

INNOCENT GADZAWANI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 2 December 2016

Bail Pending Appeal

Applicant in person
T Mapfuwa, for the respondent

CHITAPI J: I dismissed the applicant's application for bail pending appeal on 2 December, 2016. I indicated that I would provide written reasons for my order. These are they.

The applicant was charged with 5 counts of contravening s 60 A (3) (b) of the Electricity Act, [*Chapter 13:19*]. He was arraigned before the Regional Magistrate at Bindura Court to answer to the charges. Following a full trial, the applicant was convicted on one of the counts and acquitted on the remaining four counts. The applicant was sentenced to the mandatory 10 year imprisonment term. I should mention that the applicant was charged together with a co-accused. The two were both convicted and similarly sentenced. They were represented at their trial by different counsel.

It was alleged in the charge sheet that on 11 and 15 April, 2012 respectively, the applicant and his co-accused unlawfully cut, damaged, destroyed or interrupted an apparatus for generation, distribution, or supply of electricity. They were alleged to have cut down electricity poles carrying copper cables and thereafter stolen the copper cables in the Shamva area.

I need to mention that the applicant's then legal practitioners filed a notice of appeal on 31 January, 2013. I do not know why the clerk of court accepted the notice of appeal because the same was hopelessly out of time since the applicant had been convicted and sentenced on 12

November, 2012. The applicant then filed an application under case No. Con 245/16 on 14 December, 2015. I will not comment on the application other than to point out that on 14 February, 2016, MANGOTA J granted the following order:

- “(a) Leave to prosecute appeal in person is hereby granted
- (b) Leave to file a fresh notice of appeal is hereby granted
- (c) No order as to costs (sic).”

Pursuant to MANGOTA J’s order, the applicant then filed his notice of appeal on 17 March, 2016. It will be noted that MANGOTA J did not specify the date by which the fresh notice of appeal had to be filed. The grounds of appeal read like a composition and are not clear and concise as required by the rules of court. The problem with the applicant’s grounds of appeal lie for purposes of this application in that I am not able to properly appreciate what aspects of the judgment that appeal is directed at. Consequently, I cannot gauge the chances or prospects of success on appeal. As to the validity of the notice of appeal, given my *prima facie* view that it does not comply with the rules, the appeal court will unlikely hold that the appeal is valid.

Without the aid of the grounds of appeal, I carefully considered the record. The applicant was in the position of a thief caught red handed. A resident of the area who was employed by Agritex was coming from Shamva to Somer Farm where he is stationed. It was at night. His motor cycle broke down and he was now pushing it along as he walked. He saw electric sparks at Somer Farm. He moved closer to the scene. He then saw people in black attire cutting and pulling the conductors or copper cables. The witness telephoned other person to come and assist to apprehend the thieves who were about four in number.

The applicant was apprehended by the local people whilst still at the scene and was part of the four thieves. His defence that he was caught in cross – fire whilst on his way to visit a girlfriend was respected by the regional magistrate. Whilst other thieves fled, the applicant was not so lucky. He was apprehended as aforesaid. He also made indications to the police after he had been handed over to the police. The indications were recorded and viewed by the court. The court made a finding that the indications were voluntarily and freely made by the applicant.

Having convicted the applicant and his co-accused, the applicant bore the onus to proffer special circumstances to escape the mandatory 10 years jail term. None were proffered apart

from simply alleging economic hardship which led to their being tempted. The regional magistrate properly ruled that there were no special circumstances.

In applications for bail pending appeal s 115 C (2) (b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*] as amended by s 28 of The Criminal Procedure Amendment Act No. 2 of 2016 provides that after an accused person has been convicted of the offence, he or she bears the burden of showing on a balance of probabilities that it is in the interests of justice that such accused be released on bail.

TAGU J in *Machangana v State* HH 16/16 eloquently set out the approach of the court in dealing with an application for bail pending appeal and quoted various authorities including the supreme court authorities of *S v Williams* 1980 ZLR 466 AD and *S v Dzawo* 1988 ZLR 1998 (1) ZLR 536 (S). In summary, the authorities provide that courts should allow liberty to the applicant if the administration of justice will not be prejudiced. The courts should balance the risk of abscondment with the prospects of success. From a logic and common sense point of view, an applicant whose prospects of success on appeal are bright is unlikely to abscond with the converse being true where prospects of success are poor.

In *casu*, the proven facts showed that the applicant sought to take flight when he was apprehended. Such is his character. The hurdle he faces albeit on a balance of probabilities to convince the court that it is in the interest of justice to grant him bail pending appeal is in the circumstances of this case a difficult one. He has said very little about who he is, what he has and can offer as surety in the event he defaults prosecuting his appeal or he absconds. There is no gainsaying that there would have to be advanced circumstances out of the ordinary to sway a court to grant bail pending a hopeless appeal. The applicant's appeal in my view is hopeless. I thus dismissed his application.

National Prosecuting Authority, respondent's legal practitioners