MAKHOSIWONKE NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 16 AUGUST 2019 AND 9 SSEPTEMBER 2021

Opposed Application

V Ndlovu, for the applicant
K Jaravaza, for the respondent

TAKUVA J: This is an application for condonation for late noting of appeal.

After hearing argument I dismissed the application. Subsequently a request for reasons was filed by the applicant's legal practitioners.

These are they.

The applicant was arraigned with three others before a Regional Magistrate sitting at Tredgold on allegations of contravening section 126 of the Criminal Law Codification and Reform Act Chapter 9:23. The state's allegations were that on 13 March 2018 the appellant and his accomplices went to house No. 115 Mahatshula South Bulawayo where they pretended to be police officers on duty. They later produced a firearm and threatened to shoot the complainant one Sipho Nobulelo Mowa and her family if they resisted. The group ransacked the house and stole the following property; a solar, battery, HP Laptop, Samsung S7 cellphone, welding machine, cash US$600-00, $800-00 bond notes and a passport belonging to the complainant.

On 18 March 2018 detectives arrested applicant's three accomplices in possession of a 9mm pistol loaded with a magazine of two live rounds. Applicant was incriminated by his accomplices leading to his arrest. The four appeared in court and pleaded guilty to the charge. They were each sentenced to 10 years imprisonment, 2 years suspended on the usual conditions on 20 March 2018. Almost a year later on 20 February 2019, applicant filed this application seeking to be condoned for late noting of an appeal against conviction and sentence.

In his Founding Affidavit, applicant alleged that he did not genuinely plead guilty in that he told the Magistrate that he was only engaged as a driver and was not given any proceeds of the robbery. However the Magistrate would have none of it and proceeded to convict him as a co-perpetrator. As regards sentence, applicant pleaded ignorance as to the real meaning of "special circumstances." Resultantly, he failed to advance any special circumstances to the court.

For these reasons, the applicant contended that he has great prospects of success on appeal and that the late noting of appeal was not wilful.

It is trite that the principles to be considered in an application of this nature are as follows;

(a) the extent of the delay.
(b) the reasonableness of the explanation proferred for the delay.
(c) the applicant's prospects of success on appeal

See also *Chimunda* v *Zimuto & Anor* S 76-14, *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (H).

These factors are however not individually decisive but are interrelated and must be weighed one against the other for example a slight delay and a good explanation may help to compensable for prospects of success which are not strong – See *United Plant Hire (Pty) Ltd* v *Hills & Ors* 1976(1) SA 717 (A).

In casu, the applicant filed six (6) grounds of appeal against conviction and 2 against sentence. As against conviction his grounds can be summarised as;

(1) The court *a quo* erred in conducting a trial and convicting the applicant without satisfying itself that the applicant who was unrepresented understood the nature of the offence and the defences available to him.

2. The court erred by convicting applicant on his own plea of guilty without ascertaining that the applicant applied his mind to the true import of the charge and was properly aware that anything he may wish to say on his behalf could constitute a defence.

3. The court erred in treating a plea of guilty as a reason to be cursory in the explanation of essential elements.

4. The court *a quo* erred in failing to satisfy the requirements of section 271 (2) (b) of the Criminal Procedure and Evidence Act (the Act) thus rendering the conviction unsafe.

5. The court *a quo* did not satisfy itself that the applicant's plea of guilty is an unqualified or unequivocal and genuine plea.

(6) The court *a quo* erred in failing to conduct an inquiry into aspects of the charge "that arose from the applicant's evidence in terms of section 271 (2) (a) of the Criminal Procedure and Evidence Act."

AD sentence, the applicant contended that the court *a quo* grossly misdirected itself by imposing an extremely harsh sentence which induces a sense of shock as it does not demonstrate how the appellant benefited from the following mitigatory factors:-

a) Plea of Guilty.

b) Absence of previous convictions.

Applicant also complained that the court erred by disregarding the applicant's role in the commission of the offence.

THE DELAY

It is common cause that the applicant was convicted and sentenced on 20 March 2018. He only filed this application on 20 February 2019 making the delay one of ten months. I take the view that in the totality of the circumstances of this case, this delay is inordinate.

THE REASONABLENESS OF THE EXPLANATION FOR THE DELAY

Applicant submitted that the explanation for the delay is that he did not have the resources to engage the services of a legal practitioner. He alleged that his family struggled to put the money together and a lawyer was eventually engaged after ten months. Applicant does not indicate how much was required and how they would raise the money. *Prima facie,* it appears to me unreasonable to take such a long time to raise legal fees to enable a lawyer to

appeal. However given the economic situation in the country, perhaps, one may be persuaded to conclude that the reasons for the delay are plausible.

THE PROSPECTS OF SUCCESS ON APPEAL

AD CONVICTION

A close scrutiny of the grounds of appeal as couched reveals that the sole ground of appeal that arises is that the court *a quo* did not comply with the provisions of section 271(2)(b) of the Act.

The section states;

"272 (2) where a person is arraigned before a Magistrate on any charge, pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts the plea –

(a) ..

(i)

(ii)

(b) The court shall if it is of the opinion that the offence merits any punishment referred to in (i) or (ii) or if requested thereto by the prosecutor –

(i) Explain the charge and essential elements of the offence to the accused –

(ii) Inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor.

And if satisfied that the accused understands the charge and the essential elements of the offence and that he admits to the elements of the offence and the acts or omissions on which the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law.

4. Where a Magistrate proceeds in terms of paragraph (b) of subsection (2) –

(a) The explanation of the charge and the essential elements of the offence and

(b) Any statement of the acts or omissions on which the charge is based as referred to in such paragraph (i) of that paragraph and

(c) The reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph and

(d) Any statement made to the court by the accused in connection with the offence to which he has pleaded guilty shall be recorded." (my emphasis)

The answers to all the issues raised in the grounds of appeal lie in the record of proceedings of the court *a quo*. It is apparent from that record that the charge was read and explained to all the accused persons and all of them indicated that they had understood it. They all pleaded guilty. In fact the applicant's response to a question regarding his appreciation of the charge is "I understood but I did not benefit anything from it." See page 4 of the record. The court *a quo* then explained the irrelevance of this *vis-à-vis* the charge's essentialia. The explanation was recorded in compliance with section 271 (4) of the Act.

Further, the facts on which the charge is based were read and understood by the applicant. The facts are part of the record. The applicant's reply is recorded. After that the essential elements of the charge were put and explained to all the accused, applicant included. All the answers given by the applicant were recorded. They were all in the affirmative.

I must state that the provisions of section 271(2) of the Act extend to what an accused may say in mitigation. If at that stage he says something that creates a doubt that the plea was properly tendered, the court should alter the plea to one of not guilty and require the state to prove the element, act or omission causing doubt or dissatisfaction. See *S* v *Makuvatsine* 2004 (1) ZLR p. 459. *S* v *Bvunda* HH 278-90.

In casu, the applicant upon being asked by the court *a quo* in mitigation why he committed the offence said;

"I wanted some money. I apologise to the court. I also apologise to the complainant." See p. 3 of the record.

From the record it is clear that the court *a quo* adopted a systematic approach as recommended in *S* v *Ngwenya* HB 17-95. The applicant *in casu* did not give ambiguous replies. There was a clear unequivocal admission of the essential elements of the offence. Quite clearly, the court was not slap-dash in using section 271(2) (b) of the Act.

I accordingly find that there are no prospects of success on appeal against conviction. The applicant genuinely pleaded guilty. That he did not benefit from the proceeds is neither here nor there. On the facts and applicant's admissions he acted in common purpose with his accomplices by being present at the scene and driving the gate-away car. The appeal is based on hopeless grounds.

AD SENTENCE

The court *a quo* imposed an appropriate sentence in the circumstances as shown hereunder. It is trite that sentencing is in the domain of the trial court. An appellate court will only interfere with the sentence imposed by the court *a quo* where such a sentence is manifestly excessive so as to induce a sense of shock or is vitiated by an irregularity – See *S* v *Ramushu* SC 25-93, *S* v *Nhumwa* SC 40-88 and *Mkombo* v *The State* HB 4-10.

In the present matter, it should be noted that the applicant and his accomplices were armed with a firearm that they used to threaten the complainant. This aggravates the robbery. See *Raison Moyo & 2 Ors* v *The State* SC 49-03.

> In *S* v *Madondo* HH 60-89 the court stated that "robbery usually involves premeditation, criminal resolve and purpose. It requires brazen execution. It is an attack on a human victim with attendant disregard of that person's regard to personal security. It constitutes a forceful dispossession of the victim's property. It is usually a terrifying and degrading experience, the sentence of the court must reflect the abhorrence with which the courts view this form of criminal behaviour. A prison term is normally imposed for this sort of offence."

CONCLUSION

The court did not fall into error by imposing the sentence it imposed notwithstanding the guilty plea and the absence of a previous conviction. The aggravatory circumstances far outweigh the mitigating features.

DISPOSITION

The application is devoid of merit and it is hereby dismissed in its entirety.

Mlweli Ndlovu and Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners