BLESSING MAWOKO
and
TINASHE MAWOKO
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 3 February 2015

APPLICATION FOR BAIL PENDING APPEAL

T Machaka, for the applicants
Mrs F Kachidza, for the respondent

TAGU J: After reading documents filed of record and hearing argument, I gave an ex-tempore judgment and dismissed the application for bail pending appeal. I have been asked for written reasons for that decision. The applicants intend to appeal against my decision. These are the reasons.

The applicants were convicted after a fully contested trial of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They were each sentenced to 15 years imprisonment of which five years imprisonment were suspended for five years on the usual condition of future good conduct. They were to serve an effective 10 years.

The facts were that on 24 August 2014 at about 2100hrs the complainant, who was employed by the Ministry of Agriculture as a Goromonzi District Head of Department for Irrigation, was riding his motor cycle along Old Harare – Murewa road. He saw stones blocking the road. He stopped his motor cycle and started to remove the stones from the road. Whilst removing the stones, the two applicants emerged from the right side of the road. They grabbed the complainant by the neck and tripped him. They assaulted the complainant with open hands, fists and booted feet several times all over the body. The second applicant

produced a knife from his pocket and threatened to stab the complainant. Acting in common purpose they covered the complainant's face with a sack and dragged him into an abandoned house near the road where they further assaulted him and left him. Before leaving him they stripped the complainant naked and stole his two cell phones, a G- Tel A7041 and a ZTE Econet cell phone as well as cash amounting to $50-00. Later the applicants returned and threw back the G-Tel cell phone at the complainant. They went to the motor cycle where the complainant overheard them arguing whether to deflate the tyres or to take the motor cycle with them. Finally they decided to leave it but returned to the complainant for unknown reason but failed to locate him since the complainant had crawled out of the house and hid at a nearby bush. They then went away.

The complainant sustained three fractured ribs, abdominal and spleen injuries and was treated in Harare. On 1 September 2014 the complainant managed to make a report at Juru Police Station leading to the arrest of the two applicants. Property valued at $65-00 was stolen and nothing was recovered.

In their notice of appeal the applicants attacked the decision of the trial court on the basis that-

(1) the applicants were not positively identified;
(2) the report was made late after a week;
(3) the court relied on the evidence of a single witness;
(4) the court relied on the medical report which is not consistent with someone who was stabbed; and
(5) the sentence was too harsh so as to induce a sense of shock.

The application for bail was opposed by the respondent.

Both counsels were in agreement on the principles that govern applications of this nature. The principles were clearly outlined in the case of *S* v *S Dzawo* 1998 (1) ZLR 536 (SC) as follows-

a) Whether there are prospects of success on appeal.
b) Likelihood of abscondment.
c) Rights of an individual to personal liberty.
d) Likely delay before the appeal is heard.

I will deal with each of the principles.

The applicants contented that their conviction was unsafe and that they have bright prospects of success on appeal. The respondent on the other hand submitted that save for

denying identity, the circumstances of the identification and the features of identification were not disputed by the applicants. Hence there are no prospects of success on appeal.

In *casu*, it is not in dispute that the applicants and the complainants knew each other prior to the commission of the offence. It is trite that a great degree of cautious approach is required where the evidence of identification is dependent upon the testimony of a single witness. This "precautious" approach is necessitated because the identification of an accused person is a matter notoriously fraught with error. It is an area wherein the potential for honesty mistake looms large. This was observed by GUBBAY JA (as he then was) in *S* v *Ndlovu & Ors* 1985 (2) ZLR 261 (S) at 262, *S* v *Dhliwayo & Anor* 1985 (2) ZLR 101 (S).

In the present case, as I stated above, it is not disputed that the applicants and the complainant knew each other before. Their defence is merely that they were not present at the scene of crime. Not only did the parties know each other before, but they even talked to each other at close range. The area was well lit by lights from the motor cycle. One of the applicants even remarked " aaah it's Gurumombe" to the complainant. When they were arguing between themselves the complainant was hearing their voices. This meant that the complainant saw and recognised the applicants and the applicants also equally saw and recognised the complainant. There was therefore no issue of mistaken identity.

As regards the issue of the court's reliance on the evidence of a single witness, I found no fault with that since it is competent for a court of law to convict on the evidence of a single credible witness in terms of s 269 of the Criminal Procedure and Evidence Act [*Chapter 9.07*].

On the issue of the report having been made a week later there is nothing untoward since the complainant had sustained serious injuries and had to be hospitalised in Harare. The injuries were confirmed by the medical report. The injuries were said to have been caused by a blunt object. The court was not at fault at all to rely on it.

Coming to the issue of the sentence, the sentence is within the range of sentences imposed by this court in respect of offences of this nature. It does not induce a sense of shock at all. See *S* v *Ndlovu* HB 62/04. Even if the court is to interfere with the sentence, it will be a slight reduction. The applicants cannot expect a non- custodial sentence. See *S* v *Chimone* HH 327/83. Therefore, there is a need for the applicants to prosecute their appeal while serving. The mere fact that the sentence may be reduced is not a basis for admitting the applicants to bail pending appeal. See *S* v *Williams* 1980 ZLR 466 (AD). In my view there are no prospects of success on appeal.

The applicants were sentenced to an effective sentence of 10 years. The offence itself was a serious offence which involved premeditation and planning. By blocking the road the applicants intended to rob whoever was to appear first at their trap. Now that they know their fate, which is a long term of imprisonment, this may induce them to abscond. There is therefore, a high risk of absconding if released on bail.

As to the right of an individual to liberty, the applicants have been convicted. The presumption of innocence has fallen away. Their guilty has been proved beyond a reasonable doubt. They are not entitled to be released on bail as of right.

Lastly, on the likely delay before the appeal is heard, this is no longer applicable since appeals are now being expeditiously processed. They have to prosecute their appeal while serving.

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

Pundu & Company, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners