PRINCE NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 14 AND 21 FEBRUARY 2013

M. Ndlovu for the applicant
J.L. Mhlanga for the respondent

Bail pending appeal

KAMOCHA J: This is a chamber application for leave to appeal. The applicant appeared in the Magistrates' Court on 22 January 2013 facing a charge of contravening section 36 (1) (c) as read with section 36 (1) (j) of the Immigration Act [Chapter 4:02] (assisting border jumpers). He pleaded guilty and was found guilty as charged.

The court then sentenced him to 24 months imprisonment of which 6 months imprisonment was suspended for a period of 5 years on the usual conditions of future good behaviour.

Aggrieved by the sentence imposed by the trial court, he filed an appeal against it. He then applied for bail pending the appeal he had noted. His application found favour with the state's representative who sought to persuade the court to grant it.

However, the court held the view that the concession by the state counsel was misplaced and not properly made and dismissed the application.

The appellant is aggrieved by the decision of this court to refuse him bail pending appeal and seeks the leave of this court to prosecute an appeal against that refusal.

Are there any prospects of success in the appellant's appeal? There is need to examine the circumstances giving rise to this matter before an answer can be arrived at.

The applicant lives or sometimes lives in the border town of Beitbridge at number 854 Dulibadzimu Township. He owns or has unlimited access to a Toyota Quantum vehicle registration number XYX 505 GP. It should be noted that the vehicle is registered in the Gauteng Province of South Africa.

On 21 January 2013 the applicant loaded the said vehicle with 11 passengers who all did not have passports. Seven of them were children while 4 of them were adults. He admitted in court that he knew that those passengers did not have travel documents when he assisted them to exit Zimbabwe to South Africa. He, however, ran out of luck and was intercepted and arrested by police before accomplishing his mission.

He appeared in court at Beitbridge the following day and pleaded guilty. The trial court took into account what the accused told it in mitigation. The fact that the accused was a first offender who pleaded guilty was also taken into account.

I pause to observe that not much weight should be attached to his plea of guilty as he was caught *in flagrante delicto.* He had no choice in the matter but to plead guilty.

The trial court held the view that a custodial sentence was the only suitable form of punishment in the circumstances of this matter. The applicant had assisted a large number of people to illegally cross into South Africa including minors. There were 7 children and 4 adults. Further, the offence was prevalent at the border town. The court is at the border town and is well placed to gauge the prevalence of the offence. All such cases are handled by that court. The court's conclusion that the offence is prevalent is supported by the fact that the applicant assisted 11 people to illegally cross from Zimbabwe to South Africa on this trip alone. The trial magistrate was entirely correct in holding that adequate deterrent sentences ought to be meted against those caught committing the offence and further held a custodial sentence was the only appropriate form of punishment in the circumstances of this case.

It admits of no doubt that the applicant is well known for illegally assisting border jumpers. That is why on that day alone 11 different people individually approached him for that illegal service which he was ready to provide and did it at a large scale. A beginner would not have started with a full load or nearly a full load of people illegally leaving Zimbabwe to enter South Africa. A beginner would have started with just one or two people.

The offence committed by the applicant is viewed in a very dim light by the Legislature which provides a punishment in section 36 (1) (j) of the Act a fine not exceeding $3 000 or imprisonment not exceeding 10 years or both such fine and such imprisonment.

Having concluded that a custodial sentence was the only suitable form of punishment in this particular case the court a quo properly exercised its discretion and imposed the sentence that the applicant complains of. The sentence is within the court's power and is nowhere near excessiveness.

In the result, it seems to me that there are no prospects of success in the applicant's appeal and I would, consequently, dismiss his application for leave to appeal against this court's refusal to grant him bail pending appeal.

Mlweli Ndlovu & Associates, applicant's legal practitioners
Attorney General's Office, respondent's legal practitioners