VENGAI DARLINGTON JASI

And

ARCHIFOLD ZHANJE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 27 MAY 2022 & 2 JUNE 2022

Application for bail pending appeal

Chinyanganya, for the applicants
K.M. Nyoni and T.M. Nyathi for the respondent

DUBE-BANDA J

1. This is a composite judgment in respect of two applications for bail pending appeal, i.e. Cases No. HC 186/22 and HC 187/22. The applicants in both cases were jointly charged and tried together before the Regional Magistrate Court, sitting in Plumtree. Although each applicant filed his own notice of appeal, they are appealing the same judgment, and they both seek release on bail pending the finalisation of their respective appeals against the same judgment. At the hearing of the applications, applicants were both represented by one counsel. I then heard the two applications jointly and hence this composite judgment.

2. For ease of reference Vengai Darlington Jasi (HC 186/22) is referred to as 1st applicant, and Archiford Zhanje (HC 187/22) is referred as 2nd applicant.

3. After a contested trial applicants were convicted and sentenced by the Regional Magistrates' court sitting at Plumtree on the 27 April 2022. They were charged with the crime of fraud as defined in section 136(a)(b) of the Criminal Law (Codification and Reform) [Chapter 9:23], it being alleged that on the 19th November 2021, and at Plumtree Border Post, Plumtree, accused persons either one of both of them presented and captured in the ZIMRA SAP (Systems, Applications and Products) details of a

Mercedes Benz E220 DAMG, and internationally entered a false duty payment receipt resulting in the ZIMRA SAP generating a receipt for assessment without customs duty being paid. This resulted in ZIMRA being prejudiced of USD13 374.00 in unpaid customs duty.

4. They were each sentenced to 3 years imprisonment of which 1 year was suspended for 5 years on the conditions of good behaviour, and a further 1 year was suspended on condition each applicant pays restitution in the sum of USD6 687, leaving them with 1 year effective imprisonment. Aggrieved by both conviction and sentence, applicants noted an appeals to this court. 1st applicant's appeal is pending under HCA 46/22, and for the 2nd applicant is pending under HCA 48/22. In their applications, applicants seek release on bail pending the finalisation of their appeals.

Submissions of the parties

1st applicant

5. This applicant contends that he has prospects of success on appeal against both conviction and sentence. He contends that the trial court *erred* in finding that the defence that he made an error was an afterthought when the State witness testified that this was his explanation well before the matter was reported to the police. It is submitted that the error he made was that he skipped the proof of payment given to him by 2nd applicant when checking whether there were corresponding deposits. It is said he had about eight or nine such proof of payments for verification. It is argued that his version that says he made an error was not controverted.

6. It is submitted further that no common purpose to defraud complainant was established between the 1st and 2nd applicants. 1st applicant received proof of payment from the 2nd applicant, it bore the name Richard Fombe and Socuum Enterprises (Pvt) Ltd. It was argued that there was no evidence that this applicant was involved in the manufacture of the fake proof of payment, which was presented to him by 2nd applicant.

7. It was submitted further that the trial court misdirected itself in finding (at the close of State case) that a person answering to the name Phillip Bhunu does not exist, when the State papers suggest that he is on the run. Phillip Bhunu is the alleged originator of the fake proof of payment.

8. Cut to the bone, 1st applicant's contention was that his appeal has prospects success against conviction on the basis that his version is reasonably possible true. As regards sentence, it was contended that it is disturbingly inappropriate. It was argued that the trial court *erred* in not attaching sufficient weight to strong mitigating factors in favour of this applicant, and in not considering a fine or community service. It was submitted that the appeal against sentence has prospects of success on appeal.

9. 1st applicant's bid to be released on bail pending appeal is not opposed. Mr. *Nyoni* counsel for the respondent argued that this applicant's appeal against conviction has prospects of success. Counsel contended further that this applicant's version was not shown to be false beyond a reasonable doubt, in fact it was submitted that his version was reasonably possible true. It was submitted further that if the appeal court finds that he made an error in not checking whether the proof of payment submitted by 2nd applicant had no corresponding deposit, such would take away the issue of fraud and his appeal would likely succeed.

2nd applicant

10. 2nd applicant contends that he has strong prospects of success on appeal against both conviction and sentence. It was contended that central to his defence was that one Phillip Bhunu was the one who made the payment through Richard Fombe of Soccum Investments (Pvt) Ltd. It is contended further that the proof of payment he presented bore the name of CABS inscribed on it, and the amount of duty payable for the vehicle in question. It was argued that he was not aware that the proof of payment was fake. It was argued that he still believes that payment was made to ZIMRA.

11. It was contended further that this applicant has prospect of success on appeal against sentence, in that the sentence is too excessive and induces a sense of shock. It was contended further that the trial court *erred* in failing to consider community service as an alternative form of punishment.

12. This applicant's bid to be released on bail pending appeal was also not opposed. It was argued that his version that he obtained the proof of payment from Phillip Bhunu was not rebutted. It was submitted further that without the evidence of Philip Bhunu or a representative of Soccum Enterprises (Pvt) Ltd rebutting applicant's version, the State cannot be said to have proved its case beyond a reasonable doubt.

13. It was argued further that this applicant presented the proof of payment to 1st applicant, which according to him was not fake. It was said to prove the genuineness or other wise of the deposit slip that he presented to ZIMRA, the State ought to have called a bank official or sought an affidavit from the bank official in terms of section 286(2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. It was argued further that without such evidence, it could not be said that this applicant presented a fake deposit slip to ZIMRA, because a bank official is the one who is qualified to comment about the bank documents whether or not they are fake. It was contended further that it was not proved that the proof of payment was fake.

14. Regarding sentence, respondent contends that it is manifestly excessive and induces a sense of shock, in that he is a first offender and a family man. It was argued further that the trial court *erred* in not considering community service. It was submitted that the appeal against sentence has prospects of success.

The legal principles

15. In *S v Gomana* SC 166 / 2020 it was held that the purpose of exercising discretionary power vested in the court in terms of s 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is to secure the interest of the public in the administration of justice by ensuring that a person already convicted of a criminal offence will appear on the

appointed day for his/her appeal or review. It is for that reason that the Act provides, that upon sufficient evidence being led to justify it, a finding that a convicted person is likely not to appear for his/her appeal or review when released on bail is a relevant and sufficient ground for ordering his/her continued detention pending appeal or review.

16. Bail pending appeal is not a right. An applicant for bail pending appeal has to satisfy the court that there are grounds for it to exercise its discretion in his favour. In the case of bail pending appeal the proper approach is that in the absence of positive grounds for granting bail, the application will be refused. The applicant having been found guilty and sentenced to imprisonment is in a different category to an applicant seeking bail pending trial. See: *Mutizwa v The State* SC 13/20, *S v Tengende & Ors* 1981 ZLR 445 (S) 447H – 448C.

17. In *S v Pfumbidzayi* 2015 (2) ZLR 438 (H), the court said:

> 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 are interconnected because the less likelihood are the prospects of success the more the 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.

18. The main factors to consider in an application for bail by a person convicted of an offence are twofold: Firstly, the prospects of success on appeal in respect of both conviction and sentence. Secondly, the likelihood of abscondment. Other factors to bear in mind are the right of the individual to liberty and the delay before the appeal can be heard. See: *S v Gomana* SC 166 / 2020.

19. It has been held that considerations of reasonable prospects of success on the one hand, and the danger of the applicant absconding on the other, are inter-connected and have

to be balanced. Furthermore, that the less likely the prospects of success on appeal, the more inducement there is on an applicant to abscond. It is also emphasised that in every case where bail after conviction is sought the *onus* is on the applicant to show why justice requires that he should be granted bail. See: *Mutizwa v The State* SC 13/20, *S v Williams* 1980 ZLR 466(S), *Chivhayo v The State* SC 94/05.

20. It is on the basis of these legal principles that this application must be viewed and considered.

Prospects of success on appeal

21. The record of proceedings show that the following facts are either common cause or not seriously disputed: the vehicle in issue was imported from England; the importer engaged the services of 2nd applicant who is a motor vehicle clearing agent to clear the vehicle with ZIMRA; the importer paid the full clearing fees of USD13 374.00 to the 2nd applicant; 2nd applicant presented a copy of proof of payment to 1st applicant showing that the amount of USD$13 374.00 had been deposited into ZIMRA account held at CABS; on the basis of the proof of payment, 1st applicant issued a receipt for the assessment in the name of the importer; on the strength of the proof of payment ZIMRA released the vehicle to the 2nd applicant who then delivered it to the importer. It is common cause that the proof of payment was not authentic, it was a façade, a fake.

1st applicant

22. It was not in dispute that 1st applicant issued receipt R37122 for assessment N2030 in the name of the importer with a value of USD13 374.00 without following ZIMRA ASYCUDA receipting procedures. ASYCUDA procedure Finp 60 and Finp 08 requires a cashier to check the presence of a deposit in the bank statement or deposit reconciliation general ledger account before issuing a receipt.

23. 1st applicant conceded that he did not follow the correct procedures before receipting the USD$13 374.00, and his answer was that he made an error. He said he made an error because he was supposed check the payment in the system first, before receipting

it. His version was that the error was caused by the fact that he was busy on that day, in that he was manning counter 6 and also performing duties at the back office. He was doing banking and confirming banking details.

24. However this version that he made an error because he was busy on the date of the transaction does not appear in his defence outline, it was not put to the State witness Augustine Marecha, who was representing ZIMRA at the trial, and it was only raised for the first time in his defence case.

25. For the purposes of this application, I take the view that there was a duty to put applicant's version to the witness, I say so because that version was the anchor of his defence, that he made an error. It is trite that failure to cross examine might lead to the version being taken as a fabrication, improvised to create a defence. To me, and for the purposes of this application the trial court could not be faulted for rejecting this version about an error. The trial court found that even if his new version was reasonably possible true, he still acted recklessly by not following the standard operating procedures, i.e. to check in the system that the ZIMRA account had been credited before receipting. He would still be guilty as charged.

26. Furthermore, to compound issues, the proof of payment was unstamped, and it was directly given to him, which witness Marecha said was not the normal procedure. To sun up, this applicant did not follow the correct procedures before receipting the fake payment from 2nd applicant, and the proof of payment did not bore a stamp from CABS.

27. On the conspectus of the evidence on record, my view is that this applicant has no prospects of success on appeal against conviction. Regarding appeal against sentence, he has no prospects of success. This crime hit at the centre of State revenue collection, he was put in that public office to protect and guard State coffers, not to connive in prejudicing the State. My thinking is that if the trial court *erred*, it actually *erred* on the side on leniency.

2nd applicant

28. It is common cause or not seriously disputed that the proof of payment 2nd applicant presented to 1st applicant was a façade, a fake. He presented an unsigned copy of proof of payment to the 1st applicant.

29. This applicant when asked by the importer about the payment allegedly made to ZIMRA, he said the payment was reversed by the system. This was a lie. No payment was reversed by the system, because no payment was made in the first place.

30. This applicant's defence was that he got the fake proof of payment from one Philip Bhunu. The evidence of the investigating officer (I.O) was that Soccum Enterprises (Pvt) Ltd confessed ignorance of the proof of payment in issue. Further the I.O. testified that:

> Accused 2 (2nd applicant) mentioned the name of Philip Bhunu. From the investigations I did not establish the existence of Philip Bhunu since accused 2 did not provide any address of Philip Bhunu, phone number or identity particulars. From these investigations I concluded that either Philip Bhunu was a non-existent character or if he or she existed the accused persons did not want the true identity of Philip Bhunu to be established.

31. 2nd applicant and Mr *Nyathi* counsel for the respondent seem to think that it was for the State to produce this Philip Bhunu. It was not. I take the view that this thinking seems to emanate from confusing the *onus* of proof and the evidential burden. According to his version, it is him 2nd applicant who brought this Mr Philip Bhunu to this transaction. My view is that he had an evidential burden to produce this Philip Bhunu. He is the one who knew him. The State could not produce someone it did not know. This does not mean 2nd applicant had an *onus*, all it means is that once he had been put to his defence, he had an evidential burden to discharge, by producing this Mr Philip Bhunu. He could not even provide the I.O. with the address, phone number or identity particulars of this Philip Bhunu. My view is that the trial court could not be faulted for finding that this Philip Bhunu is just false creation and does not exist.

32. In conclusion, he produced a fake receipt, lied to the importer that ZIMRA reversed the transaction, and failed to produce this Mr Philip Bhunu. He in fact failed to provide the I.O. with the address, phone number or identity particulars of this Philip Bhunu. It can't

be as simple as just throwing in a name of a character and ask the State to produce such a person. The law would fail to protect society if it were to operate in that way.

33. On the totality of the evidence on record, my view is that this applicants has no prospects of success on appeal against conviction. Regarding sentence, he also has no prospects of success on appeal. My view is that if the trial court *erred*, it actually *erred* on the side of leniency.

The likelihood of absconding

34. In my view, the applicants have a high probability of absconding considering that there are no reasonable prospects of success on appeal. The principle that the lesser the prospects of success the higher the risk of abscondment is applicable in this case. In *S* v *Kilpin* 1978 RLR 282 (A), it was pointed out that a court may well consider that the brighter the prospects of success, the lesser the likelihood of the applicant to abscond and *vice versa*. The applicant was sentenced on 27 April 2022. The terms of imprisonment they are serving might induce them to abscond. They have experienced the rigours of imprisonment, and they still have some months to go before they complete their sentences. The remaining sentences are likely to cause them to abscond if released on bail pending appeal. They are a flight risk.

Likely delay before the appeal can be heard

35. Applicants were sentenced to an effective 1 year imprisonment. It is very possible that they may complete their sentences before their appeals are heard and finalised. That is what they have to contend with. This court cannot release them on bail with such dim prospects of success on appeal.

36. It is important that those that have broken the law are seen to serve their punishments without any unnecessary delay. The confidence of the community in the administration

of justice would be seriously eroded if persons convicted of crimes are seen to be roaming the streets where they have little prospects of their appeals succeeding.

37. Therefore, the fact that they were sentenced to short terms of imprisonment, and that they may complete the sentences before their appeals are heard and determined is of no moment.

Conclusion

38. The evidence shows that 2nd respondent originated a fake proof of payment, and presented it to ZIMRA through the medium of 1st applicant. 1st applicant accepted an unstamped fake proof of payment and did not follow the verification procedures to verify the authenticity of the proof of payment, he merely accepted it and receipted 2nd respondent. On the strength of the receipt issued by 1st Applicant, ZIMRA released the motor vehicle to the importer. ZIMRA was prejudiced in the sum of USD$13 374.00.

39. The fraudulent transaction would not have been successful without the active participation of the two applicants. Each played a crucial role to make it a success. For the purposes of this application, I take the view that the evidence shows that the two acted in common purpose to commit the crime charged.

40. A closer perusal of both notices of appeal show that the attack on the convictions are in the main factual, i.e. they attack the factual findings of the trial court. This kind of attack is very unlikely to score much for the applicants on appeal, because it is a well-established principle that the appeal court seldom interferes with the trial court's findings of fact unless same is afflicted by gross unreasonableness. The rationale being that the trial court having been steeped in the atmosphere of the trial is best placed to assess the veracity of the witnesses. It (i.e. the trial court) would be in a position to observe the witness' conduct on the witness stand and assess his or her demeanour among other considerations. See: *S v Chewiro and Another* (1 of 2022) [2022] ZWMSVHC 1.

41. The concessions made by the two counsel for the respondent have not been properly taken. Counsel had the strength of arguing that there is no evidence that the proof of payment was fake, when even the 1st applicant testified that he did not find a deposit corresponding to the proof of payment. ZIMRA did not receive the payment in the sum of USD$13 374.00. Is that simple. My view is that the two applicants have no prospects of success on appeal against conviction.

42. Regarding sentence, my view is that if the trial court *erred*, it *erred* on the side of leniency. This crime struck at the very heart of revenue collection. My thinking is that those who turn and strike at the Fiscal for personal gain, must not expect leniency from the courts. The appeal court is very unlikely to set aside the sentences, because it is trite that in every appeal against sentence, the court hearing the appeal should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court"; and should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised, i.e. whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. See: *S v Rabie* 1975(4) SA 855 (AD) at 857 E. On the facts of this case, I take the view that applicants have very dim prospects of success on appeal against sentence.

43. Ultimately therefore, both applicants have failed to discharge the *onus* on them to establish that their admission to bail pending appeal is in the interests of justice. The applications must fail.

    In the result, I order as follows:

    i. The bail application pending appeal under HC 186/22 be and is hereby dismissed.

    ii. The bail application pending in appeal under HC 187/22 be and is hereby dismissed.

Liberty Mcijo & Associates, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners