

MICHAEL JAMBAWO
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGUJ
HARARE, 10 and 25 February 2015

Application for Bail Pending Appeal

B Pesanai, for the applicant
E Makoto, for the respondent

TAGUJ: This is an application for bail pending appeal. The applicant was convicted at Harare Magistrate Court on a charge of Fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

On 7 February 2014 he was sentenced to 42 months imprisonment of which six months imprisonment were suspended for 5 years on the usual conditions of future good behaviour. The remaining 36 months imprisonment were wholly suspended on condition that the applicant pays restitution to Guest and Tanner in an amount of \$ 18 000-00 through the clerk of court Harare on or before 30 April 2014.

The applicant failed to pay the full restitution by the given date. He managed to raise an amount of \$ 4 800-00 only. He appeared before a magistrate on two occasions requesting for further extensions of time to pay the restitution. His requests were granted. On 31 December 2014 he again appeared before a magistrate requesting for a further extension of time to pay. Unfortunately, this time his request was turned down. The magistrate ordered him to serve the alternative sentence.

The appellant appealed against the magistrate's decision to refuse him further extension. He applied for bail pending appeal against the magistrate's refuse to extent his time to pay. His application for bail was dismissed by the magistrate. In dismissing the application for bail the magistrate said-

“.....It is almost a year and accused still owes \$ 13 200 which is clear that he is labouring to

pay. He benefitted from the commission of the crime and should also have paid his dues in time.

This is not a bank loan but money which the complainant suffered prejudice and is not getting any interest. Applicant has been given several chances to pay up but has failed. That does not need any extrinsic enquiry. His failure is quite apparent and he will never extinguish his dues at the rate he is paying. There should be finality to any litigation and applicant cannot enjoy an indefinite period to pay. Serving the alternative is justified in the circumstances.

The application for bail pending appeal against the court a quo's refusal to grant further time to pay has no merit in fact and at law. It is stillborn and hereby dismissed."

The applicant has now appealed to this court against the court a quo's refusal to grant him bail pending appeal against the court a quo's refusal to grant him further extension of time to pay restitution.

The application is opposed by the respondent.

In an application of this nature the approach to be adopted is whether the magistrate misdirected himself when refusing bail. The appeal should be directed at the magistrate's findings. See *S v Malunjwa* HB – 34/ 03.

In my view, among the factors which the Court has to take into account when considering whether to admit an applicant to bail pending appeal or not in an application of this nature are the following-

- a) the prospects of success on appeal;
- b) the likelihood of defeating the due administration of justice.

In casu, the applicant is not appealing against conviction and sentence. The conviction and sentence are proper. What applicant is appealing against is the refusal to be granted bail pending appeal against refusal to extent time to pay restitution.

PROSPECTS OF SUCCESS ON APPEAL

The powers of Courts as to postponement or suspension of sentences are derived from s 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. I will quote the relevant subsections. Section 358 (2) (b) says –

“ When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may - pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order;.....”

The sentence in this case was suspended on condition the applicant pays restitution by

30 April 2014.

Subsection 5 gives directions to the magistrate on what to do in the event of a breach or failure to fulfil the condition of suspension of a sentence. It says-

“(5)....., if a magistrate has reason to believe whether from information on oath or otherwise, that a condition of any postponement or suspension made in terms of paragraph (a), (b) or (c) of subsection (2) has been contravened or that the offender has failed to pay a fine or any instalment thereof on a date fixed in terms of paragraph (c) of subsection (2), he may whether before or after the expiration of the period of postponement or suspension, order the offender to be broughtfor the purposes of subsection (7).”

Subsection (7) directs the magistrate on what to do once the defaulting party has appeared before him. It says-

“(7) When the offender is brought before the court in accordance with an order made in terms of subsection (5), the court may commit him to undergo the sentence which may then be or has been lawfully passed or,....”

The court therefore has discretion to further suspend or to commit the offender to prison. However, subsection (8) deals specifically with compensations. It says-

“(8) Where-

- (a) the condition or one of the conditions on which any period of imprisonment has been ordered to be suspended in terms of paragraph (b) of subsection (2) is that the offender pay by a specified date an amount of money to any person as compensation; and
- (b) before the date part of such amount has been paid in terms of order of suspension; and
- (c) solely because of the contravention of the condition specified in paragraph (a) the court, in terms of subsection (7), commits the offender to undergo the suspended period of imprisonment;....”

It is clear, therefore, that where only a part has been paid like in the present case, the court can still commit an offender to prison. This applies even where the offender had personally surrendered himself or had previously benefited from an earlier extension as long as the full amount has not been paid, See sub(s) (11) and (12).

In the present case the magistrate exercised his discretion judiciously after noticing that previous extensions yielded nothing. There was no misdirection committed by the court *a quo* in refusing further extension and refusing bail since there are no prospects of success in this case.

LIKELIHOOD OF DEFEATING DUE ADMINISTRATION OF JUSTICE

As noted by the court *a quo* it is almost over a year and a substantial amount is still unpaid. There is need to have finality to cases. In his bail statement the applicant indicated that he is a tobacco farmer who realises only \$ 5 000-00 per season. He has no assets of value.

It shows that it will take him several years to pay back. This is not in the interest of justice. If he cannot pay then he must serve the alternative sentence. The fact that he already restituted part of the money is an administrative issue that can be resolved by the Prison Authorities. It is not the duty of the magistrate to compute what the offender has to serve. That alone cannot be a basis for granting applicant bail pending appeal.

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

IEG Musimbe & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners.