WILLARD MURUNGWENI
and
THE STATE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J.
HARARE, 1ST OCTOBER, 2013

Kamupira, for applicant
Ms *Fero*, for respondent

MATANDA-MOYO J. This is an application for bail pending appeal. The brief facts are that the applicant was arraigned before the Magistrates Court on a charge of assault as defined in s 89 of the Criminal Law (Codification and Reform Act) [*Cap 9:23*]. The applicant pleaded guilty to the charge and was sentenced to twelve months imprisonment, of which four months were conditionally suspended. The applicant noted an appeal against conviction and sentence. Pending the determination of the appeal, the applicant applied for bail on the following grounds;

(1) that the applicant will not abscond if admitted to bail,
(2) that applicant has good prospects of success on appeal in that;
    (a) the presiding magistrate erred in convicting the applicant on his own plea of guilt without explaining the essential elements of the offence for which the applicant was charged;
    (b) the presiding magistrate erred in convicting and sentencing applicant without proof of injuries sustained by the complainant;
    (c) the presiding magistrate erred in failing to consider the applicant's personal circumstances which were highly mitigatory;
    (d) the presiding magistrate erred in failing to grant applicant the opportunity to address the court in mitigation prior to sentencing him, and

(e) the presiding magistrate erred in failing to take into account the fact that the complainant had withdrawn charges against the applicant.

In considering an application of this nature, the court amongst other factors, considers the possibility of applicant absconding if given bail and whether or not applicant has good prospects of success on the main appeal see *State* v *Mutasa 1988* (2) ZLR 4(S). The principles governing the granting of bail after conviction are somewhat different from those governing bail before conviction. Where a person has already been convicted obviously the presumption of innocence is no longer applicable. A person who has already been convicted and sentenced, and has tasted incarceration is more likely to abscond if he has no prospects of success on appeal.

It is common cause that applicant pleaded guilty to assault. The applicant admitted to stabbing the complainant twice on the neck with a screw driver. The applicant also admitted that he intended to injure the complainant and that he foresaw that the complainant could be seriously injured. From the evidence on the record the appeal court is not likely to interfere with the conviction. Applicant's prospects of success with regard to conviction are slim to non existent. As regards sentence the applicant's counsel submitted that an appeal court is likely to interfere with the penalty imposed. He argued strongly that without a medical affidavit indicating the seriousness of the injuries sustained by the complainant there was no evidence that complainant suffered permanent injuries. Whilst it is correct that the medical affidavit was never tendered to show the extent of injuries suffered by the complainant, it is not the sole determinant factor. A look at the weapon used and the area the attack was directed at, would leave one with a view that the charge was understated. Taking all the factors into consideration, it would have been appropriate to charge applicant with attempted murder. An appeal court is not likely to be persuaded with the mere fact that there was no medical report in order to reduce the sentence.

It is apparent from the record of proceedings that indeed the magistrate took into consideration the fact that the accused was a first offender who pleaded guilty to the offence. The magistrate also considered that the complainant had indicated his desire to withdraw charges against the accused. However in this matter the magistrate indicated in his reasons for sentence that he was of the view that a lengthy imprisonment term was appropriate but given the fact that the complainant felt sorry for the accused, he was going to give a moderate term of

imprisonment. From a reading of the magistrate's reasons for sentence he considered all the mitigatory factors.

I am satisfied that applicant has no prospects of success on appeal as the appeal court is not likely to interfere with the penalty granted.

Accordingly the application for bail pending appeal fails and is dismissed.

Dondo and Partners, for applicant