CAZWELL MACHISA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 4 December 2020 & 21 April 2021

**Bail Pending Appeal**

Applicant in person
*F. I. Nyahunzvi*, for the respondent

CHITAPI J: The applicant has made numerous applications in pursuit of bail pending appeal. The record shows he filed an application for bail pending the determination of an application for leave to appeal out of time which was pending under case number CON 319/19. That application was filed on 7 November 2019. The applicant filed a supplementary bail statement on 9 December 2019. The application was removed from roll by NDEWERE J on 14 November 2019. The reason for the removal of the application from the roll was that the applicant was required to first obtain leave to appeal out of time before he could properly apply for bail pending appeal. A convict who has no pending appeal and who has not been granted condonation or leave to note appeal out of time has no basis to apply for bail pending appeal because there would be no appeal pending. The provisions of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] particularly s 123 does not provide for the making of an application for bail pending the determination of condonation of late noting application which is aptly called application for leave to appeal out of time.

The applicant obtained leave to appeal out of time and noted his appeal under case number CA 778/19. The appeal is pending determination before the appeal court. He then re-enrolled his application for bail for determination. Mr *Nyahunzvi* for the respondent filed a response in which he opposed the admission of the applicant to bail pending appeal. Counsel submitted on the authorities of *S* v *Dzawo* 1998 (1) ZLR 53 and *S* v *Ndlovu & Anor* HB

10/15 that bail pending appeal may be granted where the proposed appeal has prospects of success, is reasonably arguable and is not doomed to predictable failure with these factors being considered together with the risk of abscondment.

It is opportune to give the background to the case. The applicant was convicted of two counts of stock theft as defined in s 114(2)(a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] by the magistrate sitting at Karoi on 3 February 2016. The applicant was charged with a co-accused namely Innocent Mugariwa who was second accused and the applicant the first accused. Innocent Mugariwa was acquitted on the charge. It was alleged that the accused stole *bovines* belonging to two different complainants from the communal grazing area. The evidence against the applicant at trial was overwhelming as found by the magistrate, and I daresay, the finding of overwhelming evidence is supportable upon a reading of the record of proceedings and the trial courts' judgment.

There was credible evidence led from the two complainants who testified to having released their cattle into the communal grazing land and missing them. There was evidence of a witness whom the applicant hired to assist to drive the cattle and he assisted in tying the *bovines* to trees. The complainants identified their *bovines.* The trial court's finding rejecting the applicants' explanation that he believed that the *bovines* belonged to his brother is well supported. The trial magistrate noted that when the applicant tied the *bovines* to a tree, there was no attempt made by the applicant to find the brother. There was evidence that the applicant requested for transport to ferry the *bovines* to the cattle market and was acting in his personal stead and not on behalf of his brother the alleged owner of the *bovines*.

In the bail response by Mr *Nyahunzvi*, counsel noted that although the appeal against conviction did not enjoy prospects of success, the appeal against sentence was reasonably arguable because although the imposition of 9 years imprisonment per count, after a finding of no special circumstances was proper, the overall sentence of 18 years imprisonment was too harsh and could have been ameliorated by making the sentences run concurrently since the applicant committed a single act of theft albeit it turned out that the two bovines belonged to different complainants. I found the concession to be merited. I however noted that even if the sentences were to run concurrently, the applicant had to serve at least 9 years because

these, were mandatory sentences. I reasoned that the applicants' plea for bail could have sat on firmer ground had he served at least 9 years for one count. I dismissed the application for bail. I indicated in my ruling that the applicant may well have been granted bail had he served at least 9 years since even the order that the sentences be concurrent would still result in the applicant serving 9 years. I delivered my decision on 14 January 2020.

No sooner had I delivered the ruling that the appellant, four days later, on 17 January 2020 filed another bail application citing a change in circumstances. The grounds of the application which the applicant submitted were that he wanted the court to know that the applicant would have served 9 years imprisonment on 5 February 2022. The state counsel Mr *Nyahunzvi* correctly submitted that the issue of the date of the release of the applicant being pleaded as a changed circumstance was not knew because the information was available but not presented to the court. It was not surprising then that on 8 January 2020, TSANGA J dismissed the application and endorsed that there were no changed circumstances warranting a review of my determination of 14 January 2020.

On 22 July 2020, the applicant filed yet another application based on changed circumstances. His main argument was that since the judge who granted him condonation of late noting of appeal must have been satisfied that the intended appeal had prospects of success, the bail court judge was wrong to hold that there were no prospects of success. He also submitted that there was a likelihood of the appeal hearing being delayed because he had not been called yet to argue his appeal. He also indicated that he had appealed to the Supreme Court against the refusal to grant him bail and required a full judgment for the Supreme Court to accept his appeal. On 25 August 2020, I dismissed the changed circumstance application and made the following endorsement:

> "No changed circumstances. The fact that the appeal is yet to be set down would not amount to a change in circumstances as envisaged in proviso (ii) to s 123 of Criminal Procedure & Evidence Act in the absence of the applicant showing positive steps made to ensure an early hearing of appeal like for example applying for an order that hearing of his appeal is done urgently giving reasons for seeking such order."

On 22 October 2020, the applicant filed yet another application for bail based on changed circumstances. This time, the applicant averred that the court *a quo* erred to convict

him and also passed a harsh penalty yet the applicant was a juvenile first offender who gave an explanation in denying that he stole the two *bovines*. He also submitted that he was denied his constitutional right to legal representation. He also submitted that he would not abscond because he would stay with both his parents.

On 12 January 2021, I dismissed the application and endorsed that:

> "application is an abuse of court process because a finding has already been made that there are no prospects of success on appeal. The High Court has spoken on this and the finding based on the same record of proceedings will not change. Applicant if advised should appeal this decision or make application for an early appeal set down."

This constitutes the fully dressed judgment which applicant requested for.

*National Prosecuting Authority*, respondent's legal practitioners