TERRENCE MUKUPE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 4 & 10 January 2023

Bail Pending Appeal

L Uriri, for the applicant
W Mabhaudhi with L Masuku & FC Muronda,for the respondent

CHIKOWERO J:

1. This is an application brought in terms of s 123 (1) (a) (i) of the Criminal Procedure and Evidence Act *[Chapter 9:07*] as read with Rule 90 (4) (e) of the High Court Rules, 2021 for the admission of the applicant to bail pending appeal against conviction and sentence.
2. On 8 November 2023 this court convicted the applicant and his three co- accused of the alternative charge of contravening s 174 (1) (e) of the Customs and Excise Act [*Chapter 23 :02*] ("the Customs and Excise Act").
3. The Court found that the quartert had imported or assisted in or were accessories to or connived in the importation of certain litres of diesel without payment of duty thereon.
4. It acquitted them of the main charge of fraud as defined in s 136(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code"). Therein the allegations were made that they misrepresented to the Zimbabwe Revenue Authority ("Zimra") at the Forbes Border Post that the diesel in question was in transit to the Democratic Republic of Congo when they knew that it was destined for Zimbabwe and by means of this deception, evaded the payment of duty. The prejudice occasioned to Zimra was alleged to be a certain amount of duty.
5. The applicant and his co-accused were each sentenced to three and half years imprisonment of which six months were suspended for 5 years on the usual conditions

of good behaviour . In addition, each was sentenced to pay a fine in the sum of US $ 12 780 in default of payment two years imprisonment.

6. Among other things the Court found it proven that the applicant had committed the offence as demonstrated by his role in facilitating not only the purchase of the diesel but also its transportation from Beira in Mozambique into Zimbabwe as well as his sustained but unsuccesful endeavour to prevent the physical examination of the cargo at the Chirundu One Stop Border Post. As for the other three they were the drivers who had loaded the diesel in Mozambique and brought it into Zimbabwe through the Forbes Border Post in Mutare.
7. Once inside this Country the diesel was decanted and replaced with water. The offence was discovered at Chirundu when the cargo was physically examined, forensically tested and turned out to be water.
8. The fourth driver did not stand trial. His being a fugitive from justice meant the respondent could not even indict him for trial.
9. In a long line of cases, the approach in an application for bail pending appeal is that the applicant must show, on a balance of probabilities, that there are positive grounds for admitting him to bail pending appeal, that justice will not be endangered by his admission to bail and that there are reasonable prospects of the appeal succeeding. The applicant must tip the scale in his favour. See *S* v *Williams* 1980 ZLR 466 (A); *S* v *Tengende* 1981 ZLR 445 (S); *S* v *Manyange* 2003 (1) ZLR 21 (H); *S* v *Labuschagne* 2003 (1) ZLR 644 (S); S v Dzvairo 2006 (1) ZLR 45 (H) & *S* v *Makarahanda* HCC 04/22.
10. The point was made in the above cases, and many others, that a convicted offender upon whom a custodial sentence has been imposed no longer enjoys a right to bail. He is no longer presumed innocent. S 50 (d) of the Constitution of Zimbabwe, 2013 makes it clear that the right to bail relates to a person pending a charge or trial. A prison sentence is thus just cause for depriving a convicted offender of his right to personal liberty see s 49 (2) of the Constitution. Section 70 (5) (b) of the Constitution cannot be read to mean that a person who has been tried convicted and sentenced to a custodial term has a right to bail pending appeal against conviction and sentence. The right provided for therein is to appeal against the conviction and sentence. If the makers of our supreme law intended to make bail pending appeal a constitutional right there was

nothing precluding them from expressing such an intention either in ss 50, 70 or indeed anywhere in Chapter 4 part 2 of the Constitution.

11. Section 123 of the Criminal Procedure and Evidence Act [Chapter 9:07] ("The CP and E Act") simply enshrines the powers of a judge of the Supreme Court or the High Court to admit an offender to bail pending appeal. That s 123 (1) gives a judge of either Court or discretion to a magistrate to admit an offender to bail pending appeal is not the same thing as an offender enjoying a right to bail pending appeal. Neither do I read s 123 (2) of the CP and E Act as speaking to a right to bail pending appeal.
12. In all the circumstances, it is my finding that the applicant, having been convicted and sentenced to a term of imprisonment, does not have a right to bail pending determination of his appeal against conviction and sentence. The Constitution of Zimbabwe, 2013, did not alter this settled legal position. This conclusion works against the admission of the applicant to bail pending the determination of his appeal.
13. The record of appeal is ready and was attached to the written bail statement. The applicant did not place any evidence before me in respect of what, if any, he has done to expedite the hearing of the appeal. He also was silent on the likely dela y, if any, before the appeal is heard and determined. He did not say that there is a delay in the setting down, hearing and determination of criminal appeals in the Supreme Court. He did not even indicate whether, to expedite the hearing of the appeal, he has taken it upon himself to file and serve his heads of argument without waiting for the Registrar of the Supreme Court to call upon him to do so. Indeed, he has not disclosed whether the Registrar of this Court has sent the appeal record to the Registrar of the Supreme Court and, if so, whether the latter has received it. Considering that the appeal record is ready I agree with Mr *Mabhaudhi* that it has not been shown that justice will not be endangered by admitting the applicant to bail pending appeal. It occurs to me that it is in the interest of the administration of justice, which includes the integrity of the courts, that the applicant, a convicted and serving offender, prosecutes his appeal while serving.
14. Despite Mr Uriri's efforts, I take the view that the applicant enjoys no reasonable prospect of success on appeal against the conviction and sentence.
15. It is not in his interest, which coincides with the wider interest of the proper administration of criminal justice in this country to interrupt the sentence pending determination of the appeal. The interest of the administration of justice in this case

requires that the applicant, whose appeal is wanting in reasonable prospect of success, should continue serving as he prosecutes the appeal.

16. The Notice of Appeal, in relevant part, reads as follows:

"[A] AS REGARDS CONVICTION

1. The Court *a quo* erred misdirected itself on the law, alternatively the Court *a quo* misdirected itself on the facts and evidence such gross misdirection amounting to a misdirection in law, in convicting the appellant of contravening s 174 (1) (e)of the Customs and Excise Act [*Chapter 23:02*] in circumstances where as a matter of law and on the evidence the appellant, not being an importer or exporter had neither an obligation nor the mandate pay duty for the goods concerned as this obligation was the of the importer and or Southern Business Service, a duly mandated clearing agent for the importer of the goods.
2. The Court a quo erred and grossly misdirected itself in law in convicting the appellant on circumstantial evidence where the inference of guilt was not the only reasonable inference to be drawn from the facts and the evidence.
3. Having acquitted the appellant on the main charge of fraud allegedly in that false misrepresentations had been made to ZIMRA at Forbes Border Post that fuel was being imported in transit to the DRC well knowing that this was false, the Court *a quo* erred in convicting the appellant on the alternative charge which had the same exact *facta probanda* (that is , a misrepresentation at the port of entry) as the charge on which the court aquo had acquitted the appellant.
4. The court *a quo* erred and grossly misdirected itself on the facts and evidence, such gross misdirection amounting to a misdirection in the law, in not finding that the appellant's role in the whole transaction was merely advisory without direct or indirect knowledge of the difference in content of the trucks at the point of entry and point of exit respectively.
5. Consequently, in the absence of direct evidence the court erred in law in not resolving the resultant reasonable doubt in favour of the appellant and in not holding that the state had for that reason not proved its case beyond a reasonable doubt.

[B] AS REGARDS SENTENCE

In the event of the appeal against conviction not being sustained the appellant appeals against sentence on the following grounds:

1. The court *a quo* erred and grossly misdirected itself at law in sentencing the appellant for the offence of contravening s 174 (1) (e) of the Customs and Excise Act [*Chapter 23:02*] on the basis of considerations and sentencing guidelines applicable for the offence of smuggling as defined in terms of s 182 of the Customs and Excise Act [Chapter 23:02].
2. The Court a quo having found that the appellant was a first offender and of good behaviour erred and grossly misdirected itself in imposing a custodial sentence against the appellant.
3. Having found that duty for the fuel had been fully paid and that the Zimbabwe Revenue Authority was not in any way prejudiced, the court *a quo* erred and grossly misdirected itself at law in imposing a fine of US$ 12 780 on the appellant and a sentence of two years in the event that appellant defaults in paying the fine of US $ 12 780.

4. The court *a quo* erred and grossly misdirected itself at law in imposing a sentence which emphasizes more on general deterrence as opposed to the subjective reformation and rehabilitation of the appellant.
5. The court *a quo* having found that the offence committed by the appellant was not the worst case of a contravention of s 174(1) (e) of the Customs and Excise Act [*Chapter 23:02*] , erred and grossly misdirected itself at law in imposing both a fine and imprisonment and in not finding that a fine was in the circumstances of the case, an appropriate sentence.

RELIEF SOUGHT

WHEREFORE, tendering as aforesaid, the appellant prays for the following relief:

1. That the appeal against conviction is allowed.
2. The appellant's conviction and sentence on the alternative charge is quashed and substituted with the following:
   "in the result, the accused is also found not guilty, discharged and acquitted on the alternative charge of contravention of s 174 (1) (e) of the Customs and Excise Act [*Chapter 23:02*].
   IN THE ALTERNATIVE in the event that the appeal against conviction fails the appellant prays for the following relief:
   1. The appeal against sentence is allowed.
   2. The sentence imposed on the appellant be and hereby set aside and is substituted with the following:
      "The accused is sentenced to one and half years imprisonment wholly suspended for 5 years on condition the accused does not within the next 5 years commit any offence involving the bringing of goods into the Country illegally or without payment of duty thereon for which upon conviction the accused is sentenced to a term of imprisonment without the option of either a fine or community service. In addition, the accused is sentenced to pay within a period of 90 days, a fine in the sum of US$ 12 780 through the Registrar of the High Court at Harare in default of payment (2) two years imprisonment."

17. I consider that all the grounds of appeal are without substance. I do not think that there is any real prospect of the appellate court finding differently.
18. As explained in the judgment subject to the appeal (The *State* v *Mukup*e & *ors* HH 629/23), the Customs and Excise Act has wide definitions of the words "import" and "importer". The court explained why the applicant is caught in the ambit of being an importer and why it was satisfied that he imported the diesel in question. Further, it must always be borne in mind that even if the court had not found that the applicant did not import the diesel, it still made a finding that he unlawfully and intentionally therefore assisted in or was an accessory to or connived at the importation of the diesel without payment of duty thereon.

19. Section 174(1) (e) is not targeted only at those required by law to pay duty on imported goods, but also those who unlawfully and intentionally assist or are accessories to or connive at importing goods without payment of duty.

20. It is for these reasons that I take the view that the first ground of appeal is frivolous.

21. The second ground of appeal not only attacks findings of fact, some of which were based on an assessment of the credibility of all those who testified at the trial, but is erroneous. The conviction was not based solely on circumstantial evidence. It rested on a combination of direct evidence and circumstantial evidence. Consequently, there is not and can be no substance in the second, being an incorrect ground of appeal.
22. The essential elements of the offences of fraud (the main charge) and a contravention of s 174(1)(e) of the Customs and Excise Act (the alternative charge) are different. I agree with Mr *Mabhaudhi* that misrepresentation is not an essential element of the offence with which the applicant was convicted. Fraud is undoubted only one of the many methods a person can employ to enable him to contravene s 1749(1) (e) of the Customs and Excise Act. It is not, itself, the offence defined in s 174(1)(e). The conduct upon which the alternative charge rested and on which the applicant was convicted, was not misrepresentation. Instead, it was the importation or assistance in importation or being an accessory to the importation or conniving in the importation of the diesel in question without payment of duty. A reading of the alternative charge makes that abundantly clear. There is nothing in the third ground of appeal warranting the serious attention of the appellate court.
23. The fourth ground of appeal indirectly questions the correctness of factual findings made on an assessment of the evidence as a whole, including an appraisal of the credibility of the state witnesses and the applicant. It does this via the convenient route of complaining that the applicant's defence ought not to have been rejected without attacking the findings of fact made on the basis that the state witnesses were credible. The court gave detailed reasons why it made the credibility findings. It gave detailed reasons why it found that the applicant was a discredited witness and hence rejected his defence. For instance, the interaction between the applicant and the Zimra Station Manager at Chirundu over the phone and the former's physical interaction with the State witnesses at Chirundu could not be anything but irrefutable evidence that the applicant was no mere agent/advisor. The fourth ground of appeal is likewise devoid of any real prospect of success.
24. The fifth is hardly a ground of appeal. It is argument premised on the one preceding it. Even if it were a ground of appeal, it is erroneous in proceeding on the basis that the conviction was solely predicted on circumstantial evidence.

25. As regards the prospect of success of the appeal against sentence, the court explained why it took inspiration from the sentencing guidelines as they related to the kindred offence of smuggling. The applicant, who was represented throughout the trial, deliberately decided not to object to that approach, which was suggested by the State at the pre-sentencing hearing. In any event, the sentence was not informed solely by the sentencing guidelines. The sentence imposed fell within the penal provisions of s 174(2a)(a) and (b) of the Customs and Excise Act. I am persuaded, in the circumstances, that there is no substance in the first ground of appeal.
26. As regards the second, I do not think that any serious argument can be advanced on appeal that the incarceration of the applicant was a misdirection just because he was a first offender. First offenders who commit serious offences risk imprisonment if convicted. I still need to point out, as I do, that I did not find that the applicant was of good behaviour.
27. There is no need to dwell on the third ground of appeal vis a vis prospect of success because the prayer as cast in the Notice of Appeal is evidence that the portion of the sentence requiring the applicant to pay a fine in the sum of US$ 12 780 in default of payment two years imprisonment is not being appealed. In the circumstances, the third is no ground of appeal at all. It does not speak to anything.
28. Sentencing is an exercise of discretion by a trial court. The sentencing judgment (*S* v *Mukupe and Ors* HH 625/23) explains the interplay between the offender, the crime and the interests of the society which justified the imposition of a custodial sentence. In respect of the aggravation I highlight only two of some of the factors considered. The applicant was a member of an organized criminal group. He, as were those not before me, had no respect for national laws and national borders. I do not think that the appellate court will take the view that the applicant was sacrificed on the altar of general deterrence, and his person disregarded as suggested in the fourth ground of appeal. It will be recalled that the applicant was afforded the opportunity to avoid a whole two years imprisonment provided he pays a fine. He has not appealed this portion of the sentence. Further, he had 6 months of the three years imprisonment suspended on the usual conditions of good behaviour. The suspended portion of the imprisonment term was chiefly on account of his status as a first offender.
29. It is true that the court found that this was not the worst case of its kind. That, however, was not enough to sway the court to settle for a fine only by way of sentence.

Imprisonment was merited because the case was bad. To have imposed the sentence of a fine in the circumstances of the matter would have been manifestly lenient as to amount to a gross miscarriage of justice. The message such a sentence would have conveyed was that the courts of this country are not dispensing justice. The implications of such a message are anybody's guess.

30. I am aware that at the hearing Mr *Uriri,* for the applicant, successfully applied for amendment to the draft order. Instead of the US$500bail deposit initially offered, the proposed bail quantum was varied to US$2 000. Further, the proposed reporting condition was tightened and a Deed of Transfer in respect of a property in Caledonia, registered in the name of the applicant, was tendered as security. The proposal to surrender the applicant's passport was retained as was the condition to reside at a certain address until the appeal is determined. The assurances that the applicant will not abscond and will surrender himself to prison authorities should his appeal fail were persisted with.
31. I have not been swayed by these proposed conditions and the undertakings. Even if I were to order the release of the applicant on bail on conditions including that the Registrar holds the applicant's passport, the risk of the applicant becoming a fugitive from justice remains high. The extent of his immovable assets remains unknown to the court. There is no evidence on which I can find that the applicant cannot sacrifice the Caledonia property for his freedom by turning into a fugitive from justice.
32. In the final analysis, the applicant has failed to satisfy me that there are positive grounds that I should admit him to bail pending appeal. He has not established that the interests of justice will not be endangered by his admission to bail pending the determination of his appeal. There is no evidence that there is any likelihood of delay before the appeal is set down, heard and determined. Being a convicted offender who is serving a three-year prison term (he did not disclose whether he was avoided serving the further two years imprisonment by paying the US$ 12 780 fine in view of the fact that he did not apply for time to pay the fine when the sentence was imposed on him on 26 November 2023) he has enough reason to want to flee. This is compounded by the fact that the appeal has no prospect of success.
33. In *S* v *Labuschagne* (supra) GWAUNZA JA (as she then was) at 649 E, quoted the sentiments of the trial judge who, like Her Ladyship, dismissed the application for bail pending appeal. Those sentiments are these:

> "… I wish to reiterate what has been repeatedly stated by our courts and indeed by courts in other jurisdictions, that it is improper to allow people convicted of serious crimes to be walking in the streets instead of serving their sentences when the prospects of success are non –existent. Society would lose faith in the system and revolt. This is a proper case, in my view, where the applicant should prosecute his appeal while serving his sentence"

34. I am mindful of the fact that the above sentiments were echoed, in approval, in respect of an applicant who was convicted of murder and sentenced to fifteen years imprisonment. That notwithstanding, they reflect my own thoughts in this matter. Even if I had found that the applicant will not abscond, everything else is against him. He failed to tip the scales in his favour. It is just that he prosecutes the appeal while serving his sentence.
35. The application for bail pending appeal against conviction and sentence be and is dismissed.

Chingeya Mandizira Legal Practitioners, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners.