

**LANGELIHLE MSIPHA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 17 JANUARY 2023

**Application for bail pending appeal**

*G. Nyathi*, for the applicant

*Ms. D.E. Kanengoni*, for the respondent

**DUBE-BANDA J:**

1. This is an application for bail pending appeal against sentence. On 17 January 2023 after hearing arguments, I delivered an *ex tempore* judgment, to wit: “The application for bail be and is hereby dismissed.” I have, however, been requested to provide a fully dressed judgment with reasons. I outline hereunder the reasons for this decision.
2. The salient facts are that the applicant was arraigned before the Magistrate Court sitting at Filabusi. He was charged with the crime of assault as defined in section 89(1) of the Criminal Law (Codification and Reform) Act [Chapter 09:23]. It being alleged that on the 3<sup>rd</sup> November 2022 the applicant unlawfully committed an assault upon the complainant by slapping her once on the left cheek using open hands, once on the left cheek and right shoulder using a wooden log.
3. The applicant pleaded guilty and was duly convicted. He was sentenced to forty months imprisonment of which twelve months were suspended for three years on the usual conditions. Aggrieved by the sentence, the applicant noted an appeal before this court. The appeal is pending under cover of HCA 159/22. The grounds of appeal are that: the sentence imposed by the trial Magistrate is so excessive as to induce a sense of shock; and that the trial Magistrate misdirected himself by not considering a fine or community service.

4. In support of the application, the applicant filed a bail statement. It is contended that the trial court failed to place impetus on the fact that the applicant pleaded guilty and apologised to the complainant. He showed remorse and paid USD100 to cover the complainant's medical bills. He is a first offender. The trial court is criticised for allegedly not considering other sentencing options available in terms of the law, like community service or a fine. It is contended further that a non-custodial sentence would have met the justice of the case. The applicant contends further that if admitted to bail pending appeal he will not abscond, and that he has a fairly arguable appeal on the merits.
5. The application was not opposed. The respondent argued that the applicant had an arguable case on appeal and it would be in the interests of justice that he be released on bail pending appeal. The anchor of this concession was that the trial court seemed to have taken the view that the applicant's intention was to inflict serious bodily harm because the complainant could possibly lose her sense of hearing in the left ear and vision on the left eye. The respondent further argued that a prison term was harsh considering the fact that the complainant suffered no fractures and factoring in the mitigating factors. It was contended that by sentencing the applicant to a prison term the trial court fell into error.
6. In *Gumbura v The State* SC 78/14 the court said the test to be applied in this regard is relatively uncomplicated: Is the appeal "reasonably arguable and not manifestly doomed to failure"? As was highlighted in *Manyange v The State* HH 1-2003, there is a clear distinction between the principles governing the grant of bail pending trial and those relating to bail pending appeal. In the former situation, the presumption of innocence, which resides within the constitutionally guaranteed right to liberty, operates in favour of granting bail unless there are positive reasons for refusal. In the latter situation, on the other hand, the presumption of innocence is inoperative because the accused is a convicted and sentenced offender. The accused must go further than showing that he has prospects of success on appeal. He must establish that there are positive grounds for granting bail and that the grant will not endanger the interests of justice. See: *State v Hudson* 1996 (1) SACR 431 (W); *S v Anderson* 1991 (1) SACR 525 (C); *S v Dzawo* 1998 (1) ZLR 536; *S v Bennet* 1985 (2) ZLR 205 (HC); *S v Ncube*

& Ors HB 04-03; *Mutizwa v The State* SC 13/20, *S v Tengende & Ors* 1981 ZLR 445 (S) 447H – 448C; *S v Pfumbidzayi* 2015 (2) ZLR 438 (H).

7. The applicant seeks to be released on bail pending appeal against sentence only. The prospects of success on appeal play an important role in the determination of whether or not bail ought to be granted at this stage. The inquiry is whether there are reasonable prospects that the appellate court will impose a non-prison sentence. The absence of such reasonable prospects would justify refusal of bail. Although the personal freedom of the individual is always an important consideration, where a person does not challenge his conviction, the administration of justice requires the speedy serving of his sentence, and no logical reasons exist why execution of his sentence should be delayed if an appeal against sentence has no prospects of success.
8. It is trite in this jurisdiction that the power of an appellate court to interfere with a sentence imposed by a lower court is limited. In every appeal against sentence the court hearing the appeal is guided by the principle that punishment is “pre-eminently a matter for the discretion of the trial court”; and should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised”. The test is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. See: *S v Rabie* 1975 (4) SA 855 (A) at 857; *S v Anderson* 1964(3) SA 494 (AD) at 495 D-H.
9. In passing sentence the trial court factored into the equation the following mitigating factors; that the applicant pleaded guilty; that he was a first offender; he apologised to the complainant and gave her USD100 to meet her medical bills; and that he is a family man and if sentenced to a long prison term his family will be negatively affected. On the other side of the pendulum the trial court considered the following aggravating factors; that the applicant assaulted a frail seventy one year old woman over *trivia*; the complainant could not defend herself; and that the medical report shows that a severe degree of force was used to commit the assault. The trial court further factored into the equation that the applicant struck the complainant with a log on the left side of the head, and the strike inflicted serious injuries. The medical report shows that the complainant may lose the sense of hearing in the left side ear, and vision in the left eye. The trial

court made a factual finding that in using a log the applicant's intention was to inflict serious bodily harm, and that a prison term was warranted in the circumstances. My view is that the trial court factored into the sentencing equation all that needs to be factored into the equation.

- 10.** The applicant contends that he has prospects of success on appeal. Mr *Nyathi* counsel for the applicant argued that the trial court misdirected itself in not considering community service. The jurisprudence in this jurisdiction is that where a court is of the view that it should impose a sentence of twenty-four months or below it must first consider community service. In *casu* the trial court was of the view that a sentence of forty months would meet the justice of the case. The sentence of forty months was clearly outside the realm or ambit of community service, and failure to consider community service cannot be said to be a misdirection in such circumstances. I do not think that the appeal court will find that non-consideration of community service amounts to a misdirection.
- 11.** Mr *Nyathi* argued that the trial court misdirected itself in failing to consider a fine. The trial court factored into the equation the moral blameworthiness of the applicant and found that a prison term was warranted. Therefore, the argument that the trial court did not consider a fine is of no moment. It is of no consequence. The court did consider a fine and discounted it. The appellate court is unlikely to find fault with the sentence imposed by the trial court. I say so because the appeal court is not permitted to usurp the sentencing discretion of the trial court.
- 12.** It is an important consideration in an application for bail pending appeal whether the applicant will serve his sentence if released on bail and should his appeal fail. The court will naturally take into account the increased risk of abscondment in view of the fact that the applicant has been convicted and sentenced to a term of imprisonment. Also, a stark change of circumstances is the fact that the presumption of innocence has ceased to operate in favour of the applicant. In *casu* the applicant has been convicted and received a heavy sentence. The possibility of absconding is always a very real danger in cases where long terms of imprisonment have been imposed. The prospect of a

protracted prison term, coupled with his fresh experience of post-trial incarceration, affords abundant incentive for him to abscond.

- 13.** I do not agree that the applicant has proffered any positive grounds for allowing him to proceed on bail. Moreover, he has failed to satisfactorily demonstrate his prospects of success on appeal. I take the view that his appeal is not arguable and is manifestly doomed to failure. He is a flight risk. The less likely the prospects of success are, the more likely the incentive to abscond. This is the case in *casu*. In light of the facts of this case, I take the view that none of the grounds of appeal raised in this case are sustainable. His release on bail at this stage could be a danger to the administration of justice. The cumulative effect of these facts constitute a weighty indication that bail should not be granted. See: *S v Myers* 1991 (1) SACR 383 (C); *S v Gomana* SC 166 / 2020.
- 14.** Mr *Nyathi* in his submissions emphasised that the respondent was not opposed to the admission of the applicant to bail pending appeal, as if such a concession is dispositive of the matter. It is not. It is trite that notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the circumstances of the case against the interests of justice. In this case there is nothing that commends the applicant's right to liberty. On the facts of this case I take the view that the concession was not properly taken.
- 15.** In all the circumstances, I am amply satisfied that the appellant is not a good candidate for bail pending appeal. It is for the above reasons that I dismissed this bail application pending appeal.

*Sansole & Senda*, applicants' legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners