KINOS MUCHADUBWA
and
ARTWELL CHAOLA
and
KUDAKWASHE CHAOLA
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 5 July 2019 & 10 July 2019

Bail

A. F Bimha, for the applicants
K. H Kunaka, for the respondent

FOROMA J: The three applicants were charged and tried in the Magistrate Court of contravening s 37 of the Criminal (Codifcation and Reform) Act [*Chapter 9:23*] i.e. participating in a gathering with intent to promote public violence breaches of peace or bigotry. They were all convicted as charged despite their pleas of not guilty and each one of them was sentenced to 4 years imprisonment one year of which was suspended for 5 years on condition that each of them does not within that period commit any offence or a crime against public order for which on conviction he would be sentenced to imprisonment without the option of a fine. Each of them was therefore sentenced to an effective 3 years imprisonment.

The three of them noted an appeal against both conviction and sentence. They have appeared before this court seeking bail pending appeal which the State has vigorously opposed.

The applicants presented the same defence at their trial namely an *alibi* claiming that on 16 January 2019 when at a place called the Grid near a place called Mverechena Business Centre Domboshava a mob that was protesting violently blocked the road with burning tyres, stones, logs

demanding money from motorist requiring passage they were at their home at Zimbiru village Domboshava.

Other than testifying for themselves and in support of each other's *alibi* defence only one witness Bright Nyabusha (whose evidence the court disbelieved) was called in support of the *alibi.*

The State called 2 members of the ZNA as witnesses before closing its case. The court in its well-reasoned judgment justified its acceptance of these 2 witnesses' testimony. The court found the 2 witnesses to have had no motive to falsely implicate the applicants. In summary the witnesses who the court found to have corroborated each other testified that they were assigned to go to a place called the Grid at Mverechena where there was a gathering of protesters who were blocking the road with some logs and stones and burning tyres. Their mission was to weed out those participating in the violence. Whilst at the Grid they observed the rowdy crowd from a safe distance. Whilst at a safe distance an army truck arrived causing the crowd to disperse and disappear into the bush. The soldiers in the truck cleared the road of rubble used to block the road and left the scene. Once the army vehicle had left the crowd returned and continued with the blocking of the road with rocks, burning tyres and demanding money from motorists intending to pass. It was at this time that both witnesses took advantage of the commotion and sneaked into the huge crowd and started making their observations as to who were the ring leaders or active participants in the disturbance taking place unnoticed as they were dressed in civilian clothes in order to disguise their presence in the crowd. It was in the course of their undisclosed mingling with the crowd that they noted the accused's names. The accused unguarded called each other by name as they either burnt the tyres or cleared the road to grant passage to motorists who paid for their free passage. One of the witnesses actually wrote down the accuseds names and when they left the rowdy gathering they gave the names to their superiors who gave the names of the police who when the situation calmed down country-wide arrested the accused persons whom the 2 witnesses were asked to identify at Chinamhora Zimbabwe Republic Police.

The court was satisfied that the accused's *alibi* defence could not be believed as it reasoned that the two State witnesses were not known to the accused persons and had no reason to falsely implicate them by name except the accused were indeed present at the scene at the Grid on the day in question.

There is no evidence on record that an identification parade was conducted at which the applicants were picked by the State witnesses.

It is trite that the requirements for an applicant to satisfy before the court can grant them bail pending appeal are:

(i) the applicant must show that the appeal has reasonable prospects of success

(ii) the interests of justice will not be endangered if the applicant is released on bail. Put differently the applicant must allay any fears that he may not turn up to serve his sentence should his appeal either not succeed or only partially succeed so that a portion of the effective prison term has to be served.

See *State* v *Williams 1*980 ZLR 466. See also *Peter Chikumba* v *The State*. While a bail court is not an appeal court and is not required to determine the appeal itself, it is required to assess whether the appeal is free from predictable failure or put differently that the appeal is arguable in order to exercise its discretion in favour of granting applicant's application for bail or not. I have perused the trial record in detail in order to assess whether the grounds of appeal put forward by applicants have some merit in order to determine whether the appeal is arguable. The judgment of the court *a quo* is fully supported by the evidence on record that the applicants were properly placed at the scene of crime. I do not therefore consider that the applicants have any reasonable prospects of success as regards their attempts to assail the conviction. The matter turned on credibility which is a province of the court *a quo* – *State* v *Ndhlovu* 1994 (2) ZLR 410.

As regards the attack on the sentence the applicants have not shown that the court *a quo* misdirected itself. Applicants have expressed the view that the sentence is so harsh it induces a sense of shock especially in light of the fact that the applicants are all first offenders. They need to go beyond that and show that the court *a quo* misdirected itself in its approach to sentence. The sentence may be harsh but the suggestion that a fine would be appropriate would be a travesty of justice. In the circumstances I do not regard applicants' prospects of success against sentence to be reasonable either.

In view of the assessment that the appeal is not one with reasonable prospects of success it is unavoidable to conclude that the risk of abscondment is too high for the court to exercise its discretion in favour of granting the applicants bail pending appeal.

The court is cognisant of a possible delay in the finalization of the appeal bearing in mind that each one of the three applicants will be entitled to a one third remission of his effective sentence. In light of the conclusion I have come to regarding the prospects of success it is only proper that the applicants prosecute their appeal whilst serving their sentence.

In the circumstances the applicants' application for bail pending appeal is dismissed.

Honey & Blanckenberg, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners