HH 1-2003
Crb B 2826/02
KEITH CHINOWAWA MANYANGE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 16 December, 2002 and 8 January, 2003

BAIL APPLICATION

Mr *Kabote*for the applicant;
Mr *Mushangwe*for the respondent.

MAKARAU J: In April 2001, the applicant was convicted of one count of theft of a motor vehicle by a Harare Magistrates court. He was sentenced to 7 years imprisonment, 2 of which were conditionally suspended.

The applicant noted an appeal to this court against both conviction and sentence. Pending determination of the appeal, he applies for bail.

In his application for bail, the applicant contends that his appeal against both sentence and conviction has good prospects of success. In support of this contention, he submits that the state failed to prove that the applicant was properly identified by one of the witnesses. He further submits that he identity testimony of this witness is unreliable. The applicant further attacks the testimony of the other witnesses and reaches the conclusion that the charges against him were trumped up by the police.

The respondent concedes that a different court, furnished with the same facts, might arrive at a different verdict. In making this concession, the respondent submits that the trial magistrate erred in relying on the testimony of the arresting detail which evidence amounted to a confession on the part of the applicant. In view of the fact that the applicant was not properly warned and cautioned before the confession, the respondent submits that the trial court should not have admitted this evidence. On the basis of the foregoing, the respondent does not oppose the applicant's application for bail.

It therefore appears to me that the applicant's application is based solely on the ground that he has an arguable case on appeal.

There is a clear distinction in our law between the principles governing the granting of an

application for bail pending trial and one for bail pending appeal. In the former, the presumption of innocence operates in favour of the granting of the application unless there are positive reasons for refusal. In an application for bail pending appeal on the other hand, the presumption of innocence is inoperative, as the applicant is a convicted and sentenced offender. For his application to succeed, such an applicant must show in his application that there are positive reasons why bail should be granted. In the absence of positive grounds, bail should be denied. (*S*v *Tengende*[1]).

It is trite that bail is a matter for the discretion of the court. In exercising its discretion the court considering an application for bail pending appeal must be satisfied that there are reasonable prospects of success on appeal and that the granting of bail will not endanger the interests of justice. This has been the approach of this and the South African courts in such matters.[2]
It thus appears to me that the consideration of such an application cannot rest on the consideration of whether there is a reasonable prospect f success on appeal alone. In *S*v *Tengende*(*supra*), it was held that the mere fact that there are reasonable prospects of success on appeal alone or that the appellant has a reasonably arguable case on appeal, does not entitle an applicant to bail. In this regard, the Judge of Appeal rejected the submission by the applicant's legal practitioner that because the applicant had been granted leave to appeal, (which meant that he had a reasonably arguable case), there was no reason to deny him bail. In rejecting the submission, he had this to say:

> " There is, I think, *force in this submission in so far as it relates to the narrow question of prospect of success. But I do not approach the matter on this basis alone; I approach it on the basis I have already indicated, namely whether, taking into account all the factors relevant to the question of bail pending appeal, the applicants have shown that the court's discretion should be exercised in their favour."*

It further appears to me from the authorities that the applicant must go further than showing that he has reasonable prospects of success on appeal and establish that there are positive grounds for granting him bail pending appeal and that the granting of bail will not endanger the interests of justice. This is so because the consideration of bail is in essence a balancing of two conflicting interests. These are the liberty of the applicant on one hand and the proper administration of justice on the other. Where an accused has been convicted and sentenced, he is not as of right entitled to his liberty. He must prove his entitlement to it, taking into account the interests of justice and the integrity of the justice delivery system. The onus is on him to tip the balance in his favour.

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1 1981 ZLR 445.
2 See *R Mtembu* 1961 (3) SA468; and *S* v *Williams* 1980 ZLR 446 (AD).

The above represents the approach that these courts have followed in considering bail pending appeal and I have no reason for departing from that approach.

In the application before me, the applicant has contended that he has good prospects of success on appeal. In so doing, he has attacked the individual testimonies given by the witnesses and sought to show that such testimony was unreliable or inadequate to secure a conviction.

I have given the matter my most anxious consideration. In my view, it is not adequate for the applicant to simply show some inadequacies in the State case and argue that because of these, he is entitled to bail as he has a reasonable prospect of success on appeal. That was the submission that was rejected in *S*v *Tengende*(*supra*). The applicant must show that in addition to his prospects of success on appeal, the interests of justice will not be endangered if he is granted bail.

The applicant was convicted of one count of car theft. He was acquitted on two other charges. At the time of his arrest, he had run away from his pursuers who included the police. He does not in his evidence dispute that he scaled over a pre-fabricated wall to get into a residential property whereat he was subsequently apprehended. The trial court was not impressed by the accused explanation of why he had to scale the walls before he was apprehended. In other words, the trial court made a finding as to the credibility of the applicant in this regard. It did not find him credible. I have not been given any reason why I should not be guided by the trial magistrate's findings on the credibility of the witnesses who appeared before him. The applicant ran away from his pursuers before apprehension to avoid detection and arrest.

In view of the above evidence against the applicant and the fact that the applicant has been sentenced to a fairly lengthy prison term and for which he has already served nine months, a factor that may induce him to abscond, the onus is clearly on the applicant to show that his release on bail will not result in him absconding and thereby prejudice the interests of justice.

The concession made by the respondent does not in my view, take into account the above factors. While it may be correct that the applicant may have an arguable case on appeal, that is not the only factor that I should take into account in determining an application of this nature.

In this application, it is pertinent to note that the application for bail is being made nine months after conviction and sentence. The record of proceedings in the trial court had been transcribed for the purposes of this bail application. In the application, the applicant has not indicated what efforts he has made to have the appeal set down for hearing now that the record is available. It has not been indicated to me how long it will take for the

appeal to be determined.
Taking all the above factors into account, I am of the view that the applicant has failed to discharged the onus on him to satisfy me that there are positive grounds why he should be allowed out on bail pending the determination of his appeal.
Accordingly, the application for bail is dismissed.

L M Kabote & Co, applicant's legal practitioners
Attorney-General's Office, respondent's legal practitioners