Judgment No. HB 93/2003
Case No. HCB 139/03

ROWAN DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 18 SEPTEMBER 2003

N Mazibuko for the applicant
L Masuku for the respondent

Application for Bail pending appeal

CHEDA J: This is an application for bail pending appeal which application is opposed.

The background of the matter is that applicant was charged with contravening section 4(a) of the Prevention of Corruption Act Chapter 9:16 as read with section 15(2)(e) of the same Act, alternatively, attempting to defeat or obstruct the course of justice. He pleaded not guilty to both charges but, was however, convicted by the Regional Magistrate, Bulawayo on the main charge on 19 June 2003. He was sentenced to 4 years imprisonment of which 1 year was suspended on the usual conditions. It was respondent's arguement at the trial that applicant was asked by the South African Police Service to track down certain suspects in a case involving armed robbery at the Johannesburgh International Airport in South Africa where cash and jewellery amounting to R117m was stolen. Amongst the suspects was one Khulekani Ncube whom after he had been referred to him by Detective Inspector Joseph Nyoni, did not arrest him as he should have, when he was fully aware that he was required by the South African Police Service to do so but corruptly refrained from so doing.

Mr *Mazibuko* for the applicant has argued that applicant should be granted bail pending appeal because the court *a quo* had misdirected itself by convicting the applicant because one Khulekani Ncube although he was being sought by the South African police it was for the allegations of robbery and not theft. He also went further and argued that robbery being not a continuing offence is not an extra-territorial offence. My understanding of this argument if I am correct, is that, with that knowledge, applicant had no legal obligation to arrest Khulekani Ncube. This therefore was his main argument.

The court in considering bail pending appeal will no doubt bear in mind that applicant was not only facing mere allegations but has been convicted and sentenced, therefore without taking into account the merits of the case his status has fundamentally changed thereby introducing an element of increased risk of abscondment. Thus, the severity of the sentence imposed will be a decisive factor in the determination of his application . Therefore the conviction and the subsequent sentence, more particularly, its severity has to be taken in totality in assisting the court to determine bail. Prospects of success on its own is not enough. See *S* v *Benator* 1985(2) RLR 205 (HC). This, is so, in my view because applicant will have to decide whether to abide by the bail conditions until his appeal is finalised or abscond. Bearing in mind always that the principles governing bail are to ensure that applicant where possible should not be deprived of his liberty unless it can be shown on a balance of probabilities that his release will result in the proper administration of justice being frustrated and/or defeated.

It has been argued on applicant's behalf that his prospects of success on appeal are indeed bright in view of the supposed misdirection by the trial court. While this

argument is indeed sound, it appears to be based on applicant's belief that he was not under any legal obligation to have arrested the suspect (Khulekani Ncube) because the South African authorities wanted him for robbery committed in South African, which of cause, fundamentally is not a continuing offence and that no extradition proceedings had commenced. This argument in my view seems to have lost sight of the legal duty on applicant under section 25(2)(e) of the Criminal Procedure and Evidence Act Chapter 9:07 which reads:

> "Any peace officer may without any order or warrant, arrest:-
>
> (e) any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received, or reasonable suspicion exists of his having been concerned in, any act committed at any place outside Zimbabwe which if committed in Zimbabwe would have been punishable as an offence and for which he is in terms of any act relating to extradition or fugitive offenders or otherwise liable to be arrested or detained in custody in Zimbabwe."

I, however, do not wish to comment much on applicant's basis for his appeal as it is pending in the Supreme Court. *In casu*, suffice to deal with bail pending appeal. These courts' approach to bail are adequately laid down, see *S* v *Tengende* 1981 ZLR 45; *S* v *Kilpin* 1978 RLR 282; *S* v *Benator* 1985(2) ZLR 205 (HC).

The court has a discretion either to grant or refuse bail pending appeal. No doubt such discretion is not slight as it must be used judicially. Difficult as it may be, it is still the court's duty to at all times in that process balance the interests of the applicant against those of the proper administration of justice.

The court in view of the changed status of the applicant in an application for bail pending appeal will generally refuse such application where a lengthy prison term has been imposed or alternatively impose an extremely large sum of money designed to encourage applicant to await the outcome of his appeal.

As in all applications applicant bears the onus of proving on a balance of probabilities that he should be admitted to bail in the circumstances. In view of applicant's changed status, the danger of frustrating the proper administration of justice, his prospects of success on appeal which are strongly argued against by Mr *Masuku* for respondent and the lengthy prison term imposed, I am of the view that the exercise of my discretion can not be to his favour.

This application is accordingly dismissed.

Calderwood, Bryce Hendrie & Partners applicant's legal practitioners
Attorney-General's Office respondent's legal practitioners