

MOSES CHEWIRO
And
OBERT MUSOSA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 5 & 18 January 2022

Mr R.M. Macharaga, for the appellant
Ms M. Mutumhe, for the respondent

Application for bail pending appeal

ZISENGWE J: The two applicants are members of the Zimbabwe Republic Police (ZRP) who were convicted in the Magistrates Court of the offence of “Criminal abuse of office” (i.e. C/S 174 (1) (a) of the Criminal Law (Codification and Reform) Act, Chapter 9:23). The nub of the charge was that they unlawfully and irregularly released two suspects they had apprehended on drug related charges. Irregular in that such release did not conform with laid down police procedures. Following their conviction, they were each sentenced to 36 months’ imprisonment, six of which were suspended for 5 years on the usual conditions.

Through the present application they seek to be released on bail pending the outcome of the appeal which they swiftly noted against both conviction and sentence. This application is brought in terms of S123 (1) (b) (ii) of the Criminal Procedure and Evidence Act Chapter 9:07. The said section confers concurrent jurisdiction to both the High Court and the Magistrates Court which convicted the applicants to entertain such an application for bail pending appeal.

In the statement submitted in support of this application, the applicants referred and addressed the main factors relevant for determination in an application for bail pending appeal.

These are:

- (i) Likelihood of absconding
- (ii) Prospects of success of appeal
- (iii) The right of an individual to liberty, and
- (iv) The potential length of the delay before the appeal is heard.

See *S v Dzawo* 1998 (1) ZLR 536 (SC), *S v Williams* 1980 ZLR 466 and *S v Musasa* SC45/02,

They both claim that they enjoy bright prospects of success on appeal and in this regard, they enumerated an array of what they perceive as material errors on the part of the court *a quo* vitiating both the conviction and the resultant sentence.

In summary however, the main gripe against the conviction is that the trial court erred in its evaluation of the evidence leading to the acceptance of the evidence of the state witnesses and a rejection of theirs. They contend that a proper application of one's mind to the evidence should have yielded the opposite result. They therefore express the firm view that the appeal court will in all probability overturn the conviction.

Regarding sentence the two applications criticise the decision of the court *a quo* in imposing an effective 30 months' prison term when in their view a fine would have sufficed. They similarly express strong optimism of the custodial sentence being either significantly reduced or substituted with a non-custodial one.

This application stands sternly opposed by the state on whose behalf it was averred that there was no misdirection on the part of the court *a quo* in arriving at the decision it did in convicting applicants. Likewise, it was contended that the gravity of the offence is such as to render an effective custodial sentence virtually inescapable. Ultimately therefore it was submitted on behalf of the state that the chances of the applicants' appeal succeeding are remote hence there is no good basis for having them released on bail pending the determination of their appeal.

The following is a precis of the circumstances surrounding the commission of the offence as same can be gleaned from the record of proceedings attached to this application.

As stated earlier, both applicants are members of the ZRP. They are stationed at Chiredzi and attached to the Masvingo Flora and Fauna Unit (MFFU) (a unit which deals with combating crimes associated with environmental crimes). The allegations were basically that the two applicants apprehended two suspects namely Phillis Mufandaedza (“Phillis”) and Cynthia Mhuriro (“Cynthia”) in connection with the offence of unlawful possession of dagga following information they (i.e. applicants) had received to the latter effect. This was at a place called Masekesa Business Centre in Chiredzi. It was further alleged that at that particular point in time the two applicants were driving a black Toyota Hilux motor vehicle Registration Number AES 5590 (“the motor vehicle”). The place where the alleged arrest and irregular release took place and the description of the motor vehicle were critical in the ensuing trial for reasons that will soon become apparent.

According to the state, a search at Phillis’s house by the applicants yielded a fairly large consignment of dagga stored in some 48 plastic bags. They (i.e. applicants) then learnt from Cynthia that Phillis was at Masekesa shopping centre. Upon receipt of that information they then proceeded to the said shopping centre where they confronted and apprehended Phillis. It is the events that allegedly followed thereafter that led to the arrest and subsequent arraignment of the applicants.

It was alleged that not only did the two applications irregularly and unprocedurally release both Phillis and Cynthia, but also that they returned the illicit drug to the latter two.

The two applicants denied the charge. Their defence was a flat denial of ever having apprehended either with Cynthia or Phillis, let alone having unprocedurally released either of them as alleged. Most significantly, however, they vehemently denied ever having gone to the Masekesa area where the incident is alleged to have played out. Although they did not say so in as many words, the applicants claimed in their defence that the allegations were actuated by spite and malice on the part of their colleagues who were consumed by jealousy over their unit’s receipt of the Toyota Hilux motor vehicle referred to earlier.

The evidence

Six witnesses testified for the state and the two applicants and three other witnesses testified for the defence. Three of the state witnesses Bishop Chapombera, Artwell Ngara and Andrew Chirata, (the state witness 1, 2 and 4) are police officers and as such applicants' colleagues. The remaining three state witnesses were the following: firstly, an official from a company called "Easy Track", whose primary business involves the installation of electronic motor vehicle tracking devices. His evidence was material in that it related to the information extracted from the company's vehicle tracking system regarding the movement of the motor vehicle on the day the offence is said to have been committed.

The sixth state witness Michael Bold, is a Trust Security Manager with Malilangwe Trust. The said organisation services and maintains the motor vehicle on behalf of the owners of the same namely Hywood Foundation. His evidence was led to establish the nexus between the motor vehicle (using its own particular identity particulars) with the information extracted from the remote motor vehicle tracking system.

The third state witness, Tamia Mhara was 15 years old at the time she testified in court. She is Phillis' daughter. Her evidence was crucial for the state as it was aimed at establishing that despite their protestations to the contrary, the applicants did show up at their house on the day in question in the Masekesa area of Chiredzi looking for her mother and did thereafter (in circumstances that will be described later) actually meet up with her mother.

In their respective accounts the two applicants completely denied ever having proceeded to the Masekesa area of Chiredzi on the day in question as alleged. They maintained throughout that as a matter fact went to a different place namely the Save area on that day. Theirs was therefore effectively an alibi defence. They roped in three defence witnesses; namely Makandu Edlite the thrust of whose evidence was that he knew from the information which he received that the two applicants had been seen in the Save area on the day in question and that later that day he accompanied the second applicant from the police station where the latter had parked the motor vehicle to his homestead. According to him this was well before the offence was the allegedly committed.

The evidence of the other two witness Tasso Bango and Blessed Wozhero was similarly aimed at showing that the two applicants arrived home and stayed put thus effectively excluding

the possibility of them having proceeded to Masekesa at the alleged time. In other words, the evidence of the defence witness was to support applicant's alibi defence.

From the evidence as a whole it is common cause that the two applicants are police officers attached to the Flora and fauna Unit of the CID department of the ZRP in Chiredzi. It is further common cause that their unit was privileged to be afforded the use of a Toyota Hilux double cab motor vehicle black in colour with Registration number AES 5590. This motor vehicle belongs to the Malilangwe Trust but was for the time being lent to applicants' unit for use in combating wildlife offences. It is also common cause that this motor vehicle was fitted with a remote satellite-based tracking device. Significantly, it is common cause that the two applicants were in charge of that motor vehicle on the day in question, namely the 1st of February 2021. It is further common cause that Phyllis was subsequently arrested, charged and convicted of the offence of unlawful possession of dagga.

It goes without saying from the foregoing that the sole issue was whether the two applicants proceeded to the Masekesa area of Chiredzi and apprehended two suspects (Cynthia and Phillis) in connection with the unlawful possession of cannabis before proceeding to irregularly release them contrary to the laid down procedures.

From this broad issue there were three areas of material contestation between the state and the defence. Firstly, the State sought to show that the 2 applicants went to Masekesa on the day in question and the defence strove to refute the same. Secondly, the parties disagreed on whether the applicants did in fact apprehend Cynthia and Phyllis, and the third issue related to the entries in the occurrence books (OB) of the Police Station supposedly indicative of the mission undertaken by the two applicants on that day. Each of these will be dealt with in turn

Evidence relating to whether the two applicants proceeded to the Masekesa area on the day in question

This issue was central in light of the applicants' alibi defence. The evidence of the third State witness Collen Chirombedzi was essentially that the information retrieved from the *Easy track* GPS satellite-based tracking system database involving the movement of the motor vehicle revealed that it was driven to the area commonly referred to as Masekesa. Easy-Track is the company that installed the tracking system installed in the motor vehicle in question. Further the

same definitely recorded information detailed the movements of that motor vehicle in the said area.

Further, the same digitally recorded information detailed the movements of the motor vehicle in that area between 21:27 and 21:30 having earlier left Chiredzi around 20:20 before departing back from Chiredzi at around 22:26. The record of proceedings further shows that a soft copy of the movement of the motor vehicle was played on a computer and viewed by all parties and the court. He indicated that the tracking system's margin of error was very narrow indeed to the extent of approximately 5 metres only.

This witness was quizzed at considerable length on the apparent disparity between the registration numbers of the motor vehicle as shown on the witnesses' statement vis-à-vis that of the motor vehicle (AES 5530 and AES 5510 respectively) a discrepancy to which the witness attributed to error on his part. He indicated on this regard that he latter is in fact the correct Registration number. The other areas of focus during cross examination were his qualifications and the accuracy of the tracking system.

The evidence of the 6th state witness Michael Bold dovetailed with that of the above witness the thrust of which was to confirm the Registration Number of the motor vehicle as AES 5590. He would however indicate that its Registration number changed in the past depending on its registration at that stage in its life. Further he pointed out that the 2nd applicant had fuelled the motor vehicle on the day in question indicating that he wanted to go to the Save area to conduct some investigations.

The third witness Tamia Mhara as earlier stated is Phillis' daughter. The aggregate of whose evidence was basically that the 2nd applicant came to their home in the Masekesa area. He was in the company of three other men and this was around 8pm. They were driving a motor vehicle matching the description of the motor vehicle (a black Toyota Hilux double cab Registration number AES 5590). She was in the company of Cynthia, and at that stage her mother was away.

She indicated that the 2nd applicant and those in his company entered their house and discovered a consignment of dagga which they loaded into some empty bags. They then ordered to call her mother using the 2nd applicant's phone and she complied.

It was her evidence that thereafter she and Cynthia were taken by the 2nd applicant and those in his company to the local shopping centre in the same black Toyota Hilux double cab motor vehicle. There, they (i.e. 2nd applicant and his companions) apprehended Phillis before returning home where her mother put on some warm clothes. They then returned to the shopping centre once again where she was released at the instance of the 2nd applicant before her mother was whisked away.

She would deny under cross examination having been influenced or coerced by anyone to testify or fabricate evidence against the 2nd applicant. She would further testify that shortly after the departure of 2nd applicant and his companions, a six-member team of police officers from Ndali also came to their house similarly searching for dagga.

Evidence relating to whether or not the two applicants apprehended Phillis and Cynthia

The evidence of Tamia Mhara is relevant here just as it was relevant for the previous question and it serves no useful purpose to repeat here. It suffices a say that the young witness was steadfast in her evidence that 2nd applicant and those in his company did apprehend her mother on having unearthed a quantity of cannabis at their home.

The evidence on the question of the OB registers

Central to this question was the investigating officer Andrew Chitewa who testified as the fifth state witness. He was assigned to investigate this case in the wake of the allegations being levelled against the two applicants. According to him a perusal of the relevant entry of the Chiredzi OB register revealed that on the day in question (the 1st of February 2021) the 2nd appellant booked out for the surveillance of “wanted” persons.

He would insist under cross examination that there was one OB register used by CID and that if the Flora and Fauna Unit (to which the 2 applicants belonged), had opened a separate OB register it was not to his knowledge. He however dismissed as a fraud the entry made in the later OB Register seemingly exculpatory of the two applicants. He would explain that there was no need to make a second booking after the main entry in the official OB register and that after all it had been earlier decided by the 2 commanders of CID to use only one OB register.

Quite apart from the question of the OB registers this witness testified that his investigations unearthed that the 2nd applicant was in telephonic communication with Phillis during the period and he denied that the charges were actuated by malice over the use of the Toyota Hilux motor vehicle by applicants.

The other witness whose evidence was relevant in respect of contested OB entries was the very first state witness Bishop Chapombera – also a police officer attached to CID Chiredzi. He is the 2nd in charge for that department. His evidence regarding the existence of a second OB register used only by the Flora and Fauna Unit appeared to contradict that of Detective Inspector Chaitewa (who by then was yet to testify) and appeared to confirm that of the 2 applicants in this respect.

He however indicated that he never checked entries made in either the main OB register or the one used by Flora and Fauna, the latter register being in the custody of the 2nd appellant. He also indicated that on the day in question at around 11:00 in the morning the 2nd applicant had informed him that he was proceeding to the Save area to check for a wanted person and asked him if he had any enquiries there to which he answered in the negative.

Assistant inspector Artwell Ngara testified as the 2nd state witness. He was part of the team of police officers who reacted to the information received of a person peddling dagga in the Masekesa area. He was obviously referring to Phillis. Upon arrival at Phillis' residence (whose address was referred to as house number 63), they found Cynthia Mhuriro who in turn informed them that a group of detectives (one of whom was Musosa i.e. the 2nd applicant) had just departed from their home having undertaken a similar operation. They then recovered some packs of dagga. However, by some stroke of fate on their way back to Chiredzi they encountered a motor vehicle (described as a Toyota Noah Vox) laden with suspicious luggage travelling to the opposite direction. They promptly made an about turn and followed that motor vehicle and caught up with it, searched it and recovered a consignment of dagga.

The version of each of the two applicants as earlier stated, was that they never went to the Masekesa area on the day in question, let alone apprehend and release Cynthia and Phillis as alleged. Needless to say they denied ever having communicated with Phillis or her daughter Tamia. They insisted that they instead visited the Save area that day having departed Chiredzi at 11:30am and returning therefrom at 18:41. Reliance was therefore placed on the entries in the

Flora and Fauna OB register to that effect. They would similarly insist that upon their return from Save they parked the motor vehicle and made the short trip home on foot and arriving at approximately 7:20 and never left home thereafter.

They would dispute the evidence of all the state witnesses and in particular the computer print-outs from both Econet (showing telephonic communication with Phillis) and that of the motor vehicle tracking system.

In this evidence in Chief, the first applicant would introduce for the first a new dimension to the GPS motor vehicle tracking system namely that it was not only highly unreliable but also that it was susceptible to serious errors occasioned by both natural and man-made features such as mountains and buildings respectively. It was his fervent belief that a proper analysis of the efficiency of the information relayed thereby could only be done by its American based manufacturers or by the US Department of defence. He based all this on the knowledge acquired during his Bachelor degree in Geography and Environmental Studies. He was predictably quizzed during cross examination on his failure to question the relevant witness on issues relating to the efficiency of the GPS based motor vehicle tracking system.

The first defence witness Edlite Makondo indicated that he was an investigator at Gonarezhou National Park and in that capacity worked hand-in-glove with the two applicants wherein he shared information with them on a “wanted person” in the Save area. According to him the two applicants undertook to proceed to Save to arrest said suspect. According to him upon the applicants’ return at around 6pm, they requested him to transport them to their respective residences which he proceeded to do.

The evidence of Tasson Bango, a relative of the 2nd applicant, was essentially that on the day in question the latter returned home at around 7pm. The obvious import of her evidence was that the 1st applicant could not have possibly gone to Masekesa to commit the alleged offences as he was home at the material time.

Similarly, the wife of the 1st applicant Blessed Wozhere, who testified as the third and final defence witness, indicated that on the day in question her husband returned home at around 7pm and never ventured out again that evening implying that he never went to the Masekesa area as alleged.

At the conclusion of the trial, the learned magistrate in a reasoned judgment accepted the evidence of the state witness and the supporting documentary and electronic evidence. She rejected the version of the accused and convicted them.

Aggrieved by both conviction and sentence the two applicants swiftly noted an appeal against both. The grounds of appeal read as follows: -

Ad Conviction

1. The court **a quo** erred at law and fact in making a finding that the Appellants released Cynthia Mufandaedza and Cynthia Mhuriro without following normal procedure yet no evidence was placed before it to substantiate its finding.
2. The Court **a quo** erred at law and fact in convicting the Appellant of having committed Criminal abuse of office yet no evidence was adduced by the State to prove the essential elements of Criminal abuse of office as contemplated by the law.
3. The court **a quo** grossly misdirected itself as law and fact in accepting the State witness' testimonies specifically Cynthia Mufandaedza and Cynthia Mhuriro more particularly that Appellants visited Masekesa village on the particular day were the offence allegedly committed yet the evidence adduced before it falls short to prove its finding.
4. The court **a quo** erred at law and fact in failing to consider the Appellant's statement of defence and in disregarding their evidence which prove that the allegations were levelled against them by their colleagues over the Toyota Hilux AES 5590 that had been given to the department to assist compact crime.
5. The magistrate **a quo** grossly misdirected herself by failing to consider Appellants statement of defence that appellants on the 1st of February 2021 when they checked out they were going to Save area for some surveillance and wanted person follow-up and proceeded to convict the Appellants yet evidence by the state was adduced from incredible and grossly unreliable witnesses which evidence falls short of proving the essential elements of the offence.

Ad Sentence

6. The court **a quo** grossly erred at law and fact in passing a sentence of thirty (30) effective months imprisonment which is excessive and does not meet the demands of justice.

It is trite that in an application for bail pending trial, the main factors that fall for consideration are prospects of success on appeal, risk of abscondment, the applicant's right to his or her personal liberty and the likely delay before the appeal is heard see *S v Dzawo* 1988 (1) ZLR 536 (S) and *S v Labuschagne* SC 21/2003.

It is equally instructive to note that the court is required to place the above factors particularly the prospects of success and the risk of absconding in balance. See *S v Williams* (supra) and *S v Meyers* 1993 (1) SACR 383 at 385.

The onus in an application for bail pending appeal rests on the applicant to show that the justice will not be endangered by his admission to bail; see *R v Mthembu* 1961 (3) SA 468 at 471.

Prospects of Success on appeal

Such prospects must of necessity must be considered in light of the grounds of appeal. One observes that the first two grounds constitute not only a single ground of appeal, namely that the evidence led does not reach the required threshold of proof beyond reasonable doubt, but are strictly speaking not proper grounds of appeal as they do not attack a specific finding of the court. They both relate to the overall conclusion thereby reached. I briefly pause here to make the observation that the appellants mixed up the names of some of the witnesses who testified for one state. Reference was made in this regard to "Cynthia Mufandaedza as me of the people irregularly released by the applicants yet the correct name is Phillis Mufandaedza. Further, in the third ground of appeal, the appellants averred that the court *a quo* grossly misdirected in accepting evidence of Cynthia (they obviously meant Phillis) Mufandaedza and Cynthia Mhuriro, yet neither Phyllis nor Cynthia testified in the trial. All that was done by the state (for the reasons it advanced and accepted by the curt) was to produce two records of previous court proceedings in which the two testified.

The attack on the conviction on the basis that the trial court misdirected itself by accepting the evidence of the state witnesses and rejecting that of the applicants and their witnesses is unlikely carry the day for the applicants in the appeal. It is a well-established principle that the appeal court seldom interferes with the trial court's findings of fact unless same is afflicted by gross unreasonableness. 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. In this regard the following was said in *ZINWA v Mwoyounotsva* SC 28/15.

“It is settled that an appellate court will not interfere with factual findings made by a lower court unless those findings are grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided would have arrived at it; or that the decision was clearly wrong.”

See also *S v Isolano* 1985 (1) ZLR 62 (SC)

An objective evaluation of the evidence led during the trial vis-à-vis the judgment of the court reveals no such gross unreasonableness in factual findings of the court.

Much ado was made about the variance between the registration number of the motor vehicle in relation to both the witness statements and the so called third number plate. Not only was this apparent discrepancy satisfactorily explained by the relevant state witnesses, but it is trite that the evaluation of the evidence requires the court to consider the evidence as a whole instead of focusing too intently on one particular aspect. Of course, doubt may indeed arise if one were to consider such piece of evidence in isolation but such doubt may be set to rest if the evidence considered as a whole.

In my view the trial court can hardly be faulted for accepting as it did the evidence of the state witnesses and rejecting that of the two applicants and their witnesses. The evidence of the GPS based motor vehicle tracking system showing that the motor vehicle in question was in the vicinity of Masekesa area coupled with the evidence of Tamia Mhara against applicants admits of no doubt that the latter proceeded to Phillis Mufandaedza's place. Tamia's description of what transpired upon the arrival of the 2nd appellant and those in his company and more particularly the apparent “arrest” of her mother (Phillis) by the 2nd applicant when put in the overall context of the charge rendered the resultant conviction justified.

Dovetailing with the above was the evidence on the form of the computer printout from ECONET Wireless of the telephonic communication between 2nd applicant and Phillis at that

critical time just before the offence was committed. This tallies with the evidence of Tamia that when the 2nd applicant and those in his company arrived home (in the Masekesa area).

The fact that in the wake of the apparent arrest of Phyllis and Cynthia and the seizure of the cannabis discovered at the former's house by the two appellants, when juxtaposed with the recovery yet again of a consignment of cannabis moments after the first consignment was so recovered only serves to confirm that the applicant released Phyllis and Cynthia after having supposedly arrested them.

Then there were the records of previous proceedings in which Phillis was convicted of unlawful possession of dagga produced as exhibit 6 of record (the production of such court record of previous proceedings being permissible in terms of section 255 of the Criminal Procedure and Evidence Act, Chapter 9:07 subject to the satisfaction of the requirements set out therein). In those proceedings there was the incriminating evidence of Phillis, Cynthia and Luckson Munhukwaye pointing to the arrival of the 2nd applicant in the black Toyota Hilux motor vehicle. Pertinently Phillis's evidence related to her arrest and subsequent question and how she was then released and how the dagga which had ben earlier seized was left in her possession.

Regarding the OB entries, the trial court in my view gave sound reasons for dismissing the second OB register supposedly maintained by the Flora and Fauna Unit of the CID. The Magistrate observed not only that the entries made in that second OB register were scant and irregular but also that there was no real need to keep the same. She concluded that that second OB was merely a façade designed to falsely exculpate the applicants.

In the final analysis therefore, an acceptance of the applicant's alibi defence would by necessary implication have meant a rejection of the ECONET call register showing the telephonic communication between 2nd applicant and Phillis there being no good reason for so rejecting it. It would have equally meant the trial court rejecting the satellite-based GPS tracking system showing the movement of the motor vehicle in the Masekesa area when there was no rational reason for rejecting it. It would have meant the trial court rejecting, without good reason, the evidence of Tamia Mhara in its entirety.

I could go on *ad infinitum*, the tapestry of woven by evidence led in court was such as to leave little room for doubt of the guilt of the applicants. The appeal against conviction has very dim prospects of success.

Equally destined to fail is the appeal against sentence. I cannot find any misdirection in the sentence imposed by the learned senior Regional Magistrate warranting any interference with the same on appeal. Sight must also not be lost that sentencing is pre-eminently in the discretion of the trial court and the appeal court will not lightly interfere with the exercise of that discretion. The moral blameworthiness of the two applicants can only be described as severe. The two in their capacity as police officer have a duty to uphold the rule of law not to subvert the same. The conduct they displayed not only brings the justice delivery system in general and the image of the Zimbabwe Republic Police in particular into serious disrepute, but also erodes the security of the community. This is because if the very people who are entrusted with the duty of combating crime are seen to be either aiding or protecting criminal elements within society, the fabric of society is compromised.

The risk of applicants absconding

Although the applicants have no history of absconding in the run up to and in the course of the trial a fact which is being used in support the contention that they will similarly not abscond if released on bail pending appeal. However, three related principles in my view militate against that course of action. Firstly, it is a well-established principle that in serious matters such as the present one bail pending appeal may be refused even if there is little risk of abscondment. In this regard the following was said in *S v Williams (supra)*:

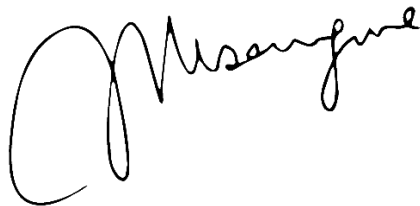
“Different considerations, do of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must be a 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 of an applicant absconding. Such cases as *R v Milne and Erleigh* (4) 1950 (4) SA 601 (W) and *R v Mthembi* 1961 (3) SA 468 (D) stress discretion that lies with the court and indicate that the proper approach should be towards allowing liberty to persons to

persons where that can be done without any danger to the administration of justice”.
(Emphasis mine)

The second principle is that although the individual liberty of a person is an important consideration, there is an equally compelling need that those that have broken the law are seen to serve that punishments without any unnecessary delay. The confidence of the community in the administration of justice would be seriously eroded if persons convicted of serious crimes are seen to be roaming the streets where they have little prospects of their appeal succeeding, see the *Labuschagne* case (*supra*)

Thirdly, prospects of success and the likelihood of absconding are inter-related. It is axiomatic to say that the less likely the prospects of success the greater the inducement to abscond. In the present case as already noted, the applicants have minimal prospects of success on appeal and the urge to flee cannot be ruled out.

Ultimately therefore, both applicants have failed to discharge the onus on them to establish that their admission to bail pending appeal is in the interests of justice, accordingly the application is hereby dismissed.

A handwritten signature in black ink, appearing to read 'Zisengwe J.', with a large, stylized initial 'Z'.

ZISENGWE J.

Macharaga Legal Practitioner, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners