PATRICE SOMUENI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 15, 17 November 2021 & 6 December, 2021

Mr T. Mbwachena, for the appellant
Mr B.E. Mathose, for the respondent

Application for bail pending appeal

ZISENGWE J: The application seeks to be admitted to bail pending the outcome of his appeal against both conviction and sentence on sentence on a charge of robbery (i.e. contravening section 126 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (hereinafter referred to as the "Criminal Code"). He avers in his statement submitted in supporting this application that he habours no intention whatsoever to abscond should he be so admitted to bail and secondly that he contends that he enjoys bright prospects of success in the appeal.

It must be stated right from the onset that although the state readily acceded to the application, indicating as it did that the an evaluation of the evidence, according to it, reveals that the appeal does not appear to suffer from predictable failure, I nonetheless reserved judgment to properly ventilate the issues. This was particularly important in view of the inherent seriousness of the offence for which applicant was convicted.

The allegations leading to the arraignment and subsequent conviction of the applicant were that the applicant were that the applicant was part of a gang of robbers who in the dead of the night pounced in a business concern called Intrachem Company which company trades in explosives in Kwekwe and made away with a large consignment of explosives.

It was alleged by the state that in the course of the raid, the robbers physically subdued the guards on duty and issued threats of death for them to submit to the taking of the explosives. At arraignment, the applicant who was jointly charged with three other alleged accomplices namely Tinashe Mudiya, Lucky Nqobani Ndlovu and Lawrence Chidzambwa denied the charge.

Lawrence Chidzambwa was discharged at the close of the state case for want of evidence following an application brought in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the abbreviated herein as the CPEA). Tinashe Mundiya and Lucky Nqobani Ndlovu who were cited as the accused 2 and 3 respectively were acquitted at the conclusion of the trial. The applicant as indicated above was however found guilty and in the wake of such conviction sentenced to 5 years imprisonment of which one year was suspended for 5 years on the usual conditions.

Aggrieved by the outcome of the case the applicant immediately appealed against both conviction and sentence and thereafter launched this present application to be released on bail pending the determination of his appeal.

In both his grounds of appeal and his quest for bail the applicant attacks the propriety of the conviction in chiefly on the basis that his possession of some of the explosives which were stolen at Intrachem was explicable in some other way other than of his guilt. More specifically the thrust of the argument is that his explanation to the effect that he received the consignment of explosives which turned out to be part of the haul stolen at Intrachem during the audacious robbery from one Peter Chapotera was reasonably possibly true.

Consequently, according to him, therefore a conviction predicated almost solely in his possession of part of the stolen loot was not legally sound and is likely to be vacated on appeal.

The test applicable in an application for bail pending appeal was set out in the well-known case of *S* v *Williams* 1981 (1) SA 1171 (ZAD) at 1172 H where the following was stated;

> "Different considerations, do of course, arose in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find

> it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must be a reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as *R* v *Milne and Erleigh* (4) 1950 (4) SA 601 (W) and *R* v *Mthembi* 1961 (3) SA 468 (D) stress discretion that lies with the court and indicate that the proper approach should be towards allowing liberty to persons to persons where that can be done without any danger to the administration of justice".

Where an application is launched for bail for conviction it appears that the court is mainly required to consider two issues namely the likelihood of applicant absconding and the likelihood of the appeal succeeding, see *S* v *Williams* 1980 ZLR 466, *S* v *Meyers*, 1993 (1) SACR 383 at 385; *S* v *Kilpin* 1978 RLR 282 (A) and *S* v *Benatar* 1985 (2) ZLR 205 (H).

Some of the factors bearing on the exercise of the court's discretion include the seriousness of the offence and granting of the penalty imposed and of course the prospects of success on appeal. It is axiomatic that the more serious the offence and the stiffer the penalty, the greater is generally the in.....to abscond – especially where the prospects of success are dim.

It is for that reasons that in deciding whether or not to grant bail pending appeal the two factors namely the likelihood of absconding and the prospects of success should be placed on balance, *S* v *Williams* (*supra*). Equally pertinent is the principle that bail may be refused in serious cases even where there is minimal risk of abscondment; the onus being an applicant to show that the interests of justice favour him being released on bail pending the determination of his appeal.

It is against the backdrop of the above principles that the following synopsis of the background facts.

The series of events culminating in the arrest and arraignment of the appellant and his alleged accomplices are (save for a few dispute facts), common cause the summation of which is as follows. In the early hours of 15 January 2019, the premises of Intrachem Company was raided by a band of robbers armed with machetes. The two guards manning the premises, Ngonidzashe Mututa and Edison Tanyanyiwa (the 2nd and third state witnesses respectively) were manhandled and ordered to lie facing down or risk their lives. They complied. Ultimately therefore the guards were unable to identify the robbers. In that prone position they were however able to discern that the attackers were using a blow torch to hear the door of the "magazine house" where the explosives were stored before striking it open with a hammer.

In a word however, the attackers who according to the guards' estimation numbered about 8 managed to get away with a wide assortment of explosives (referred to in the annexure to the charge as "fractures") and charged (referred to as fuses). The matter was reported to the police who then launched an investigation.

It was not until the 30th of January 2019 following a tip off from a member of the public that the police were able to apprehend one Peter Chapotera in connection with the robbery. The latter's interrogation by the police yielded a trove of valuable information. This led inter alia to the recovery of several items stolen during the robbery. More pertinently it led to him (i.e. Chapotera) implicating several persons including the applicant.

Most significantly however, for the fact that the purported interrogation led the police to the applicant whom they found not only selling some of the explosives and current fuses to prospective buyers but also to the recovery of a large quantify of the same stashed concealed in a metal drum stashed underground. At the time of peddling the stolen for explosives, applicant was in the company of the accused 2, the latter who was in possession of a bag similarly containing some explosives. He i.e. accused 2 was also arrested accordingly.

Applicant's defence throughout the trial was that he received the explosives that he was found in possession of from Peter Chapotera. It was his position that he was requested by Chapotera to sell the explosives on his behalf to mining community in his area for a commission. His explanation for the sub-terranean concealment of the explosives was that this was a precautionary measure to safeguard against the accidental denotation of the same as any incincendary spark or flame could lead to an explosion.

Indeed it is not uncommon for stolen goods to find their way into the hand of unsuspecting members of the public who may be unwittingly hired to dispose of the same for a reward. The applicant's appeal is therefore not necessarily ill-fated. The disappearance of Peter Chapotera coupled with the security guards' failure to make an identification of their attackers certainly does not help the state's case.

In view of the foregoing and particularly mindful of the need to lean in favour of the individual liberty of the applicant where that can be done without jeopardising the due administration of justice, I find myself inclined to grant the application. Consequently the following order is hereby made;

ORDER

IT IS ORDERED THAT:

1. The applicant be and is hereby admitted to bail pending appeal in CRB NO. KK 143/19 on the following conditions.
   (i) The applicant deposits the sum of ZWL $5000 with the Clerk of Court, Kwekwe.
   (ii) The applicant to continue residing at Simindi Village, Chief Njelele, Gokwe until the finalisation of his appeal.
   (iii) The applicant is ordered to report at Gokwe Police Station on the last Friday of every month between 6.00 am and 6.00 pm until the appeal is finalised.

ZISENGWE J.

Mavhiringidze and Mashanyare Legal Practitioners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners