ITAI DICKSON MAFIOS
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 22 February 2019 & 10 May 2019

Bailing Pending Appeal – Ruling

Advocate Hashiti, for the applicant
S Fero, for the respondent

NDEWERE J: On 28 January 2019 the accused was charged with contravening s 187 (1) of the Criminal Law Codification [*Chapter 9:23*]. He pleaded not guilty. He was convicted on 29 January 2019, after a trial. He was sentenced to 24 months imprisonment of which 10 months imprisonment was suspended for 5 years on condition the accused does not commit any offence involving incitement to which he will be sentenced to imprisonment without the option of a fine.

On 30 January 2019, he noted an appeal against both conviction and sentence. On 1 February 2019, he applied for bail pending appeal at Bindura Magistrate's Court; arguing that he had prospects of success. The State opposed the application, saying it was devoid of merit. The magistrate dismissed the application for bail pending appeal.

What is before me is an appeal against the magistrate's refusal to grant bail pending appeal. The court is not being asked to consider the bail pending appeal afresh, but to look at the trial court's bail pending appeal proceedings and see if there was any misdirection by the magistrate when he dismissed the application. It is trite law that if no misdirection is found, this court cannot interfere with the court's a *quo's* decision.

I have looked high and low for some misdirection by the trial magistrate. I did not find any. He looked at the aspect of prospects of success, and after considering the evidence of the State

witness, he was satisfied that indeed the appellant had uttered the words referred to in the charge. Page 69 of the record gives the court *a quo's* reasons for its finding that the appellant had no prospect of success in the main appeal against conviction. Page 46 shows that the accused's *alibi* was considered but he himself confirmed going to the Chiwaridzo shops on the same day and leaving after the informant had left.

The magistrate did the same on prospects of success against sentence. He referred to the stipulated fine not exceeding level 12 or imprisonment for a period not exceeding 10 years or both; indicating that the sentence he gave was within the given parameters.

The court also took into account the fact that the appellant was not a first offender, him having been convicted of contravening the Immigration Act [*Chapter 4:02*] by departing the country from an unauthorised exit. That conviction was appropriately used by the State to buttress its opposition to bail, raising the fear that the appellant, if granted bail, may abscond and avoid the appeal hearing.

The court a quo also referred to the case authorities of *S* v *Dzawo* 1988 (1) ZLR 539 which indicated that guiding considerations on bail pending appeal are prospects of success and the likelihood of abscondment. As indicated earlier in this ruling, the court a quo's finding was that the appellant had failed to pass the test regarding prospects of success on appeal and the likelihood of absconding.

Another issue which the court considered is the fact that the appellant is now a convicted person who should be serving his sentence rather than walking the streets as enunciated in *Musongelwa Dube* v *The State*, HB49/15. Indeed, if the appellant had no prospects of success in the main appeal, why release him on bail when he should be serving his sentence.

During the bail appeal hearing, applicant counsel raised issues about the exact words uttered by the applicant; yet that issue was not raised in the trial court either during the trial or during the bail pending appeal hearing. His defence during the trial was that he was not at the scene of the crime and he did not utter the inciteful words mentioned in the charge. It is trite law that submissions during appeal hearings are restricted to what appears in the four corners of the record of proceedings. So counsel's arguments should have been raised in the court a quo by the applicant who enjoyed legal representation during the trial court hearings. Submissions which were not before the trial magistrate cannot be considered for the first time during an appeal hearing. In any

event, where interpretation by the police or witnesses is an element, words may not be exact but the meaning will be the same. In the present case, there was no difference in the meaning of the words in the charge and those uttered by the witness in his evidence. If the applicant felt that the meaning was different, he should have taken up that issue during cross-examination in the trial court. He did not do so and he cannot raise that issue in the appeal for the first time.

There being no misdirection by the trial court in its refusal of bail pending appeal, it is ordered that the appellant's appeal against the refusal of bail be and is hereby dismissed.

Manyurureni & Company, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners