FRADERICK CHIMAIWASHE

versus

THE STATE

HIGH COURT OF ZIMBABWE

MWAYERA J

HARARE, 30 March 2012

**Application for Bail Pending Appeal**

*K Maeresera*, for the applicant

*E Nyazambi*, for the respondent

MWAYERA J: The applicant was convicted of theft of a motor vehicle as defined in s 113 of the Criminal Law (Codification and Reform) Act, [*Cap 9*:*23*] and was duly sentenced. The applicant noted an appeal against the decision of the court *a quo* and has approached this court with an application for bail pending appeal. The respondent in opposition of the application raised points in *limine*. The court moved for address on merit after both the applicant and respondent counsel had submitted oral argument against and for upholding of points in *limine* respectively in their documents filed of record and from oral submissions. The State sought to have the bail application struck out on the basis that the grounds of appeal attached to the application are vague and generalised. The argument presented being that were the grounds are vague then there is effectively no notice of appeal and as such no basis for bail pending appeal which in actual fact has not been noted.

In terms of the Appellate Division (Magistrate Court) (Criminal Appeals) Rules s 22(1) SI 504 of 1979 the grounds of appeal have to be clearly and specifically set out. This notification is ably illustrated in the case of *S* v *Ncube* 1990 (2) ZLR 303.

Where simply alluding to “the learned magistrate erred in accepting the complainant’s evidence” was taken as unacceptable and not in compliance with the rules. The ground of appeal was viewed as vague thus to simply assert the evidence does not support conviction is not in compliance with the rule. In our case r 22 SI 504 of 1979 spells out need for grounds to be clear and specific.

The grounds of appeal form the basis of application for bail pending appeal. If there are no grounds of appeal then indeed there is no basis of bail pending appeal against a non existent appeal, culminating in the application being struck off. If however the grounds furnished are in compliance with the rule having clarity and specificity then the application has to be decided on merit.

I propose to deal with the grounds outlined in seritum

1. The court *a quo* seriously misdirected itself in convicting the appellant yet the circumstantial evidence adduced on behalf of the State did not lead to one conclusion that the appellant committed the offence but to different possibilities.

This ground is not vague but clearly spells out the basis of appeal and it is my well considered view that the wording is in compliance with r 22 in that it is a specific assertion.

2. The learned magistrate erred in simply ruling out possibilities as fanciful and far fetched and making too many assumption which were not supported by the evidence in any way.

This is not a ground of appeal as envisaged by the rule. It is not sufficient to simply allege the magistrate erred. In any event that which is given as ground number 2 is trying to simplify ground number 1 but cannot be a stand alone ground.

3. The learned magistrate seriously misdirected himself in simply dismissing as irrelevant vital evidence that when the motor vehicle was stolen the appellant was within the premises hence he could not have stolen the motor vehicle in question and further that one of the meetings it had been discussed that the motor vehicle in question had been seen somewhere. This is not a clear grand which can stand alone with no link to the first ground and the same can be said of the fourth ground.

4. That the court a *quo* clearly failed to properly analyse the evidence before it but simply relied on unsubstantiated assumptions which were not supported by the facts in anyway.

5. The learned magistrate erred in placing too much reliance on the fact that the appellant was the one in charge of keys of motor vehicles and hence he ought to be held responsible for the stolen motor vehicle yet the evidence did not prove the guilty of the appellant as required by the law, and the ground.

6. The court a *quo* erred in simply accepting evidence of the State witnesses and just dismissing the appellant’s testimony are talking of the same issues that the court erred by relying on the State witnesses’ evidence and could not strictly speaking be dissociated from the first ground of appeal.

7. The court a *quo* erred in law and in fact by failing to properly apply its mind to requirements that have to be met when relying on circumstantial evidence. If it had done so it ought to have acquitted the appellant. Again a regagitation of the first bail condition**.**

8. The court a *quo* clearly misdirected itself by dismissing legitimate evidence and giving undue importance on circumstances which were clearly not conciable with innocence. This ground has nothing new but substitutes the first ground of appeal.

From the forgoing it is apparent there is only one valid ground of appeal raised by the applicant. The rest of the grounds are just vague assertions or statements made in effort to simplify the only ground of appeal.

The State’s argument that there is no notice of appeal because the alleged grounds lack clarity and specificity to a great extend holds water and the point in *limine* is upheld in so far as ground 2 – 8 are concerned, but for the first ground the matter could have been struck out. The first ground of appeal is clear and specific. It can further be substantiated. In heads of arguments for purposes of detail for purposes of appeal. For the purpose of the present application because the court has made a finding that the first ground of appeal that, the court a *quo* seriously misdirected itself in convicting the appellant yet the circumstantial evidence adduced on behalf of the State did not lead to one conclusion that the appellant committed the offence but to different possibility is clear and specific and in compliance with the rules there is a valid notice of appeal and the argument by the State in respect of the first ground is dismissed. Having ruled that there is a valid ground of appeal, it follows the application for bail pending appeal has to be determined on merits. In applications of this nature the court has to take into account whether there are prospects of success on appeal, the likely delay before the appeal is determined and whether there is a risk of abscondment and the right of the individual to liberty. In reaching out the decision the court has taken note of the documents or papers filed of record by both the applicant and the respondent’s counsel. Due regard has been given to the record of proceedings and oral submissions by both counsel. It is common knowledge that the appeals are taking fairly long before being finalised such that in the event of an appellant succeeding were the sentence imposed is short the appeal will basically be rendered academic. In the present case the applicant was sentenced to ten years with two years suspended on conditions of good behaviour and a further three years suspended on conditions of restitution leaving effective sentence of five years. The sentence is for theft of motor vehicle from employer. From the record of proceedings the court gave a rational content and explanation of how it arrived at the sentence. The court a *quo* has unfettered sentencing discretion which in the circumstances was exercised properly such that it is my well considered view that the sentence imposed is not likely to be tempered with. If that is the case it follows the delay in hearing the appeal will have no effect on the applicant.

The issue of likely delay in hearing appeal cannot be viewed in isolation of the other factors mentioned hence the comment on prospects of success. Having said there is no likelihood that the sentence will be interfered with it is important to turn to the prospects of success of appeal against conviction. The conviction in the court a *quo* was on circumstantial evidence and credibility of witnesses.

The trial court had the benefit of seeing, hearing and assessing the witnesses credibility and made a finding that those State witnesses were worthy believing thus credible. A perusal of the record shows the analysis of evidence by the court and one cannot help but agree with the court’s assertion. It is not an illegality to convict on circumstantial evidence. What is important is that from the given evidence the only reasonably inference to be drawn is that which the court a *quo* came up with. In the present case the court a *quo* made a finding that the only reasonable inference was that it was the applicant who stole the motor vehicle in question. The inference drawn must or ought to be the only reasonable inference that can be drawn from or drawn from the circumstances. The judgment by the court a *quo* spells out how the trial court basing on credibility of witnesses came up with the conclusion that given the evidence on hand the only reasonable inference to be drawn was that the applicant stole the motor vehicle in question. It is quite apparent from the judgment that there was no misdirection and that is further buttressed by the manner the applicant kept repeating the one ground of appeal that the court a *quo* erred in convicting the applicant on circumstantial evidence. It is not an irregularity to convict on circumstantial evidence more so when the court judiciously comes up with the decision as being the only reasonable inference to be drawn from the evidence. The conviction appears to be in order and as such there are no prospects of success on appeal against both conviction and sentence. Regard being given to the fact that there are no prospects of success on appeal the risk of abscondment is high given the lengthy custodial sentence that goes with the offence of theft of motor vehicle.

From the above it is clear there is likely to be delay in hearing and determination of the appeal. That fact on its own is not sufficient to persuade the court to rule that the applicant is a suitable candidate for bail. The court is alive to the need to safe guard the liberty of an individual. However, that right has to be juxtaposed to the interest of administration of justice. Having said there are no prospects of success on appeal and sentence and that the delay in hearing of the appeal will therefore not be prejudicial to the applicant. It is the court’s view that the applicant is not a suitable candidate for bail pending appeal.

The application is accordingly dismissed.

*Sakutukwa & Partners*, applicant’s legal practitioners

*Attorney General*’s *Office*, respondent’s legal practitioners