

GODFREY MUPAMHANGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 29 December, 2021 and 2 February 2022

Bail Application

Applicant in person
Muziwi, for the respondent

MAXWELL J: This application was dismissed on the date of hearing with an indication that reasons would follow. These are they.

This is an application for bail pending appeal. Applicant and his accomplices were arraigned before the Magistrates' Court at Harare facing charges of unlawful possession of a firearm and ammunition. The allegations are that on 24 August 2020 and at number 1184 Mashakada, Dulibadzimu, Beitbridge, the applicant and eight others, each or one or more of them unlawfully acquired or possessed a 9 x 19 mm Vector Z88 pistol serial numbers obliterated, 11 x 9 x 19 mm live cartridges and 20 x 12 Bore live cartridges without a licence. They were convicted of contravening section 4 (1) as read with section 4 (2) of the Firearms Act [*Chapter 10:09*]. The court *a quo* applied the doctrine of common purpose basing on the manner in which the applicant and his accomplices reacted upon being told of the presence of police officers at number 1184 Dulibadzimu Beitbridge. In arriving at an appropriate sentence, the court *a quo* made reference to the case of *S v Zawaira* HH-447/13 in which MUREMBA J stated that the origin of the firearm and whether or not it was linked to the commission of other offences was important. It considered that the origins of the gun in question could not be traced and that it had been used in various crime scenes. Applicant was sentenced to 4 years imprisonment of which 1 year was suspended on condition of good behaviour. Applicant noted an appeal against conviction and sentence. He argued that he was convicted in the absence of compelling evidence and that the sentence induces a sense of shock.

The respondent opposed the application and contended that there are no prospects of success on the following basis, firstly the applicant did not dispute being at 1184 Dulibadzimu on the day in question. Secondly the applicant had submitted that he was there for a business deal but was not able to show that they were genuine business people. Thirdly, the issue of an appropriate sentence is in the discretion of the trial court which is rarely interfered with.

The facts to be considered in an application for bail pending appeal include the prospects of success. See *S v Dzawo* 1998 (1) ZLR 536. It is trite that an appeal court cannot interfere with the exercise of discretion unless such exercise of discretion is afflicted by a misdirection. It is not enough that the appellate court thinks that it would have taken a different view from the trial court. It must appear from the record of proceedings that there has been an error made in the exercise of discretion such as that the trial court acted on a wrong principle, allowed extraneous or irrelevant considerations to affect its decision, made mistakes of fact or failed to take into consideration relevant matters in the determination of the question before it. See *Barros & Anor v Chimponda* 1991 (1) ZLR 58.

PROSPECTS OF SUCCESS

The applicant's main contention is that there was no necessary evidence supporting the recovery of any firearm or other property and that there was doubt as to whether or not the Vector Z88 pistol which was produced in court was handed over to the investigating officer in Harare from arresting details in Beitbridge or was fabricated. In the court *a quo* Applicant and his colleagues had argued that the police had initially said they were in possession of a Noringo pistol and later were told that it was a Vector pistol. The court *a quo* was alive to the discrepancies in the evidence of the witnesses and some inconsistencies but was satisfied that the witnesses corroborated each other on the fact that a firearm was recovered. It accepted the Forensic expert's testimony that only an expert can state with certainty the type of firearm and that the Vector and Noringo pistols are similar. It concluded that the expert witness' testimony cured the evidence of the state witnesses. I am not persuaded that the court *a quo* erred in the exercise of its discretion. Clearly this is a situation where the Applicant is of the view that the appellate court might arrive at a different conclusion. As stated above, that is not a basis for interfering and therefore there are no prospects of success against conviction.

Even though the Applicant's grounds of appeal include appealing against sentence, the bail statement is silent on that. In the grounds of appeal three issues are raised in attacking the sentence. Firstly, the applicant faults the court *a quo* in imposing a custodial sentence for an offence which has an option of a fine. The court *a quo* gave reasons why it did not impose a fine or community service. Applicant has not challenged those reasons. Secondly, the applicant alleges that the sentence does not reflect his being a first offender. It is not trite that first offenders are entitled to a non-custodial sentence or to a suspension of part or the whole of a term of imprisonment. See *S v Moyana* 1980 ZLR 460. Lastly, the applicant alleges that the court *a quo* failed to consider that he had spent a year in custody awaiting trial. In *S v Ramushu & Ors* SC 25-93 it is stated that in an appeal against sentence, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court and that the propriety of a sentence attacked on the ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate. The sentence in this case cannot be classified as disturbingly inappropriate.

For the above reasons the application for bail pending appeal was dismissed.

National Prosecuting Authority, respondent's legal practitioners