KOTSANAI KAITANO
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 13 November 2015 & 18 December 2015

Bail Application

L. Mauwa, for the applicant
T. Mapfuwa, for the respondent

ZHOU J: The applicant was convicted by the Magistrates Court at Murewa of stock theft as defined in s 114 (2) (a) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The court found that on 25 August 2014 the applicant, together with his two accomplices stole two beasts belonging to the complainant and slaughtered them. The beasts were stolen from the complainant's cattle pen at Mupfuti Farm in Murewa. The applicant was sentenced to 11 years imprisonment. He appealed against both the conviction and sentence and also made an application for the review of the Magistrates Court proceedings. He now seeks admission to bail pending the determination of his appeal and application for review. The application is opposed by the respondent.

Where release on bail is sought after conviction the principles which are applicable differ significantly from those which apply in an application for bail pending trial, for in the latter situation the presumption of innocence enshrined in s 70 (1) (a) and the provisions of s 50 (1) (d) of the Constitution which gives an arrested person a right to be released unconditionally or on reasonable conditions in the absence of compelling reasons justifying continued detention apply. Those provisions are of no application in relation to an application for bail by a convicted person who has been sentenced. In the case of *S* v *Tengende* 1981 ZLR 445 (S) at 448, Baron JA said:

> "But bail pending appeal involves a new and important factor; the appellant 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 60E-61A, Patel J (as he then was) repeated the above principles as follows:

> "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 refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success 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 individual and the proper administration of justice and where the applicant has already been tried and sentenced it is for him to tip 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 prospect of success is 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."

Put in other words, the fact that an applicant for bail has been convicted and sentenced presents a new dimension to an application for bail which requires that the applicant justifies his admission to bail. In the consideration of the application the court carefully weighs the above factors one against the other in order to determine whether the applicant has made out a case for his admission to bail. The factors are not individually decisive as they must be balanced against one another in order to reach a conclusion that does not impact adversely on the proper administration of justice. In considering the prospects of success the court is mindful of the fact that it is not dealing with the appeal itself, but is being called upon to apply its mind to the substance or lack thereof of the appeal by reference to the grounds of appeal and the evidence led before the trial court. In the instant case the applicant's case was that he did not participate in the theft of the beasts but was merely telephoned by his friend, Fungai Makoni, who successfully escaped arrest, to bring fuel for the friend at some place in Murewa. His version was that after delivering the fuel to Fungai he returned to Harare. By his own evidence the applicant places himself at Murewa which was the place at which the offence was committed. He also links himself to Fungai Makoni. The simple question which the Magistrate grappled with even after accepting that the applicant had indeed taken fuel to Murewa was whether the applicant by his conduct had participated in the commission of the offence. The fuel which he provided was meant to enable the motor vehicle which was

carrying the carcasses of the two slain beasts to move. The trial court found as a fact that the applicant was aware that the motor vehicle was carrying the beasts. His conduct upon approaching a police roadblock betrays that fact. He made a u-turn in order to avoid the road block. His friend who was driving behind him carrying the beasts also took the same action in order to evade the police. The applicant accepted that he kept in constant telephone communication with Fungai Makoni as he was driving. Quite clearly, his explanation for his conduct presents such a thoroughly unconvincing version that enjoys no prospect of acceptance by the appellate court.

The application for review is equally without prospect of success as the alleged gross irregularities are non-existent. The Magistrate did not rely on the confessions of the applicant's co-accused to convict him but properly rejected his version of the nature of his involvement with Fungai Makoni by reference to independent facts, including the facts disclosed and/or admitted by the applicant himself, such as that he went to Murewa, provided fuel to transport the carcasses, kept in communication with those who were carrying the carcasses, and avoided a police roadblock. He successfully escaped from the police.

The offence itself is a very serious one which attracts a mandatory minimum penalty. The applicant was indeed sentenced to a long term of imprisonment. That fact, taken together with the very tenuous nature of the applicant's version, clearly constitutes an inducement to abscond on the part of the applicant. In any event, the evidence of the police officers who arrested the applicant was that he fled at the time that his accomplice was arrested. He cannot be trusted now after being convicted and sentenced.

The record of proceedings is now ready as it was part of the papers in this application. There is therefore unlikely to be any considerable delay in the setting down of the appeal if the applicant through his legal representatives push for the appeal to be given a date.

Given the above circumstances, the applicant has not succeeded in establishing positive grounds for admission to bail pending the determination of his appeal and application for review.

Resultantly, the application must fail, and is hereby dismissed.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners