

HERBERT MATIYENGA MUDZINGWA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 9 AND 25 JANUARY 2007

T Hara, for applicant
Ms B Wozhele, for the respondent

Bail application pending appeal

NDOU J: The applicant was convicted of three counts of housebreaking with intent to steal and theft by a Gweru Provincial Magistrate. In all counts the applicant and his four accomplices drove from Bulawayo to Gweru, a distance of around 165 kilometres to go and steal. The applicant provided his Toyota Cressida registration number 613-658T for the criminal activity. In count 1, they broke into Power Sales under the cover of darkness. They stole property valued at \$8 603 870,00 and value recovered was \$240 000. They conveyed the stolen property to Bulawayo. In count 2, they broke into Save Dollar Centre in Gweru and stole property valued at \$8 267 244,00 of which \$6 267 224,00 worth was recovered. Once more they conveyed the property to Bulawayo. In count 3, they broke into Price Cut Centre. The applicant remained on guard in the vehicle. Whilst inside, his four accomplices were spotted by an alert security guard at the shop who raised alarm with the police. The police arrived and found the four inside. The four threatened the police and managed to escape. They did not steal anything. The security guard had already taken down the vehicle registration numbers. Police traced the applicant through the registration details of his vehicle. The applicant has noted an appeal against sentence only and as such, his guilt is not in dispute. In his appeal, he seeks the reduction of prison term to a period of 6 years with part thereof suspended leaving an effective sentence of two years. In the circumstances it is not clear why he is seeking to be on bail. He will not be prejudiced as the appeal is likely to be heard even before his own suggested reduced

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sentence is served in full. It is trite that principles governing the grant of bail before conviction are entirely different from those governing its grant after conviction, particularly where the accused's guilt is not in issue and a substantial prison term is the usual sentence for the offence – *S v Williams* 1980 ZLR 466 (AD); *S v Kilpin* 1978 RLR 282 (AD); *S v Tengende & Ors* 1981 ZLR 445 SC and *S v Benetar* 1985 (2) ZLR 205 (HC) at 208-9. There are no positive grounds for the granting of bail as the applicant concedes that he had to serve an effective prison term of two years. Why would he seek to wait for the appeal whilst on bail in such circumstances? If I am wrong on this approach, the application is weak on the merits when one considers decided cases of the superior courts for similar conduct. There was planning and determination on the applicant and his accomplices as alluded to above. They drove from Bulawayo to Gweru for the offences. Large amounts are involved. These are aggravating factors – *S v Maeongambiri* GB-47-77; *S v Moyo* GS-134-81; *S v Ndanga* HS-18-82 and *S v Mpofu* HB-38-88. Though the sentences seem to be on the high side, they are, however, still within the appropriate range for such offences. There are no prospects of success on appeal and the applicant will be induced to abscond. His accomplices are still at large.

Accordingly, the application is dismissed and the applicant is refused bail pending appeal against sentence.

T Hara & Partners, applicant's legal practitioners
Criminal Division of Attorney-General's Office, respondent's legal practitioners