is for these reasons that this application must fail.

In the result, the applicants' bail application pending appeal be and is hereby dismissed.

T.J. Mabhikwa and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners