EDSON MAKAMURE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 2 November 2012 and 11 February 2014

Bail pending appeal ruling

S. Ushehwekunze, for the applicant
Mrs S. Fero, for the respondent

MWAYERA J: The appellant approached the court on 2 November 2012 with an application for bail pending appeal.

The matter was received on 2 November 2012 and this court made a finding that the conviction was well founded and anchored on evidence which was adduced before the trial court. The sentence of 7 years imposed by the trial court for armed robbery clearly showed sentencing discretion was properly exercised. At the hearing of the application the court outlined reasons for holding that there were no prospects of success on appeal and stated that the nature of conviction and sentence would induce the applicant to abscond. The application was accordingly dismissed as the court held the view that it was not in the interest of justice to admit the applicant to bail

The applicant's counsel through a letter dated 13 November 2013 requested for written reasons for dismissal of the application. Unfortunately the request erroneously referred to the matter having been heard on 2 December 2013 and as such the file and note book could not be easily located. Through a follow up letter dated 18 November 2013 the applicant's counsel explained the position that the file was dealt with on 2 November 2012 and the notebook and file where uplifted.

As earlier mentioned reasons for dismissal of the application were outlined in court on 2 November 2012. The same reasons will be tabulated herein in written form as per applicant's request.

The applicant conceded the trial court properly exercised it sentencing discretion thus there is no need to dwell on question whether or not there are prospects of success as regards sentence.

Mr *Ushehwokunze* presented argument that there was no evidence placed before the court warranting a conviction. The applicant and three co-accused were arraigned before the Masvingo Regional Court on 2 counts of armed robbery as defined in s 126 (3) of the Criminal Law (Codification and Reform) Act [*Cap* 9:23]. The co-accused absconded before the trial was finalised and separation of trial was effected. This culminated in the applicant's matter being finalised whereupon he was convicted and sentenced for armed robbery.

The state opposed the application and highlighted that there was no misdirection on the part of the court *a quo* as the record clearly showed a conviction of armed robbery was the only reasonable in inference to be drawn from the facts before the trial court.

In applications for bail pending appeal the principles as enunciated plethora cases are fairly settled and clear. The case of *S* v *Dzawo* 1998 (2) ZLR 536 for example is instructive. It is apparent in applications of this nature one has to consider the following

1. Prospects of success on appeal
2. Likelihood of abscondment
3. Likely delay before appeal is heard
4. Right of an individual to liberty.

In considering these factors on need not look at them in isolation but a wholistic approach would be to consider the cumulative effect and seek to strike a balance between the interest of administration of justice on one hand and the right to individual liberty on the other hand.

A perusal of the record of proceedings of the court *a quo* clearly reveals that the trial magistrate carefully analysed the evidence presented and from the set of evidence came to the only reasonable-inference that could be drawn. From evidence on record it was established the applicant was with his co-accused who latter absconded. The association of the applicant with the co-accused coincided with relevant time that the complainants were assaulted and robbed. There was nothing that sought to dissociate the applicant from the commission of the offence. When wholistically viewed the evidence of the applicant his co-accused and witnesses points to no other conclusion but guilty emanations from connivance with common purpose. It could be gleaned at from the record of proceedings and indeed the judgement of the trial court that the complainants were robbed by 5 assailants. The applicant was among the people who slept at Trust Mupfurutsa's residence. The co-accused were positively

identified by Thomas Rwasarira and Trust Mupfurutsa. Further the applicant was arrested upon investigation by police and he was implicated by his co-accused. Even in the absence of the confession of Crispen Maxwell Takuranei there is nothing to dissociate the applicant from the offence given his association with the co-accused immediately before the commission of the armed robbery. The trial court convicted the applicant after careful scrutiny of evidence before it and given the circumstances and evidence before it the only reasonable inference emanating there was that the applicant acting with common purpose and in concert with co-accused robbed the complainants. The court's *a quo* did no rely on confession but clear circumstantial evidence linking the accused to the offence.

It can be said the conviction is well supported by the evidence and the sentencing discretion was properly exercised. It is appears that there are no prospects of success on the appeal against that conviction and sentence. Given the nature of conviction and sentence it would be prejudicial to the interest of administration of justice to admit the applicant to bail. This is for the obvious reason that the conviction and sentence which is not likely to be changed will then act as an inducement to abscond on the part of the applicant.

Once there is entertainment of that aspect of abscondment then the right to individual liberty has is to be curtailed so as not to frustrate the ends of justice. It is accepted appeals take long to be prosecuted but that factor alone cannot stand to vitiate the other principles in bail applications. There are no prospects of success of appeal and given that position the likelihood of abscondment is high.

Accordingly upon weighing the right to individual liberty and the interest of administration of justice given the lack of prospects of success on appeal and likelihood of abscondment it would be prejudicial to the administration of justice to admit the applicant to bail.

The application is accordingly dismissed.

Ushewokunze Law Chambers, applicant's legal practitioners
Attorney General's Office, respondent's legal practitioners