MACKMATE MUPFIGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 21, 23 and 24 November 2016

Bail Pending Appeal

R Muchirewesi, for the applicant
F Nyahunzvi, for the respondent

CHITAPI J: The applicant seeks bail pending appeal No CA 716/16. He noted his appeal on 2 November 2016 following his convictions on 26 October 2016by the magistrates at Harare. The applicant upon being arraigned before the magistrate, was represented in the court *a quo* by a legal practitioner. The proceedings were conducted in terms of s 271 (2) (b) of the Criminal procedure and Evidence Act [*Chapter 9:07*]. In other words the applicant pleaded guilty to the charges. The charges and the sentences imposed upon the applicant following conviction were as follows:

Count 1

Theft of vehicle as defined in s 113 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. He was sentenced to 5 years imprisonment with 2 years imprisonment suspended on conditions of goof behaviour and a further 6 months on condition of restitution of US$1 000.00 by 23 December, 2016.

Count 2

Contravening s 6 (1) of the Road Traffic Act [*Chapter 13:11*] for driving a motor vehicle without a driver's licence. He was fined US$50.00 or 30 days in default of payment.

Count 3

Contravening s 131 of the Criminal law (Codification and Reform) Act [*Chapter 9:32*] being the offence of unlawful entry into a premises. He was sentenced to 24 months imprisonment with 6 months suspended on condition of restitution of US$800.00 to the complainant by 23 December 2016 leaving an effective sentence of 18 months imprisonment.

In the appeal against sentence the applicant's grounds of appeal are couched as follows:

The effective imprisonment sentence was excessive in the circumstances. The court *a quo* should have considered a non-custodial sentence in that:

a) It is impossible for the appellant to restitute whilst he is in custody
b) the magistrate did not consider community service as an alternative to imprisonment

Wherefore appellant prays that the sentence be set aside and he be ordered to perform community service.

The facts of the case grounding the conviction were accepted by the applicant through his legal practitioner who confirmed that the applicant understood and accepted the correctness of the facts. In brief the applicant, a 25 year old resident of Hopley Suburb in Waterfalls, Harare, went to the complainant's residence in Mount Pleasant Harare, on 18 September 2016. The complainant and his family were not at home having gone to church. The family had locked all doors, closed all windows and left their two motor vehicles a Mercedes Benz and a Toyota Hilux truck in the garage. The applicant unlawfully gained entry into the homestead of the complainant, forced open the bedroom window and gained entry. In the bedroom, the applicant took the Mercedes Benz car keys. He proceeded into the study room and stole a Samsung LG 800 Tablet. He also stole an Apple I-Pad, LG CD writer and a Laptop from a spare bedroom. The applicant drove away in the complainant's Mercedes Benz with the stolen items. The complainant made a report of theft to the police.

On 21 October, 2016 the complainant's Mercedes Benz vehicle was recovered by Zimbabwe Republic Police detectives from vehicle theft squad unit following a tip off. The vehicle was recovered in the possession of a third party who was test driving the vehicle intending to buy it. The third party led the police to the arrest of the applicant. The applicant led the police to the recovery of a spare wheel to the Mercedes Benz which the applicant had sold to

another person. The accused also led the police to the recovery of some of stolen other electric gadgets. The value of stolen Mercedes Benz was put at US$20 000.00 at the time of its theft and US$19 000.00 on recovery whilst the electronic gadgets were valued at US$2 800.00 with the recovered ones being valued at US$2 000.00. The variances in the values of the vehicle and the electronic gadgets being US$ 1000.00 and US$800.00 respectively were used in ordering restitution. It is not clear from the record how the values were computed. However, no issue appears to have been raised in this regard at the trial nor in the grounds of appeal and I will leave the matter at that and note that restitution was correctly put as $1 800 000.00.

In assessing sentence, the learned magistrate took into account the personal circumstances of the applicant and that he had pleaded guilty albeit the offence being serious. The magistrate took into account the value of the property and the fact that the accused benefited from the offence. He then considered ordering restitution. The magistrate indicated that the court would not impose a lengthy custodial sentence because of the guilty pleas. It was then reasoned that a custodial sentence would act as a personal deterrence to the applicant and a general deterrence to likeminded offenders. It is true that the magistrate did not indicate that the court had considered community service as a possible punishment. It must be this omission which the applicant's present counsel pounced upon to seek to advance to impugn the sentence of the court *a quo*.

The applicant's counsel submitted that the magistrate misdirected herself by resorting to imprisonment as a first option instead of as the last resort. It was also submitted that the plea of guilty was not rewarded with a defined sentence. This of course is untrue because the magistrate suspended a portion of the sentence on conditions of good behaviour. The fact that the magistrate considered imprisonment as the first option would appear to be inaccurate. The magistrate reasoned that the applicant had started his life of crime at the deep end. A deep end crime is one that is obviously serious. Implicit in the magistrate's reasoning is the fact that she would have been persuaded to consider a lesser penalty had the offence been a shallow end crime or less serious offence. I am not persuaded that an appeal court would find that the magistrate misdirected herself in this regard.

The applicant's counsel submitted that it was a misdirection on the part of the magistrate to order the applicant to pay restitution and at the same time to incarcerate him because such

incarceration meant that the applicant would not have an opportunity to work to raise money for restitution. This argument was as already indicated framed as a ground of appeal. The argument shows that counsel's knowledge on the law and principles of sentencing needs sharpening up. It is not a misdirection to order restitution and couple it with an effective term of imprisonment. The applicant's counsel should be advised to consider part XVIII of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The courts have also pronounced that the indigence of a convicted person ought not be used against him by denying such person a sentence of the imposition of a fine where the circumstances merit purely on the basis that the likelihood of such person paying will be remote. It appears to me therefore that the applicant's counsel did not apply his mind fully to the import of restitution. An offender without means to pay may for example apply for extension to pay restitution. The inability of the applicant to immediately pay restitution or a fine is the reason why time to pay is granted. An offender's circumstances should not be assumed to be a continuing status into the future. I am again not persuaded that the appeal court will find favour or merit in the applicant's argument that it was a misdirection on the part of the magistrate to both order restitution and an effective prison term.

Counsel for the respondent submitted that the appeal filed by the applicant had no prospects of success. Following on my analysis of the magistrates court proceedings as borne on the record I agree with the submission. I was referred to the case of *S* v *Sibanda* HB 37/10 wherein CHEDA J is quoted as stating that "the principle of keeping first offenders out of goal is not a be-all-and-all procedure. It is a guiding principle which should always be applied with caution…" The remarks by CHEDA J hold true and reflect the approach of the court to sentencing first offenders to imprisonment. It is a guiding principle of sentencing to keep first offenders out of prison. However, the circumstances of each case are considered and the fact of an applicant being a first offender is considered together with other factors relevant to sentence and only when a fine or other forms of punishment other than an effective prison term present themselves as inappropriate will such penalty be properly imposed. As already pointed out, the magistrate considered that imprisonment was the only appropriate sentence in counts 1 and 3. I am not persuaded that an appeal court will find the applicant's contentions appealing or be persuaded to disturb the sentence on the basis that as a first offender the applicant should not in the circumstances of the case have been imprisoned.

In applications for bail pending appeal after conviction, the onus is upon the applicant to demonstrate on a balance of probabilities it is in the interests of justice that that he or she be released on bail. Section 115C (2) (b) of the Criminal Procedure and Evidence Act has spelt out the evidence of onus. Such onus has always been cast upon the applicant who has filed an appeal.

See *S* v *Dzawo* 1998 (1) ZLR 536 (S); *S* v *Macmillan* HH 11/2007, *Machangara* v *S* HH 16/16.

The approach is the same in South Africa where the law is the same as in this jurisdiction on the point. See *S* v *Harmse* [2007] ZANCHC 23

The court determining an application for bail pending appeal should consider the following factors

(i) the prospects of success of the appeal

(ii) the likelihood of abscondment

(iii) the potential delay before the appeal is heard

(iv) the applicant's right to liberty.

See *Dzawo*'s case (*supra*); *S* v *Jingura* HB 20/15; *DeVilliers* v *S* [2012] ZAFSCHC 172; *Smith* v *S* [2009] ZAECH 52.

Although the above factors are considered cumulatively, it is the first factor which is most important. If there are no prospects of success of an appeal succeeding an applicant will have reason or inducement to abscond. Equally the interests of justice would not be served by granting bail to the applicant whose chances of his or her appeal succeeding are academic or hopeless. The applicant's rights to liberty will not have a basis upon which they should be protected. The delay in the hearing of an appeal is an extension of the concept of the right to liberty in that an appellant should be liberated and enjoy his or her liberty if the appeal will delay in its hearing to avoid prejudice which can happen where a sentence will be reduced or overturned on appeal yet the applicant will have served it.

During the hearing, I asked of applicant's counsel whether the application was *bona fide* or he was simply performing a perfunctory lawyer's duty. I paused the question because it appeared to be very clear in all the circumstances of the case that the applicant could not have escaped a prison term. To imagine that any reasonable court could impose a fine or community

service upon an offender who breaks into a residence, breaks into the rooms, steals car keys and other gadgets, steals a car and offers the stolen items for sale would be to expect a miracle. Any sentence other than imprisonment would offend the accepted notions of justice and bring the criminal justice system into disrepute in the eyes of right thinking members of the society. With the legislature providing for sentences of up to 25 years imprisonment for theft and ten years for unlawful entry, it should have dawned upon the applicant's legal practitioner given the circumstances of the case *in casu* that imprisonment was unavoidable. In such circumstances rather than filing an application for bail pending appeal which was doomed to predictable failure, and in the process exposing himself to possible criticism on the applicant and his legal practitioners *bona fides*, it was advised to attend on the preparation of the record and set down of the appeal so that it is heard within a short time whilst the applicant was serving because as already indicated, any sentence other than imprisonment in the circumstances of this case would have amounted to a travesty of justice as being wholly inadequate and inappropriate.

Accordingly it is my finding that the applicant's prospects of success on appeal are hopeless and he has failed to discharge the onus of proving on a balance of probabilities that it would be in the interests of justice to release him on bail pending appeal. There are no judicial, logical or moral reasons which exist in this application to warrant in delay in the serving of sentence as there are no prospects on appeal. I dismiss the application without hesitation and it is so ordered.

Muchirewesi & Zvenyika, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners