

DENIS SCHOLZ  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 6 April 2017

### **Bail Pending Appeal**

*G Shumba*, for the applicant  
*T Mapfuwa*, for the respondent

TSANGA J: This was an application for bail pending appeal which I declined. I hereby give my written reasons for so doing. The applicant, a German national who was visiting Zimbabwe was charged and convicted of unlawful possession of cocaine as defined in s 157 (a) of the Criminal Law (Codification and Reform Act [*Chapter 9:23*] as read with Statutory Instrument (93) of 2010 (Dangerous Drugs Amendment Regulations No. 8) as read with part 1 s 4 (a) of the Dangerous Drugs Regulations Government Notice 1111/75.

He was convicted on his own plea of guilty and sentenced to 8 months imprisonment of which 2 months were suspended for 3 years on the usual conditions of good conduct. The applicant sought bail pending appeal on the grounds that the sentence was excessive given the quantum of cocaine which was involved which was said to be 1.7 grams. The applicant's argument was that in reality a fine would have sufficed and that his status as a foreigner should have been taken into account as he stood deported as a foreigner. Furthermore, his counsel argued that the applicant should have been accorded a similar punishment to those found in possession of small amounts of *dagga*.

The state was opposed to the application primarily on the grounds that the appeal against sentence was unlikely to succeed given that it is generally not for the appeal court to interfere with sentencing discretion simply because it would have passed a different sentence more so where the sentence is in compliance with relevant principles. (*S v Nhumwa SC 40/88*). The state's opposition to bail pending appeal was also founded on the basis that the magistrate had provided detailed reasons for arriving at the sentence. In particular, the state

drew attention to the fact that out of a possible sentence of five years the court had only imposed a sentence of 8 months with two months suspended.

When convicted and sentenced, the presumption of innocence no longer prevails, particularly so in cases of appeal against sentence. Where there are no positive grounds for granting bail, it is generally refused. The onus falls on the accused to show that he should be granted bail. Discharging such onus depends on two main factors: a) likelihood of appellant absconding which will depend on length of sentence passed and b) the prospects of success on appeal. *See S v Dzawo* 1998 (1) ZLR 536 (S). It is also a principle that the greater the likelihood that he will abscond the greater must be the prospects of success before bail should be granted. Other factors to be considered are the right to individual liberty and the likely delay before an appeal is heard. The above principles apply to all bail applicants pending appeal regardless of whether the applicant is a national or a foreigner. These considerations are important regardless.

I was in agreement with the state's articulated reasons that the appeal is unlikely to succeed. There is no doubt that cocaine is definitely treated as a dangerous drug across the globe and its possession is certainly treated far more strictly than the possession of *dagga* or marijuana as it is better known in some countries. In his pursuit of bail pending appeal, applicant's counsel was not able to draw this court's attention to any cases of possession of small amounts of cocaine where an accused had gotten away with a fine. What is of significance is that the relevant provision under which he was charged permits a sentence of a fine up to level ten or imprisonment up to a period of five years or both such fine and imprisonment. Sentence is in the discretion of the trier of fact.

Apart from the unlikelihood of the appeal court interfering with the sentence, I also based my decision on the grounds that the applicant was likely to abscond if granted bail taking into account the following factual circumstances. The applicant does not have any strong ties to this country. He was on a visitor's visa visiting his girlfriend in this country when he committed the crime. His counsel admitted that his visitor's visa had expired. He is therefore only in this country on account of serving the sentence which was imposed for the offence he committed. The only reason he would have to remain in Zimbabwe were bail to be granted would be to prosecute his appeal yet no special dispensation would be accorded in hearing his appeal on a fast track basis simply because he is a foreign national. Importantly, it is not the court that has the responsibility for extending his stay in Zimbabwe. Having shown a wanton disregard for the law of the country by being in possession of a dangerous

and prohibited drug, it is unlikely that the immigration authorities would extend his stay on account of prosecuting an appeal to be heard on a date as yet unknown. Whether or not he is likely to abscond was therefore inferred from these facts.

Having experienced the hardships of prison is likely to be an inducement for him to abscond. The surrender of his passport is neither here nor there as that has never really stopped those determined to cross porous borders in pursuit of their freedom. This is not a case that can simply be addressed by imposing so called stringent bail conditions. Whether or not a person is likely to abscond is often a matter of common sense and not just the law. My conclusion was that applicant could prosecute his appeal whilst serving his sentence.

It was for these reasons that bail pending appeal was refused.

*Madotsa and Partners*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal counsel