

OSCAR MANYIKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 20 NOVEMBER 2014

Bail Pending Appeal

Applicant, in person
I Muchini, for the respondent

TAGU J: On 20 November 2014, after perusing documents and hearing submissions from the applicant and Mr *I Muchini*, I delivered an ex-tempore judgment, dismissing an application for bail pending appeal. The applicant has now requested me to submit full written reasons since he wants to appeal against my decision. The following are the reasons.

The applicant appeared before a Bindura Regional Magistrate facing 7 counts of robbery and one count of attempted murder, as defined in the Criminal law (Codification and Reform) Act [*Cap 9:23*]. He was jointly tried with another accomplice. One count was withdrawn before plea since the complainant in that count was not located to testify. However, the applicant was found guilty of all the 8 counts despite the fact that the other count had been withdrawn before plea. The applicant was sentenced to a total of 23,5 years imprisonment of which 3 years imprisonment were suspended on conditions of future good conduct and restitution, leaving an effective sentence of 19,5 years imprisonment.

Dissatisfied by both conviction and sentence, the applicant noted an appeal with this Honourable Court under case number CA 290/14. Further, he now applies for bail pending appeal.

The application for bail pending appeal is opposed.

The main factors that are taken into account in an application of this nature are:

- (a) A possible delay before the appeal is heard;
- (b) The prospects of success on appeal;
- (c) The interests of justice, that is to say, will the admission of applicant to bail not jeopardise the interests of justice through abscondment – *S v Hudson* 1999 (2) SACR 431, *S v Williams* 1980 ZLR 466 (AD); *S v Kilpin* 1978 RLR 282 (A) and *S v Manyange* 2003 (1) ZLR 21 (H).

I will deal with each of the above factors separately. The first factor is the possibility of delay before the appeal is heard. Of late this is no longer a valid reason given the fact that appeals are now being dealt with expeditiously unlike in the past.

The second factor relates to prospects of success on appeal. In *casu*, there are no prospects of success in the majority of counts. The evidence shows that the applicant was present when the offences were committed. When the applicant was arrested on 28 October 2011 at Pambeno Farm in Bindura part of the stolen property was recovered from him. The applicant implicated his co-accused who was also found in possession of some of the stolen property. The learned magistrate correctly held that it cannot be coincidence that the state witnesses who were the complainants described a Toyota Chaser which was being driven by the applicant's co-accused whilst applicant was an occupant who participated in the robberies. While the appeal court may set aside conviction and sentence in respect of count 7 only which was withdrawn before plea, this alone cannot be a basis for granting the applicant bail pending appeal. In the case of *S v Williams (supra)*, it was held that-

“But it was putting it too highly to say that bail should only be granted where there was a reasonable prospect of the appeal succeeding. On the one hand, in serious cases even where there was a reasonable prospect of success on appeal bail should sometimes be refused, notwithstanding that there is little danger of the convicted person absconding”. (Emphasis added)

In *casu*, all the counts are very serious. Risk of absconding if granted bail pending appeal is very high.

Prospects of success in respect of the sentences imposed by the court *a quo* are also not available. The offences for which the applicant was convicted of are very serious. A lengthy custodial term was unavoidable under the circumstances.

I will now deal with the last factor, the likelihood of abscondment if granted bail. In the case of *S v Kilpin (supra)*, the court pointed out that the principles governing the granting of bail after conviction were different to those governing the granting of bail before conviction. On the one hand, where the person has not yet been convicted he is still presumed innocent and the courts will lean in favour of granting him/her liberty before he/she is tried. On the other hand, where he/she has already been convicted the presumption of innocence falls away. In the present case the applicant has already been convicted and sentenced to a lengthy term of imprisonment. If granted bail pending appeal, the applicant is likely to abscond to evade the lengthy prison term. It is in the interest of justice that the applicant prosecutes the appeal whilst in custody. Even if the sentence is reduced on appeal, a relatively long custodial sentence is unavoidable.

In the result, the application for bail pending appeal is dismissed.

Applicant in person
Prosecutor –General’s Office, Respondent’s Legal Practitioners