

TAURAI MAUSA
and
MAXWELL MAISA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 7 October and 14 October, 2021

Bail pending appeal

Mr V. Ruombwa for both applicants
Mr E. Mbavarira for the respondent

ZISENGWE J: The two applicants seek to be admitted to bail pending the determination of their appeal against both conviction and sentence. They were convicted in the Magistrates Court of the offence of prospecting for minerals without a licence authorizing the same in contravention of section 368(2) of the Mines and Minerals Act [*Chapter 21:05*] (“the Act”).

The brief history of the case is that the two applicants were arraigned before the Magistrates Court sitting at Masvingo on the aforesaid charges it being alleged that on the 5th of March and at Clipsham Farm, Masvingo they unlawfully prospected for gold or any [other] minerals without a licence. The state outline whose contents they admitted during the questioning by the Magistrate in terms of section 271(2)(b) of the Criminal Procedure and Evidence, Act [*Chapter 9:07*] states *inter alia* that the two of them used an assortment of digging implements (consisting of a pick, a shovel and a crow bar) to extract and transfer from beneath

the surface some gold ore. According to the state, they were caught in *flagrante delicto* by police officers attached to the Masvingo Flora and Fauna Unit as they were busy hurling ore into buckets out of a trench onto the surface.

In the wake of their convictions, and the court having found no special circumstances as contemplated in Section 368(4) of the Act, they were each sentenced to the mandatory prescribed sentence of 2 years' imprisonment.

Despite having been convicted on the basis of their respective pleas of guilty, the applicants nonetheless impugn the propriety of the convictions alleging several procedural irregularities besetting the proceedings leading to such convictions. Further, they contend that the magistrate failed to properly explain and canvass for special circumstances as he was enjoined to do resulting in an inordinately harsh sentence.

The contend that they enjoy bright prospects of success as they hold the firm belief that the convictions will be overturned on appeal – or at the very least that their sentences will be set aside in view of the alleged irregularity stated above. They further vow not to abscond should they be so admitted to bail stating as they do that they neither harbour such intentions nor do they have the wherewithal to achieve the same.

The grounds of appeal as set out in the notice of appeal a copy of which is attached to the present application read as follows:-

Grounds of appeal

1. The charge was fatally defective, incompetent and unconstitutional and should therefore be set aside in its entirety.
2. The convictions though by pleas of guilty were not knowingly and genuinely made because the procedure adopted by the court *a quo* was hurried and mechanical.
3. Special circumstances were not specifically explained and canvassed by the court *a quo* thus leading to an uninformed failure to explain away the special circumstances.
4. Important mitigatory features were not properly solicited or canvassed otherwise the court would have come to a different conclusion.

I feel constrained to observe that these grounds of appeal are couched in rather unusually wide and general terms. Constrained because the question of the correctness or otherwise of the formulation of the grounds of appeal is generally determined at the hearing of the appeal itself. However, I am obliged to comment on these grounds of appeal in light of the fact that in deciding on the present application I am required *inter alia* to assess the applicants' prospects of success on appeal which assessment can only be made through the lens of the grounds of appeal.

The requirements and purpose of proper grounds of appeal are well established. The main purpose is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues. Precision and specificity in stating the grounds of appeal also enable the Magistrate to know what the issues are which are to be challenged so that he can adequately address them in his or her response to the appeal. Counsel for the State must know what the issues are so that he can prepare and present argument which will assist the court in his deliberations and finally, the court itself needs to be apprised of the grounds so that it can know what portions of the records to concentrate on and what preparation, if any, it should make an order to guide and stimulate a good argument in court.

It must be emphasized in this regard that the notice of appeal constitutes the very foundation on which the case of the appellant must stand or fall, see *S v Khoza* 1979 (4) SA 757 (N) at 758 B. Finally a notice of appeal crystallizes the disputes and determines the parameters within which the court of Appeal will have to decide the case and consequently it serves as stated earlier, to focus the minds of the judges of Appeal when reading the sometimes lengthy records of appeal, researching the law in point considering argument and adjudicating the merits of the appeal.

In the present case it is not clear, for example, what makes the charge "fatally defective" as alleged in the first ground of appeal or what makes it "unconstitutional". It is also unclear why the applicant says that the procedure adopted was "hurried and mechanical". If the complaint is that the canvassing of an essential ingredient of the offence was omitted or that an essential component of the Section 271(2) (b) questioning was omitted or done incorrectly, the same should have been identified. Similarly, the constitutional principle or provision allegedly abridged by the charge should have been identified and stated.

Be that as it may, the state in a rather perfunctory way meekly acceded to this application. Under the heading of Prospects of Success the following was stated;

“It is submitted for the respondent that applicant do enjoy reasonable prospects of success. Their chances of having their convictions and sentences overturned may not be said to be high but they have what can be termed as ‘a fighting chance on appeal’”

The state then proceeded to lament the procedure adopted by the court a quo vis-à-vis the applicants whom they labelled “unsophisticated rural folk”. It behoved the state to proceed beyond such perfunctory remarks in acceding to this application.

During oral submissions in court, I engaged counsel to some considerable extent with a view to eliciting the precise nature of the alleged errors by the trial court supposedly vitiating the proceedings and some of the issues covered during the exchange will be canvassed shortly.

In an application for bail after conviction, the court is principally required to consider two main issues namely the likelihood of applicant absconding and the prospects of success on appeal. These factors must be placed on balance. In *S v Williams* 1980 ZLR 466 (A) the following was stated;

*“Different considerations do, of course arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger or an applicant absconding. Such cases as *R v Milne and Erleigh* (4) 1950(4) SA 601(W) and *R v Mthemba* 197 (3) SA 468 (D) stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice, in my view, to apply this test properly it is necessary to put in balance both the likelihood of the applicant absconding and the prospects of success. Clearly, these two factors are interconnected because the less likely the prospects of success are the more inducement there is on an applicant to abscond. 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”.*

See also *S v Benatar* 1985(2) ZLR 205(H), *S v Tengende* 1981 ZLR 445 (SC).

In the present case, the question of the likelihood of absconding should not detain me. The two applicants are mother and son respectively. The uncontroverted evidence placed before

the court *a quo* is that they eke out an existence panning for gold with each earning a modest monthly income of US\$100.

In this application it was averred on their behalf that the 1st applicant has a 13 year old son solely dependent on her for his sustenance and that both are unsophisticated rural dwellers who do not have acquaintances abroad who could afford them asylum as fugitives from justice.

From the above summation of applicants circumstances one is inclined to accept their position that they pose a minimal flight risk.

The prospects of success are however a different kettle of fish. Firstly, as indicated earlier, the grounds of appeal are phrased in rather sweeping terms making it fairly difficult to discern precisely the errors supposedly committed by the Magistrate.

The contention advanced during oral submissions in court that the charge is fatally defective for failing to specify the exact geographical location of where the prospecting took place is unlikely to carry the day for the applicant on appeal. It is not a requirement that the charge specifies the exact location of the commission of a crime (save of course where such precise location constitutes an essential ingredient of the offence). It suffices if the description given (in this case Clipsham farm Masvingo) enables the accused to appreciate where the incident giving rise to the charge occurred.

Similarly, the complaint that the charge does not specify whether the area where prospecting took place is a mining location or not is unlikely avail the applicants on appeal. A simple reading of section 368(2) of the Act shows that the proscribed conduct consists of prospecting for any mineral without proper authorisation from the Ministry of Mines. The mischief aimed to be addressed by the legislature is to prevent random and unregulated prospecting activities. This is for obvious reasons.

Relying on the case of *S v Joto* HH 741/17 it was averred on behalf of the applicants that a conviction for prospecting could not have ensued in the absence of scientific proof that the earth which the applicants excavated contained gold. Such a requirement may have been appropriate in the context of a contested trial where the accused were denying having been prospecting but clearly distinguishable from the present. This is especially because the applicants in the present case admitted to have been prospecting for gold at the time of their arrest. I do not

believe the *ratio* in Joto is that in all instances where an accused is charged with prospecting for a mineral there must be scientific evidence for the recovery of the mineral sought. Prospecting activities are obviously speculative in nature. They involve a search for a mineral. Such search may or may not yield the mineral sought for. Further not all prospecting involves digging and trenching. A simple online search reveals that there are several techniques of mineral prospecting, (magnetic, gravimetric, electrical, radiometric, and seismic to name but a few). Some methods, as the one in question, are basic and rudimentary and involve the use of elementary implements such as picks and shovels, but others include the use of highly sophisticated instruments and do not even require the physical excavation of the earth to detect the minerals that may lie underneath. In the latter regard some methods employ the use of drones and similar non-invasive techniques. Yet they all fall under the rubric of “prospecting” It is absurd, therefore, to suggest for one to run afoul of section 368(2) of the Act one needs a positive assayers report indicative of the mineral sought.

To insist that a charge under Section 368(2) of the Act is only sustainable where there is some recovery of that mineral being searched for would render nugatory the intention of the legislature namely to discourage by punishing all unsanctioned prospecting activities of whatever method or technique.

The only perceptible glimmer of hope for the overturning of the conviction on appeal is perhaps the apparent failure by the Magistrate to explain the charge as required under s 271(2) (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. Under this section it is obligatory on the part pf the court to explain BOTH the charge and the essential elements of the offence. The said section reads;

“271 Procedure on plea of guilty

(1) ...

(2) *Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea*

—
(a)

- (b) *the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (a) or if requested thereto by the prosecutor—*
- (i) *explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and*
- (ii) *inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the ... (emphasis my own)”*

An explanation of the charge would of necessity have included an explanation of the term “prospecting” something which does not appear *ex facie* the record. It remains, of course, up to the appeal court to determine whether or not such an omission to explain the charge amounts to an irregularity vitiating the proceedings.

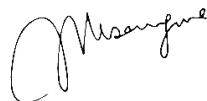
Ultimately, however, it is generally accepted that where there is no risk of absconding the court should lean in favour of granting bail, see *S v Anderson* 1991 (1) SACR 525. I say this mindful that bail may be denied in serious cases even where there is no risk of applicant absconding, *R v Fourie* 1948 (3) SA 584 (T) at 549; *S v Williams (supra)*. I find however, that the current offence can by no means be categorized as serious (the prescribed minimum sentence notwithstanding) to warrant the refusal of bail. On the principle enunciated in the *Williams* case (*supra*) I am therefore inclined to exercise my discretion by admitting the applicants to bail.

Another related consideration is the length of the term of imprisonment they are currently serving relative to the inevitable delay in processing and finalizing appeals. If bail is denied and the applicants ultimately succeed in their appeal, such success will be hollow and meaningless and rendered merely academic as they would have in all probability served the entire sentence by the time the appeal is heard and determined, see *S v Mc Coulagh* 2000 (1) SACR 542 (W) at 549 – 51; *S v Hudson* 1996 (1) SACR 431 (W) at 434 (b); *S v De Villiers* 1999 (1) SACR 297 (O) at 310 and *S v Anderson (supra)*.

In the final analysis, therefore, I am inclined to grant the application and the following order is hereby given.

ORDER

1. The application for bail pending appeal in respect of each applicant hereby succeeds.
2. Each applicant to deposit the sum of ZWL\$1 500 as bail with the Clerk of Court, Masvingo Magistrates Court.
3. The applicants to reside at Village Muza, Chief Mugabe, Masvingo until their appeal is finalised,
4. Each applicant to report once every fortnight on Fridays at Nemamwa Police Station until the appeal is finalized.



ZISENGWE J

Great Zimbabwe University Law Clinic, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners