

DISTRIBUTABLE (116)

TAKUNDA LAWRENCE MADAMOMBE
v
THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, 13 MAY 2021 & 15 OCTOBER 2021

The appellant in person

F. Kachidza, for the respondent

IN CHAMBERS

BHUNU JA: This is an appeal against refusal of bail pending appeal by the High Court (the court *a quo*). The application is in terms of r 67 of the Supreme Court Rules, 2018 as read with s 121(2)(a) of the Criminal Procedure and Evidence Act [*Chapter. 9.07*].

FACTUAL BACKGROUND

The appellant was employed by the Zimbabwe National Army under the Presidential Guard Unit. He was arraigned before the Magistrates' Court together with two other accused persons facing a charge of public violence as defined in s 36 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. He pleaded not guilty and thereafter trial ensued.

It was the state's case that the appellant participated in the violence and looting which occurred at Puma Service Station near White House in Harare. In the state outline it was alleged that the appellant together with the other accused persons intercepted a Zimbabwe United Passengers Company (ZUPCO) bus which was on its way to the Central Business

District. Thereafter, they ordered all the passengers to disembark from it. After the passengers had disembarked from the bus, they burnt it. They proceeded to loot shops and pharmacies at the service station where they stole a variety of tablets, a 12-volt car battery and a blue Yamaha motor bike.

Police raided the appellant's house where they found the motor bike and 17 containers of tablets. In his defence, he claimed that the tablets belonged to his relative who suffered from mental illness as well as HIV. With regards the motor bike, he claimed that he had purchased it although he did not have an agreement of sale.

The court *a quo* found that if it was true that the tablets belonged to his relative, the appellant ought to have called them to testify. It also found that the appellant had claimed that there was an affidavit which proved that he purchased the motor bike but he had not produced it. After evidence was led the appellant was found guilty as charged. He was convicted and sentenced to sixty (60) months imprisonment with twelve (12) months suspended on appropriate conditions.

Dissatisfied by the decision of the Magistrates' Court, the appellant noted an appeal to the High Court. Pending the appeal, he applied for bail in the High Court. The court *a quo* dismissed the bail application. It held that there was overwhelming evidence which proved that the appellant had committed the offence thus proving that the intended appeal did not have good prospects of success. Irked by the decision of the court *a quo*, the appellant has noted the present appeal.

ANALYSIS OF THE FACTS AND THE LAW

This Court's approach to matters of this nature was stated in *S v Chikumbirike* 1986 (2) ZLR 145 (SC) at 146 F-G where BECK JA said the following:

“The next matter to be decided is whether this Court in hearing the appeal should treat it as an appeal in the wide sense, that is to say, that it is to be treated as if it were a hearing *de novo*. Once again that matter has been decided by the case of *The State v Mohamed* 1977 (2) SA 531 at 542 B-C where TROLLIP JA said that in an appeal of this nature the court of appeal will only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision.”

The same point was subsequently made by this Court in *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S) at 252E-F as follows:

“While the Judge President, in considering the appeal was at liberty to substitute his discretion for that of the magistrate on the facts placed before the latter, the present appeal is one in the narrow sense. The powers of this Court are, therefore, largely limited. In the absence of an irregularity or misdirection this Court has to be persuaded that the manner in which the Judge President exercised his discretion was so unreasonable as to vitiate the decision reached”.

See *State v Barber* 1979 (4) SA 218 (D) at 220E-G; *State v Chikumbirike* 1986 (2) ZLR 145 (S) 146F-G’.

The principle is therefore well established. It follows that in the present appeal, for the decision of the learned judge to be reversed, it must be shown that the learned judge committed an irregularity or misdirection, or that the manner in which he exercised his discretion was so unreasonable as to vitiate the decision made.”

Both in the court *a quo* and before this Court, the appellant makes the argument that since his co accused was granted bail it follows that he too ought to be granted bail. The court *a quo* correctly noted that the circumstances of the appellant and his co accused are different. Evidence was led to establish that the appellant was at the scene of the public violence. He was found in possession of stolen goods, that is the motor bike and the tablets.

In determining whether the appellant was entitled to bail it was necessary to determine his prospects of success in the main case. In the case of *Essop v S* (2016) ZASCA 114, the court in defining the term “prospects of success” held that;

“What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably conclude different to that of the trial court. In order to succeed, therefore, the appellant must convince this

court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

In *casu* there is overwhelming evidence against the appellant. As a result, the prospects of success of his appeal against conviction are slim. The appellant makes the argument that he was an innocent purchaser of the motor bike. Even if the court was to accept that he was an innocent purchaser he failed to account for the seventeen (17) containers of tablets found in his room.

When the appeal against refusal of bail was being heard, the appellant was asked where he got the tablets from. He said that he purchased them from the pharmacy for his uncle. When asked where the prescriptions for purchasing the tablets were, he replied that they were at home. He however failed to proffer any evidence that the tables belonged to his uncle.

The appeal against sentence also does not have good prospects of success. The appellant was employed by the Zimbabwe National Army under the Presidential Guard Unit. These are the people whom the public look up to for peace keeping instead of inciting public violence. Consequently, it cannot be said that the court *a quo* misdirected itself when it dismissed the appellant’s application for bail pending appeal.

The principle that the lesser the prospects of success the higher the risk of abscondment is applicable in this case. In *S v Kilpin* 1978 RLR 282 (A), it was pointed out that a court may well consider that the brighter the prospects of success, the lesser the likelihood of the applicant to abscond and vice versa. I fully associate myself with the above reasoning.

The applicant is serving a lengthy sentence and if granted bail might abscond. Due to the gravity of the offence, I find that the appellant might abscond if admitted to bail pending appeal.

In the absence of any misdirection by the court *a quo*, this appeal cannot succeed. In the result, it is ordered that:

‘The appeal be and is hereby dismissed with no order as to costs.’

Attorney-General's Office, respondent's legal practitioners