LANGTON GARANDE

And

OBERT MAZERE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI 10 JULY 2023

Bail Pending Appeal

U Saizi, for the applicants
TH Maromo, for the respondent

MUZOFA J: This is an application for bail pending appeal.

The applicants appeared before a Regional Magistrate sitting at Karoi on three counts of robbery in contravention of s126 (1) (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23. They pleaded not guilty but were all convicted and each was sentenced to 12 years imprisonment of which 4 years imprisonment were suspended on condition of good behavior. In addition, 2 years imprisonment were suspended on condition of restitution.

The allegations are that on the 27th of July 2021 the 2nd applicant was the driver of a white Toyota Mark X with registration number AET 9739 and had a black spot in front. The motor vehicle had a number plate at the back and no number plate in the front. The 1st applicant together with another man who was not apprehended were passengers in the motor vehicle. They offered transport to the three complainants who intended to travel from Karoi to Chirundu. Along the way the 2nd applicant stopped the motor vehicle and the trio threatened the complainants using a knife, a pistol and a chisel to surrender all their possessions. The complainants complied.

The complainants were driven to some bushy area where they were dumped and the applicants sped off. The complainants later sought help and eventually reported the matter. The 1st applicant was arrested on the same day at TM Karoi. A chisel was recovered from the motor vehicle but nothing belonging to the complainants was recovered.

The applicants denied the offences and raised the defence of an alibi. Although the 1st applicant was arrested in a white Toyota Mark X with registration number AET 9739 he denied using it for the robberies. The two applicants believed this was a case of mistaken identity of both the persons and the motor vehicle.

Proceedings before the court *a quo*

The state led evidence from the three complainants whose evidence was almost similar with a few variances. They narrated how they secured transport from the applicants and their accomplice who was not before the trial court. They intended to travel from Karoi to Chirundu. Along the way they passed through a road block and the driver paid US$5 to a lady officer and they passed. This was during the Covid 19 times and travelling was still restricted.

When they were near Rydings College the applicants demanded their goods using threats of violence. They obtained US$1320-00, ZWL300, a passport, black skirt, a Huawei cellphone from the 1st complainant. From the 2nd complainant they obtained US$1600-00 a Samsung A30 cellphone, three jean trousers and a black pouch and from the 3rd complainant they got away with US$ 70-00, ZWL500-00 and a black small Itel cellphone. None of these items were recovered.

They were dumped at some bush. They managed to capture the motor vehicle's number plates and its peculiar features. Fortunately, they managed to get help and they went back into Karoi town. One of the witnesses called her husband and advised her of the robbery. The husband had accompanied his wife to the place where they boarded the applicants' motor vehicle. The matter was reported to the police.

The police were proactive and together with the complainants they drove around Karoi Town to try and locate the motor vehicle. The complainants had said they could identify the motor vehicle if they see it. Eventually they saw the motor vehicle parked at TM Supermarket. The 1st applicant was driving the motor vehicle. He was arrested and he called the 2nd applicant to confirm his alibi. When the 2nd applicant arrived at the police station to rescue his colleague he was arrested, the complainants identified him as one of the assailants.

Washington Chigwida one of the complainants' husband also gave evidence. He accompanied his wife to get transport to travel to Chirundu from Karoi. He secured transport for her in the applicants' motor vehicle. He is the only witness who indicated that the applicants were putting on homemade masks covering their nose and mouth. He described the motor vehicle with registration number AET 9731 and indicated that the 1st accused was driving the motor vehicle.

The arresting detail gave evidence. He confirmed the report made and explained how the applicants were arrested. He searched the motor vehicle and recovered a chisel. He investigated the applicants' alibi and confirmed it. He recorded a statement from Shonhiwa a police officer.

The state then closed its case. An application for discharge at the close of the State case was made. The application was dismissed and the matter proceeded to the defence case.

In their defence the accused gave evidence. They explained how they spent the day. That they were busy repairing the 2nd applicant's motor vehicle with other mechanics. A police officer Shonhiwa gave evidence that on the day the 2nd accused approached him in the morning seeking help in relation to his truck.

The defence then closed its case.

In its judgment the trial court ably identified the determinant issues in this case. The issues were the identity of the applicants, the identity of the motor vehicle and the accused's defence of alibi.

In respect of the identification of the applicants it accepted that the complainants managed to positively identify their assailants. They boarded the motor vehicle around 7a.m they travelled some distance with the applicants. They had ample time to observe them. Although they were ordered to bow down when the robbery eventually took place, they must have observed the applicants when they travelled one hour or so with them.

The court also accepted the identification of the motor vehicle as conclusive particularly taken in conjunction with the fact that the applicants claim they were together on the day.

The trial court dismissed the applicants' alibi. It found the defence witness Shonhiwa not credible and highlighted the material contradictions in his evidence.

On that basis it found the applicants guilty and sentenced them as already set out.

The grounds of appeal

Dissatisfied by the decision, the applicants noted this appeal against both conviction and sentence.

The six grounds of appeal against sentence can be summarized as follows;

1. Whether the complainants positively identified the applicants.
2. Whether the trial court's findings on the alibi is competent at law.
3. Whether the chisel was recovered from the motor vehicle.

The 6th ground of appeal did not raise any issue. It was a general attack on the judgment on the consistencies in the state evidence. The ground of appeal did not refer to any of those inconsistencies. Thus, the ground of appeal does not comply with the rules.

In respect of sentence, it was alleged that the sentence is excessive in the circumstances. The trial court focused on the aggravating circumstances to the exclusion of the mitigating factors. Further, that the order for reinstitution was bundled each appellant was supposed to contribute a 3rd of the total amount stolen from the complainants.

The law

The power to admit to bail pending appeal or review is provided for in section 123 (1) (b) (ii) of the Criminal Procedure and Evidence Act Chapter 9:07. The right to bail pending appeal is premised on the filing of an appeal against the decision of the Magistrate. Thus there must be proof that the applicant has filed an appeal. Usually this is done by attaching the Notice of appeal to the application.

The onus is on the applicant to show that it is in the interest of justice to grant bail pending appeal[1].At this stage the granting of bail is not a right any more, the presumption of innocence no longer operates in favour of the applicant.

The applicable principles in such applications are now trite. They have been addressed in a number of cases[2]. A reading of case law shows that a balance must be struck between the interests of justice and the prospects of success. The delay in hearing the appeal is another consideration. Where there is a high likelihood of a delay in hearing the appeal and there are reasonable prospects of success bail maybe granted.

The learned author John van der Berg in his book titled *Bail A Practitioners Guide* 3rd Edition[3] at pages 215 – 216 noted,

"The primary consideration in an application for bail pending appeal or review is whether the accused will serve his sentence if released on bail should his appeal or review fail. The risks of the accused interfering with the investigation or influencing witnesses will have fallen away. The court will naturally take into account the increased risk of abscondment in view of the fact that the accused has been convicted and sentenced to a term of imprisonment and is not merely awaiting the outcome of his trial. Also, a stark change of circumstances is the fact that the presumption of innocence has, by this stage, ceased operating in the accused's favour. Thus, the severity of the sentence imposed will be a decisive factor in the court's exercise of its discretion whether or not to grant bail and as to the amount of bail to be considered, for the notional temptation to abscond which confronts every accused person becomes a real consideration once it is known what the accused's punishment entails … In considering a bail application at this stage of the proceedings the trial court should carefully weigh the likelihood of the accused considering it worthwhile to abscond rather than serve his sentence. It follows that bail will more readily be refused where the sentence imposed is a long term of imprisonment.'

Although the length of the imprisonment term is a high incentive to abscond it must always be considered together with the prospects of success on appeal.

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[1] *S* v *Williams* 1980 ZLR 466 (A),

[2] For instance S v Dzawo 1998 (1) ZLR 536, Sv Manjani & Anor v The State HH 642/17

[3] Cited in S v Hlabangana & 2 ors HB 101/22

Application of the law to the facts

I address the issues raised in seriatim.

Identification of the appellants.

In its written response the respondent did not close its eyes to the glaring weaknesses in the evidence on identification. However, having noted them it went on to justify the decision of the trial court.

Identification of accused persons has been a subject of discussion in various cases. It is now acceptable that for a conviction to stand based on identification alone of an accused not known to the witness prior to the commission of the offence there must be positive identification. The courts must consider a number of factors like the time the witness spent with the accused, whether there was adequate illumination, the distance between the parties. The witness must give some positive description of the accused person.

Where there has been no prior description of the accused person and the witness describes the accused in court or any other time after he or she had sight of the arrested accused may raise doubts on the authenticity of the identification. Such description is not acceptable where it is given in court, it amounts to dock identification. The proper approach in my view is that the witness describes the accused to the police upon making the report. If the description eventually matches the accused, then there is proper identification.

In this case the assailants had their mask on that covered their mouth and the nose. Two had hats. At no time did the complainants indicate that the assailants removed their masks. A question certainly arises how the complainants identified their assailants. On making the report, none of the witnesses described the assailants by any peculiar feature. None mentioned any of the assailants by name. Although the trial court addressed, the length of time the complainants spent with the assailants, it failed to consider the effect of the masks coupled with hats on two of the assailants. There is a high likelihood that due to the masks there could be some mistaken identity.

Nyarai Kamangira's evidence was that he knew the 2nd applicant for quite some time since their children used to attend the same school at Magunje Barracks. The 2nd applicant's father used to work with Nyarai's father. However, when she made the report to the police she did not mention the 2nd applicant's name. The 2nd applicant was arrested when he visited the 1st accused that is when the complainants identified him. If indeed Nyarai had identified the 2nd applicant, she could have given the name to the police. A doubt arises from the applicants' identification.

The identification of the motor vehicle

The court a quo's finding was that the witnesses identified the motor vehicle by its number plates which they observed and took note of when they were dumped. The trial court failed to consider the effect of the police officer's evidence under cross examination. The officer was clear that the complainants narrated their story and sure, they described the make of the motor vehicle a white Toyota Mark X. No further details were given. He actually said

'*Further identification marks arose seeing the motor vehicle at TM'*. The complainants therefore concluded their 'positive' identification while looking at the motor vehicle. Such evidence taints the whole identification process.

One witness was so candid in her evidence that they noted the registration numbers when they were dumped. They encouraged each other that each memorise a certain of the registration number, she memorised AET. However, the other witnesses did not allude to this. In any event if they did, they did not advise the police on making the report. The report was filed on the same day of the robbery and the events were still fresh in the complainants' memory. The time of making the report is critical, there must be information that the witness knew the assailants and give out information to assist the police. In this case for instance the police would have been looking for a white Toyota Mark X and nothing further. There are a number of such motor vehicles on the roads.

Washington Chigwinda one of the witnesses' husband said the registration number was AET 9731 which number is different from the numbers given by the complainants. It was not the registration number of the motor vehicle that the 1st applicant was driving on the day he was arrested.

The position of the law on contradictions is as espoused in S *v Mkohle*[4] that:

> 'Contradictions *per se* do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* **1982 (3) SA 571** (T) at 576B – C, they may simply be indicative of an error. And (at 576G – H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.'

Even if it may accept that there could be an error, the fact that the complete and solid identification of the registration number was made while looking at the motor vehicle casts some doubts on the evidence. It simply becomes not credible.

Closely linked to the identification of the motor vehicle is the recovery of the chisel in it. The applicants denied that a chisel was recovered in the motor vehicle. The trial court accepted the officer's evidence and relied on the recovery to link the applicants to the offence.

The veracity of a recovery of property by the police is first proved by its seizure and safe keeping by the police in terms of s58 (1) of the Criminal Procedure and Evidence Act (Chapter 9:07). The police are required to seize the property and cause the person from whom it was seized to acknowledge such seizure by way of affixing his signature on the seizure form. That way proof of such recovery from the accused person is conclusive.

In this case, Detective Constable Mushonga who arrested the 1st applicant said he searched the motor vehicle and allegedly recovered the chisel but he failed to comply with

[4] 1990 (1) SACR 95 (A) at 98f – g

the provisions of s58(1). There was no documentary evidence to show that the 1st applicant acknowledged that a chisel was recovered from the motor vehicle. As if that was not enough the chisel was not even entered anywhere in the police books, the officer conceded that it was not entered in the police Report Received Book. To crown it all there was no chisel that was produced before the trial court. With all these mishaps it is reasonable to conclude that there was no chisel recovered from the motor vehicle.

Alibi

Where an accused raises the defence of an alibi, he is required to place sufficient facts for the state to investigate it. Once the accused raises such a defence the state must disprove it. No onus lies on the accused to prove his defence.

In this case, the D/Cst Mushonga confirmed the alibi. The trial court did not simply accept the evidence. It correctly went on to analyse the evidence of the witness in light of all the evidence before it. The approach of the court cannot be faulted. This approach resonates with the settled principle in R v Biya[5] that the alibi does not have to be considered in isolation. The court held that:

> "The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. … if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime."

The court reasoned that the witness was not credible especially as regards regard being made to the time, he was woken up by the 2nd applicant. Also, that he said the 1st motor vehicle did not leave since it had no fuel yet the 1st accused used it to get into town where he was arrested. It also considered that the other mechanics were not called to confirm the appellant's defence. Obviously by stating so, it would seem the trial court was now shifting the onus to the applicants to prove their defence.

What is crucial though is that, Shonhiwa's evidence placed the 2nd applicant at his house in the morning. On time he varied from 6.30 am to 7.00 a.m. This variance would not mean much since the witnesses also spoke to time in estimate none was precise. They said it was around 7.00 am. Then from the morning to around 9 a.m when he left the 1st applicant did not leave the place. The 2nd applicant is the one who went somewhere and returned in the morning. He said he saw the Toyota Mark X but it had no fuel it did not leave the place. The trial court found that the witness professed knowledge that the motor vehicle did not go anywhere yet it went to town. That on its own cannot be conclusive the decisive factor is that by 9.40 the witness was at home and the 1st and 2nd accused were within the vicinity. With that, they may not have been at the scene of crime. There are reasonable prospects of success on this ground of appeal.

Disposition

[5] 1952 (4) SA 514 (AD).

From the foregoing it is apparent that the key issues forming the basis of the conviction rest on a shaky foundation. The identification of the appellants raises doubt just like the identification of the motor vehicle. Similarly, the recovery of the chisel was simply not anything to rely on. Even if the accused are facing a long term of imprisonment, that their appeal enjoy reasonable prospects of success may mean there is low risk of absconding.

Accordingly, the following order is made.

The application be and is hereby granted in the following terms.

1. That each applicant deposits a sum of US $200-00 with the Clerk of Court, Karoi.
2. That the 1st applicant resides at house number 2992 Chiedza, Karoi and the 2nd applicant resides at house number 430 Jubilee Lane, Karoi until the appeal is finalized.
3. That both applicants report at CID Karoi every last Friday of the month between 0600hours and 1800hours until the matter is finalized.
4. That both applicants attend court on the date of hearing of the appeal.

Saizi Law Chambers, appellants' legal practitioners.

The National Prosecuting Authority, respondent's legal practitioners.