

ADMIRE DHIYO
and
ALFRED ZENGEYA
and
GEORGE MANYAU
and
COSTA MACHIKA
and
TINASHE DUBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 28 November 2013 and 18 December 2013

Bail pending appeal

Ms R. Maphosa, for the applicants
E. Makoto, for the state/respondents

TSANGA J: This is an application for bail pending appeal. The five applicants were charged and found guilty of two counts of robbery as defined in s 126 of the Criminal law Codification and Reform Act [*Cap 9:23.*] On the first count, they received four years imprisonment of which one year was suspended on condition accused 1, 3, 4 & 5 restate the first complainant in the sum of **US \$2 250.00** through the clerk of court by 4pm on 30 November 2013.

On the second count, all five of the accused were sentenced to 5½ years imprisonment of which 2 years were suspended for five years on condition they do not within that period, commit an offence involving violence on the person of another or dishonesty for which they are sentenced to imprisonment without the option of a fine. A further three months was suspended on condition they restate the complainant in the sum of US 63. 66 via the clerk of court, Harare by 4pm on 31 December 2013.

On the first count the magistrate found that four of the applicants (with the exception of the second applicant) robbed one Tapera Saizi and stole cash from him amounting to

US \$13 500. Complainant had parked his car outside Jameson hotel with the intention of collecting stationery. The applicants are said to have parked their car beside him. Two were also said to be wearing police uniforms. Those in civilian clothes accused the complainant of dangerous driving and assaulted him. Complainant was shoved into their car on the pretext of being taken to the police station. Information led to the arrest of the first applicant, a police sergeant who then led the police to the arrest of the other applicants. With respect to count one, the complaint is said to have managed to identify four out of the five applicants. Three of the applicants were also identified by another witness with whom complainant was meant to have done business on that day and who witnessed the debacle leading to the robbery.

On count two, the applicants were found to have stopped and robbed one Purity Chikangaise. One of them who was in uniform introduced the others as detectives from CID on stop and search duties. She was handcuffed and shoved into a Toyota Gaia car that the applicants were driving. She was assaulted and robbed of \$300. The five applicants were arrested on 17 May 2013. Police apparel was also recovered from their car including some police identification cards from three of the applicants. On 19 May 2013 they were placed on a formal identification parade and the complainant is said to have managed to identify all of them out of 12 persons who were lined up.

The basis of the appeal against conviction, for which they seek bail, is that the identification parade was fraught with irregularities. On count one, the applicants claim to have been elsewhere other than the scene of the robbery and that their identification was flawed. On count two, they do not deny the encounter with the complainant but deny the robbery. In particular, they aver that it was not possible for the complainant to identify all complainants considering the duration of the robbery.

Ms *Maphosa* for the applicants relied on the case of *State v Mwanza Gomo* HH 21/23 in particular to argue that the State had not led evidence in the trial that a proper identification parade had been conducted. She insisted that because the identification parade was veiled in obscurity applicants have prospects of success on appeal.

The State opposes bail on the basis that the court did not err in convicting the applicants of both counts. In relation to count one the State maintains that the identification parade was properly carried out as the participants in the identification parade all wore similar clothing. In relation to count two, the State emphasises that the applicants did not

deny meeting the complainant on that day and therefore the issue of identification does not arise. Also the ordeal lasted between 15-20 minutes in broad day light such that complainant was able to recognise her assailants. It is the State's view that there are little prospects of success on appeal.

Factors to be taken into account in assessing cases of bail pending appeal include the following: prospects of the appeal succeeding; likelihood of abscondment; likely delay before the appeal can be heard and the right to individual liberty. See *S v Dzawo* 1998 (1) ZLR 36 (S); *S v Ncube & Anor* HB 04/03.

In examining prospects of success, while indeed mistaken identity can be a source of miscarriage of justice in cases involving the identification of multiple perpetrators, much depends on the totality of the circumstances in each case. It is stated in the case of *S v Jiya* 1991 (2) SA 52 "a prosecutor stands in special relation to the court and his paramount duty is not that of procuring a conviction but of assisting the court in ascertaining the truth". It must be borne in mind that the prosecutor, whose responsibility it was to prosecute the case, did so on the basis of consideration of the evidence from the police concerning the identification. It is unlikely that the prosecutor would have proceeded on the basis of a weak evidence linking the applicants to the charges preferred against them.

It is in relation to the first count that applicants all allege that to have been at different places on the given day. Sight must not be lost of the fact that in both cases the complainants interacted with the robbers in a manner which made it easier to identify them. With respect to both counts, particularly count two, the arrests and identification were made within a reasonably short time from the commission of the offence.

The totality of the circumstances do not seem to suggest that the applicants were wrongly identified or that the magistrate erred in convicting him. For these reasons the prospects of success on appeal appear minimal.

In the result, the application for bail pending appeal is hereby dismissed.

Thondhlanga & Associates, applicants' legal practitioners