HB 150-15
HCA 260-14
X REF REG 118/12

LYNNA NDAGURWA

Versus

THE STATE

IN THE IGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 10 FEBRUARY & 16 JULY 2015

Bail pending appeal

G. Nyathi for the appellant
A. Munyeriwa for the respondent

TAKUVA J: This is an appeal against refusal of bail by a magistrate in terms of section 121 (1) (b) of the Criminal Procedure and Evidence Act Chapter 9:07. The appellant was on 18th day of July 2014 convicted on a charge of contravening section 136 of the Criminal Law (Codification and Reform) Act Chapter 9:23 namely fraud. She was sentenced to "60 months imprisonment of which 6 months imprisonment is suspended for five years on condition accused does not within this period commit an offence of dishonesty for which accused is sentenced to a term of imprisonment without the option of a fine. Of the remaining 54 months imprisonment 30 months imprisonment is suspended on condition accused pays US$15 632,42 through the clerk of court Bulawayo by 31st December 2014. Effective 24 months imprisonment."

Appellant who was dissatisfied with the conviction and sentence appealed against both. She also applied for bail pending appeal and her application was dismissed hence this appeal. The facts are as follows:

The appellant and two others were jointly charged with fraud. All of them were employed by the Grain Marketing Board (GMB). The 1st accused one Samuel Bongo was employed as a sales clerk at GMB Lusulu depot, the second accused Haruziviishe Zishiri was employed as a depot assistant at Lusulu depot while the appellant was employed as an accounts clerk at GMB Belmont depot in Bulawayo.

During the period extending from 20 November 2010 to 24 March 2011 the trio connived and raised grain receipts with serial numbers, tonnage and value of maize grain as per annexure to the state outline in the names of Shadreck Makosa, Dephine Teurai Zinyama, Mkumbulo Mathe and Caroline Nyathi as farmers who had delivered maize grain at GMB Lusulu depot. Accused 2 then signed these receipts confirming that grain as reflected had been delivered. Appellant, acting in connivance with accused 1 and 2 processed payments for all the transactions mentioned in the schedule by completing GMB petty cash requisition vouchers and the Real Time Gross Settlement (RTGS) transfer applications.

Appellant deposited these funds into the following accounts:

(a) Account number 3020089360357 in the name of Dephine Teurai Zinyama domiciled at FBC Bank, Jason Moyo Branch, Bulawayo
(b) Account number 64460230810012 held by Caroline Nyathi and domiciled at CBZ Main Street Branch Bulawayo
(c) Payments in respect of all grain receipts raised in the name of S. Makosa and Dephine T. Zinyama were deposited into the FBC account in the name of Dephine T. Zinyama
(d) Payment for all grain receipts raised in the name of M. Mathe and Caroline Nyathi were deposited in the CBZ account held by Caroline Nyathi.

Subsequently, appellant instructed Dephine Teurai Zinyama and Caroline Nyathi to withdraw all the funds from the above mentioned accounts. This was duly done and the money was handed over to the appellant. It was later established that:

(i) no maize grain was delivered in respect of all grain receipts listed in the schedule to the state outline.
(ii) the fictitious farmers namely Shadreck Makosa, Caroline Nyathi, Dephine Teurai Zinyama and Mkumbulo Mathe whose names appear on the grain receipts never delivered maize at GMB Lusulu.

The trio misrepresented to the GMB that the fictitious farmers had delivered a total of 170 535 metric tonnes of maize grain valued at US$46 897,26. GMB was prejudiced of the said amount which appellant and her accomplices converted to their own use. Nothing was recovered.

The grounds of appeal in the appellant's written statement are that;

> "1. the court *a quo* erred in finding that there are no prospects of success on appeal despite the appellant's submission that the state case was fraught with discrepancies and inconsistencies which should operate in favour of the appellant.
> 2. the court *a quo* erred in finding that the appellant is likely to abscond despite the fact that the appellant "religiously attended court throughout the long and protracted trial."

It is trite that bail is a matter for the discretion of the court. In an application for bail pending appeal, the court must be satisfied that there are reasonable prospects of success on appeal and that the granting of bail will not endanger the interests of justice. See *S* v *Tengende & Ors* 1981 ZLR 445 (S) and *S* v *Benatur* 1985 (2) ZLR 205 (HC). In *S* v *Manyange* 2003 (1) ZLR 21 (H), MAKARAU J (as she then was) held that:

> "in an application for bail pending appeal, as distinct from bail pending trial, the presumption of innocence is inoperative, and for his application to succeed an applicant must show that there are positive reasons why bail should be granted. It is not enough for the applicant to show that he has reasonable prospects of success on appeal; he must go further and establish that there are positive grounds for granting him bail pending appeal and that the granting of bail will not endanger the interests of justice. The onus is on him to tip the balance in his favour".

In considering whether an applicant should be admitted to bail pending appeal courts generally take the following factors into account;

(1) the appellant's prospects of success.

(2) the likelihood of appellant absconding.

(3) the length of the sentence currently being served.

(4) the likely delay before the appeal could be heard; and

(5) the liberty of the individual.

John Van der Berg *Bail: A Practitioner's Guide* 3rd edition at 215 states that:

> "The primary consideration in an application for bail pending appeal or review is whether the accused will serve his sentence if released on bail and should his appeal or review fail; the risk of the accused interfering with the investigation or influencing witnesses will have fallen away. The court will naturally take into account the increased risk of abscondment in view of the fact that the accused has been convicted and sentenced to a term of imprisonment, and is not merely awaiting the outcome of his trial. Also a stark change of circumstances is the fact that the presumption of innocence has, by this stage, ceased operating in the accused's favour. Thus the severity of the sentence imposed will be a decisive factor in the court's exercise of its discretion whether or not to grant bail … for the notional temptation to abscond which confronts every accused person becomes a real consideration once it is known what the accused's punishment entails".

In *S* v *Barber* 1979 (4) SA 218 HEFER J made the following remarks:

> "It is well known that the powers of this court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this court may have a different view, it should not substitute its own view for that of a magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this court's own views are, the real question is, whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly".

In casu, the court *a quo* refused bail on two main grounds namely (a) the appellant's prospects of success on appeal are very slim; and (b) the appellant is likely to abscond in light of the severity of the sentence.

During the hearing, counsel for the appellant conceded that he had no meaningful submissions as regards appellant's prospects of success on appeal. In his own words he had "a mountain to climb". From the evidence on record, this concession is hardly surprising. The state witnesses painted a picture of an elaborate scheme orchestrated by the appellant and her two conspirators where maize deliveries were falsified at Lusulu. This was achieved through accused 1 and 2's blatant interference with the guards' proper performance of their duties. The guards

were specifically barred from having access to the grain book, resulting in their failure to properly record maize deliveries in the gate book. From the evidence, accused 1 instructed the security guards to enter information in the gate book based on grain receipts brought to them by him. Further, the doctored information was not being entered in real time (i.e. when the transaction was occurring) but was being entered in retrospect. In some instances the information entered in the gate book would not be complete, the signatures of those making deliveries or the vehicles' number plate would be missing. This was all part of the trio's well-oiled machine to defraud GMB.

The three coordinated their efforts in the criminal enterprise with astounding efficiency. In this regard, I totally agree with *Miss Munyeriwa* for the respondent when she submitted that "It is also worthy of note that the first state witness indicated to the court that Lusulu depot payments ordinarily are not made at Belmont branch. Lusulu depot payments are ordinarily processed through the Hwange office (Ref page 33) [of the record]. This therefore clearly shows that the three were working together in the criminal enterprise. Accused 1 and 2 forced the guards to operate at limited capacity in order to cause them to record the non-existent deliveries in their gate book, while the appellant's job was to ensure that GMB paid out the money in respect of those non-existent deliveries".

I would add that the appellant's entire defence incorporating the so called defence witnesses' testimony is patently false. The defence witnesses could not supply the relevant details of the deliveries they made. Even where specific questions were put, they would evade such questions by hiding behind loss of memory. The appellant does not know most of them well. The allegation was that appellant claimed to have delivered 170 535 metric tonnes of maize at Lusulu depot valued at US$46 897,26 which money she does not deny receiving. In light of such a serious allegation, it is baffling that appellant who obviously had an evidentiary burden to discharge failed to provide proof in the form of documents indicating the quantities and dates of delivery of such maize. In my view, the appellant's defence in all its facets is merely a deceit consisting of a series of fraudulent misrepresentation of material facts with full

knowledge of their falsity intended to induce reliance on them to the detriment of GMB and genuine maize farmers.

For these reasons, I agree with the Regional Magistrate that there are no prospects of success on appeal against conviction.

As regards the risk of abscondment, it is trite that those considerations which militated against a court lightly granting bail to an accused awaiting trial will be magnified many times over once the accused has been convicted. This is the case because the notional temptation to abscond becomes a real consideration once it is known what the accused's punishment entails. The severity of the sentence imposed is a decisive factor. In casu, the appellant was sentenced to 5 years imprisonment. If however she pays restitution, she will serve an effective term of 24 months imprisonment. In my view, the severity of this sentence is likely to induce the appellant to abscond. Therefore, the finding by the court *a quo* is unassailable.

In respect of prospects of success an appeal against sentence, the Regional Magistrate summed it thus:

> "The effective prison sentence of 24 months is justifiable if not lenient in the circumstances. The applicant stole out of greed than need as she was gainfully employed by the complainant. She was an accounts officer at GMB Belmont Depot. She abused the trust that her employer had bestowed on her. Thus her moral blameworthiness is very high in the circumstances. Accordingly the sentence is justified."

I fully agree with this conclusion suffice to say appellant stole public funds meant to pay genuine farmers for maize delivered and the amount is astronomical.

Consequently, I agree that there are no prospects of success on appeal against sentence.

Accordingly, I find no merit in the appeal against refusal of bail and it is hereby dismissed in its entirety.

Sansole & Senda, appellant's legal practitioners
Prosecutor General's Office respondent's legal practitioners