

ARTWELL NYAKUDYA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
TSANGA J  
Harare, 3 April 2019 and 5 April 2019

### **Bail Pending Appeal**

*O Kondongwe*, for the applicant  
*T Mapfuwa*, for the state

TSANGA J: This is an application for bail pending appeal. The applicant was convicted on his own plea of guilty of contravening s 89 of the Postal and Telecommunications Act [*Chapter 12:05*]. He was sentenced to a mandatory 10 years imprisonment. He successfully applied for condonation of his late filing of his appeal which was granted. He now seeks bail pending appeal.

Applicant's counsel argues that he was convicted and sentenced on an improperly constituted charge in that s 89 (4) of the relevant Act (Post and Telecommunications) does not contemplate theft anywhere in the provision. Despite his guilty plea, the charge is argued to be improper since what was pleaded was theft and not that he had damaged telecommunication lines. As such, he is said to have high prospects of success on appeal in the absence of evidence of wilful damage or interference with telecommunication cables as envisaged in s 89 (4) of the relevant Act. Prospects of success and the risk of absconding are key considerations in an application for bail pending appeal. This is in addition to the right to liberty as well as considerations of the likely delay before the matter is heard.

The state is opposed to his application for bail pending appeal on the basis that he was properly convicted and sentenced in the absence of any special circumstances and therefore that there are no prospects of success on appeal.

The provision under which he was convicted and given the minimum sentence reads as follows:

**“89 Wilful damage to or interference with or theft of telecommunication lines and apparatus**

(4) Any person who—

(a) without lawful cause, the proof whereof shall lie on him or her, tampers with any cellular telecommunication or telecommunication apparatus constructed or adapted for use in transmitting or receiving a cellular telecommunication or telecommunication service, with the result that such service is interrupted or cut off; or

(b) without lawful cause, the proof whereof shall lie on him or her, destroys, injures **or removes any telecommunication line belonging to or used by a telecommunication licensee;** or

(c) **receives or takes possession of any telecommunication infrastructure material—**

**(i) knowing that it has been stolen; or**

(ii) realising that there is a real risk or possibility that it has been stolen;

shall be guilty of an offence, and if there are no special circumstances peculiar to the case as provided for in subsection (10), be liable to imprisonment for a period of not less than ten years.”

The provision clearly encompasses theft not just in its heading but more substantially in its body. He took possession of cables which he knew he had stolen. To “take possession” essentially is the act of taking something into one’s control, and, in this instance, without regard to ownership. The record shows that the facts of the matter were read to the applicant and that he agreed to stealing 3 kgs of telecommunications copper cables from the corner of Chelmsford and Aberdeen Road in Avondale. The outline of the state case was that he took advantage of copper cables exposed to the ground by Harare City Council workers who were repairing water pipes. He was seen stealing by someone who then alerted police. Section 89 (4) (b) makes it an offence to remove any such telecommunications lines used by a licensee whilst s 89 (4) (c) makes it an offence **to take possession of any telecommunications infrastructural material knowing it has been stolen.** The outline recorded that he actually stole the cables so he took into his possession stolen cables. The applicant agreed when the essential elements were put to him that he had no consent from Telone to take those cables. He admitted that he intended to deprive Telone permanently of those cables. He further admitted to knowing that it was unlawful. It is hard to see how these elements which were put to him and recorded do not fit in with the elements of s 89 (4) which I have outlined. The applicant stole telecommunication cables which offence is governed by the applicable Act in question that was used by the magistrate. He met the elements of the offence as envisaged in s 89 (4).

The fact that the applicant was granted condonation is also not a point that justifies him bail. Prosecutors and the courts are generally loathe to deny an applicant condonation unless it is manifestly unwarranted. Also the reasons for granting condonation generally hinge on the explanation tendered for the delay, the length of the delay and a preliminary assessment of prospects of success even if remote. However, it does not follow that because condonation has been granted bail is inevitable. Ultimately at the point that an application for bail pending appeal is made, the court places added scrutiny on prospects of success and whether a person is likely to abscond. As stated in *S v Manyanga* 2003 (1) 21 (H)

“..the decision to grant bail pending appeal cannot be based solely on the consideration that there are reasonable prospects of success on appeal. The applicant must go further and establish that there are positive grounds for granting him bail pending appeal and that the granting of bail will not endanger the interests of justice. This is so because the consideration of bail is in essence a balancing of two conflicting interests, namely the liberty of the applicant on the one hand and the proper administration of justice on the other. Where an accused has been convicted and sentenced, he is not as of right entitled to his liberty. He must prove his entitlement to it, taking into account the interests of justice and the integrity of the justice delivery system. The onus is on him to tip the balance in his favour.”

Herein there are no positive grounds for granting him bail pending appeal for the reasons explained above. In imposing the mandatory minimum sentence the court explained to him the meaning of special circumstances and its obligation to impose the mandatory minimum sentence in the absence of special circumstances. His explanation as to why he had committed the offence was that he was unemployed and wanted to use the cables to make baskets and fend for his family. The magistrate found that these were not special circumstances and imposed the minimum sentence.

To the extent that the courts have said that personal hardship does not amount to special circumstances, it is clear that the magistrate did not err at all in imposing the minimum mandatory sentence as the reasons given were not special in the manner envisaged by the legislature. This in reality an appeal occasioned by the harshness of the mandatory minimum sentence as opposed to any misdirection in findings or the law on the part of the magistrate. To the extent that the applicant thinks he has a fighting chance to argue on the theft elements he must prosecute his appeal whilst serving his sentence.

The application for bail pending appeal is dismissed.

*Dube Manikai and Hwacha*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners