BRIGHTON DZINGAI MAKURA
and
OBERT TAONEZVI CHODOKUFA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 6 July 2015

Bail application

T Kabasa, for the applicant
Ms *S Fero,* for the State

ZHOU J: This is an application for bail pending appeal. The appeal by the applicant is against a judgement of the Magistrates' Court at Mwenezi in terms of which judgment both applicants were found guilty of two counts of contravening the provisions of s 131 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (unlawful entry into premises). The conviction arose from the allegations against the applicants that on 1 May 2014 the applicants unlawfully and intentionally entered Chingwanga Supermarket at Neshuro. In the second count the allegation was that in the period extending from 30 April to 1 May 2014 the applicants unlawfully and intentionally entered Living Waters Shop, also at Neshuro Business Centre. The applicants were each sentenced to 24 months imprisonment of which 3 months was suspended for 5 years on condition that within that period they are not to be convicted of an offence involving unlawful entry as an element and for which upon conviction they are sentenced to a term of imprisonment without the option of a fine.

The applicants have appealed to this court against both conviction and sentence. They now seek to be released on bail pending the determination of the appeal by this court. The principles applicable to an application for bail after a person has been convicted are settled. In the case of *S* v *Dzvairo* 2006 (1) ZLR 45 (H) at p 60 this court said:

> "The principles governing bail pending appeal were very lucidly articulated in S v Williams 1980 ZLR 466 (A) at 468 E-H per Fieldsend CJ and in *S* v *Tengende & Ors* 1981 ZLR 445 (S) at 448 A-E and 449 F-H per Baron JA. I paraphrase the principles emunciated in these cases as follows.

> Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice, and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likehood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are prospects of success the more inducement there is to abscond. Where the prospect of success on appeal is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail."

See also *S* v *Labuschgne* 2003 (1) ZLR 644 (S); *S* v *Manyange* 2003 (1) ZLR 21 (H).

From the above authorities it is clear that the court will take into account the prospects of success on appeal, the likelihood of abscondment, the likely delay before the appeal is heard, and the right of an individual to liberty. In considering the question of the prospects of success of the appeal the court does not look at whether the appeal will or should succeed but whether it has prospects in the sense of it having substance or being genuinely arguable. In the present case the applicants were convicted based on fingerprints evidence. They suggest, in this application, that the fingerprints upon which the experts linked them to the unlawful entry at the above premises were not uplifted from the premises but from an iron bar on some subsequent date after the commission of the offence. That is clearly false, as both the evidence and the judgement show that the fingerprints were taken from the premises to which the charges relate. The evidence of the fingerprints expert is clear that in May 2014 he received the fingerprints which had been uplifted from the scene of the crime. In June of the same year he was furnished with another set of fingerprints which he used in making the comparisons with the first set. The suggestion that the fingerprints used related to some iron bar is not based on the evidence placed before the court *a quo*. In any event, it has not been suggested why the police would be motivated to do the outrageous thing being suggested now in this application. The applicant also suggest that the dynamite cartridge which they were found in possession of which was similar to the one used to commit the crime was not taken for ballistic testing. I do not understand how an unused dynamite cartridge could be taken for ballistic examination to prove its similarity to the one recovered in connection with the crime. There cannot be any sustainable ground of appeal premised upon that contention. Thus on the conviction, my view is that the appeal enjoys no prospects of success. The grounds of appeal

advanced are not founded on the proved facts.

As regards the sentence, that is a matter within the discretion of the trial court. Any impeachment of a sentence imposed by the trial court must reveal that the sentence is manifestly excessive to such an extent that it induces a sense of shock or amounts to such a misdirection revealing an improper exercise of discretion. The sentence *in casu* is being attacked on two grounds, firstly, that it is not clear as to how the amounts ordered in respect of restitution will be distributed between the complainants, and, secondly, that it was improper for the court to order that the applicants are liable to render the restitution jointly and severally, the one paying the other to be absolved. As regards to the latter, I have not been referred to any authority which suggests that such an order is incompetent at law. As for the former, the question of how the amount of the restitution ordered will be distributed is not of concern to the applicants, and cannot constitute a misdirection upon which the sentence can be impugned. The applicants are not challenging the value of the property lost by the complainants.

In all the circumstances of this matter, this is a matter in which the appeal has no prospects of success. In view of the fact that a custodial sentence has been imposed and the applicants have served part of it, there is, in my view, an inducement to abscond in this case. I need to balance that factor with the issue of the absence of prospects of success considered above. The applicants have not suggested that the likely delay in the determination of their appeal is so apparent and would outweigh the other factors. I believe that there has been a significant improvement on the time taken for appeals to be heard in this court once the records are properly prepared and availed. The fundamental right to liberty must yield to the other considerations raised above. I have considered that this is a deprivation of liberty after the conviction of the applicants, and cannot be viewed in the same light as pre-trial incarceration.

In the result, IT IS ORDERED THAT:

1. The application for bail be and is hereby dismissed.

Gutu & Chikowore Attorneys At Law., applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners