JOSEPH TADERERA
and
SAME KAPISORISO
and
LEONARD MUDZUTO
versus
THE STATE

HIGHCOURT OF ZIMBABWE
CHIKOWERO J
HARARE; 16 and 19 January 2024

Bail Pending Appeal

L Uriri, for the applicants
W Mabhaudhi with L Masuku, for the respondent

CHIKOWERO J:

1. This is an application for bail pending appeal against both conviction and sentence.
2. It was triggered by the judgement of this court convicting them, together with one Terrence Mukupe, of the alternative charge of contravening s 174(1)(e) of the Customs and Excise Act [*Chapter 23:02*] ("the Customs and Excise Act") and the sentence imposed on each of them.
3. The court found it proven beyond reasonable doubt that the four had imported or assisted in or were accessories to or connived in the importation of certain litres of diesel without payment of duty thereon.
4. It acquitted them of the main charge of fraud.
5. Terrence Mukupe filed a separate application for bail pending the determination of his appeal against the conviction and sentence. He filed a separate notice of appeal to those before me. The latter filed a joint notice of appeal.
6. Mukupe's application for bail pending appeal was argued on 4 January 2024 and was dismissed in a written judgment under the names Terrence Mukupe v The State HH 11/24. The judgment was handed down on 10 January 2024.

7. The applicants must satisfy me, on a balance of probabilities, that there are positive grounds for admitting them to bail pending appeal, that justice will not be endangered thereby and that there is a reasonable prospect of the appeal succeeding. See *S* v *Labuschagne* 2003(1) ZLR 644(S); *S* v *Dzvairo* 2006(1)45 (H) and *S* v *Makarahanda* HCC 04/22.
8. The applicants will rely on essentially the same grounds in challenging their conviction and sentence as those listed by Mukupe in his notice of appeal. In disposing of the latter's bail application, the court gave reasons why it took the view that his appeal has no reasonable prospect of success. Accordingly, it is not my intention to burden this judgment by rehashing the same reasons already set out in HH 11/24. It suffices that I record that, for the same reasons stated in the earlier judgment, the court finds that there is no reasonable prospect of the applicants' appeal succeeding.
9. But this I add, by reason of the applicants' role as the drivers of the trucks which loaded the fuel at Beira in Mozambique, took it into Zimbabwe through the Forbes Border Post in Mutare but the contents were no longer diesel but water when the trucks were intercepted at the Chirundu One Stop Border Post. In convicting the applicants and Mukupe, the Court considered the cummulative effect of all the evidence, direct and circumstantial, and concluded that the applicants' were not mere innocent drivers but had played critical roles in importing or assisting in or as accessories to or connived in the importation of the diesel without payment of duty thereon. Among other things they had twice driven off the geo fencing area between Harare and Chirundu. They also abandoned the trucks at Chirundu, which made physical examination and testing of the cargo impossible as same could not be done in the absence of the drivers. It was fortuitous that one of the state witnesses observed the third applicant, who had surreptitiously returned to his truck, apprehended him and thus paved the way for physical examination and testing of the cargo. As already pointed out the cargo was no longer diesel but water. The first and second applicants were nowhere to be seen as the drama involving the third applicant unfolded at Chirundu, despite Mukupe's parting shot to the Zimbabwe Revenue Authority Officers at Chirundu (who testified as witnesses for the prosecution) that officials from the President's Office would bring the applicants to

facilitate the conducting of the physical examination of the cargo. The appeal does not attack the correctness of the finding that the state witnesses were credible witnesses.

10. That the appeal has no reasonable prospect of success increases the risk of the applicants endangering the interest of the administration of justice by absconding pending the hearing of the appeal. The fear of resumed incarceration to complete serving the remainder of their custodial sentences, if released on bail pending appeal, will prompt the applicants to become fugitives from justice.
11. In terms of s 50(1)(d) of the Constitution of Zimbabwe it is a person yet to be charged or tried who has a constitutional right to bail. An offender who has been tried, convicted and sentenced to a custodial term does not have a right to bail. This is the position of the applicants. Their conviction has erased the presumption of innocence which operated in their favour before the verdict was pronounced.
12. The appeal record is ready. There is no evidence that there will be any delay before their appeal is heard by the Supreme Court. In these circumstances, in light of the want of reasonable prospect of success of the appeal, which in turn feeds into the high risk of abscondment, justice demands that they prosecute the appeal while serving their sentences.
13. I have looked at the proposed bail conditions. They look no different from the usual conditions attaching to bail pending trial. Even if they had been tighter, I would still not have acceded to this application on the bases that the applicants no longer have a right to bail and will abscond by reason of their appeal being devoid of a reasonable prospect of success.
14. Indeed, there are no positive grounds for admitting the applicants to bail pending appeal, such admittance will endanger the interest of the administration of justice and there is no reasonable prospect of success on appeal against the conviction and sentences imposed upon the applicants.
15. In the result, the application for bail pending appeal, in respect of all the applicants, be and is dismissed.

T Kadhau Law Chambers, applicants' legal practitioners

The National Prosecuting Authority, respondent's legal practitioners