CHINEKA MUMPANDE

And

GCOBANI MKWANANZI

And

RENIAS MAPFUMO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO3 NOVEMBER AND 4 DECEMBER 2014

Advocate L. Nkomo with *Mr Ndlovu* for the applicants
Mr T. Makoni for the respondent

Bail Application

MOYO J: This is an application for bail pending appeal. The three Applicants were convicted of culpable homicide by the High Court sitting on Circuit in Gweru. Central to the determination of such an application are the interrelated factors of the prospects of an appeal and whether the granting of bail will jeopardise the interests of justice.

In *R v Kilpin* 1978 RLR 282 (A) the appeal court pointed out that the principles governing the granting of bail before conviction. In that case it was held that where a person has been convicted the presumption of innocence would have fallen away. Also that there are certain cases where bail pending appeal should not be granted such as where a person has been convicted of an offence which almost invariably attracts a lengthy prison term and there are no reasonable prospects of success on appeal.

In *Williams v S* 1980 ZLR 466 (A) the appeal court said that even after conviction the court should lean in favour of liberty if this would not endanger the interests of the administration of justice That the prospect of success on appeal must be balanced against the interests of the administration of justice. That the less the chance of success on appeal, the greater the chance

there was of the convicted person absconding. That in serious cases even where there was a reasonable prospect of success on appeal bail should sometimes be refused.

That where the evidence of guilt is overwhelming, there is no reasonable prospect of success, but if there is room for a difference in opinion regarding conviction there would be a reasonable prospect on appeal. In *Labuschague vs S* SC 21/03, the court held that the fact that leave to appeal has been granted does not, *per se,* entitle a convicted person to be out on bail. The onus of establishing that justice will not be endangered and that there is a reasonable prospect of success is upon the applicant. That it is improper to allow people convicted of serious crimes to be walking the streets instead of serving their sentences where there are no prospects of success. That society would lose faith in the justice system.

Refer also to *Benatar vs S* 1985 (2) ZLR 205(H). In determining whether or not the interests of justice would be prejudiced on the granting of bail, the court will take into account the seriousness of the offence, the seriousness of the penalty imposed, whether the appeal is against conviction only or conviction and sentence, and the prospects of success on that appeal. With a serious offence, which attracts a substantial prison term, there will be a pronounced risk that the convicted person will flee from justice if released, especially if he has no reasonable chance of appealing against conviction. There will also be a very great risk of flight if accused is only appealing against sentence and where the most he can hope for is that the prison term will be adjusted slightly. Even in those cases where there is a reasonable prospect of success on appeal against conviction, the convicted person may not be inclined to take the chance of the appeal succeeding but may take flight instead if he is released pending appeal. With less serious offences not attracting drastic penalties the position will be radically different.

In *Manyame v S* HH 1/03, it was held that the fact that there are reasonable prospects of success on appeal or that the Applicant has a reasonably arguable case, does not entitle him to bail. He must show instead, that in addition to the prospects of success on appeal, the interests of justice will not be endangered if he is granted bail. In the case of *S v Tengende* and others 1981 ZLR 445 the learned judge therein brought the distinction between the considerations that the court should weigh in an application for bail pending appeal and an application for bail pending trial. He stated thus:-

"This submission loses sight of the essential difference between bail pending trial and bail pending appeal. In either case bail is a matter of discretion of the court, but bail pending trial will not normally be refused on charges of this nature unless there are positive reasons for refusal, such as the danger of the accused absconding or of interference with witnesses. But bail pending appeal involved a new and important factor:-

The accused has been found guilty and sentenced to imprisonment. Bail is not a right. An Applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal, the proper approach is that in the absence of positive grounds for granting bail it will be refused. This is not to say an Applicant for bail pending appeal has a heavy onus to discharge, as HENOCHSBERG J said in *R v Mthembu,* 1961 (3) SA 468 (D and CLD) at 471,;

> "If justice is not endangered, the court favours liberty, more particularly where there is a reasonable prospect of success."
>
> But it is nevertheless important not to lose sight of the fact that the exercise of the courts discretion involves balancing the considerations of the liberty of the individual and the proper administration of justice, and that where the applicant has been tried and sentenced it is for him to tip the balance in his favour"

The learned judge stated further that it is not the consideration of any particular factor that should weigh with the court in considering such an application. Rather, the question to be answered at the end of the day is whether the Applicant has shown that the court's discretion should be exercised in their favour, taking all factors into account.

I now turn to assess the application before me, with a view to finding if the Applicants have shown that the court's discretion should be exercised in their favour, taking into account all the factors. They submit that they have prospects of success on appeal as the state's key witness could be held to be an accomplice on appeal and therefore this may lead to an acquittal.

Secondly they submit that on the evaluation of the rest of the evidence of the other witnesses the Supreme Court may have come to a different conclusion from that of the trial court. They also submit that they will not abscond and are committed to serving their sentences in the event that the appeal fails. They then go into their conduct prior to conviction, that they indeed

complied with all the bail conditions and they waited for trial for a period beyond 5 years.

On prospects of success

This court granted the three Applicants leave to appeal to the Supreme Court mainly because there is an important question of law in this matter, that of the definition of an accomplice witness. It was the view of this court that the door should not be shut on the appellants if they so wish to have the Supreme Court extensively define who an accomplice is.

However this court, dealt with this aspect of the law in great depth, assessing the definition of an accomplice in our Zimbabwean law as provided for in the statutes and the texts. This court even went beyond the authorities in this jurisdiction to seek persuasive authorities in the English language jurisdictions on how an accomplice is defined there. It is the view of this court that the finding that the key state witness is in fact not an accomplice witness is a sound and solid one. The evidence against the three Applicants was overwhelming and if the Supreme Court agrees with this court's findings that the key state witness is in fact not an accomplice then the matter would end there in my view. This is an appeal premised on a technicality in a way, the technicality being the finding on who is an accomplice in terms of the law. Once the key state witness is found not to be an accomplice then the appeal will fail. It can therefore, not be found, in the face of the in depth definitions that this court went through, that there are reasonable prospects of success on appeal. Perhaps at the best the Applicants have an arguable case on whether this witness was an accomplice or not, but the trial court's assessment thereof was pregnant with in depth definitions that settled this point. Again the rest of the case, save for this one technical point is straightforward and there is no merit whatsoever in any other ground raised as the key witness's evidence is the crucial aspect of the state case. The sentence of 8 years imprisonment for culpable homicide committed by police officers against a suspect in custody is fair and is in line with other decided cases. Once conviction is confirmed, the Supreme Court is not likely to find fault with the sentence given. To suggest that a term of 2 years imprisonment is what justice demands in the circumstances, is in fact to trivialise the lives of suspects kept in custody and also to send a wrong message to police officers out there on the value of the life of a suspect in custody. The sentence of 8 years imprisonment is a substantial sentence that carries

with it an inducement to abscond. The prior conduct of the Applicants before conviction does not have much weight at this stage as they have already appeared before a court that has found them guilty unlike before when they could have waited with the hope for an acquittal. Their pledge that even if their appeal fails they are prepared to serve their sentence, is an empty one that can not be supported in any way. There is a temptation that once granted bail, facing the lengthy term of 8 years in prison will only serve as an inducement to abscond. It is my considered view after alluding to the authorities and the principles enunciated herein that, it can not be in the interests of justice that the Applicants be released on bail pending appeal, neither have they sufficiently shown that the court's discretion should be exercised in their favour taking all factors into account. The state had conceded to the application for bail pending appeal, on the sole basis that since leave to appeal had been granted, then it meant they had prospects of success on appeal. The concession is misplaced and was in fact made by a State Counsel who was not privy to the matter and is not in a position to substantiate his concession. On that basis, this court does not accept the concession as it is not an informed opinion and was not formulated upon due consideration of the whole case and all the issues attendant to such applications and to this particular matter.

For the aforegoing, I can not exercise my discretion in favour of the Applicants, bail pending appeal is accordingly dismissed.

R. Ndlovu and Company, applicants' legal practitioners
Criminal Division, National Prosecuting Authority, respondent's legal practitioners