DISTRIBUTABLE (9)

SAMUEL MUTIZWA

v

THE STATE

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA
HARARE: AUGUST 27, 2019 & JANUARY 30, 2020

Appellant in person

R. Chikosha, for the State

IN CHAMBERS

MAVANGIRA JA

The appellant has approached this Court in terms of Rule 67 of the Rules of this Court which rule must be read with s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The rule provides *inter alia* in relevant part:

> "67. (1) An appeal against the refusal of bail in terms of section 121 (1) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] may be noted, at any time after the refusal of bail by the judge of the High Court …"

Section 121 (1) (b) of the Criminal Procedure and Evidence Act provides:

> **"121 Appeals against decisions regarding bail**
>
> (1)Subject to this section and to subsection (5) of section 44 of the High Court Act [*Chapter 7:06*], where a judge … has … refused to admit a person to bail-
> (a) …

(b) the person concerned, at any time;

may appeal against the … refusal …

(2) An appeal in terms of subsection (1) against a decision of –

(a) A judge of the High Court, shall be made to a judge of the Supreme Court

(b) …

(3) …

(4) An appeal in terms of subsection (1) by the person … refused admission to bail shall not suspend the decision appealed against."

Section 44 (5) of the High Court Act reads:

"**44 Right of appeal from High Court in criminal cases**

…

(5) Subject to rules of court, where a judge of the High Court has made an interlocutory order or given an interlocutory judgment in relation to any criminal proceedings before the High Court-

(a) the person against whom the criminal proceedings are being or will be brought; or

…

may, with the leave of a judge of the High Court or, if a judge of that Court refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against the interlocutory order or interlocutory judgment."

The respondent's very brief written response to this appeal which was filed on 26 August 2019 was to the effect that as the appellant had not sought and been granted leave to appeal to this Court, he had no right of audience and there was no appeal before the court. This stance was not persisted with at the hearing where Mr *Chikosha*, for the respondent addressed the court and opposed the appeal on the merits. At my request for a written response reflecting the respondent's true attitude to the appeal he subsequently filed written submissions on 28 August 2019 in which he opposed the application on the merits and did not persist with the issue of leave. I shall assume that the preliminary issue has been abandoned and will not dwell on it. I will therefore proceed to determine the appeal on the merits.

The appellant was convicted after a full trial by the Regional Magistrate sitting at Harare on 26 October 2018, of one count of armed robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. He was sentenced to six years imprisonment of which two years were suspended on the usual condition of future good conduct. Aggrieved by both conviction and sentence, the appellant noted an appeal to the High Court. He also petitioned the High Court for bail pending the hearing of his appeal. The bail application was opposed by the State and after oral submissions were made before the High Court, it was dismissed. It is against this dismissal that the appellant has now launched this appeal.

This Court's approach to matters of this nature was stated in *Chivhayo v The State* SC 94/05 as follows:

> "In any event, this Court has stated in a number of cases the basis on which it would interfere with the High Court's decision on bail.
>
>> Thus, in *S v Chikumbirike* 1986 (2) ZLR 145 (SC) at 146 F-G BECK JA said the following:
>>
>>> 'The next matter to be decided is whether this Court in hearing the appeal should treat it as an appeal in the wide sense, that is to say, that it is to be treated as if it were a hearing *de novo*. Once again that matter has been decided by the case of *The State v Mohamed* 1977 (2) SA 531 at 542 B-C where TROLLIP JA said that in an appeal of this nature the court of appeal will only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision.'"

Bail pending appeal is not a right. An applicant for bail pending appeal has to satisfy a court that there are grounds for it to exercise its discretion in his favour. In the case of bail pending appeal the proper approach is that in the absence of positive grounds for granting bail, the application will be refused. The applicant having been found guilty and sentenced to imprisonment is in a different category to an applicant seeking bail pending trial. See *S v*

Tengende & Ors 1981 ZLR 445 (S) at 447H – 448C (also cited with approval in the *Chivhayo* case *(supra)*).

Reference was also made in the *Chivhayo* case to *The State v Williams* 1980 ZLR 466 (S) wherein it was stated that considerations of reasonable prospects of success on the one hand and the danger of the applicant absconding on the other, are inter-connected and have to be balanced. Furthermore, that the less likely the prospects of success on appeal, the more inducement there is on an applicant to abscond. It also emphasised that in every case where bail after conviction is sought the *onus* is on the applicant to show why justice requires that he should be granted bail.

It is against this backdrop that the decision of the court *a quo* must be viewed and this appeal determined.

DOES THE APPELLANT HAVE PROSPECTS OF SUCCESS ON APPEAL?

The judge in the court *a quo* captured this issue as reflected in the following excerpt:

> "In such an application, the established factors for consideration by the court are the prospect of the appeal succeeding, the likelihood of the applicant absconding pending determination of the appeal, the applicant's right to personal liberty as well as the likely delay before the hearing of the appeal. See *S v Dzawo* 1988 (1) ZLR 536 (S); *S v Labuschagne* SC 21/03."

Patently, the judge in the court *a quo* was alive to what the law required him to take into consideration. He proceeded:

> "These factors are not individually decisive. They are considered together.

But it goes without saying that the conviction and sentence mean the applicant has lost his right to individual liberty. His situation is now different from that of an applicant for bail pending trial."

Notably, in this respect the judge was alive to the exigencies of the matter before him. See the *Tengende* case (*supra*). Neither did the guidance in the *William's* case (*supra*) escape him as shown by his further pronouncement below:

> "The predominant factor is whether the appeal enjoys a reasonable prospect of success.
>
> The brighter that prospect is the less likely the risk of abscondment. The converse is equally true.
>
> I therefore devote most of my energy to assessing the prospect of the appeal succeeding."
>
> In essence I must determine whether the appeal is reasonably arguable and not manifestly doomed to failure. See *S v Robert Martin Gumbura* SC 349/19. (sic) (N.B. the correct citation is SC 349/14.)
>
> Put differently, I must decide whether there is substance in the appeal. I must do that without determining the appeal itself. That is so because the appeal itself is not before me."

The learned judge then examined the facts as reflected in the judgment of the trial magistrate pertaining to the offence as well as the applicant's dramatic arrest. In summary the learned judge considered that this was an armed robbery committed on petrol attendants at a service station. After the robbery the two victims of the crime chased after the applicant and his two accomplices. A customer who arrived at the service station shortly after the commission of the offence joined in the pursuit of the armed robbers with one of the two victims who were running in pursuit getting into the customer's vehicle. The other victim continued with the chase on foot.

The dramatic arrest is captured in the following excerpt from the trial magistrate's judgment:

> "When Muchineripi took over he pursued the assailants who upon realised (sic) that the vehicle was close by parted ways. One ran into Mukuvisi and another ran into PHD durawall. The one who ran over the PHD durawall was chased after by the PHD Security guards. He jumped back and was hit by the vehicle driven by Muchineripi. And this person who was hit at this time was the accused person and this is what led to his arrest. The other 2 fled from the scene and were later arrested with the assistance of the accused."

The trial magistrate dismissed as fanciful the applicant's claim that he was a victim of mistaken identity particularly when it was him, who upon his arrest, led the police to the arrest of his accomplices who were eventually prosecuted, convicted and sentenced before the applicant's trial was finalised.

It is also pertinent that the first of the two accomplices to be tracked and arrested with the help of the applicant was found in possession of three cellphones which were taken from the service station on the day of the robbery. The other accomplice was, on arrest, found with a gun which was examined by the Ballistics expert and found to have fired some shots.

The following summation in the court *a quo's* judgment aptly captures the most compelling factors that led to the applicant's conviction by the trial magistrate and similarly the finding by the learned judge *a quo* that there were no prospects of the appeal against conviction succeeding. The learned judge stated:

> "Quite clearly, the applicant was pursued and caught. He was found in possession of a gun-pouch. He was the bridge which led to the arrest of his accomplices. One of those accomplices was found in possession of three cellphones robbed from the service station on the day of the commission of the offence. The other was found in possession of a firearm which, on examination, was established to have fired some shots. The pursuers, as already indicated, had been shot at. A firearm had also been pointed at the victims in the course of the commission of this heinous offence."

The learned judge *a quo* also concluded that there were no prospects of success in the appeal against the sentence imposed on the applicant by the trial magistrate. He noted that armed robbery ordinarily attracts a custodial sentence. He considered that considerable fear was instilled into the victims, that a loaded firearm was pointed at them and that some of the property taken was not recovered. He noted that the trial magistrate had also considered the prevalence of robberies at service stations and had decided to impose a sentence that would have a deterrent effect to not only the individual but also in general. He found no misdirection on the part of the trial magistrate. Neither do I find any misdirection on the part of the learned judge *a quo*.

Significantly in this regard the applicant did not make any submissions pointing to any alleged misdirection on the part of the court *a quo*. Despite exhortations by the court to point out what he viewed as misdirections by the court *a quo*, he concentrated his efforts in revisiting the evidence led at the trial and he tried to discredit it as not worthy of belief and thereby discrediting the correctness of his conviction by the trial magistrate. The appeal court will be faced with the task of assessing whether there was before the trial magistrate sufficient evidence justifying his conviction. The court *a quo's* determination of the applicant's application for bail pending appeal is the subject of the present appeal. In the absence of any misdirection on that court's decision, this appeal cannot succeed.

It is also significant that the applicant absconded during a joint trial with his accomplices resulting in a separation of trials. The applicant was rearrested after his co-accused had been convicted and sentenced. This turns out to be another relevant factor that tends to confirm the risk of abscondment on the applicant's part in the face of the finding of no prospects of success on appeal as found by the judge in the court *a quo*.

For the above reasons the appeal has no merit. It is accordingly ordered as follows:

The appeal be and is hereby dismissed.

National Prosecuting Authority, respondent's legal practitioners.