ELPHAS NCUBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 26 MAY AND 27 MAY 2016

Bail Appeal

R. Dzete for the appellant
W. Mabaudhi for the respondent

MATHONSI J: This is an appeal against the refusal of bail pending appeal by a magistrate sitting at Bulawayo following the conviction of the appellant on a count of fraud involving a sum of $21 300-00. He was sentenced to 4 years imprisonment of which 1 year was suspended on condition of future good behavior. A further 1 ½ years imprisonment was suspended on condition he restitutes the complainant in the sum of $21 300-00. This left the appellant with an effective sentence of 18 months imprisonment assuming he made restitution.

The appellant has appealed against sentence only on the grounds *inter alia* that the court *a quo* paid lip service to the strong mitigating factors in his favour, it erred in considering that he has a similar previous conviction when that conviction came in 2010 and that it erred in not considering non-custodial options like community service.

Having noted an appeal against sentence the appellant then approached the trial court for bail pending appeal arguing that he has prospects of success on appeal and as such should be admitted to bail. On 26 April 2016 that court dismissed the application. In dismissing the application the court reasoned that:

> "It is noted that there will be a very great risk of flight if appellant is only appealing against sentence and the most he can hope for is that the prison sentence will be subject to some minor adjustment. Coming to the circumstances of this application or which are before me, the appellant is appealing against sentence only and the offence of fraud is regarded as serious, he has been sentenced to 48 months imprisonment which is quite a substantial period. Looking at the grounds that have been raised in his notice of appeal the court doesn't see any prospects of success. Actually the grounds that were given were considered in passing of sentence. It has been pointed out that a non-custodial

> sentence will trivialize this offence, there is no doubt this is a serious offence and the amount involved is substantial. In *S* v *Benator* 1985 (2) ZLR 205 (H) it was indicated that in serious cases even where there was a reasonable prospect of success on appeal bail should --- be refused notwithstanding that there is little danger of the convicted person absconding.
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> It is correct to say that there is no indication that the appellant has a propensity to abscond. However having said the above, the court finds him being unsuitable to be admitted to bail, thus the application by the defence is hereby dismissed."

The state proved at the trial that in March 2014 the appellant misrepresented to one Stella Ngwenya that he was selling Plot numbers 11, 13 and 15 Sebungwe Road Richmond, Bulawayo well knowing that they did not belong to him. He was duly paid the sum of $21 300-00 as purchase price in the presence of his lawyer, one *Mlamuli Ncube*. Therefore at the time of conviction the appellant had had the benefit of the complainant's money for two years and had not refunded it.

It is generally accepted that in an application for bail pending appeal the appellant would have lost the benefit of the presumption of innocence having been convicted. This is particularly so where he is not contesting the conviction but only the sentence meaning that the conviction will forever stand and the applicant for bail therefore would be a convict, in this case a convicted fraudster who spirited away a substantial sum of $21300-00 from a property seeker.

The point is made in *S* v *Williams* 1980 ZLR 466 at 468 G-N 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 are the prospects of success, the more inducement there is on an applicant to abscond."

See also *S* v *Benator* 1985 (2) ZLR 205.

The court *a quo* appeared to discount the possibility of abscondment. It however leaned in favour of the concept adopted in *S* v *Kilpin* 1978 RLR 282 (AD) 286 A that:

> "The principles governing the grant of bail before conviction are entirely different from those governing the grant of bail after conviction and the difference is even more marked when the guilt of the accused is not in issue and the usual sentence for the offence is an effective prison sentence of substantial duration. It is wrong that a person who should

> properly be in goal should be at large and nothing is more likely to encourage frivolous and vexatious appeals than the attitude adopted by the magistrate in the present case."

Mr Dzete for the appellant has complained bitterly that the court *a quo* had regard to the appellant's conviction on similar fraud charges in 2010. He is of the view that the conviction was irrelevant having occurred six years earlier and therefore should have been disregarded by the court. In other words, that the appellant has previously defrauded someone by purporting to sell a house that he did not own should count for nothing in considering his suitability for bail pending appeal. I do not agree and in doing so, I subscribe to the pronouncement of this court in *AG* v *Phiri* 1987 (2) ZLR 33 (H) 39 (H) – 40 A-B which, although dealing with a slightly different set of facts, commends itself to me. The court said:

> "The test, in my view, should be one of deciding whether or not there is a real danger; or a reasonable possibility that the due administration of justice will be prejudiced if the accused is admitted to bail. If this real possibility exists, then the public is entitled to protection from the depredations of the accused; and bail should be denied to him. In the absence of exceptional circumstances, I believe that it would be irresponsible for a judicial officer to allow bail to a person who has given every indication that he is an incorrigible and unrepentant criminal. (*S* v *Maharaj* 1976 (3) SA 205 (D) 209 H; *S* v *Hlongwa* 1979 (4) SA 112 (D) at 113 H)."

The appellant has been convicted of similar infractions before. He has now been convicted again his hand having been found in the cookie jar again. He is therefore unrepentant and is likely to do it again. The fact that the conviction was six years ago is only relevant in considering sentence and not bail. In fact that he is a repeat offender also disqualifies him for community service, a factor which literally brings the appeal to its knees because the appellant was not a first offender. See *S* v *Mutenha and Another* HB 35/16; *S* v *Mabhena* 1996 (1) ZLR (H) 140E.

I tend to agree with *Mr Mabaudhi* for the state that considering all the relevant factors, including the substantial amount involved, a term of imprisonment was unavoidable and the effective sentence imposed was "a mere slap on the wrist."

In that regard, I am of the view that the appellant has dim prospects of success on appeal. This is a person who should, in the interest of justice be in custody. I am unable to find any misdirection in the judgment of the court *a quo*. It would be an affront to all sense of justice to release him to allow him to go and look for money to make restitution as he suggests.

Considering his previous behavior, that is an exercise that may involve the commission of another offence.

In the result, the appeal is hereby dismissed.

Marondedze, Mukuku and Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners