

JOHN MADA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BACHI –MZAWAZI
CHINHOYI, 6 October 2022

Opposed Bail Application

M Muchini, for the appellant
T H Maromo, for the respondent

BACHI MZAWAZI J: The applicant approached this court seeking bail pending appeal, after noting an appeal against both conviction and sentence with this court. The grounds of appeal, which I will not, duplicate herein are clearly outlined in his heads of argument and statement in support of this application. The common thread that runs throughout his grounds of appeal against conviction is that, the court of first instance erroneously convicted him on the basis of circumstantial evidence which did not exclude the reasonable inference that he had been hired as an innocent taxi driver. In that regard, he submits that he has prospects of success on appeal and that he is a good candidate for bail given his personal circumstances. The State is opposed to the granting of bail pending appeal on the basis that firstly, the trial court did not err on its findings against both conviction and sentence. Secondly, that there is danger that applicant will abscond given the seriousness of the case and the stiffness of the sentence already imposed.

The facts are that the applicant and two co-accused persons, were arrested, charged and convicted after a full trial of armed robbery in contravention of s 126(1) (a) of The Criminal Law (Codification and Reform) Act. The allegations are that he teamed up with five others who are still at large, to assault, steal and rob the complainant of the property that was in his custody. It is further stated that, the assailants used a firearm and various weapons to subdue the complainant. The state outline and the witnesses' testimony differ on how the applicant was eventually accosted and arrested. As such the trial court admittedly convicted the applicant from the circumstantial evidence that he was found with part of the stolen loot from the robbery soon after the incident. The court of first instance did not accept the

applicant's defence that he was an innocent taxi driver who had only been hired to ferry goods.

On analysis, it is true that there are divergent versions as to how the applicant was arrested. The evidence of the police officers when juxtaposed contradicts itself on this aspect and several others. Whilst the State outline gives the impression that the appellant ran away from a police road block that had been mounted pursuant to a tip off, of the said robbery, the witnesses' evidence did not support that fact. In fact, the evidence which emerged at the end of the trial is that the accused was arrested on his way back from purchasing fuel. Apparently, the learned magistrate explicitly distanced the applicant from the scene of the crime. He noted that the evidence on record failed to place him at the scene of the offence, but however, the fact that he was found with stolen goods is circumstantial evidence warranting the conviction.

Applicant argues that, that fact alone was not sufficient for one to be convicted on the basis of circumstantial evidence as the court did not exclude the inference that he had been hired. It is on this basis that applicant motivates that he has prospects of success on appeal.

Two issues arise for consideration from the above facts. Whether or not there are prospects of success on appeal and whether or not the applicant has made a case for the granting of bail pending appeal?

In order to determine the prospects of success on appeal, there is need to firstly examine the ground of appeal on circumstantial evidence.

The first ground of appeal reads that, the lower court erred on a point of law in convicting the appellants on the basis of circumstantial evidence yet the proved facts of the case did not exclude the very reasonable inference that the appellants were merely hired to ferry the stolen goods and did not participate in the robbery.

In our jurisdiction, a person can be convicted purely on circumstantial evidence alone. Circumstantial evidence is indirect evidence from which an inference of guilt may be drawn. This is done when the State fails to place real and direct evidence before a court of law in criminal matters. However, there are safeguards that are in place to avoid wrong and misguided convictions in the guise of circumstantial evidence. Professor G. Feltoe, in his book, *'Magistrates' Handbook, August 2021*, Edition, Judicial Service Commission and UNDP publication, outlined five crucial guide lines on pp 322-323. These are:

The circumstances from which an inference of guilty is sought to be drawn are all established.

- (a) The inference of guilt is consistent with all the proved facts and the proved facts are such that they exclude every reasonable inference from them except that accused is guilty.
- (b) The circumstances taken cumulatively form a chain so complete that the conclusion is inescapable that within all human probability the crime was committed by accused and no-one else.
- (c) Where circumstantial evidence leads inexorably to a definite conclusion no direct evidence is necessary for their probative value, save that things do not happen that way without reason or explanation.
- (d) The circumstantial evidence is incapable of explanation by any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of accused but also inconsistent with his innocence.

See *S. v Marange & Others* 1991(ZLR) 244(S), *S v Tambo* 2007 (2) ZLR 33H and *Muyanga v The State* HH 79/2013.

From the record of proceedings, the trial court on p 7 of his reasons for judgment, paragraph two first sentence noted that:

“The first and third accused persons were not seen at Dasapa workshop.”

On p 8 of the same reasons, first paragraph, the court stated that:

“Now the court looks at circumstantial evidence whether there could be drawn an inference from the circumstances of the case linking the first and third accused persons to the crime.”

On the third paragraph of p 8 the court had this to say:

“As pointed out earlier, there is no direct evidence against accused number one and two. However, there is direct evidence against the second accused.”

On p 9, the court stated that the first accused person’s vehicle was not identified at the scene but was recovered with the loot from Dasapa workshop, at around 9am after his car had run out of fuel. If the first accused person had been hired by Asani Mwenye they should have directed the police to where he was.

For the record accused one is the applicant in this matter. Further, for clarity Dasapa workshop is where the robbery took place.

Clearly, there is no dispute that the applicant was convicted on the basis of circumstantial evidence. The inference drawn by the court is that he was found with part of the stolen loot and that he could not lead the police to where the named owner of goods was.

In my view, the fact that applicant is a taxi driver was not disputed. There is no evidence on record rebutting that he had been hired on the day in question by Asani Mwenye to ferry his goods. It is not in dispute that the offence is said to have been committed at around 2am but from the above excerpts of the trial court 's judgment, it is also a common fact that accused was arrested after he had gone to fetch fuel at 9am. Had he been part of the robbery team or had he known that these were stolen goods would he have waited until broad morning light to search for fuel?

It is also not denied that the bulk of the stolen items were in the third accused's truck. Applicant stated that Asani Mwenye boarded a truck after boarding some of his goods in the applicant's car and left two of his colleagues. This averment is in tandem with the accused version of events which was not disputed.

Accused two testified that Asani Mwenye was sitting with him in the car when their vehicle was stopped by the police, but he managed to escape. The existence of Mwenye was thus not rebutted in court, making the applicant's version more plausible.

I am of the perspective that against the backdrop of the five guidelines laid out by Professor Feltoe above and the staged approach in the treatment of circumstantial evidence as advocated for in the *Muyanga case* above, the applicant has prospects of success on appeal. From the above analysis, it cannot be reasonably concluded that the inference that he was an innocent taxi driver hired to ferry goods was excluded by the trial court. More so, when the onus to prove its case beyond reasonable doubt lies with the state and not an accused person. See, *R v Difford* 1937 AD.

On the second issue, the principles governing bail pending appeal is clear and straight forward. The applicant in such cases no longer enjoys the right to the presumption of innocence. There is reverse onus, in that in bail pending trial it is the state that is compelled to prove compelling factors against an accused person is outright Constitutionally sanctioned right to bail in terms of s 50(1) (d) of Amendment Act No. 20 of 2013. In an application for bail pending appeal the onus is shifted onto the applicant to prove that he is a right candidate for bail. See, *Kwenda & Another v The State* HH-37-10.

This is so, because once a person has been convicted, the presumption of innocence as espoused in s 70 (1) (a) of the Constitution, Amendment Act number 20 of 2013 no longer operates in his favour. Further, s 115 C (2)(b) of the Criminal law Code, places the burden of proof in applications for bail pending appeal on the appellant. See, *Majani & Anor v the State*, HH 642/17. In addition, even in instances where there are prospects of success on appeal, in applications for bail pending appeal, like in all bail applications, a balance is struck against the interests of the administration of justice and those of the liberty of an incarcerated person. This was highlighted in *S v Williams* 1980 ZLR 466(A) *S v Tengende*, 1981 (2) ZLR 445 (S) at 448 and *S v Dzvairo* 2006 (1) ZLR 45 H.

As already indicated, the state's objection is premised on the likelihood that the applicant may not prosecute his appeal but abscond given the standing conviction on a very serious offence, as well as, the stiffness of the sentence already imposed and on the fact that there are no prospects of success on appeal. There is a plethora of authorities that state abscondment alone is not a factor to deny an accused person his liberty. Stringent bail conditions can alleviate any danger of abscondment. Applicant is an aged family man with no previous convictions. His personal circumstances indicates that up to the time of the alleged offence he was an honest man earning an honest living.

I have already made a finding that there are prospects of success on appeal. There is nowhere on record that shows that it was disproved that applicant was a taxi driver in order to effectively rebut his explanation that he was hired. Each case deserves to be treated on its merits. If the appeal court finds in favour of the accused that indeed there was no firearm, assuming that his appeal on conviction succeeds, then his sentence is likely to be significantly reduced. This is so, because the key witness did not mention the presence of any firearm or dangerous weapons in his evidence-in-chief.

In light of the above I am of the view that applicant not only has prospects of success against both conviction and sentence but has an arguable case.

For these reasons the application for bail pending appeal succeeds in terms of the draft order.

Accordingly, bail is granted in terms of the draft order.

Kachere Legal Practitioners, applicant's legal practitioner
National Prosecuting Authority, State's legal practitioners