TAPERESU CHIVAVA
and
PASCAH SENGENDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE 23 September 2016 & 3 March 2017

Bail Application

M. Chiwanza, for the applicants
E. Makoto, for the respondent

ZHOU J: This is an application for bail pending appeal. The applicants were convicted by the Magistrates Court at Chivhu of four counts of Stock Theft as defined in s 114 (2) (a) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. On 21 December 2015 they were each sentenced to 9 years imprisonment in respect of each count, giving a total of 36 years for each of them. On 5 January 2016 the applicants noted an appeal against both the conviction and sentence. The appeal is still pending. They now seek admission to bail pending the determination of their appeal.

The principles which are applicable to an application for bail pending appeal are well settled in this jurisdiction. In the case of *S* v *Tengende* 1981 ZLR 445(S) at 448, BARON JA stated them as follows:

> "But bail pending appeal involves a new and important factor; the appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused."

In *S* v *Dzvairo* 2006 (1) ZLR 45(H) at 60E-61A, PATEL JA (as he then was) repeated those principles, and explained the factors which are relevant to the determination of whether the positive grounds have been established to justify admission to bail of an applicant who has been convicted. He said:

> "Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospect of success is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable the right to liberty favours the granting of bail."

See also *S* v *Labuschagne* 2003 (1) ZLR 644(S) at 649A-B; *S* v *Williams* 1980 ZLR 466(AD) at 468F.

The applicants were convicted of a serious offence, and a lengthy period of imprisonment was imposed upon them. They were each sentenced to 36 years imprisonment. That on its own would be an inducement upon them to abscond. This is a case in which the likelihood of abscondment is very real. When that factor is considered together with the weak prospects of their appeal, there is an even greater reason to conclude that there are no positive grounds for the applicants to be admitted to bail. The notice of appeal attacks the learned magistrate's judgment for having accepted the cattle identified by the complainant as belonging to the complainant yet some of them bore the accused persons' brand mark rather than that of the complainant. That is a matter to which the magistrate addressed his mind. The allegation, which the applicants seem to ignore, is that they rebranded the cattle. In other words they tempered with the brand marks on the cattle. The applicants cannot therefore illustrate their prospects of success by reference to the branding when the evidence which was accepted by the learned magistrate confirmed that the branding had been tempered with. The witnesses who testified for the State also gave other descriptions of the stolen cattle apart from the brand marks. Those descriptions were found to be credible by the learned magistrate. There was evidence of some wrongly done fresh brand marks

on some of the stolen cattle. That, too, was evidence which was accepted by the magistrate. The magistrate found, based on the evidence led, that the cattle identified by the complainants during an inspection *in loco* belonged to the complainant, and that some of the brand marks had been tempered with by the applicants. There is nothing to suggest that those findings were so wrong as to present the applicants' appeal with any prospect of success.

The record of proceedings is ready. There is unlikely to be any inordinate delay in the setting down of the appeal if the applicants genuinely wish to pursue their appeal.

In the circumstances, the applicants have not shown any positive grounds to justify their admission to bail at this juncture. The request for admission to bail is clearly without merit.

The application for bail is, accordingly, dismissed.

Chiwanza & Partners, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners