GODWIN MUCHEMWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 15 & 22 January 2016

Bail Application

Ms *D. Machaya*, for the applicant
Ms *S. Fero*, for the respondent

ZHOU J: The applicant was convicted by the Magistrates Court at Harare of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to five years imprisonment of which one year was suspended leaving an effective four years imprisonment. He has appealed to this Court against both the conviction and sentence. He has instituted the application *in casu* seeking his admission to bail pending the determination of his appeal. The application is opposed by the respondent.

The allegations upon which the conviction was sustained are that on 25 April 2014 and at House Number 17 NewBold Road, Greystone Park, Harare, the applicant together with two of his accomplices unlawfully and intentionally used violence against Perpetua Tafadzwa Magarira in order to steal her wallet with US$200, a Samsung Galaxy S3, a Samsung S4, a jacket, and motor vehicle keys. The facts which do not appear to be in dispute are that the complainant approached the police after seeing the applicant's photograph in a newspaper and advised them that he was one of the persons who had robbed her. Pursuant to that, the complainant's mobile phone which had been stolen during the robbery was recovered.

The principles which apply in an application for bail after an applicant has been convicted and sentenced are settled in this jurisdiction. In the case of *S* v *Tengende* 1981 ZLR 445 (S) at 448, Baron JA enunciated those principles as follows:

> "But bail pending appeal involves a new and important factor; the applicant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are

> grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused."

See also *S* v *Labuschagne* 2003 (1) ZLR 644 (S) at 649 A-B.

In *S v Dzvairo* 2006 (1) ZLR 45 (H) at 60 E-61A, PATEL J (as he then was) reiterated the above principles in the following terms:

> "Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospect of success is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail."

The issue of the identity of the applicant as one of the persons who robbed the complainant was canvassed by the trial court. The fact that the complainant's phone was recovered in circumstances in which the applicant and his accomplices were implicated is a factor which the Learned Magistrate considered as weighing against the applicant. That is not an unreasonable conclusion on the facts of this matter. The Magistrate rejected the suggestion by the applicant that the cellular phone which was recovered was not the one that he had sold to Russell Muchekesi merely because the covers had been changed. That is a finding of fact which is sound in this case. The explanation given by the applicant as to why he fled from the police when they wanted to arrest him was rejected by the Magistrate. The applicant has raised no argument of substance in that respect to warrant a conclusion that his appeal has prospects of success. From the above, it is clear that the applicant's appeal is very weak. When that factor is considered together with the seriousness of the offence and the considerable period of imprisonment which has been imposed upon the applicant it becomes clear that the inducement upon the applicant to abscond is real. After all, he even attempted to flee when he was about to be arrested by the police prior to his conviction. He has a greater motivation to escape now since he has already been convicted. The applicant has not shown positive grounds for him to be admitted to bail pending the determination of his

appeal. The transcribed record of proceedings is now available. The applicant should push for the appeal to be set down, as there are reasonable chances of getting a date in the near future for the appeal to be determined on its merits.

Given the above circumstances, the court is of the view that the application must fail.

In the result, the application is dismissed.

Machaya & Company, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners