NKOSIYAPHA KHUMALO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 17 & 2 JUNE 2022

Appeal against refusal of bail pending appeal

M. E. P. Moyo for the applicant
K. M. Guveya for the respondent

MAKONESE J: This is an appeal against the refusal of bail pending appeal by the magistrate in the *court a quo*, made in terms of s 121(1)(6) of the Criminal Procedure and Evidence Act (Chapter 9:07). The appeal is opposed by the state on the grounds that the appellant had failed to show that the court a *quo* committed an irregularity or that it exercised its discretion unreasonably.

Background facts

The facts of this case are these. Appellant was arraigned before a Regional Magistrate at Bulawayo on a charge of attempted murder. Appellant was convicted after a full trial and was sentenced to 5 years imprisonment of which 3 ½ years were suspended for 5 years on condition appellant did not commit an offence involving violence upon the person of another for which upon conviction he would be sentenced to imprisonment without the option of a fine. Aggrieved by that decision the appellant noted an appeal with this court against both conviction and sentence. Applicant filed an application for bail pending appeal before the magistrate in the court *a quo*. The application was dismissed. Appellant has now approached this court seeking to have the magistrate's

decision in refusing to admit him to bail pending his appeal overturned and that he be admitted to bail.

The facts surrounding the conviction are that appellant was accused of striking the complainant, a 19 year old female NTANDOYENKOSI NDLOVU with the blunt side of an axe on the head. Appellant pleaded guilty to the lessor charge of assault. He was nonetheless convicted inspite of his protestations. Applicant argues that the conviction is unsafe and that there are reasonable prospects of success on appeal as regards the issue of sentence.

Submissions by the applicant

Appellant avers that the court *a quo* erred in refusing to admit him to bail pending his appeal by failing to consider the most important aspect of the matter, which is whether the interests of justice would be undermined by the granting of bail pending appeal. Appellant contends that the learned magistrate in the court *a quo* erred and misdirected herself when she held that "the wheels of justice now turn much faster and that the appeal will most likely be heard before a substantial portion of the sentence of the effective sentence of 1 ½ years imprisonment has been served." Appellant concedes that in applications of this nature the onus remains on the applicant to show that it is in the interests of justice that he be released on bail pending his appeal. Appellant avers that his appeal has bright prospects of success in that he has an arguable case against both conviction and sentence. Appellant states that if he is not granted bail he is likely to have served the entire sentence before his appeal is heard. Further, and in any event, appellant argues that the fact that the learned magistrate in the court *a quo* toyed around with the possibility of community service indicates that on appeal the sentence may be set aside and substituted with a non-custodial one.

Submissions by the respondent

The respondent submits that the applicant has failed to show that the court *a quo* committed an irregularity or that it exercised its discretion unreasonably by refusing to grant the appellant bail pending his trial. Respondent avers that an appeal court will only interfere with the court's refusal to grant bail where the court *a quo* failed to apply its mind to the application before it. Respondent argues that the learned magistrate in the court *a quo* meticulously dealt with each ground appellant had raised in court in persuading the court to admit him to bail pending his appeal. In the absence of a misdirection therefore, the respondent contends that this court may not overturn the decision of the court *a quo*. Respondent argues that the appellant failed to discharge the onus that rested on him as a convicted person to demonstrate that it was in the interests of justice to admit him to bail.

Analysis

It is trite that the granting of bail to a convicted person pending his appeal is a matter of discretion. The requirements for the grant of bail after conviction are now well traversed in this jurisdiction. The main factors to consider in an appeal against a refusal of bail brought by a person convicted of an offence are two-fold. First, the likelihood of abscondment. See *Aitken & Anor* v *Attorney General* 1992(1) ZLR (S) at 254F. Second, the prospects of success on appeal in respect of both conviction and sentence. See *S* v *Williams* 1980 ZLR 466 (A) at 468G-H; *S* v *Mutasa* 1988(2) ZLR 4 (S) at 8D; *S* v *Woods* S-60-93. Other factors that are taken into consideration are the right of the individual to liberty and the potential length of the delay before the appeal can be heard.

It was not argued by the state that there was any risk of abscondment if appellant was admitted to bail. Indeed, the learned magistrate in the court *a quo*

did not suggest that such risk existed. The application was opposed and rejected solely on the ground that that there are no reasonable prospects of success on appeal. I have perused the record of proceedings and I am of the view that there are reasonable prospects of success on appeal. The appellant does have an arguable case. His appeal is not entirely hopeless. Even if on appeal, the conviction is confirmed there is a possibility that a different sentence may be imposed. It has not escaped the court's notice that the trial magistrate dwelt at length with the possibility of community service as an alternative form of punishment. Again, with respect, there appears to me to be an arguable case as regards the appeal against sentence. Although the record has been transcribed, there can be no doubt that by the time the appeal is argued the appellant would have served a substantial portion of his sentence.

Disposition

From the aforegoing, I conclude that the learned magistrate in the court *a quo* erred when she reasoned that the wheels of justice now turn much faster and that the appeal will more likely be heard before a substantial portion of the offence sentence of 1 ½ years imprisonment has been served. The basis for such a conclusion is hard to understand. While appeals may be heard much faster than before, there was no basis to suggest that the appeal would be heard before "a substantial sentence was served." It is my view that the court *a quo* exercised the discretion unreasonably in denying the appellant bail pending appeal.

In the result, I find that this application does have merit.

I accordingly make the following order:

1. Appellant be and is hereby admitted to bail pending appeal on the following conditions:

(a) Appellant to deposit a sum of RTGS$30 000 with the Registrar, High Court, Bulawayo.

(b) Appellant is hereby ordered to reside at house number 72104 Lobengula West until his appeal under case number HCA 34/22 is finalized.

(c) Appellant is to report on the first day of each month at Bulawayo Central Police station between the hours of 6:00 am and 6:00 pm until the matter is finalized.

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