HB 168-18
HCB 110/18
XREF HC BYO 717/18
XREF HCA 49/18

PRINCE SIBANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 21 JUNE 2018 AND 28 JUNE 2018

Bail Appeal

S Siziba for the appellant
State in default

MATHONSI J: After hearing submissions from *Mr Siziba* who appeared for the appellant I admitted the appellant to bail pending appeal and said the reasons for doing so would follow. I took that course of action because the state filed opposition to the appeal but did not appear for the hearing. I therefore had to consider the appeal on the merits in the absence of a representative from the state.

It is apparent that the state, though opposed to the bail appeal, has not taken the matter seriously at all when it is one involving the liberty of an individual. I say this because despite knowledge of the set down, the state did not send an officer to appear before me. The registrar took the trouble to telephone *Mr Mabaudhi* a senior officer at the National Prosecuting Authority to remind the state of the set down and I am advised that only then did he advise that *Ms Ngwenya* who filed opposition was indisposed. Upon being asked to send another officer for the hearing he indicated that they were all committed elsewhere. This hearing then proceeded in the absence of the state. Maybe there is a reason why the state behaved like it did.

This bail appeal is being opposed for emotional reasons. I say so because in opposing the application the state has conceded that the trial court did not consider community service as a form of punishment at all even though it settled for an effective imprisonment term of 9 months

which falls squarely within the community service grid. Notwithstanding that the states contention is that what is clearly a misdirection on the part of the lower court should be ignored because the girl child should be protected from sexual abuse especially by those in authority. To do so, custodial sentences should be imposed to show accused persons and society at large that the crime will not be tolerated. That has never been the consideration in an application for bail pending appeal.

The appellant is a 34 year old primary school teacher at Lushabe School in Nyamandlovu. He was arraigned before a magistrate at Bulawayo charged with indecent assault as defined in section 67 of the Criminal Law Code [Chapter 9:23]. Although he pleaded not guilty, he was convicted following a full trial and sentenced to 12 months imprisonment of which 3 months imprisonment was suspended for 5 years on condition of future good behaviour. He has appealed against both conviction and sentence which appeal is yet to be determined by the appeal court.

Pending determination of the appeal he approached the trial magistrate seeking his admission to bail pending appeal arguing that his appeal enjoyed bright prospects of success. As such he should be admitted to bail. The application was opposed by the state. The court did not say much. After agreeing with the state that the appeal against conviction had no prospects of success because there was overwhelming evidence against the appellant the court concluded that:

> "Coming to the issue of abscondment, the court indeed noted that the accused (now the applicant) was abiding by the bail conditions during trial, however the situation has change, the defence highlighted that he has technically lost his job, which the court feels that it may make him to realize he has nothing to lose if he escapes he may therefore be induced to escape whilst his appeal has not been finalized. Having said this the court will have the application dismissed by the court."

In the same way that the court *a quo* completely ignored alternative sentencing options when it assessed sentenced at the conclusion of the trial, it also overlooked that the appeal was also noted against sentence as well. In fact, the court had the benefit of the appellant's grounds of appeal filed on 23 April 2018 when it considered the bail application and even referred to it. In that appeal the appellant had taken issue with the court's failure to consider "other alternative

forms of punishment." This was an open invitation for the court to apply its mind to that aspect of the appeal and not just the appeal against conviction.

The appellant has now approached this court on appeal seeking his admission to bail pending appeal. What I consider to be the main thrust of the appeal is contained in paragraph 4.2 of the appellant's statement namely:

> "4.2. The learned trial magistrate grossly erred at law in failing to appreciate that there was a high likelihood that the appellate court could interfere with the appellant's custodial sentence by substituting it with a non-custodial sentence in the form of community service in line with the sentencing trend in cases where custodial sentences of twenty four months and less are involved. It is notable in the matter in *casu* that the learned magistrate never addressed her mind to the suitability or otherwise of community service as the appropriate sentence especially considering that the offence has an option of a fine."

In an application for bail pending appeal it is true that the applicant would have lost the benefit of the presumption of innocence as he or she would have been proven guilty. However it is the constitutional right of every convicted person to contest the conviction and seek recourse to a higher court by way of an appeal. The relevant considerations therefore would be the prospects of success of the appeal and the interests of justice, the proper approach being to allow liberty to an applicant only where that can be done without any danger to the administration of justice. See *S* v *Williams* 1980 ZLR 466; *S* v *Benator* 1985 (2) ZLR.

Consideration of a bail application pending appeal zeros around the prospects of success on appeal because invariably there would be a risk of abscondment which affects the administration of justice where there are no prospects of success on appeal. An applicant who knows he or she is unlikely to succeed is likely to be motivated to take flight to avoid serving time in custody. See *S* v *Ndlovu* HB 267/16. In that regard, success on appeal is not restricted only to the appeal against conviction but extends to the appeal against sentence as well. For a start, it occurs to me that the risk of abscondment to avoid serving time diminishes where even the effective prison term itself is not lengthy but a short one as in the present case. It is not within human experience that a person who knows he or she will serve a prison term of less than a year like 9 months which, with remission would be even less, would want to relegate himself to

a fugitive from justice forever by absconding. Of course where the prison term is lengthy the temptation to take flight also increases.

Related to that is the need, in the interests of justice, to release an applicant for bail pending appeal where it is apparent that by the time they have their day in court on appeal, they would have completed serving the effective prison term. It is undesirable to keep a person in prison to such an extent that their right of appeal is completely negated and they would have no motivation to prosecute the appeal having served the sentence.

In this case there was a misdirection on the part of the sentencer in that she completely ignored alternative forms of sentence. This court has repeatedly stated that the moment the trial court settles for an effective imprisonment term of less than 24 months, even more where it is less than 12 months, that relegates the offence to a less serious one, in which event it is required to inquire into the suitability of community service as an option where the accused person is a first offender. If, following such inquiry, the court is still of the view that community service is inappropriate, it should record both the inquiry and the reasons for rejecting it. It is not open for the court to merely ignore that procedure because it has its eyes fixed on a prison term. See *S* v *Antonio and others* 1998 (2) ZLR 64 (H).

The appellant is a first offender who was sentenced to an effective 9 months imprisonment. The court was required to inquire into the suitability of community service. As it did not, this was a misdirection which then brightens his prospects of success on appeal. The appeal court will be a large regarding sentence even though ordinarily sentencing is the domain of the trial court.

In the result, it is ordered that:

1. The appellant be and is hereby admitted to bail pending appeal on the following terms and conditions:

(a) He deposits $100-00 with the registrar of the High Court Bulawayo.

(b) He resides at house number 2174 Nketa 8 Bulawayo until the appeal is finalized.

(c) He reports at ZRP Tshabalala once every week on Fridays between the hours of 0600 hours and 1800 hours until the appeal is finalized.

Sengweni Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioner