MAZVITA EVELYN TAFA

versus

THE STATE

HIGH COURT OF ZIMBABWE

MWAYERA J

HARARE, 30 March 2012

**Bail Application**

Miss *M. Chimhoga*, for the applicant

*F.I. Nyafunzu*, for the State

MWAYERA J: The application for bail pending appeal against both conviction and sentence was dismissed on the basis that the conviction was well sounded on evidence adduced before the court and that the trial court properly exercised its sentencing discrepancy and came up with an appropriate sentence in the circumstances.

In application for bail pending appeal the law is fairly settled. The court has to consider factors ably outlined in the case of *S* v *William* 1980 (2) ZLR 468 the court has to consider.

1. Whether there are prospects of success on appeal
2. Whether there is risk of abscondment
3. The potential delay before the appeals is heard

In order to consider the above highlighted factors it is apposite for the

court to have a look at not only the bail statement and opposition papers but also to look at the record of proceedings of court *a quo*. This has to be done so as to establish whether the applicant has prospects of success on appeal and whether the interests of justice will be met.

The back ground of the matter from the court *a quo* record of proceedings is that the accused was convicted of theft as defined in s 113 of the Criminal Law (Codification Reform) Act [*Cap 9:23*] and was duly sentenced to 4 years imprisonment of which 6 months imprisonment was suspended for 5 years on conditions the accused does not within that period commit any offence involving dishonesty for which accused will be sentenced to imprisonment without the option of a fine. A further 36 months imprisonment is suspended on condition accused restitutes the complainant of $24 000 through the clerk of court Harare.

A perusal of the record of proceedings shows that the applicant was employed by the complainant as a domestic worker or maid when the complainant’s cash totalling $24 000 was stolen from the bedroom from which the applicant had access. The applicant denied the allegations and sought to explain her possession of huge sums of money by pointing out that she was raped by the complainant’s husband on two occasions and was given a total of $7000 in batches of $5000 and $2000 respectively.

The evidence from the complainant was to the effect that a day after the accused requested to leave employment she discovered that her money was missing. The applicant’s relative confirmed being given $3000 by the applicant at the relevant time and that the applicant disclosed she had been given the money by her Indian employer and that she only mentioned having been raped after arrest had been effected. The applicant then testified her defence case.

It was apparent from the record that the applicant had access to the room where the money was kept. She during the same period had large sums of money which she lent to a relative and also built a new rural home and purchased expensive household furniture. The applicant’s explanation for possession of large sums of money varied from sale of diamond to the money having been offered by her Indian employer’s husband for non disclosure of rape by him.

From the forgoing it appears the court *a quo* which had the benefit of assessing the credibility of witnesses founded its decision on evidence adduced. The conviction is in order and appears to be the only reasonable inference that could be drawn from the totality of the evidence moreso given the inconsistent statements by the applicant.

Having said the conviction was well founded on evidence adduced it follows there are no prospects of success on appeal against conviction.

Turning to sentence the court is alive to the fact that the issue of sentence is discreationary and can be subject to counts coming up with different sentences. The question is did the trial court properly exercise the unfettered sentencing discretion it has or not. If the answer is that the court properly exercised its discretion and properly assessed sentence, taking into account the nature of offence, the offender and the societal interests while at the same time seeking to strike a balance of these and all the same time attaining justice. The applicant a first offender breached position of trust, employer-employee relationship and stole a huge amount of money. The sentence imposed with a very large portion suspended on condition of restitution leaving an effective sentence of 6 months cannot be said to induce a sense of shock restitution should not be taken to mean that a dishonest transgression should go unpunished further it is not every case where the effective custodial sentence is less than 24 months were community service should be deemed appropriate. Each individual case circumstances should be taken into consideration. In the present case of breach of trust by a maid entrusted with her employer’s bedroom keys a custodial sentence is appropriate. To this end therefore the court *a quo* did not misdirect itself as it properly and judiciously exercised its sentencing discretion. There are therefore no prospects of success on an appeal against sentence.

Having said there are no prospects of success against both conviction and sentence the temptation to abscond is high. It is given and accepted appeals take long to be prosecuted. The factors to be considered for purposes of bail pending appeals have to be viewed cumulatively and not in isolation. Having said there are not prospects of success on appeal against both conviction and sentence it follows imprisonment is in evitable and it is in the interest of justice that the applicant’s application for bail pending appeal against both conviction and sentence be dismissed.

*Goneso & Associates*, applicant’s legal practitioners

*The Attorney General’s Office*, defendant’s legal practitioners