

MENDISON DUBE

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 13 FEBRUARY 2012 AND 16 FEBRUARY 2012

Mr Malinga for applicant
Mr. T Makoni for respondent

Bail Pending Appeal

MAKONESE J : This is an application for bail pending appeal .The matter was argued before me on the 13 February 2012 although the application was filed way back on 15 December 2011. The reason for the delay is partly because I requested for the record of proceedings because other than the notice of appeal and heads of argument for applicant and respondent there was scant information available upon which I could make a reasoned determination .

The applicant is a 42 year old male adult who was convicted on his own plea of guilty in respect of an assault as defined in terms of section 89 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He was sentenced to 24 months imprisonment of which 6 months were suspended for 5 years on condition of good behavior . The applicant has noted an appeal against sentence and argues that he has good prospects of success .

The brief facts are that on the 23rd September 2011 the applicant and complainant were sharing jokes when a misunderstanding arose . The appellant suddenly pulled a knife and stabbed the complainant once in the left side of the chest . The stab wound was 3 cm deep and the medical report describes the injuries as serious . Applicant has through his legal practitioner advanced the following arguments in support of his application;

The applicant is a family man and the breadwinner for his family

The applicant will not abscond if granted bail pending his appeal

The applicant has good prospects of success

The court *a quo* should have imposed community service instead of a custodial sentence

The applicant cited a number of decided cases that set out the principles applicable in deciding whether or not bail should be granted pending appeal. The main factors taken into account in such applications are;

- (a) The prospects of success on appeal, and,
- (b) The interests of justice i.e. will the admission of applicant to bail not jeopardize the interests of justice through abscondment - *S v Hudson* 1980 (4) SA 145; *S v Williams* 1980 ZLR 466 (AD); *S v Kilpin* 1978 RLR 282 (A) and *S v Manyange* 2003 (1) ZLR 21 (H)

It is now trite law that once an accused person has been convicted the approach to bail is different in that the onus automatically shifts to the accused to show that he ought to be granted bail pending the outcome of his appeal. It was held in the case of *S v Murimba HH_19/04* that the presumption of innocence no longer exists when a convicted person applies for bail pending appeal and in the absence of positive grounds for granting bail, the proper approach is that it will be refused especially when the person's guilt is no longer an issue and a substantial prison term is the usual sentence for the offence.

Mr Malinga appearing for the applicant did concede that he could not point to any misdirection or some defect in the proceedings of the lower court. He argued that the applicant deserves a much shorter sentence and that at the hearing of the appeal, so he argues, it will be urged that community service be imposed instead of a custodial sentence.

It is my considered view that there are no reasonable prospects of success on appeal. The sentence imposed is unlikely to be interfered with on appeal. The principle our courts rely on was well set out by HOLMER JA in the case of *De Jager and Another* 1965 (2) SA 616 at 628-9 where he stated;

"... a court of appeal does not have a general discretion to ameliorate the sentence of the trial court. The matter is governed by the principle. It is the trial

court which has the discretion , and a court of appeal cannot interfere unless the discretion was not judicially exercised...”

There can be no doubt therefore that in the absence of any misdirection or obvious irregularity or defect in the proceedings the applicant has a huge mountain to climb in proving that he is indeed a suitable candidate for bail pending appeal.

I am not persuaded that the applicant has any reasonable prospects of success on appeal, and, in the result I would dismiss the application.

*Messrs Job Sibanda and Associates, applicant’s legal practitioners
Criminal Division, Attorney General’s Office, respondent’s legal practitioners*