JACOB MUTANDAURWI
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 15 November 2013

Application for bail pending appeal

E Mandegere, for applicant
T Mapfuwa, for respondent

TAGU J: This is an application for bail pending appeal against sentence only. The applicant was convicted on two counts of stock theft as defined in s 114 (1) (a) of the Criminal Law (Codification And Reform) Act [*Cap 9.23*]. He pleaded guilty to both counts and was sentenced to 9 years imprisonment on each count on 10 September 2007 and is serving an effective sentence of 18 years imprisonment. The applicant successfully applied for condonation of late noting of his appeal which was granted by ORMAJEE J on 23 March 2011 in case No. 1410/09. He has since filed his appeal against sentence under CA1103/13.

The applicant has since finished serving the first 9 years for the first count and is now serving the 9 years for the second count. He now seeks for bail pending appeal in respect of the remainder of the sentence. His contention is that he has prospects of success on appeal and that he would not abscond if released on bail. He seeks to be released on bail on the conditions that he deposits an amount of $50. 00 with the Registrar, High Court, Harare, that he resides at No. 1 Hillview, Lalapanzi until the finalisation of this matter and not to interfere with witnesses until finalisation of the matter.

He cited the following authorities as a basis for his application -

"(a) *State* v *Tengende & 7 Others* 1981 ZLR 445 (S)

(b) *State* v *Benator* 1985 (2) ZLR 205 (AD).

(c) *State* v *Kiplin* 1978 ZLR 282 (AD)

(d) *State* v *Williams* 1980 ZLR 446 (AD)"

In his grounds of appeal the applicant says:

"1. The Honourable Court grossly misdirected itself in sentencing the appellant to 18 years imprisonment.

2. Further the Honourable Court ought to have sentenced the appellant to 18 years to run concurrently."

The Appellant prayed that the sentence be set aside and in its place the following be entered- "That the sentence of 18 years to run concurrently".

The counsel for the respondent opposed the application. He submitted that the court *a quo* was correct in not ordering the sentence to run concurrently in view of the case of *S* v *Gwarega* HBv35/13. He further submitted that there was no misdirection on the part of the court *a quo* and that the applicant enjoys no prospects of success on appeal. He therefore prayed that this application for bail pending appeal be dismissed. In *S* v *Gwarega supra* as regards ordering sentence to run concurrently in stock theft cases CHEDA J had this to say –

> **"…**The mandatory sentence cannot be interfered with in a manner that effectively reduces or removes the sting of a court in that manner."

However, the applicant countered that argument by referring to the cases of *S* v *Huni & Others* 2009 (2) ZLR 432 (H) and *S* v *Pearce* 1974 (2) SA 37 at 38 A –B. Where BEADLE CJ said-

> "I draw attention to the fact that sentences on two separate counts each carrying a minimum sentence of imprisonment can, and often are, made to run concurrently with each other, and a portion of the sentence of imprisonment on a minor offence can and is ordered to run concurrently with a minimum sentence of imprisonment imposed on a more serious offence."

Upon perusal of the record it became clear that on 28 July 2007 the applicant proceeded to the kraal of one Nellie Madzinga and took out one ox and went away unnoticed. He slaughtered the ox. On 3 September 2007 one Tichadini was found with fifty kilograms of dried meat. He indicated he was given the meat by applicant. On 4 September 2007 the applicant admitted having stolen the complainant's beast. That formed the basis of the first count. Then on 6 September 2007 the applicant again admitted having taken a Brahman cow from lalapanzi area and slaughtered it. He then showed the police where he had hidden the

carcass i.e. the hooves and the hide in a Blair toilet. That formed the basis of the second count committed sometime in the year 2007.

The main points that are taken into account in such applications for bail pending appeal are:-

(a) The prospects of success on appeal, and
(b) The interests of justice i.e. will the admission of applicant to bail not jeopardize the interests of justice through abscondment –*S* v *Hudson* 1999 (2) SACR 431*; S* v *Williams* i980 ZLR 466 (AD); *S* v *Kilpin* 1978 RLR 282 (A) and *S* v *Manyange* 2003 (10 ZLR 21 (H).

In the **kilpin** case *supra,* the court pointed out that the principles governing the granting of bail after conviction were different to those governing the granting of bail before conviction. On the one hand, where the person has not yet been convicted he is still presumed innocent and the courts will lean in favour of granting him/her liberty before he/she is tried. On the other hand, where he/she has already been convicted the presumption of innocence falls away.

In *casu*, the applicant was convicted of two counts of stock theft on his own plea of guilty and has so far served half of the sentence. Therefore, the presumption of innocence no longer operates in his favour. He now has a heavy onus to discharge and to show that he is a good candidate deserving to be released on bail pending his appeal. Here the prospects of success on appeal should be balanced against the interests of the administration of justice. The less the chance of success on appeal, the greater the chance there is of the convicted person absconding.

In this case the sole issue to be decided on appeal is whether or not the court a quo grossly misdirected itself in sentencing the applicant to a total of 18 years on two counts of stock theft and failing to order that the sentence on one count should run concurrently with the sentence on another count. In short it a question of whether the court *a quo* failed to exercise its discretion judiciously.

The offences for which the applicant was convicted of carry a mandatory minimum sentence of nine years imprisonment per count unless the court makes a finding that there are special circumstances why the mandatory minimum sentence should not be imposed. To that effect s 114 (2) (a) of the Criminal Law (Codification And Reform) Act [*Cap 9.23*] provides that:-

" Any person who –

(a) Takes livestock or its produce –

(1) Knowing that another person is entitled to own, possess or control the livestock or its produce or realising that there is a real risk or possibility that another person may be so entitled , and
(2) Intending to deprive the other person permanently of his or her ownership, possession or control, realising that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership , possession or control,
or
(b)……
(c)……
(d)……..
Shall be guilty of stock theft and liable –
(e) if the stock theft involved any bovine or equine animal stolen in the circumstances described in paragraph (a) or (b), and there are no special circumstances in the particular case as provided in subsection (3), to imprisonment for a period of not less than nine years or more than twenty-five years, or……."

In *casu*, no special circumstances were found and so the applicant faced imprisonment for a period of not less than nine years in respect of each count. The approach by the court a quo was therefore proper. The magistrate ought as he then did, to have passed individual sentences for each count. He therefore exercised his discretion judiciously and followed the proper sentencing principles. The options available to the court *a quo* would have been to either order the applicant to serve the total of 18 years as it then did, or to order that one count run concurrently with the other if the court a quo felt an effective 18 years imprisonment was too harsh. But the magistrate felt the sentence was adequate.

In *S* v *Mundowa* 1998 (2) ZLR 392 (H) Court held that:-

"it is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed if the sentence complies with the relevant principles even if its severer than one that the court would have imposed sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court."

In *S* v *Narker* and another 1975 (1) SA 583 the court again said –

"in every appeal against sentence the question is whether it can be said that the trial court exercised its judicial discretion improperly. Bearing in mind that reasonable men may differ in the matter of sentence, a test to be applied, in the absence of

misdirection or irregularity, is whether the sentence imposed appears to the court of appeal to be disturbingly inappropriate".

In view of the above reasons the court *a quo* did not grossly misdirect itself in sentencing the applicant as it did. I am not convinced that the applicant has prospects of success on appeal. Since he has served the greater part of his sentence the chance of him absconding if granted bail is very high coupled with lack of prospects of success on appeal. The applicant is not a good candidate for bail pending appeal.

For the above reasons the application for bail pending appeal is dismissed.

Kadzere, Hungwe & Mandevere, applicant's legal practitioners
Criminal Division, Attorney-General's Office, respondent's legal practitioners