WALTER WILLIAM CRAWFORD
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 5 and 7 February 2014

Bail Application – Appeal

R. Harvey, for the appellant
F. Kachidza, for the respondent

MAWADZE J: This is an appeal against refusal of bail pending appeal.

The appellant was arraigned before the Provisional Magistrate Harare on 11 December 2013 and charged with contravening s 23(1) of the Maintenance Act [*Cap 5:09*] (hereafter this Act). The charge preferred against the applicant was couched as follows:-

> "In that on 31st March 2011 and Harare Civil Court, the accused was ordered by the Magistrate to pay US$800-00 per month as maintenance fee for his four children. The accused person then failed to pay maintenance and is in total arrears of US$6 660-00".

Although the State outline is not drafted in a detailed manner it captures the material facts upon which the charge is premised. The complainant in the maintenance matter is one Michelle Lisa Crawford who was married to the appellant but the parties are now divorced. Apparently four children were born out of this marriage. It is unclear if the maintenance order was granted before or after the divorce. It is common cause that on 31 March 2011 the appellant was ordered by the Magistrate Civil Court to pay US$800 per month as maintenance for the four children. The appellant has since accumulated arrears to the tune of US$6 660-00. The details of how the maintenance arrears are calculated are not given. Be that as it may the graveman of the offence is that the appellant did not comply with the maintenance order and is in arrears of US$6 660-00 as at the time of his prosecution.

The appellant who was not represented in the court *a quo* pleaded guilty to the charge and was duly convicted. The following sentence was imposed:-

"12 months imprisonment which is wholly suspended on condition accused pays the full arrears of $6 660-00 to the applicant Michelle Lisa Crawford through the Clerk of Court Harare by 31/1/14".

In view of the subsequent application for bail pending appeal by the appellant to the court *a quo*, the grounds of appeal and submissions made by Mr Harvey for the appellant before this court during the appeal hearing it is prudent to capture the short but precise proceedings as recorded in the court *a quo*.

"CHARGE PUT

I understand and admit

271(2)(B)

FACTS AGREED

I understand and agree.

ESSENTIAL ELEMENTS

Q. So it is correct that on 31/03/11 at Harare Civil Court you were ordered to pay $800-00 per month as maintenance for your 4 minor children

A. Yes

Q. Correct that you defaulted in paying maintenance that you are now in arrears of $6 660-00

A. Yes

Q. You know it was unlawful

A. Yes

Q. Any defence

A. No

BY COURT

Guilty as charged

NO RECORD

MITIGATION

Aged 41. Divorced with 4 children. Not employed. I have $50 on person. No valuable assets".

After this inquiry into mitigation brief reasons were then given. The following factors were considered by the court *a quo* in assessing the sentence:

(i) then appellant was a first offender

(ii) that appellant showed contrition by pleading guilty to the charge

(iii) that it is aggravating that appellant had accumulated arrears in the sum of $6 600-00.

(iv) the need to keep first offenders out of prison

(v) the need to induce the appellant to pay the arrears for the sake of the four children.

On 16 December, 2013, five days later, the appellant noted an appeal with this court against both the conviction and sentence. The grounds of appeal which inform the application made in the court *a quo* for bail pending appeal and the submissions made before the court in support of the appeal can be summarised as follows:-

(a) that the appellant pleaded not guilty to the charge as he had no means to pay maintenance and therefore he had a valid defence to the charge.

(b) that the court *a quo* failed to enter a plea of not guilty tendered.

(c) that appellant is challenging how the amount of $6 600 was arrived at.

(d) that appellant's answers to the effect that he knew that his conduct was unlawful and that he had no defence to the charge should not be taken as the correct position.

(e) that the nature of the mitigation given by the appellant in the court *a quo* should have resulted in the court *a quo* altering the plea of guilty to one of not guilty.

(f) that the sentence imposed induces a sense of shock because the appellant is unable to pay the arrears of $6 600-00 by the due date given which is 31/01/14 and that the term of imprisonment is draconian.

On 20 December 2013 the appellant now represented by Mr *Harvey* who had filed a notice of appeal with this court made an application for bail pending appeal before the court *a quo.* The submissions made by Mr *Harvey* at p 17 of the record of proceedings are difficult to appreciate. All one can ultimately discern is that the appellant made an application for bail pending appeal based on the grounds of appeal I alluded to. The appellant was unsuccessful. In dismissing the application for bail pending appeal the court *a quo* reasoned that the proceedings were in terms of s 271(2)(b) of Criminal Procedure and Evidence Act [*Cap 9:07*] and that the appellant had admitted to the essential elements of the offence. The court *a quo* did find that that there was therefore no basis for the appellant's review or appeal. The court *a quo* further stated that if appellant had no means to comply with the maintenance order he should have applied for the downward variation of the maintenance order as provided for in s 8 of the Act. On that basis the application was dismissed.

It is this decision which has irked the appellant hence the appeal to this court.

The law which guided the court *a quo* in dealing with the application for bail pending appeal is settled as can be discerned from the plethora of authorities in our jurisdiction. In a nutshell the court should consider the following factors:-

(i) reasonable prospects of success on appeal

(ii) the likelihood or otherwise of abscondment

(iii) the balance between the right of individual to liberty and the proper administration of justice

(iv) the potential length of delay before the appeal is heard

(v) any other factors which the court deems necessary in assessing the suitability of the application for bail pending appeal. See *S* v *Dzawo* 1998(1) ZLR 530, *Katewera & Anor* v *S* HH 96/13.

In an appeal of this nature it is the magistrate's decision in the court *a quo* to deny appellant's bail pending the prosecution of his appeal which should be attacked. The case of *S* v *Malujwa* 2003 (1) ZLR 275 (H) is illustrative. It was said that;

> "In appeals of this nature the approach to be adopted is looking at whether magistrate misdirected himself when he refused bail. The appeal should be directed at the judgement of the court *a quo*. It is the judgement of the court *a quo* that the appeal must attack."

It is clear that for the appellant to succeed in an appeal of this nature, it should be shown that the magistrate committed an irregularity or a misdirection or exercised his discretion so unreasonably or in an improper manner to such an extent that the decision cannot be upheld. See *S* v *Ruturi* HH 23/03.

I find no misdirection or any irregularity in the manner the court *a quo* dismissed the application for bail pending appeal. In fact having fully considered the facts of this matter I have no doubt in my mind that this appeal is not only doomed to fail but is totally misplaced to such an extent that it amounts to an abuse of the court process. The appellant's conduct in making such frivolous applications and appeals simply reinforces the view that he is unwilling to subject himself to the orders of this court. To say the appeal lacks merit is simply an understatement.

I am disturbed that appellant is prepared to lie and mislead this court on how the proceedings were held in this court *a quo* solely for purposes of justifying this frivolous appeal. The record of proceedings is clear that the proceedings were held in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Cap 9:07*] which procedure is designed to

ensure that an accused's plea guilty to the charge is a clear and unambiguous admission of the charge preferred and the essential elements of their charge.

This was a simple matter which appellant could not have possibly failed to appreciate. Appellant was well aware that a maintenance order of US$ 800-00 had be awarded as against him in 2011 in respect of his 4 children. The appellant cannot possibly purport not to know that he did not fully comply with the order. The appellant is therefore aware of the arrears. It is disingenuous for appellant to try and argue that he was not aware of the duty just like any other law abiding citizen of the country to obey the law especially a clear and explicit court order. The record of proceedings clearly shows that specific questions relevant to the essential elements of the offence of non- compliance within the provisions of s 23 (1) of the Act were put to appellant and he gave clear, specific and unambiguous answers. It is foolhardy for the appellant to believe he can now woodwink this court by ascribing different meaning to clear answers he gave in a language he fully understands. The court *a quo* was therefore correct to dismiss the application for bail pending appeal as it was premised on falsehoods and totally lacked merit.

I find no misdirection in the court *a quo*'s decision to dismiss this application for bail pending appeal. The appeal therefore lacks merit.

All I can advise the appellant is that he cannot escape the clear obligation to comply with court orders. A maintenance order was made against him and that order is extant. Appellant has no choice but to comply with the order. It was well within his rights to appeal against the maintenance order when it was made if he had cause to do so. He did not. Further, the appellant could still have sought its discharge or the downward variation of the maintenance order in terms of s 8 of the Act if at all he was unable to comply with the order. He did not save for the feeble counter claim made when his ex-wife sought an upward variation of the same order. It seems that even after his arrest and conviction appellant does not appreciate or chooses not to realise the gravity of the situation. While lack of means may be a defence to a charge of contravening s 23(1) of the Act at as outlined in s 24 (1) of the Act the appellant did not raise that defence. He cannot successfully do so now.

The penalty provided for non-compliance with the maintenance order in contravention of s 23 (1) of this Act is very harsh as it does not provide for an option of a fine but custodial term not exceeding one year. This clearly shows the intention of the legislature on the nature of sentences to be imposed for non-compliance with maintenance orders. This court is the upper guardian of all minor children and the appellant's conduct of failing to comply with a

maintenance order designed to protect the welfare of and cater for his children's needs is viewed seriously by this court. I find no misdirection in the sentence imposed. In fact the appellant should have utilised the opportunity given until 31 January 2014 to pay off the arrears or at least to seek an extension of the due date. Instead the appellant shows his determination not to comply with the maintenance order by persuing a frivolous application for bail pending appeal and subsequently a hopeless appeal against the court *a quo*'s decision to refuse to grant bail. The appeal should be dismissed for want of merit.

In in result it is ordered that the appeal be and is hereby dismissed.

Granger & Harvey, appellant's legal practitioners
National Prosecution Authority, respondent's legal practitioners.