TIGERE MAJANI
and
NORMAN MAJANI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 6 & 8 September 2017

Bail pending appeal

C. Bare, applicants' legal practitioners
F. Kachidza, for the respondent

CHITAPI J: The applicants were on 15 September, 2016 convicted on their own plea of guilty by the Regional magistrate sitting at Kadoma on a charge of assault and another of attempted murder as defined respectively in ss 89 and 47 (1) (b) as read with (1) (a) of the Criminal Law Codification Reform Act, [*Chapter 9:23*]. On the first count they were each sentenced to pay a fine of $100.00 in default 3 months. On the second count, they were each sentenced to 10 years imprisonment with 2 years suspended for 5 years on condition that they did not commit a similar or related offence. The applicants were not legally represented at the trial.

The applicants subsequently engaged the services of a legal practitioner whom they instructed to file an appeal against sentence. As the applicants were time barred in noting their intended appeal. They applied for the leave of this court to note their appeal out of time. An extension to note the appeal out of was granted by Ndewere J on 28 June, 2017 in terms which they were allowed to note their appeal within 14 days of delivery upon them of a copy of the judges' order. The applicants' legal practitioners on 18 July, 2017 duly noted that appeal which is now pending determination by this court under case No. CA 443/17. After noting the appeal, the applicants' legal practitioners on 27 July, 2017, filed the present application for bail pending the determination of the appeal. The application was strenuously opposed by the State on the main basis that the circumstances of the case inevitably called for the imposition of a

lengthy custodial sentence and that therefore the interests of justice would best be served if bail was denied and the applicants prosecute their appeal whilst serving their sentence.

In determining an application for bail pending appeal, the court is guided by several considerations. The first one is that the convict no longer enjoys the presumption of innocence until proven guilty as guaranteed by s 70 (1) (a) of the Constitution of Zimbabwe (2013). Secondly the convict no longer enjoys the same rights to be released on bail on reasonable conditions pending appeal as are accorded to an unconvicted trial prisoner under s 50 (6) of the Constitution. The only constitutional rights which a convicted person enjoys as may be said to be intrinsically connected to his or her completed case are those set out set in s 70 (4) and (5) of the Constitution. In terms of the said provisions, the convict has a right to be given a copy of the record of proceedings within a reasonable time subject to payment of such fees as may be prescribed by law. Further, the convict has the right, subject to such restrictions prescribed by law to have his or her case reviewed by a higher court and/or to appeal against his or her conviction and sentence to a higher court.

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 by a judge of this court or the Supreme Court as provided for therein. *In casu*, the applicant's application falls under the provisions of s 123 (1) (b) (ii). Whenever an application is made to the court or judge and the same is based or grounded in a specific provision of an enactment, the applicant especially the represented one, should always cite the provision of the law relied upon. This assists the judicial officer to appreciate the basis of the application and the powers which can be exercised in relation to the application. Thus, where the judicial officer is in doubt as to the nature of the application being made it is easy to find the applicable law and acquaint with it.

Since bail after conviction and sentence is not a right, the court exercises a discretion whether or not to admit the convict to bail. Such discretion as with any judicial discretion must be exercised judiciously taking into account the circumstances of each individual case. In terms of s 115 C (2) (b) of the Criminal Procedure and Evidence Act, where a convicted person applies to be released on bail, such convict "shall bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail". I will

accordingly be guided by this provision on the incidence of onus in this application. Section 115 C (2) (b) of the Criminal Procedure and Evidence Act was introduced by the Criminal Procedure and Evidence Amendment Act No 2/2016. It simply codified the common law position which the courts have always followed of saddling the applicant who applies for bail after conviction with the onus to satisfy the court that the interests of justice tilt in favour of the grant of bail.

As correctly noted by TSANGA J in *Denis Schliz* v *S* HH 234/17, where bail is sought after sentence, the court considers the prospects of success on appeal and the likehood of abscondment. The Supreme Court reinforced these principles in *S* v *Dzawo* 1998 (1) ZLR 536. Other factors relevant to consider are the convict's rights to liberty and the likely delay before the appeal is disposed of. The delay aspect is relevant because it would amount to an injustice if bail were refused and the applicant serves the entire sentence only for the sentence to be set aside or reduced to levels lower than the period already served.

It would appear in my view that whether or not a convicted and/or sentenced person should be admitted to bail depends on the circumstances of each case. A convicts' liberty should only be allowed where this can be done without endangering the administration of justice. This is done by balancing the prospects of success requirement with the risk of abscondment, the two being interconnected. A hopeless appeal acts as incentive to the convict if released on bail to abscond and vice versa, that is, the greater the prospects of success, the lesser the risk of abscondment since a person with good prospects of success remains confident that his or her appeal will succeed. He or she would not be a likely flight risk. See *S* v *Williams* 1981 (1) SA H 70 (ZAD). A court should be less inclined to grant the convict his or her liberty in bail pending appeal cases as opposed to bail pending trial cases. This is so because convicted and sentenced persons must serve their sentences where there are little prospects of their appeals succeeding.

The applicants thrust in their appeal is that the sentence which was imposed in count two is so excessive as to induce a sense of shock. The admitted facts as set out in the State outline and put to and accepted by the applicants before the regional magistrate were that:

"(i) The complainant in count 1 a was aged 36 years old and the applicants 19 and 21 years old respectively.

I note that the applicants were therefore youthful offenders 17 and 15 years younger than the complainants.

(ii) The applicants committed the offence at night around 8.00 pm. The complainant gave his memory card loaded with music to a shopkeeper so that she could play the stored music. This did not go down well with the applicants who accused the complainant of being in love with the shopkeeper.

(iii) The applicants then assaulted the complainant with booted feet, open hands and fists several times.

(iv) One, Paradzai Chinoda intervened and rescued the complainant and the complaint ran away. The applicants waylaid the complainant and ambushed him. In the process one of them struck the complainant on the forehead with a stone."

The above facts formed the basis of the 1st count.

In the 2nd count the complainant aged 22 years was the peace maker in count 1. The applicants were incensed that the complainant had intervened to stop the altercation in count. The applicants admitted to the following facts:

"(i) They ganged against the complainant and waylaid the complainant after he left the Shopping Centre (scene of the altercation in count 1).

(ii) The applicants were now armed with an axe and a machete .

(iii) They threatened to kill the complainant. One of them struck the complainant on the head with an axe and the other one with a machete on the chin.

(iv) The complainant fell to the ground and lost consciousness where after the two applicants dragged the complainant to his homestead in that unconscious state and dumped him by the door step leaving him helpless.

(v) The matter was reported to the police who attended to the report and referred the complainant to Kadoma General Hospital for treatment."

A medical report produced by consent showed that the complainant was suffering a reduced level of consciousness. He had a 4 cm laceration on his head, a 4 cm laceration on his chin and swelling on the left side of the head. The doctor opined that the injuries were serious enough to be fatal and that the complainant needed to be attended on by a neuro-surgeon.

By the time the trial of the applicants was called, the complainant had recovered enough to attend court. He testified in aggravation of sentence. He said that he failed to raise money required by the neuro surgeon in Harare. He now had limited use of his arm. He could not see nor speak properly. He had hearing problems. He was hospitalized for 2 months. He only now uses his left hand and cannot do manual work anymore. He did not even attend to his fields because of his condition.

I carefully considered the regional magistrate's reasons for sentence. He properly took into account that the applicants were first offenders who pleaded guilty and did not waste the

court's time. He further took into account that the applicants had family responsibilities and were men of straw.

Against the mitigatory factors the magistrate considered that the applicants engaged in acts of lawless and gangsterism, waylaying the complainants and ambushing them. In the second court they used dangerous and lethal weapons and made sure that the complainant was left for dead. They directed the dangerous weapons on the head of the complainant. The magistrate correctly found the assaults to have been severe and resulted in lifetime injuries which the court properly captured upon a reading of the medical report.

The regional magistrate exercised his discretion to impose a competent sentence which he considered appropriate after considering the mitigatory and aggravatory circumstances. The court emphasised the need for society to value human life and not hold other persons lives cheaply. He reasoned that the general rule to keep first offenders out of prison whenever possible would in this case amount to a travesty of justice.

It is difficult to fault the approach and reasoning of the regional magistrate. The applicant's counsel struggled to persuade me that the regional magistrate misdirected himself. I was referred to various cases in an attempt to persuade me to accept that the applicants' prospects of success on appeal were very good. Most of the cases were decided prior to the advent of the new constitution. The new constitution entrenches the sanctity of human life in s 48. Therefore an attempt to unlawfully take away the life of another person should be viewed very seriously by the courts. I asked the applicants' counsel whether he had considered what the law provides as punishment for the offence of attempted murder. Counsel submitted that the punishment was imprisonment for life. In fact s 47 (b) of the Criminal Law (Codification & Reform) Act provides for a sentence of "imprisonment for life or any definite period of imprisonment".

The applicants' counsel submitted that an appropriate sentence would have been a sentence of 2 years imprisonment with 1 year suspended on conditions of performance of community service. With due respect whilst I do not purport to pass judgment on counsel's submission sitting as an appeal court, I believe that I can still express a non-binding opinion on the appeal court that such a sentence in the circumstances of this case would be so disportionately inadequate regard being had to the seriousness of the offence as to justify any reasonable person to exclaim that the sentence amounts to a mockery of any effective criminal justice system.

I was therefore persuaded easily by the State counsel that if the appeal court was going to be inclined to be reduce the sentence it would not be to the extent suggested by applicants' counsel. A substantial custodial sentence being inevitable and appeals no longer delaying in being disposed of it, State counsel submitted that the interests of justice would be met by dismissing the application so that the applicants pursue their appeal whilst serving their sentence. I agree.

In the absence of demonstrated prospects of success on appeal, the issue of abscondment becomes academic. Having considered the judgment and sentence of the court *a quo* and applied the principles of bail and the incidence of onus in applications for bail pending appeal, I make the following order.

The bail application in respect of both applicants to be admitted to bail pending appeal is hereby dismissed.

Murambasvina, Tizivai Chapwanya, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners