FORTUNE SANGU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE: 9 May 2016, 11 May 2016, 18 May 2016

Bail Application Pending Appeal – Reasons for judgment

O. Marwa, for applicant
S. Ferro, for the respondent

CHITAPI J: On 18 May, 2016, after arguments, I admitted the applicant to bail pending appeal and undertook to furnish my reasons for so doing in due course. These are they.

The applicant was convicted by the provincial magistrate Gweru for the offence of fraud as defined in s 136 of the Criminal Law Codification and Reform Act, [*Chapter 9:23*] on 13 April, 2016. He was sentenced to 5 years imprisonment of which 1 year was suspended for 5 years on condition of good behaviour. 2 years was suspended on condition that he pays restitution to the complainant in the sum of USD12 279-00 by 20 May, 2016. The applicant was therefore given an effective sentence of 2 years imprisonment.

The applicant being dissatisfied with his conviction and sentence noted an appeal to this court on 21 April, 2016. The appeal is pending determination. On 3 May, 2016 the applicant filed the present application to be released on bail pending the determination of his appeal. The applicant attached a copy of the duly filed notice of appeal to his application. The application for bail pending appeal has been made in terms of s 123 (1) (b) (ii) which provides for such an application to be made before a judge of this court or before any magistrate within whose area the applicant will be in custody (provided of course that in the case that the offence for which the appellant was convicted and has appealed, such application cannot be entertained by the magistrate if it concerns a third schedule offence save with the consent of the Prosecutor General).

The approach to adopt in making an appropriate determination whether or not to admit an appellant to bail pending the hearing of his appeal is well settled. A distinction must be made between an application for bail pending trial and one for bail pending appeal as with the present application. I make a note that the common denomination between the two applications is that the decision whether or not to grant bail is one for the discretion of the court and as with any exercise of judicial discretion such discretion should be exercised judiciously. Judicial discretion necessarily involves room for reasonable people to hold differing views in the interpretation of the same set of facts. For example there is no law which stipulates how much bail amount is to be imposed. Section 120 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] gives absolute discretion to the judge or magistrate to determine the amount of bail to impose. The discretion is to be exercised subject to the proviso that the person to be admitted to bail should not be required to pay excessive bail. What amounts to excessive bail is a matter of circumstance. No rule of thumb can be set to determine what excessive bail in a given case can be said to be. Each case depends on its merits. The determination of the amount of bail must be exercised taking into account the nature of the charge, the person of the applicant for bail and the other factors set out in ss 117 and 117A of the Criminal Procedure and Evidence Act.

Section 120 (2) of the Criminal Procedure & Evidence Act must be taken into account in the determination of whether or not bail in any given case can be said to be exercise. It provides that "if it is established that there is a possibility that the accused if released on bail, will not stand his or her trial or appear to receive sentence, and that possibility, though short of a likelihood, is not too remote, a court shall not release the accused on bail unless it satisfies itself that the amount or the terms of the bail or both are reasonably sufficient to deter the accused from fleeing given the factors referred to in s 117 (3) (b)". Section 123 (2) of the Criminal Procedure & Evidence Act provides that in bail applications pending appeal, the provisions of ss 117 and 117A shall be applied *mutatis mutatis*. Since s 120 derives from a consideration of factors provided for in ss 117 and 117A, it must be construed as applicable as much to bail pending trial in as much as it does to applications for bail pending appeal or review. The issue of the amount of bail to be imposed arose in argument by the applicant and State counsels and I shall deal with the issue in good time in my judgment.

Having indicated that bail is a matter within the discretion of the court whether it is applied for before trial or after conviction and/or sentence, see also *S* v *Tengende & Ors* 1981

ZLR 445 (5) at 447 H-448C, the ultimate consideration is whether or not the applicant for bail will appear and stand his trial if its an application for bail pending trial or whether the applicant will avail himself to prosecute his appeal if the application is made after conviction and sentence. This application behoves me however to bring my mind to bear on issues more germane to an application for bail pending appeal. Where the applicant as *in casu* has been convicted and sentenced, the presumption of innocence falls away. Section 50 (d) of the Constitution of Zimbabwe Amendment (No.20) Act 2013 which provides that an accused who has not been tried should be released unconditionally or on appropriate conditions pending his trial unless there are compelling reasons to keep him in custody does not apply in an application for bail pending appeal. In passing I would comment that in an application for bail pending trial, the purport of s 50 (d) of the constitution is to place the burden or onus to demonstrate or prove the existence of compelling reasons for denial of bail upon an accused before his trial upon the State. The presumption of innocence entrenched in s 70 (1) (a) of the Constitution will in such a case be operative. Courts should therefore generally lean in favour of granting bail before trial in the absence of compelling reasons to deny an accused bail.

The Constitution in s 70 (5) (b) provides that "Any person who has been tried and convicted of an offence has the right, subject to reasonable restrictions that may be prescribed by law, to –

(a) Have the case reviewed by a higher court; or

(b) Appeal to a higher court against the conviction and sentence".

The applicant's counsel has sought to construe the words 'subject to reasonable restrictions' as implying that the restrictions relate to the admission of a convicted person who has appealed for bail pending review or appeal. Such a construction is incorrect. The words 'subject to reasonable restrictions 'must be construed as referring to restrictions which may be imposed by law on the rights of a convicted person to seek a review or to appeal. A proper reading of the Constitution will show that it does not deal with the issue of the liberty of a person who will have filed an appeal. In short the Constitution does not deal with the issue of bail pending appeal. As such, the traditional approaches which the courts have always followed and been guided by prior to the advert of the new Constitution remain extant.

The onus to persuade the court to exercise its discretion to admit an applicant/appellant to bail pending the determination of his appeal rests upon the

applicant/appellant and should be discharged on a balance of probabilities. The applicant should show why justice requires that he should be granted bail pending appeal when he is a convicted prisoner who should be serving his sentence. An application for bail pending appeal should therefore be dealt with by the court with extra scrutiny because it is not in the public interest that convicted and sentenced people continue to walk in the streets instead of serving their just deserts. There is also a danger that if such applications are just granted without just cause, such granting of bail would not be a proper exercise of judicial discretion. Society should not lose confidence in the criminal justice system which may end up being the result where convicted persons are allowed out on bail instead of serving their sentences especially where serious offences are involved see *S* v *Benatar* 1985 (2) ZLR 205 (H).

The grant of bail pending appeal must be predicated upon the likelihood or prospects of success on appeal. The prospects of success and the likelihood of the applicant absconding must be counter balanced. In *State* v *Edmore Musasa* SC 45/02 The Honourable ZIYAMBI JA set out the principles which must guide the court in determining an application for bail pending appeal as follows:

> "The principles by which this court will be guided in applications of this nature are twofold. Firstly, the discretion lies with the trial judge:
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> Different considerations do, of course, arise 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 always 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 *Rex* v *Milne and Erleigh* (4) 1950 (4) SA 601 and *R* v *Mthembu* 1961 (3) SA 468 stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are interconnected because the less likely the prospects of success, the more inducement there is on an applicant to abscond. 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; *S* v *Williams* 1980 ZLR 466 at p 468."

In *casu* the charge against the applicant was that between 2 September, 2012 and 28 April, 2014 the accused acting with the intent to deceive advertised in the newspaper that he could import a vehicle for intending buyers from the United Kingdom. The complainant is alleged to have acted to his prejudice and paid for a Mercedes Benz sprinter in the sum of

USD$12 279-00 into a Standard Chartered Bank account in Gweru. It was alleged that when the applicant so advertised, it was all misrepresentation.

The State outline alleged that the applicant worked with an accomplice, Kevin Sengu, his young brother who was resident in England. The applicant allegedly connected the complainant with the said accomplice. The complainant made direct contact with the said accomplice. The accomplice concluded the sale agreement with the complainant including supplying the complainant with the bank details into which the complainant was to deposit money for the vehicle purchase. The complainant paid the money into the account nominated by the England based accomplice as aforesaid. The money was in turn transferred to a bank in England. Both the accomplice and the applicant have never denied that the complainant made the deposits for the agreed amount. The only problem appears to have been the failure of the accomplice through the applicant to deliver the vehicle on the agreed dates which had been promised.

In his defence outline, the applicant admitted that he was connected with the accomplice Kevin Sengu and that Kevin Sengu was in the business of purchasing and shipping of second hand vehicles from United Kingdom to Zimbabwe. He stated that he was merely a facilitator. He was given money by the accomplice to place an advertisement in the local newspaper. The content of the advertisement was 'Import your vehicle from the U.K call 0773 034 352'. Intending purchasers of vehicle would contact the applicant on the given number. He would then refer them to his accomplice in England. He said that he would get the contact numbers of the intending importer and forward it to Kevin in England. The intending importer and Kevin would then transact. The applicant both in his defence outline and in evidence denied that he contracted with the complainant to supply the vehicle. He only linked the two. He did not receive any part of the purchase consideration. The vehicle was late in its expected delivery dates. He denied making any misrepresentation and in fact said that the vehicle in question existed, a fact proved to the police but that delivery had delayed. The applicant insisted that the person who owned the second hand vehicle supply business was his brother Kevin. When the vehicle delivery dates kept being changed and the complainant was becoming impatient, the applicant gave the complaint title deeds to hold as security pending the vehicle delivery.

The learned magistrate found against the applicant that he was the one who placed the newspaper advertisement on which the complainant acted. The learned magistrate reasoned

that the applicant could not plead that he was only acting as an agent yet the advertisement did not identify or specify that he was an agent. It was also found against him, that it was the applicant who forwarded the complainant's contact details to the accomplice. The magistrate was also critical that the applicant had even invited the complainant to Harare from Gweru to come and discuss the delays as well as offer to provide a driver to collect the vehicle from Walvis Bay in Namibia. The learned magistrate also found against the applicant that he offered title deeds as security for the car delivery. The learned magistrate concluded that the applicant and his accomplice were acting in "cohorts" to defraud the complainant and that it was the accused who set the fraud into motion. He concluded that the applicant "went to bed with the transactions of Kevin. What was done by Kevin was done by accused."

The applicant's main thrust in his proposed appeal was that the court was being called upon to criminalize what was essentially a civil contract. I was persuaded that this ground of appeal had substance and good prospects of success. Whilst I accept that there is no mathematical formula for committing a fraud, it was clear from the facts that the applicant only introduced the complainant to Kevin who was in England. The applicant did not misrepresent that he could supply the vehicle in question and never concluded the sale contract with the complainant. In my assessment of the magistrates judgment, the applicant appears to have been convicted on the basis of "but for your linking the complainant with Kevin, the complainant would not have known about Kevin nor transacted with him in a deal which failed or has taken too long to be concluded"

I was not persuaded that the applicant's appeal was manifestly doomed to fail see *S* v *Hudson* 1996 (1) SACR 43 (W) cited in *S* v *Gumbura* 2014 (2) ZLR 539 (S). My attention was also drawn to the case of *David Gardner* v *State* HH60/08 wherein MAKARAU JP (as she then was) reasoned that to refuse bail to an accused who is later on exonerated on appeal has the effect of bringing the administration of justice into disrepute. This court held per MAFUSIRE J in *Peter Chikumba* v *The State* HH 724/15 that the approach of the court should not be whether or not the appeal will succeed but whether or not the appeal is "free from predictable failure". This reasoning in my view echoes the approach enunciated in the *Hudson* case (*supra*) that the appeal should not be one that is manifestly doomed to fail in which case bail pending appeal should be refused. Again, whichever way one looks at, these expressions colourful as they may appear or sound, simply they boil down to the need by the

applicant to demonstrate prospects of success which expression is generally used in this and other jurisdictions.

Even if I am wrong in this case that prospects of success on appeal against conviction are bright, I would still be inclined to admit the applicant to bail on the basis that there are prospects of success in the argument that the sentence which was imposed on the applicant is manifestly excessive and in all the circumstances induces a sense of shock. I am not persuaded that the order of restitution was imposed after a proper consideration of the facts. The clear evidence was that the applicant did not benefit a single cent in the transaction and the movement of the complainant's money was traced to Kevin who benefited from the bank transfers. The propriety of making an order of restitution against the applicant is arguable and the finding that the applicant benefitted from the crime does not appear to be supported by the facts. The applicant's counsel also referred the court to the cases of *Cleopas Gwamwe* v *S* HH 526/15, a fraud case involving 5 counts and *S* v *Tapiwanashe Muchineripri* HH 322/15, a case of fraud involving US$59 450-00. In both cases a lesser sentence was imposed than in the present case. The applicant has reasonable prospects of success in arguing that the sentence imposed upon him is out of line with that imposed in more or less similar circumstances.

The learned magistrate reasoned that offences of the nature that the applicant was convicted on are on the increase especially with respect to citizens being defrauded on account of United Kingdom car imports. He further went on to state that the frauds involve Zimbabweans in the diaspora defrauding fellow citizens in Zimbabwe. For this reason, individual and general deterrence was called. It is noted of course that the applicant is not based in the diaspora but in Zimbabwe. He cannot fall into the group of fraudsters in the diaspora which the magistrate sought to deter. Secondly, the prevalence of an offence is a circumstance to be considered together with other circumstances of each case and offender's personal circumstances. The magistrate in his reasons for sentence did not cite any past cases from which it could reasonably be inferred that the offence in question was prevalent. The fact that the offence could have been prevalent even if one was to accept the magistrate's reasoning did not automatically make effective imprisonment the only suitable sentence. The applicant has prospects of success in arguing that the learned magistrate wrongly emphasized the prevalence of the offence without laying out the grounds for such a conclusion. In my view, case law or statistical data is invariably important in proving prevalence of offences.

I should record that Mrs *Fero*, the counsel for the State advisedly abandoned her opposition to the applicant's admission to bail following questions by the court regarding whether or not in all the circumstances of the case; it could be said that the applicant's proposed appeal had no prospects of success against both conviction and sentence. Mrs *Fero*'s concession was well made. Having properly conceded that there were prospects of success on appeal, Mrs *Fero* however submitted that the bail conditions offered by the applicant needed to be tightened especially with respect to the amount of the bail deposit which she considered to be too low given the amount involved in the case. The applicant had proposed that he deposits $100.00 as bail deposit.

I earlier on indicated in my judgment that I would revisit the issue of the quantum of bail. Whilst the law provides as I have alluded to earlier that an applicant admitted to bail should not be required to pay excessive bail, I have already stated that in considering this aspect, the circumstances of each case are considered. In an application for bail pending appeal, the presumption of innocence no longer operates in favour of the applicant. A competent court will have determined the guilt of the applicant. The applicant will now be seeking to have a second bite at the cherry in that he gets another chance to have trial proceedings reviewed and tested by a superior court. Bail conditions should in such a case be more stringent than where the applicant still has to face trial. In this case the applicant has come to court after serving part of the sentence. The rigors of prison life as a serving prisoner are no longer within his imagination but are real. The inclination to want to abscond on the part of a convicted person who has tasted prison life is more likely to be present than with an unconvicted person who still has to test the system and have day in court defending himself.

It is therefore important that the court in imposing conditions attaching to the grant of bail pending appeal should consider imposing where appropriate more onerous or stringent conditions than where the applicant still has to be tried. I was therefore in agreement with Mrs *Fero* that a bail deposit of $100.00 would not offer sufficient safeguard for the applicant not to abscond once released on bail pending appeal. Mr *Marwa* did not offer any persuasive argument to the contrary. It was not argued that the applicant was indigent. He is on the contrary a person of means who has title to property and had even surrendered his title deeds to the complainant for the due performance of the outstanding obligations of the applicant's accomplice to deliver the vehicle. State counsel proposed a doubling of the amount to US$200.00. I was however of the view that even the US$200.00 was on the lower side and I

proposed to add an additional US$50.00. Mr *Marwa* whilst submitting that the US$250.00 was not readily available did not argue that the amount was beyond the means of the applicant to raise. The wheels of justice had already traversed the case against the applicant and found him guilty. A bail deposit which would be worth its mention was in my view appropriate to impose.

It was for the above reasons that I admitted the applicant to bail pending appeal on the following conditions with my reasons for the order to follow:

1. He deposits US$250.00 with the Clerk of Court Gweru magistrates Court.
2. He resides at 26 Jansen Road Sentosa Mabelreign until the appeal was determined.
3. He reports at Mabelreign Police Station every Friday fortnightly between 6:00 am and 6:00 pm.

The applicant was said not to have travel documents, otherwise this would have been an appropriate case for the surrender of such travel documents to the clerk of court pending the determination of his appeal and I would have imposed this additional condition.

Rubaya And Chatambudza, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners