SHAME MAZHAMBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 24 July & 4 August 2015

Bail application

Applicant in person
R. Chikosha for the respondent

ZHOU J: The applicant was convicted by the Magistrates Court at Harare of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 8 years imprisonment, of which 2 years imprisonment were suspended for five years on condition that he does not within that period commit any offence involving dishonesty and robbery and for which upon conviction he is sentenced to imprisonment without the option of a fine. A further 2 years were suspended on condition of restitution, thereby leaving an effective period of imprisonment of 4 years. The applicant appealed to this court against both conviction and sentence. On 3 July 2015 the applicant instituted the instant application for admission to bail pending determination of his appeal against the judgment of the Magistrates Court. The application is opposed by the respondent.

The principles which are applicable in an application for bail pending appeal are settled. They differ from those which apply where bail is being sought before conviction. In the case of *S* v *Tengende* 1981 ZLR 445(S) at 448, BARON JA said:

> "But bail pending appeal involves a new and important factor; the appellant 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."

See also *S* v *Labuschagne* 2003 (1) ZLR 644(S) at 649A-B.

In *S* v *Dzvairo* 2006 (1) ZLR 45(H) at 60E-61A, Patel J lucidly recited the relevant principles 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 likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the 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 *Dzawo* 1998 (1) ZLR 536(S) at 539E-F.

The allegations against the applicant are that on 3 October 2012 at House Number 1 Clonmill Road, Pomona, Harare the applicant in the company of two accomplices unlawfully used violence or threats of immediate violence while armed with a pair of scissors and bricks in order to steal from the complainant. They then stole cash, as well as a camera, an iphone and some cellular phones. It is common cause that some of the property stolen during the robbery was recovered from the applicant at his residence. There are therefore sufficient facts linking the applicant to the offence. The applicant states that the items recovered from him were given by the complainant as payment or security for payment for gold sold under an illegal gold sale between him and the complainant. He stated that he and the complainant were known to each other prior to the date of the alleged offence. He even stated that the complainant visited him while he was at the remand prison on two occasions. The visitors' book kept at the prison showed that the complainant's name was indeed recorded as a visitor of the applicant on two occasions. But the complainant denied knowing the applicant other than in connection with the robbery. The learned magistrate rejected the applicant's version that the complainant was his acquaintance, and came to the conclusion that the names of the complainant ware fraudulently written in the prison's visitors book. There are indeed curious aspects of the case which warrant investigation on appeal. These include the alleged visit to prison by the complainant. Also, the reference by both the complainant and her son to the applicant by his first name during their evidence suggests over-familiarity. But those are matters which I would rather leave the appeal court to examine when it deals with the appeal.

Those matters do not constitute positive grounds for the applicant to be released on bail. The offence which the applicant was convicted of is very serious and the sentence of imprisonment imposed is considerable. At this stage the presumption of innocence no longer operates in favour of the applicant. These factors tilt the scales against the granting of bail. This, in my view, is a matter in which the court should not grant bail pending appeal notwithstanding that the appeal by the applicant appears to raise arguable matters. That is so given that the trial court rejected his version of events. It is up to him to persuade the appellate court to upset the conclusions of the trial court.

In the circumstances, the application for bail cannot succeed. It is accordingly dismissed.

National Prosecuting Authority, respondent's legal practitioners