

WILLARD GUMBITI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 18 SEPTEMBER & 20 SEPTEMBER 2012

Mrs S Matimba for the applicant
Mr L Maunze for the respondent.

Bail pending appeal

CHEDA J: This is an application for bail pending appeal following a conviction of applicant by the magistrate court sitting at Beitbridge.

The brief facts of the matter which were agreed to by the applicant are that applicant is a man of 40 years and unemployed. On the 2nd of June 2011 he was given \$2300-00 to pay duty to Zimbabwe Revenue Authority (ZIMRA) for a motor vehicle which was being imported by the complainant. Instead of paying duty he took the money and disappeared. He was later apprehended and was subsequently arraigned before the court whereat he was charged, pleaded guilty and was sentenced as follows:

“5 years imprisonment of which one year (sic) was suspended on condition accused does not during that period commit an offence involving fraud and for which he is sentenced to imprisonment without the option of a fine. A further 1 year (sic) is suspended on condition accused resitutes Shupikai Madzingwa of 1450 166 Close Budiro Harare in the sum of \$2 300-00 through the Clerk of Court Beitbridge on or before 20th of November 2011.”

It is his argument through his legal practitioner *Mrs Matimba* that although he was given time to retribute, the restitution period was far too short. Further, that the applicant is a first offender, who pleaded guilty as such did not want to waste the court's time.

It is also his argument that the appeal court may alter his sentence to community service as this will enable him to retribute the complainant.

Mr *Maunze's* for respondent argued that respondent is likely to abscond if granted bail. He further argued that there was no misdirection or irregularity on the proceedings, therefore, there are no visible prospects of succeeds.

It is a well established principle of our law regarding bail pending appeal that the presumption of innocence at that stage no longer exists. In *S v Murimba* HH 19/04 the learned Judge stated:-

“The presumption of innocence no longer exists when a convicted person applies for bail pending appeal and in the absence of positive grounds for granting bail the proper approach is that it would be refused especially where a person’s guilt is no longer an issue and a substantial prison sentence is the usual sentence for the offence.”

The question which falls for determination in my view is whether there are any prospects for success on appeal and if so, to what extent. Applicant pleaded guilty, that puts his guilty beyond question. These courts’ position is that first offenders should be kept out of prison whenever is reasonably and practicaly possible. This, however, is not an absolute rule as each case must be determined on its own merits.

Where, the offence is a serious one, and the accused has been properly convicted and sentenced to an effective prison term such accused should not be spared the rigours of his dutiful association with other convicted criminals, as this would have been the rightful place for him anyway.

In *casu*, applicant has no assets, no savings and is unemployed. I do not see any other suitable alternative sentence other than a prison term for applicant in the circumstances. This, fact, coupled with the fact that his sentence is above the 24 months imprisonment bench mark which these courts have advocated for community service, I do not see the appeal court substituting the court *a quo's* sentence with a non-custodial one.

It has also been argued that applicant should have been accorded more time to pay restitution. Serious consideration should be made with regards to an accused’s ability to retribute. If it is apparent that he is a man of straw, the question of restitution should not be easily considered as this would not be based on his/her own ability to retribute. While restitution is indeed a well grounded principle of our law that a victim should be restituted for

his/her loss it shall not be ordered where there is a physical impossibility to retribute. In *casu*, applicant, is not the right candidate for that order, as he has no means of fulfilling that order, as he is unemployed and, has no assets. It is his duty to prove to the court that he is in a position to pay a fine or restitution. If he has not paid restitution to date, in my opinion he is unlikely to do so in future.

It is Mrs *Matimba's* argument that his release on bail will enable him to raise restitution. Mrs *Matimba*, however, had difficulty in explaining how he would raise money when he is a man of straw. The only other way would be for him to revert to his nefarious ways of dishonesty. To grant him bail would be to authorise him to continue with his unlawful ways.

It has also been submitted that the sentence of 5 years is harsh in the circumstances. While, I agree with this, without seeking to pre-empt the decision of the appeal court I, however, do not see the appeal court substituting his prison sentence with a non-custodial one, but, would possibly reduce the effective custodial sentence. In the event that this occurs it would be foolhardy to expect applicant to avail himself for re-admission to the prison authorities in order to serve his residual custodial sentence.

The other factor is that applicant plies his illegal trade at the border of Beit Bridge town and it is reasonable to conclude that the route for escape to South Africa is clearly open for him. If this happens he will be out of reach of this court's jurisdiction and this will therefore, frustrate the proper administration of justice.

For that reason applicant's application for bail pending appeal should fail.

Order

The application is dismissed.

Lazarus and Sarif, applicant's legal practitioners

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