EDWIN MUNYAVI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 18 JULY 2022 & 4 AUGUST 2022

Application for bail pending appeal

R.K.H. Mapondera for the applicant
Ms. D.E. Kanengoni with K.M. Nyathi for the respondent

DUBE-BANDA J:

1. This is an application for bail pending appeal against conviction and sentence. The applicant was arraigned before the Magistrates' Court sitting at Bulawayo. He was charged with the crime of culpable homicide as defined section 49(1) of the Criminal Law (Codification and Reform) Act [Chapter 09:23]. It being alleged that on the 21st December 2020 along the Harare-Bulawayo road he drove a heavy motor vehicle negligently, in that he encroached into the path of oncoming traffic; failed to stop or act reasonable when an accident or collision seemed imminent; and failed to ascertain whether the road was clear before changing lanes resulting in a collision with an oncoming vehicle (Toyota GD6) causing the death of four passengers.

2. The applicant pleaded not guilty and after a contested trial he was found guilty as charged. The trial court found that if the applicant had been charged in terms of the Road Traffic Act [Chapter 13:11] he would have been convicted in terms of section 53(2) of the said Act. The court failed to find special circumstances and sentenced him to the minimum mandatory imprisonment of 2 years. He was suspended from driving a class 4 vehicle for six months and his licence to drive heavy vehicles was cancelled for life.

3. Aggrieved by the conviction the applicant noted an appeal to this court. The appeal is pending under cover of case number H.C.A. 64/22. He now seeks to be released on bail pending the finalisation of his appeal.

4. In support of this application the applicant filed a bail statement. In his statement he contends that the interest of justice permit his release on bail pending appeal. He underscores the point that he has prospects of success on appeal. The applicant contends amongst other grounds that the trial court misdirected itself in rejecting the defence of mechanical fault, and giving its own interpretation to the sketch diagram which interpretation was contrary to what the diagram projected. It is contended further that if admitted to bail the applicant will not abscond and therefore he is a good candidate for bail pending appeal.

5. This application is opposed. The respondent contends that the appeal has no prospects of success and applicant is likely to abscond if released on bail pending appeal.

6. In such an application the established factors for consideration by the court are the prospects of success on appeal, the likelihood of the applicant absconding pending the determination of the appeal, the applicant's right to personal liberty as well as the likely delay before the hearing of the appeal. These factors are not individually decisive. They are considered together. In *Mutizwa v The State* SC 13/20, it was held that:

> Bail pending appeal is not a right. An applicant for bail pending appeal has to satisfy a court that there are grounds for it to exercise its discretion in his favour. In the case of bail pending appeal, the proper approach is that in the absence of positive grounds for granting bail, the application will be refused. The applicant having been found guilty and sentenced to imprisonment is in a different category to an applicant seeking bail pending trial. See S v Tengende & Ors 1981 ZLR 445 (S) at 447H – 448C…The *State* v *Williams* 1980 ZLR 466 (S) wherein it was stated that considerations of reasonable prospects of success on the one hand and the danger of the applicant absconding on the other, are inter-connected and have to be balanced. Furthermore,

> that the less likely the prospects of success on appeal, the more inducement there is on an applicant to abscond. It also emphasised that in every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail.

7. In the case of *Essop v S* (2016) ZASCA 114 cited in *Madamombe v The State* SC 117/21 the court in defining the term "prospects of success" held thus:

> What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably conclude different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.

8. It is on the basis of these legal principles that this bail application must be viewed and considered.

9. A closer perusal of the notice of appeal and the grounds upon which the applicant seeks bail pending appeal are in the main factual, i.e. the applicant attacks the evidential issues and factual findings of the trial court. This kind of attack is very unlikely to score much for the applicant on appeal, because it is a well-established principle that the appeal court seldom interferes with the trial court's findings of fact unless the same is afflicted by gross unreasonableness or is irrational. The rationale being that the trial court having been steeped in the atmosphere of the trial is best placed to assess the veracity of the witnesses. It (i.e. the trial court) would be in a position to observe the witness' conduct on the witness stand and assess his or her demeanour among other considerations. See: *S v Chewiro and Another* (1 of 2022) [2022] ZWMSVHC 1; See: *Hama v NRZ* 1996 (1) ZLR 664 at 670; *S v Muroyi* SC 111 of 2020.

10. It is clear that the trial court accepted the evidence of the police officer who attended the scene and observed the horse of the applicant's truck within the lane of travel of the Toyota GD6. The police officer testified that the point of impact was in the middle of the road on the lane that was used by the Toyota GD6. The evidence of the accident evaluator was that the applicant made a harsh steering to the right side which caused his truck to suddenly turn right in front of the Toyota GD6 and hence the collision. The evidence on record is clear that the point of impact was in the lane of the Toyota GD6. The trial court then found that the final resting position of the truck was in the lane of the Toyota GD6. I take the view that it is unlikely that the appeal court may vacate this factual finding.

11. Further the trial court made a factual finding that there were no cattle on the road which the applicant says he tried to avoid. Firstly, the driver of the Toyota GD6 did not see any cattle on the road. Secondly, the accident occurred at around 20:30 and the police officer received the report at around 20:40. Although he could not remember the time he arrived at the scene of the accident, he did not see any cattle nor carcases of cattle when he arrived at the scene. This factual finding is supported by the evidence on record.

12. The trial court made a finding that the truck did not jack-knife. The police officer who attended the scene and saw the position of the two vehicles after the accident disputed that the truck jack-knifed. He said the truck made many turns before the impact and that discounted a jack-knife. The accident evaluator testified that on the facts of this case it was impossible that the truck jack-knifed. He anchored his opinion of the facts. He said:

> Considering that this haulage truck was not loaded and these cattle were almost 50m when they were observed by the accused, and he applied brakes and also considering the braking system of his vehicle was efficient and the horse was not pulled by the load since it was empty it is impossible for a truck to jack knife given those conditions.

13. The accident evaluator testified further that the entire horse was in the lane of oncoming traffic while the trailers remained on their lane and that this does not denote a jack-knife. He said a jack-knife truck should be in a "V" or "L" shape and not a straight line. On the basis of the evidence on record the trial court found that the truck did not jack-knife. My view is that this finding is firmly supported by the evidence on record and that it is unlikely that the appeal court may vacate this factual finding.

14. The trial court found that the applicant was driving at an excessive speed in the circumstances. The applicant's version was that he was travelling at around 78 to 79 km. The traffic evaluator testified that he was traveling at more than100km/h. The accident occurred at night. At a curve. The applicant was driving a heavy truck with two trailers. Even if he was driving at 78 to 79 km/h it was still excess speed in the circumstances. I do not see how on the facts of this case such a factual finding may be vacated on appeal.

15. A perusal of the record of proceedings establishes that the factual findings made by the trial court are insurmountable. It is very unlikely that they will be vacated on appeal.

16. On the basis of the evidence on record, the factual findings made by the trial court and the application of the legal principles, the verdict of the trial court is unlikely to be vacated on appeal. The trial court took into account all evidence and factors surrounding the offence before convicting the applicant. There are therefore no reasonable prospects of success on appeal against conviction.

17. I take the view that if released on bail pending appeal the applicant will abscond. The principle that the lesser the prospects of success the higher the risk of abscondment is applicable in this case. In *S* v *Kilpin* 1978 RLR 282 (A), it was pointed out that a court may well consider that the brighter the prospects of success, the lesser the likelihood of the applicant to abscond and vice versa. The applicant is serving a sentence and if granted bail he might abscond. The fact that

the applicant was out of custody pending trial and during the trial is of no moment. The situation has now changed he has been convicted and sentenced to a term of imprisonment. The applicant was sentenced on 7 June 2022. He has experienced the rigours of imprisonment for just less than two months. He still has a long way to go as he was sentenced to an effective 2 years in imprisonment. The remaining sentence is likely to cause him to abscond if he is released on bail pending appeal. He is a flight risk and not a good candidate for bail pending appeal.

18. In the absence of reasonable prospects of success on appeal and the high probability of absconding, the factors relating to the right to liberty and the delay before the appeal can be heard recede to the remote background. The applicant has not shown the existence of positive grounds for granting bail at this stage.

19. In the circumstances of this case, I am satisfied that it is not in the in interests of the administration of justice that the applicant be released on bail pending appeal.

In the result, I order as follows:

The application for bail pending appeal be and is hereby dismissed

Mapondera & Company applicant's legal practitioners
National Prosecuting Authority respondent's legal practitioners