GIBSON MUNSAKA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 19 JANUARY & 12 MAY 2022

Bail pending appeal

T. Tashaya with *T. Muzamhindo* for the applicant
T. M. Nyathi for the respondent

TAKUVA J: This is yet another crime arising from endless disputes over ownership of mines.

The applicant owns a mine known as Cake Walk 8 while D & S Syndicate own and operate Cake Walk 2 Mine. The two mines are separated by a fifty (50) metre stretch of no man's land. There was a dispute between D & S Syndicate and applicant over ownership of Cake Walk 2 Mine. It is common cause that Cake Walk 2 Mine was invaded by a mob armed with axes, pick handles and crow bars. The mob was in a combative mood shouting words to the effect that they wanted to demonstrate their intention by killing one of Cake Walk 2 employees.

The court *a quo* found on the evidence that applicant also known as "Homela" was the ring leader of this unruly gang. It was also found that applicant struck complainant in count 1 one Steven Muzengeza on the head with a small axe. In respect of the rest of the complainants, the court *a quo* concluded that the applicant is liable as a co-perpetrator as defined in section 196A of the Criminal Law (Codification and Reform) Act Chapter 9:23. The court *a quo* also found the four complainants to be credible witnesses. However, the same finding was not extended to the applicant who failed to win the court's confidence in that regard.

Despite applicant's protestation of innocence he was convicted of all four counts and sentenced as follows:

> "Count 1- 8 years imprisonment of which 2 years imprisonment is suspended for five years on condition accused is not convicted of assault on the person of another.

Counts 2 – 4 taken as one for sentence and applicant was ordered to pay a fine of RTGS$3 000,00 or in default of payment 6 months imprisonment."

Aggrieved by both conviction and sentence he noted an appeal on 28 December 2021. He now seeks to be admitted to bail pending his appeal in terms of s123 of the Criminal Procedure and Evidence Act (Chapter 9:07).

In his bail statement, applicant contended generally that he is entitled to bail, has no propensity to abscond since he has higher prospects of success on appeal. Specifically he averred that the court *a quo* erred and misdirected itself at law and facts when it convicted the applicant of these four charges based on insufficient evidence of identification. He further argued that only one witness namely Muzengezi identified him in a mob of more than fifty people. Worse still this witness did not know the applicant before the date of the crime.

The applicant further contended that the court *a quo* misdirected itself in "discarding" his "alibi" defence without any evidence being led by the State to rebut such defence. It was applicant's submission that since the State failed to place him at the scene of crime it was a misdirection for the court *a quo* to find a conviction on the doctrine of common purpose.

As regards the risk of abscondment applicant submitted that he is not a flight risk for the following reasons:

1. He was on bail during the entire trial before the court *a quo* and even after judgment was handed down he appeared for his sentence.
2. Applicant is a married man with two wives and five children of which four are still minors. He is self-employed as a miner who owns the mine in question and some stamp mill.
3. He submitted that he stands to lose more if he is to abscond and be a fugitive from justice.

This application is opposed by the respondent on the grounds that the applicant has no prospects of success on appeal against both conviction and sentence and since the applicant enjoys no prospects of success on appeal, chances of him absconding after being granted bail pending appeal are very high. With regards to prospects of success on appeal against conviction *Mr Nyathi* for the respondent submitted that applicant's prospects are bleak for the following reasons:

(a) Applicant was properly identified by three State witnesses namely Steven Muzengeze, Khumbulani Patrick Madzivanzira and Alpha Ndlovu who all knew him prior to the day of the commission of the offences. They all singled out the applicant as the ring leader of the mob visibility was very good.

(b) Applicant's defence of alibi turned out to be untrue as applicant under cross-examination made a u-turn and admitted that he was not in Bulawayo on the 11th day of September 2020 contrary to what he had initially stated that he was in Bulawayo on the day in issue.

(c) The applicant admitted that he was at Fort Rixon Police Station around 05:30 hours and proceeded to his mine which is nearby. The offence was committed at around 06:00 hours or shortly thereafter. Therefore, the applicant was at the scene of crime at the time the offences were committed.

As regards the risk of abscondment respondent submitted that the less-likely are the prospects of success, the more the inducement there is on an applicant to abscond.

The Law

Section 123 (1) (b) (ii) of the Criminal Procedure and Evidence Act Chapter 9:07 empowers the court to admit to bail a person convicted and sentenced by a magistrate who is awaiting determination of his appeal by the High Court. The section states;

"Power to admit to bail pending appeal or review

(1) Subject to this section, a person may be admitted to bail or have his bail conditions altered –
  (a) In the case of a person who has been convinced and sentenced by the High Court and who applies for bail –
    (i) Pending the determination by the superior court of his appeal; or
    (ii) …
    by a judge of the Supreme Court or the High Court;
  (b) In the case of a person who has been convicted and sentenced by a magistrates' Court and who applies for bail –
    (i) …
    (ii) Pending the determination by the High Court of his appeal; or
    (iii) …
    by a judge of the High Court or by any magistrate within whose area of jurisdiction he is in custody …"

The primary consideration in an application for bail pending appeal or review is whether the accused will serve his sentence if released on bail and should his appeal or review fail. Naturally, the court will take into account the increased risk of abscondment in view of the fact that the accused has been convicted and sentenced to a term of imprisonment and is not merely awaiting the outcome of his trial. Further, a stark alteration of circumstances is the fact that the presumption of innocence has by this stage, ceased operating in the accused's favour. Therefore, the severity of the sentence imposed will be a decisive factor in the court's exercise of its discretion whether or not to grant bail and as to the amount of bail to be considered for the notional temptation to abscond which confronts every accused person becomes a real consideration once it is known what the accused's punishment entails. In considering a bail application at this stage, the court should carefully weigh the likelihood of the accused considering it worthwhile to abscond rather than serve his sentence. Therefore, bail will more readily be refused where the sentence imposed is a long term of imprisonment.[1]

The test for bail pending appeal is as described in *S* v *Williams*[2]; *S* v *Mudzengerere*[3]; *S* v *Kilpin*[4] and *S* v *Anderson*[5]. It requires no more than an 'arguable' case on appeal, one which was not 'manifestly doomed to failure'. On the other hand, the test applicable to applications for leave to appeal is simply whether or not reasonable prospects of success on appeal may be said to exist or put differently, whether reasonable prospects existed of another court finding differently. The test has a higher threshold than the arguability test applied in applications for bail pending appeal.

In *S* v *De Abreu*[6] it was held that the prospects of success on appeal also form a factor to be taken into account in an appeal against the refusal of bail pending appeal. If for example, the view of the court should be that the appeal … is hopeless, the court would probably be reluctant to alter a judgment refusing bail. In *S* v *Williams supra*, the court explained the principle as follows;

> "Different considerations, do of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been

[1]John van der Berg, *Bail A Practitioner's Guide*, Third Edition 2014, pages 214-216

[2] 1980 ZLR 466 (A)
[3] 2018 (1) ZLR 646 H
[4] 1978 RLR 282 (A)
[5] 1991 (1) SACR 525 (C)
[6] 1980 (4) SA 94 (W)

> able to find it seems that it is putting it too lightly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as *R* v *Milne & Erleigh* (4) 1950 (4) SA 601 (W) and *R* v *Mtembu* 1961 (3) SA 468 (D) stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly the two factors are interconnected because the less likely the prospects of success are, the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail."

Application of the law to the facts

I proceed to analyse the evidence in the court *a quo* in order to evaluate the prospects of success. In doing that, it is not the function of this court to analyse the evidence in the court *a quo* in great detail lest it becomes a dress rehearsal for the appeal to follow. According to general principles the onus of proving reasonable prospects of success on appeal would rest on the appellant. This is the persuasive burden with which he is notionally saddled.

The applicant *in casu* argues that his appeal has bright prospects of success because the court a quo misdirected itself by relying on insufficient evidence of identification. According to the record of proceedings the applicant was identified by three witnesses. The complainant in count 1's evidence was as follows;

> "I know Gibson Munsaka accused 1 and I am not sure of the name of the second accused because I had seen him on the previous day. Accused 1 was leading a team of young men he was carrying an axe and they were singing. I heard them saying "bulala" in Ndebele meaning kill someone. And I did not get a chance to run away accused one immediately struck me with an axe on the forehead telling me that I was the one who wanted to take his mine and I wanted also to take his money and as I intended to take his workers … How did you identify accused 1? - He was the team leader and I know him as a miner … He was wearing a black and white track suit and tennis shoes the top was black in colour and white stripes on the sleeves." See record pages 38 -41.
>
> Under cross- examination the witness' testimony went as follows;
>
> "Q - Who was the first accused person with at the station?

A - When I saw accused person by the gate he was alone but there was someone who was seated on the steering of his vehicle *(sic)* which was parked just by the gate.

Q - How did you conclude that the particular motor vehicle was the one the accused person was using?

A - I know the car as accused person's car and I had met him driving the same car the previous day and we talked." See record p 46

Still under cross-examination the following exchange took place;

"Q - During examination in chief the state asked you a simple question to the effect that what is it that was peculiar about the 1st accused person that enabled you to identify him?

A - The clothes that he was wearing at the time of the attack at the mine are the same clothes he was wearing at the police station. And when I met him at the police station it was within two hours thirty minutes of us having been attacked at the mine." See record page 51.

What comes out of this evidence is that Muzengeza gave a credible version of who assaulted him and why. He also described how he was assaulted and with what weapons. As regards applicant's identity it is apparent that the two were known to each other prior to the incident. This is why the witness came to know the applicant's vehicle and that he is a miner in that area. The defence did not deny that applicant owns such a vehicle under cross-examination. It was also not disputed that the witness and the applicant met and had a chat prior to the incident. The incident occurred at 7am according to Muzengeza. Visibility was good and applicant and the witness were close to each other and they exchanged words over ownership of claims. Surely under these circumstances, there cannot be any question of mistaken identity. The court a quo made a favourable finding of credibility of Muzengeza. I find no basis to conclude that this amounts to a misdirection. The record shows sufficient and credible evidence of applicant's identification.

The second witness who saw applicant at the scene is Khumbullani Patrick Madzivanzira (Khumbulani) a security supervisor at Cake Walk 2 for 2 years prior to the

incident. After describing the attack by mob of approximately 50 armed men, he was asked the questions;

"Q - Who did you recognize that day?

A - I managed to identify accused one.

Q - What was accused one doing?

A - He was in the company of these people who were shouting saying that they should catch one of us and deal with him or her.

A - You mentioned that these people were armed was accused 1 armed on that day?

A _ Yes he was armed

Q - You may tell the court what you saw him armed with?

A _ He was armed with an axe." (my emphasis) see record page 69

Under cross-examination he was asked;

Q - Were the accused persons known to you prior to the offence, were they known to you?

A - I used to see accused one. I used to see him around

Q - Are you aware that accused is t registered owner of a claim called Cake Walk 8 Mine which is a neighbouring claim to your employer?

A - I work under a security company, my work has to do with security. I used to see the accused person but I do not know much.

Q - Are you aware whether or not he owns Cake Walk 8 Mine?

A _ No. What I know is that there was a dispute between accused one and my employer. That is what I know.

Q - It was a mining dispute?

A - I think so" (my emphasis) see record page 76-77.

When the applicant's legal practitioner put the defence case to the witness, he commended thus;

"Q _ The first accused further states in his defence that he was not at the mine on the 11 of September 2020 but only arrived at the mine when the incident had already occurred?

A - I saw him. …

Q - He denies ever assaulting you or any of your colleagues on the 11th of September he was not there? What is your comment?

A - I saw him in the morning as they were advancing to where Steven was or as they were advancing towards Steven. I was assaulted as I was running away but I do not know who exactly assaulted me. (My emphasis) See record p 87.

Quite clearly there is no equivocation in Khumbulani's testimony as regards the applicant's identification. He was clear and definite that he saw applicant at the scene of crime. His evidence on identification is free from exaggeration in that he did not see who assaulted him. If he was driven by vindictiveness, he could have named the applicant as his assailant. This he did not do. In my view the court *a quo* acted properly when it made the following finding;

"I am confident accused was properly identified by witnesses. He was the one who led the mob … Accused was known by the witnesses for ease of identification. I doubt if four witnesses would mistake him." See record page 22

Just like the 1st witness, Khumbulani knew the applicant prior to the commission of the offence. The two corroborated each other on material respects. The totality of this witness' evidence excludes the possibility of mistaken identity. Indeed, the court a quo believed this witness' evidence.

The 3rd witness who positively identified applicant at the scene is Alpha Ndlovu a clerk at Cake Walk 2. On page 118 of the record of proceedings he said;

"The man I managed to identify is Gibson Munsaka accused 1 because I know him and he was in front whilst there were young men following him. They were saying "catch

someone assault someone." When asked what applicant was wearing he said; "He was wearing a black and white jacket it had a white line and a track bottom …

Q - You mentioned you knew accused prior to the incident how do you know him?

A - I knew him from seeing him around at that place." Page 119

Further at page 123 – 4 under cross-examination he was asked as follows;

Q - Did you see the 1st accused person attack or assault anyone?

A - I did not see him striking or assaulting someone because at that time I had run away.

Q - When did you start working at Cake Walk 2 Mine?

A - It was now my 3rd month at the time of our attack.

Q - During that time had you seen the 1st accused person?

A - Yes as someone I used to see around.

Q - In his defence the 1st accused person is then saying on the 11th in the morning he was not there when the attack occurred, he only came to the mine after the attack occurred?

A - I will not agree with that <u>I saw him with my own eyes as someone whom I knew I easily identified him."</u> (my emphasis)

This witness like the two before him knew the applicant well prior to t1th September 2020. He did not, in his evidence exhibit a desire to falsely incriminate the applicant. The fact that he denied observing the applicant assaulting anyone proves this. The court *a quo* found him to be a credible witness. His evidence in chief together with answers he gave under cross-examination are testimony of this. Accordingly there was no mistaken identity.

As regards the defence of an *alibi*, it is true that it turned out to be false. Applicant claimed to have been between Fort Rixon Police Station and Cake Walk 8 Mine. He puts that time frame at between 5:30 am and 8:30 am. In fact in his evidence, applicant said, "At around 05:30 hours I was at the police station from Bulawayo going to the mine. From the police station to the mine it is a dust road of about 20 – 25 km." He admitted that he did not take a

long time making his report as the police officers told him to wait for them at 0800 hours at the mine. Applicant claimed to have arrived at the mine at 0800 hours that morning. This suggests that it took applicant two and half hours to drive a distance of 20 – 25km. Evidently his average speed would be 10km per hour. When asked about this, applicant blamed the poor state of the dust road to the mine. Surprisingly, his return trip to the police station took only one hour. Applicant failed to satisfactorily explain this stark difference. In view of this contradiction the court *a quo* properly found him to be an incredible witness. The finding that the defence of alibi was not established and that resultantly the applicant was at the scene of crime when the invasion took place cannot be assailed.

The court *a quo's* finding on the question of whether or not applicant acted in common purpose with members of the group as required in terms of s196A of the Criminal Law (Codification and Reform) Act Chapter 9:23 is beyond reproach. The following facts which were proved beyond a reasonable doubt demonstrate this;

1. The applicant was at the scene of crime
2. The applicant was the ring leader of this rowdy gang.
3. The applicant and those in his company were armed to the teeth with dangerous weapons.
4. The mob sang songs with lyrics that threatened to kill or injure the victims.
5. The complainant in count one said he was also attacked by applicant's companion in applicant's presence.
6. Applicant actively associated with the mob in the unlawful activities at the mine.

In respect of sentence, applicant enjoys no prospects of success he has not shown any irregularity or misdirection on the part of the sentencing court. The applicant stands convicted of a serious offence. It was a gang attack where dangerous weapons were used. From the facts which are common cause the applicant took the law into his own hands. The force used was severe resulting in serious injuries to the head and a fracture of the clavicle bone. What the court *a quo* found to be aggravatory is that the offence was premeditated. I do not detect any misdirection or irregularity in the manner in which the sentence was assessed. The sentence imposed on the applicant is in line with sentences that have been meted out in similar matters.

In my view since the applicant has no prospects of success on appeal against both conviction and sentence, chances of absconding on his part are very high if admitted to bail

pending appeal. The temptation to avoid serving the five year jail term is very high indeed. There is clearly an increased risk of abscondment.

Before I conclude, there is one other matter that I should comment on. It relates to the fact that the applicant was granted leave to appeal by this court per NDLOVU J on the 24th December 2021. However, it should not be thought that the fact that the trial court has granted leave to appeal (which implies that there are reasonable prospects of success on appeal without more) constitutes sufficient ground for granting bail pending appeal. This is because the test for bail pending appeal is different from the test applicable to applications for leave to appeal – see *S* v *Bruintjies*[7].

In view of the above reasons, I take the view that this application lacks merit.

Accordingly, it is dismissed in its entirety.

Sengweni Legal Practice, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

[7] 2003 (2) SACR