

RAPHAEL TSHABANGU

And

NICHOLAS TSHABANGU

And

DUMEZWENI TSHABANGU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17 AND 27 MAY 2010

G Nyoni for the applicants
THove for the respondent

Application for bail pending appeal

NDOU J: We convicted the applicants for murder with constructive intent on 12 June 2009 and sentenced them each to 16 years imprisonment. They applied for leave to appeal and they were granted leave to appeal against conviction. They have since filed their appeal against conviction only under SC 18/10. They now seek admission to bail pending their appeal. The main factors that are taken into account in such applications for bail pending appeal are:

- (a) The prospects of success on appeal, and
- (b) The interests of justice i.e. will the admission of applicants to bail not jeopardize the interests of justice through abscondment – *S v Hudson* 1999 (2) SACR 431; *S v Williams* 1980 ZLR 466 (AD); *S v Kilpin* 1978 RLR 282 (A) and *S v Manyange* 2003 (1) ZLR 21 (H).

In the *Kilpin* case *supra*, the court pointed out that the principles governing the granting of bail after conviction were different to those governing the granting of bail before conviction. On the one hand, where the person has not yet been convicted he is still presumed innocent and the courts will lean in favour of granting him/her liberty before he/she is tried. On the other hand, where he/she has already been convicted the presumption of innocence falls away.

In casu, the applicants were convicted of murder with constructive intent and therefore the presumption of innocence no longer operates in their favour. In the *Williams* case *supra*, it was held that even after conviction the court should lean in favour of liberty if this would not endanger the interests of the administration of justice. The prospects of success on appeal should be balanced against the interests of the administration of justice. The less the chance of success on appeal, the greater the chance there is of the convicted person absconding. Even if the court finds that indeed there are prospects of success on appeal against conviction, still that finding does not necessarily entitle the applicants to bail. It was pointed out in the *Williams* case, *supra*:

“But it was putting it too highly to say that bail should only be granted where there was a reasonable prospect of the appeal succeeding. On the other hand, in serious cases even where there was a reasonable prospect of success on appeal bail should sometimes be refused, notwithstanding that there is little danger of the convicted person absconding.” (Emphasis added)

In this case the issue taken on appeal is primarily one of fact. During the trial we made a factual finding that applicants were guilty of murder with constructive intent. Such a factual finding cannot easily be overturned by a court of appeal – *Hughes v Graniteside Holding (Pvt) Ltd* SC-13-84 and *S v Isolano* 1985 (1) ZLR 62 (SC) at 63C-G.

The applicants stand convicted of a very serious offence. Admittedly the applicants were granted leave to appeal, but this does not, *per se*, entitle them to be admitted to bail. The onus of establishing that justice will not be endangered and that there is a reasonable prospect of success is upon the applicants. It is improper to allow people convicted of serious offences to walk in the streets instead of serving their sentence when the prospects of success are non-existent. Society would lose faith in the system of justice. With a serious offence there will be a pronounced risk that the convicted person will flee from justice if released, especially if he has no reasonable prospects of success on appeal – *S v Labuschagne* 2003 (1) ZLR 644 (SC). This is the case *in casu*, there were no reasonable prospects of success and the applicants have been convicted of a very serious offence. They are no suitable candidates for bail.

Accordingly, I dismiss their application for bail pending appeal and they are refused bail.

Moyo & Nyoni, applicants' legal practitioners

Attorney-General's Office, respondent's legal practitioners