ISHMAEL DANDADZI

And

TAURAI MATIKA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 15 & 21 OCTOBER 2021

Application for bail pending appeal

T. Razemba, for the applicant
T. M. Nyathi, for the respondent

DUBE-BANDA J: This is an application for bail pending appeal. The applicants were arraigned before the Magistrates Court sitting in Bulawayo, on one count of assault as defined in section 89(1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 13 September 2021, applicants unlawfully committed an assault upon the complainant by hitting him several times with fists and kicks on the upper part of the body intending to cause him bodily harm or realising that there was a real risk or possibility that bodily harm would result from their actions. They pleaded guilty to the charge and upon conviction each was sentenced to eighteen months imprisonment of which eight months were suspended for five years on conditions of good conduct. The effective term of imprisonment is ten months.

Aggrieved by the sentence, applicants noted an appeal to this court and such appeal is still pending under cover of case number HCA 71/21. They now seeks to be released on bail pending the finalization of their appeal. The sentence is attacked on seven grounds which are set-out in the notice of appeal. The grounds upon which applicants seeks to be released on bail pending appeal are set out in their statement in support of this application. In their written application, applicants contend that they have good prospects of success on appeal. It is argued that the mitigating circumstances of the case grossly outweighed the aggravating circumstances. These are that they are first offenders, pleaded guilty, aged twenty six years, injuries inflicted on the complainant were not severe, and that they are sole providers for their

families. It is averred that they are of fixed abode and therefore not flight risk. The respondent did not oppose this application, and in fact supported it.

It will be noted that section 115 C (2) of the Criminal Procedure and Evidence Act [Chapter 9:07] (Act), saddles a convict with the burden of showing on a balance of probabilities that it is in the interests of justice for him to be released on bail at this stage. It then follows that the bar for granting bail in a case where the applicant has been convicted and sentenced is lifted a bit higher by the legislature. In *Muroyi v The State* SC 111/20, the court said the purpose of the exercise of discretionary power vested in the court under section 123 of the Act is to secure the interest of the public in the administration of justice by ensuring that a person already convicted of a criminal offence will appear on the appointed day for the hearing of his/her appeal. It is for that reason that the Act provides that upon sufficient evidence being availed to justify a finding that a convicted person is likely not to appear for his/her appeal if released on bail is a relevant and sufficient ground for ordering his/her continued detention pending appeal. See: *Madzokere & Others v The State* SC 08/12.

The main factors to consider in an application for bail brought by a person convicted of an offence are twofold. The first is the likelihood of the applicant's absconding. The second is the applicant's prospects of success on appeal. See *S v Williams* 1980 ZLR 466 (A) at 468 G-H; *S v Mutasa* 1988 (2) ZLR 4 (S) at 8D; *S v Woods* SC 60/93 at 3-4; *S v McGowan* 1995 (2) ZLR 81 (S) at 83 E-H and 85 C-E. Other factors to be taken into consideration are the right of the individual to liberty and the possibility of a lengthy delay before the appeal can be heard. See*: Mungwira v S* HH 216/10; *Muroyi v The State (supra); Gomana v The State* SC 166/20. Having said this, it should be mentioned that in evaluating the prospects of success, it is not a function of this court to analyse the findings of the trial court in great detail. As was found in *S v Viljoen* 2002 (2) SACR 550 (SCA) at 561 G-I if this is done, it would become a dress rehearsal for the appeal to follow. The consideration whether bail should be granted or not should be confined to reasonable boundaries, subject to the applicable legislation and principles of law and the rights of the applicant.

Applicants noted an appeal against sentence only. It is trite law that in every appeal against sentence the court hearing the appeal should be guided by the principle that punishment is eminently a matter of the discretion of the trial court. The appeal court should be careful not to erode such discretion, hence the further principle that the sentence should be altered only if

the discretion had not been judicially or properly exercised. The appeal court is not permitted to usurp the sentencing discretion of the trial court.

However even in the absence of a material misdirection, an appeal court may be justified to interfere with the sentence. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking" "startling" or "disturbingly inappropriate." See: *S v Rabie* 1975 (4) SA 855 (A) at 857; *Nndateni v S* [2014] ZASCA 122; *S v Malgas* 2001 (1) SACR 469 (SCA).

I am mindful of the caution that a bail application is 'not a dress rehearsal' for the court ultimately hearing the appeal. I am entitled though to take into account the prospects of success of the case as far as that could be determined at this stage. The court *a quo* took into account the fact that applicants pleaded guilty, and factored into the sentencing equation all the personal circumstances of the applicants. It considered the fact the injuries sustained by the complainant were not serious, but noted that on the facts of this case this did not reduce the moral blameworthiness of the applicants. It considered community service and found it inappropriate in the circumstances of this case. In any event, that someone is a first offender and pleaded guilty does not mean a term of imprisonment will not be imposed. It all depends on the circumstances of the case.

The trial court considered aggravating that applicants locked complainant inside their unregistered Honda motor vehicle. Accused him of being a police informer. Drove him to some secluded place at night. Assaulted him with clenched fists and kicks on the upper part of the body. When complainant tried to call for help from a vehicle parked nearby, he was again driven to a bushy area. Applicants returned him back to town after they had accomplished their mission. The circumstances of this case amounted to kidnapping. In these circumstances, I do not believe that the sentences imposed by the learned magistrate are shockingly inappropriate or disproportionate to the offence committed. I do not consider the applicants prospects to be clear-cut so as to mean that their sentences will be set aside and replaced with a wholly non-custodial one.

Applicants have been in prison following their conviction and sentence. Post-trial incarceration, affords abundant incentive for them to abscond. The risk of abscondment is even greater at this stage. See: *S v Gumbura* SC 349/14. In all the circumstances and for the reasons

set out herein, I am not persuaded that the interests of justice should permit the release of the applicants on bail at this stage.

Disposition

In the result, I order as follows: the application for bail pending appeal is dismissed and applicants shall remain in prison.

Nyawo Ruzive Legal Practice, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners