TINEYI TAVENGWA

And

THE STATE

HIGH COURT OF ZIMBABWE
WAMAMBO J.
MASVINGO, 9TH JULY AND 17TH JULY, 2019

Application for bail pending appeal

K. Mabvuure for the applicant
T. Chikwati for the respondent

WAMAMBO J. The applicant was convicted of one count of robbery as defined in section 126(1)(a) of Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] by a Regional Magistrate sitting at Chinhoyi. On 20th May 2019 he was sentenced to 7 years imprisonment of which 2 years imprisonment were suspended for 5 years on conditions of good behaviour. 18 months were suspended on condition of restitution.

The applicant filed a Notice of Appeal wherein he raised various grounds against both conviction and sentence.

In summary the grounds of appeal against conviction are as follows:-

The learned Magistrate erred by convicting applicant of robbery when the State failed to prove that the applicant was armed. The applicant's defence was ignored.

The learned Magistrate erred at law in holding that applicant was in possession of a firearm and pointed it at complainant when the State could not prove where exactly it was pointed at.

The learned Magistrate erred when he held that applicant had a firearm yet in his reasons for sentence he acknowledges that the State had not proved that the applicant was armed.

The learned Magistrate ought to have found that the complainant's conduct after being robbed does not accord with that of a robbed person.

The learned Magistrate "accorded very little weight" to the discrepancies between the evidence of the complainant and that of the second State witness who had an adverse interest to the applicant. The State failed to lead evidence from an independent witness.

On sentence the applicant avers as summarised below:-

The learned Magistrate "accorded very little weight" to the following:-

- applicant co-operated with the authorities and the matter was brought to court expeditiously. Applicant is a 41-year-old first offender who should not be hardened by being incarcerated among hardened criminals
- applicant's family would suffer if he were incarcerated as he is the family's sole bread winner
- the learned Magistrate failed to account for how "each and every mitigatory factor affected applicant's sentence"
- the learned Magistrate erred by over-emphasising deterrence while ignoring applicant's personal circumstances

The applicant deserves mercy. The sentence is harsh and left applicant "at a point of being broken."

There was an exaggeration of the aggravating circumstances.

The learned Magistrate erred by failing to consider the option of a fine or community service.

The circumstances warranted a non-custodial sentence.

The applicant proceeded to apply to this court for bail pending appeal, hence this application. The State is not opposed to the application. I had misgivings on the State's concession and requested counsel for the State and defence to make full oral submissions.

After the submissions I reserved judgment to fully reflect on the circumstances of the application as per the record and the oral submissions.

The applicant put flesh to his grounds of appeal in the applicant's bail statement augmented by the oral submissions.

The State was of the firm view that this is a matter that deserves the granting of bail pending appeal. The State is in agreement with most of the factors raised in the applicant's notice of appeal. The State however only addressed the issues concerning conviction and did not address me on the sentence.

The facts of the case can be highlighted through the complainant's version of which portions were sturdily disputed by the applicant. Most of the relevant facts however remain common cause. Complainant testified to the following effect:

He works for a company which is licensed to buy gold. On 12 February, 2019 one Chanakira who regularly sells gold to him contacted him telephonically. Chanakira said he was selling some processed gold and send photographs and the weight of the gold. This was meant to inform the complainant of the correct amount to carry. On 13 February, 2019 complainant proceeded to Murombedzi Growth Point, where he communicated with Chanakira. Chanakira gave out that he was sending his uncle a Hamandishe to complete the transaction. Hamandishe's cellphone number was provided. Thereafter complainant was now communicating with the said Hamandishe who turned out to be the applicant in this case. Applicant arrived in a toyota wish vehicle. Applicant was not comfortable with the transaction taking place at the growth point. Applicant and his three associates got into complainant's car. It should be noted that with complainant in the car was his friend who rode along up to a kilometre or two outside Murombedzi. At this point the gold was weighed and it weighed 373.9 grams. The value of the gold per gram had been agreed upon as $42.6 USD per gram. The applicant handed over to the applicant three bundles of United States Dollar notes to the tune of US$15 000.00. When he was about to give applicant a bundle containing US$1 000.00 in ten dollar notes and was in the process of subtracting US$40.00 so that the applicant would receive US$15 960.00 all hell broke loose. Applicant produced a firearm and demanded the whole bundle containing US$1 000.00 and the return of the gold. Complainant was ordered by applicant to drive away lest he would be killed. He drove away. Along the way he phoned Chanakira and informed him of what had transpired between him and the applicant. Though Chanakira indicated surprise and apologised, he promised to meet complainant in Kadoma where he promised he would assist him along with the police to

locate applicant and his colleagues. Soon, Chanakira's phone was switched off and applicant got the hint that perhaps he had a hand in what transpired. Applicant subsequently made a report at Murombedzi police station.

Applicant's version was basically that he indeed met complainant at Murombedzi and that they travelled some distance therefrom. He confirms a transaction involving the sale of gold and the exchange of some money. He avers that complainant paid US$9 060.00 for 302 grams of gold, leaving a balance of 151 grams of gold which amount complainant undertook to settle the following day. Complainant later became evasive, and refused to settle the balance raising the reason that the gold sold to him was fake. He is of the view that the allegations against him are not only false but also malicious. In the same vein he avers that he never robbed the complainant at all.

I have traversed the facts in detail for a better understanding of the background against which this application is made.

The factors to be considered in such an application are quite well known. It would appear that both counsel who appeared before me are well versed in the said principles.

I am mindful that at this stage, I am not dealing with the appeal itself. I am also aware that in a bail pending appeal application I am dealing with an applicant who is no longer presumed innocent. In fact, a proper court of law has considered the evidence and the circumstances of the matter in their fullness. After having done that that court, in this case the Regional Magistrate sitting at Masvingo, found applicant guilty and meted out a prison term as more fully appears at the start of this judgment.

In *Tatenda Kamudyariwa* v *The State* HH 97/19 NDEWERE J. at page 2 summarised the factors to be considered in a bail pending appeal application as follows: -

> "As correctly pointed out by the applicant, the principles governing bail pending appeal were enumerated in *State* v *Musasa* SC 45/02 and *State* v *Labuschagne* 2003 (1) ZLR 644(S) as follows:-
>
> (i) the likelihood of abscondment
> (ii) the prospects of success on appeal
> (iii) the right of an individual to liberty
> (iv) the potential length of the delay before the appeal is heard."

In *Tigere Majani and Another* v *The State* HH 642/17 CHITAPI J. said at page 2;

"*The convict's rights to bail after conviction does not arise as a fundamental human right as guaranteed in Chapter 4 of the Constitution. The powers of the court to admit a convicted person to bail pending appeal as in this case do not derive from the Constitution but from the Criminal Procedure and Evidence, Act [Chapter 9:07]. Section 123 of the said enactment provides for the limited instances wherein the convicted and sentenced person may be admitted to bail by the magistrate, or a judge of this court or the Supreme Court as provided for therein*."

In *Denis Scholz* v *The State* HH 234/17 TSANGA J. at page 2 said:

"*When convicted and sentenced, the presumption of innocence no longer prevails, particularly so in cases of appeal against sentence. Where there are no positive grounds for granting bail, it is generally refused. The onus falls on the accused to show that he should be granted bail. Discharging such onus depends on two main factors:*

(a) likelihood of appellant absconding which will depend on length of sentence passed and

(b) the prospects of success on appeal see S v Dzawo 1998 (1) ZLR 536 (S). It is also a principle that the greater must be the prospects of success before bail should be granted.

Other factors to be considered are the right to individual liberty and the likely delay before an appeal is heard."

I will now apply the principles as enunciated in the above cases and other cases cited therein. I have not turned a blind eye to the cases cited by learned counsel in this case.

I am of the considered view, that applicant's appeal is unlikely to succeed. Put another way that the prospects of success are dim.

On conviction I find that the Trial Court arrived at a guilty verdict after a proper consideration of the evidence before it in the circumstances.

The alleged discrepancies are to my mind more a matter of nit picking on the very minute.

One cannot allege that robbery was not proven in the circumstances of this case. Two State witnesses testified that applicant produced a fire arm and demanded the return of his gold. No direct question was ever asked of the complainant disputing that applicant produced a firearm.

Emphasis on the firearm not being produced at all at the scene now appears in the grounds of appeal. Complainant described how he was fearful and traumatised when the firearm was produced and pointed at him. That much may explain why he could not with precision say where the firearm was pointed at. The complainant's friend who was seated at the back confirmed observing the firearm being produced.

The complainant's friend's evidence corroborated that of complainant. Although he was asked a direct question that applicant never produced a firearm he stuck to his version and retorted that "no one would admit to that."

The Trial Magistrate when sentencing the applicant mentioned that what complainant saw traumatised him "after he saw a thing which he believed to be a gun." This remark hardly changes the complexion of the case considering that the facts prove theft through threats or the threats of immediate violence through the production of what complainant believed to be a gun. That amounts to robbery, in any case.

That the applicant, drove to Harare without making a police report was convincingly explained by the complainant. He testified that he initially was apprehensive after his ordeal and also could not tell which car applicant and his colleagues would use to leave the scene. He further explained that he phoned Chanakira who made him want to no avail. He righty considered that Chanakira would be the answer to his woes as it was Chanakira who had facilitated the transaction between him and the applicant.

The complainant later became suspicious of Chanakira after his (Chanakira's) phone was switched off. That may explain why Chanakira was not called as a witness as it would appear from the circumstances that he was not entirely innocent as he was the main person who knew how the transaction would pan out. He also introduced complainant to applicant. He also knew of the quantity of gold to be sold and its value.

On the value of the gold applicant explained the figures.

By figures I mean whether the gold was being sold at US$30 a gram (as per applicant) or US$42,6 a gram as per complainant.

Although complainant explained that he discounted the remainder of 9 grams the differences in the amounts as described by complainant and by applicant is a factor to be closely considered at appeal stage. It is indeed but one of the many factors to be considered in the full circumstances of this case.

I am not convinced of the version that complainant is being malicious because he does not want to pay for the rest of the gold he received. Such version was feebly put to the complainant. If it was the bedrock upon which applicant's defence lay, there would have been a sustained cross examination of applicant on this issue.

I am for the above reasons at this stage convinced that there are dim prospects of success on appeal. The Appeal Court which will consider the appeal in full may very well come to the same conclusion or a contrary one.

The suggestion that upon a conviction for robbery the Trial Court should have imposed a fine or community service does not find favour with me. It is contrary to precedent. Indeed, counsel representing the applicant could not refer me to a similar decided case where after a conviction for robbery or property worth in the vicinity of US$15 000.00 a convicted person was sentenced to pay a fine or to perform community service.

The defence referred to many cases dealing with principles of sentencing. I have considered the said cases. I however do not find that they are of direct application to this case to the extent that I should grant bail pending appeal to the applicant.

I am aware that robbery is a serious offence. Section 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which now defines the offence of robbery provides that a person convicted of robbery may be sentenced to life imprisonment or a period of imprisonment not exceeding fifty years. These are the maximum terms of imprisonment. See sub section 2(a), 2(b) and (3) of Section 126.

To reflect that the offence of robbery is serious, the applicant's legal practitioner recommended a sentence of four years with a part suspended in the court *a quo*.

I find at this stage that I do not find a reason to fault how the Trial Court reached the sentence meted out to applicant. The Trial Court noted that applicant is a first offender who deserves leniency from the court. It also considered his marital status the fact that upon incarceration his wife and children will suffer and that no damage was visited upon anyone's property nor was any physical harm visited upon any person.

The aggravating circumstances are glaring from a reading of the record.

I find that applicant may be motivated to abscond considering the imprisonment term already imposed upon him.

Considering that at present the High Court sits not only in Harare and Bulawayo but also in Mutare and Masvingo the period applicant has to wait for his appeal to be heard has been shortened.

I am in the circumstances not convinced that applicant should be granted bail pending appeal notwithstanding both counsel's submissions to the contrary.

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

Hlabano Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners