NDABA SYDNEY

AND

MANZONZA PINIEL

AND

GOROMONDO MISHECK

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO20 JANUARY 2014 AND 30 JANUARY 2014

Ms *P. Mvundla* for the appellants
Ms *A. Munyeriwa* for the respondent

Bail Application

MOYO J: This is an application for bail pending appeal.

The appellants were convicted of contravening Section 36(1) (c) of the Immigration Act [Chapter 4:02]. They were each sentenced to 2 years imprisonment of which 6 months imprisonment was suspended for 5 years on condition that they did not commit any offence involving contravention of Section 36 (1)(c) of the Immigration Act.

Dissatisfied with the sentence appellants then noted their appeal. The grounds of appeal are that:-

(1) The court *a quo* erred in disregarding the option of community service and not giving any reason why the option of community service was not appropriate.

(2) The court *a quo* erred and misdirected itself in not handing down a reasoned judgment in opting for the form of punishment it did over the other forms of punishment.

(3) The court *a quo* misdirected itself in failing to consider the effect of community service as a rehabilitative and constructive activity especially to first offenders.

(4) The court *a quo* misdirected itself in failing to consider the effect of a plea of guilty and by failing to specify to what extent the plea of guilty had reduced the sentence.

(5) The court *a quo* misdirected itself in over-emphasising the issue of deterrence, in disregard to the mitigatory factors including that the Appellants were first offenders, that Appellants pleaded guilty, that Appellants were family people and were gainfully employed.

It is trite law that in an application of this nature, the Appellants must show:-

(a) that he has prospects of success on appeal,

(b) that there is no risk or likelihood that he may abscond,

(c) that the likely delay in the prosecution of his trial be such that retaining him in custody pending appeal would not be in the interests of justice.

The appellants were first offenders, who pleaded guilty and it is important to note that there is no absolute rule that first offenders should not be imprisoned. Refer to *S v Venganayi* HH 52/89.

I am alive to the fact that there is a series of judgments which have emphasised that the courts should consider other forms of punishment such as community service especially where the sentence is 24 months or less.

I am not persuaded that the courts are strictly bound by such to an extent that the trial court is stripped of its discretionary powers in assessing the appropriate sentence. The appeal court would only interfere with the sentence imposed if there is a misdirection on the part of the trial magistrate. Refer to *S v Ramushu and others* SC 25-93, *S v Nhumwa* SC 40-88.

I am not satisfied that there are prospects of success on appeal more so that this court has dealt with similar cases on appeal and such sentences have been upheld. The appellants' prospects of success are dim and the likelihood to abscond increases since it hinges on the prospects of success. Again, the lesser the chances of an appeal court interfering with the sentence imposed, the more difficult it is for the appellants to substantiate the possibility of prejudice being suffered as a result of the likely delay in the prosecution of the appeal.

I accordingly decline to exercise my discretion in favour of the appellants as already stated herein, this would not be in the interests of justice.

The application is accordingly dismissed.

D. W. Mhiribidi and Company, appellants' legal practitioners

Criminal Division, Attorney General's office, respondent's legal practitioners