MOSES JONI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 3 & 6 November 2015

Bail Application

A Muchadehama, for the applicant
E Makoto, for the respondent

ZHOU J: This is an appeal by the appellant against the judgment of the Magistrates Court at Mbare in terms of which the appellant's application for bail pending appeal was dismissed. The appeal is opposed by the State. The brief background to the matter is as follows:

The applicant was convicted on his own plea of guilty of theft as defined in s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant unlawfully and intentionally took property, namely, a 13 inch Apple mark book pro laptop, gig external hard drive, an Apple Ipad and a wallet belonging to the complainant after tempering with the lock of a motor vehicle in order to access the property which was secured in the boot of the motor vehicle. On 13 October 2015 the appellant was sentenced to 18 months imprisonment of which 6 months imprisonment were suspended for a period of 5 years on condition that he does not within that period commit an offence involving dishonesty for which he is sentenced to a term of imprisonment without the option of a fine. The appellant is to serve an effective sentence of 12 months imprisonment.

On 15 October 2015 the appellant appealed to this Court against the penalty imposed. He then applied for release on bail pending the determination of his appeal. The application was dismissed. This court is not sitting as the court of first instance in the determination of the request for bail, but as an appellate court. For that reason, the approach is to consider whether the Court *a quo* misdirected itself in dismissing the appellant's application for bail. See *S* v

Malunjwa HB 34 – 03.

It is also accepted that bail pending appeal involves a new dimension, which is that the appellant has been convicted, hence the presumption of innocence no longer applies. In the case of *S* v *Tengende*1981 ZLR 445(S) at 448, BARON JA said:

> "Bail pending appeal involves a new and important factor: the applicant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused."
> See also *S* v *Labuschagne*2003 (1) ZLR 644(S) at 649A-B.

In *S* v *Dzvairo*2006 (1) ZLR 45(H) at 60 E – 61 A, PATELJ (as he then was) held the following:

> "Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for granting bail it will be refused. First and foremeost, the applicant must show that there is a reasonable prospect on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individuals. The court must balance the liberty of the individual and the proper administration of justice, and where the applicant has already been tried and sentenced it is for him to tilt the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospects of success are weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail."
> See *S* v *Dzawo*1998 (1) ZLR 536(S) at 539 E-F.

The Court *a quo* clearly applied its mind to the question of prospects of success of the appeal and came to the correct conclusion, in my view, that the sentence imposed is not excessive. The appellant cannot seek to impeach the penalty imposed as that penalty is clearly not excessive when one considers the moral blameworthiness of the appellant. It is also relevant that the appellant is likely to abscond, as he escaped from the police when they sought to arrest him. He was only arrested after a year. During that time he was in hiding. Quite clearly the appellant is not a person to be trusted.

In the circumstances, the appeal against the judgment of the Magistrates Court is without merit and must be and is hereby dismissed.

National Prosecuting Authority, legal practitioners for the State
Mbidzo Muchadehama & Makoni, appellant's legal practitioners