

SIPHO TSHUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 25 JUNE AND 6 AUGUST 2015

Bail pending appeal

D Dube for the applicant
T Hove for the respondent

MOYO J: The applicant in this matter was convicted by a magistrate sitting at the Western Commonage magistrates courts, of 6 counts of unlawful entry and 4 counts of theft. He was sentenced to a total of 192 months imprisonment, of which 48 months were suspended for 5 years on the usual conditions. This left him with 144 months imprisonment this translates to 12 years imprisonment effective.

Dissatisfied with both conviction and sentence, appellant noted an appeal to this Honourable court. He now seeks bail pending appeal. The state case is basically anchored on the fingerprint evidence that was given by several police officers who attended the scenes of crime in all these different cases and they then concluded that the fingerprint specimens uplifted from the different scenes of crime matched those of the applicant. It was for this reason that the learned magistrate convicted. Otherwise there were no eye witnesses accounts neither was anything recovered from the appellant.

In his notice of appeal the appellaant argues that the state did not prove its case beyond a reasonable doubt as the witnesses (that is the police officers) whose evidence the court relied upon was not credible. The gist of the notice of appeal is that the assessment of the evidence tendered before it by the trial court is found wanting.

For an appellant seeking bail at this stage, that is, after conviction because the presumption of innocence no longer operates in their favour, an appellant must show that he has

prospects of success on appeal and that the interests of justice will not be jeopardised by his admission to bail. It is the appellant's duty to show that in fact there are positive grounds for granting him bail and if there are no such grounds then the application must be refused. Refer to the case of *S v Tengende and Others* 1981 (1) ZLR 445 (SC) where the learned judge had this to say

“--- But 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 such applications the appellant should show that should he be admitted to bail, the interests of justice will not be prejudiced. This the appellant will show by proving to the court that there is no risk of him absconding and that there are prospects of success.

These two are interrelated in that, the brighter the prospects of success, the less the chances of absconding and *vice versa*. Refer to *S v Tengende and others (supra)*.

The only issue that appellant seems to quarrel with is that the police officers were incredible witnesses.

I wish to import from the judgment of MAKARAU J as she then was in the case of *Patrick Chivise v Sheba Dimbwi* HH 4/04 wherein she stated thus:

“It is trite that a court of appeal will be very slow to set aside the findings of a trial court on the credibility witnesses. This is not a rule of law but a practical recognition in court procedures that the trial court is better placed than an appeal court to assess the credibility of the witnesses from the manner in which the testimony unfolds, unlike the appeal court which has to rely on the record of proceedings. It is only in exceptional instances, where the record of proceedings clearly indicates that the findings of credibility by the trial court were in error, that an appeal court will interfere.”

The challenge by the appellant that the police officers gave different dates on the issue of the arrest of the appellant on 30 December 2014 and the taking of the fingerprints on 5 December 2014, renders the State case weak is not founded on the court record as clearly on re-examination, the witness Emmanuel Mazha, clarified that although it could be true that the accused was arrested on 30 December 2014, he knows as a matter of fact that the fingerprint specimen that he used as a comparison with the fingerprints uplifted at the scene had been taken from the appellant on 5 December 2014 and that would mean appellant had been at the police

station before his arrest on 30 December 2014. Even the trial magistrate deals with that aspect in his judgment where he states that the evidence of Saul Utete resolved that issue.

I am of the considered view that appellant has not sufficiently shown that he indeed has prospects of success on appeal in this matter and subsequently that therefore the interests of justice will not be prejudiced if he is granted bail.

I accordingly dismiss the application.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
National Prosecuting Authority's Office, respondent's legal practitioners