ADAM ZINDOGA
and
PHILLIP URIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE 28 July & 3 August 2015

Bail application

W. Nyika, for the applicant
Ms *S. Fero,* for the respondent

ZHOU J: The applicants were charged with and convicted by the Chitungwiza Magistrates Court of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They were sentenced to 4 years imprisonment, of which 1 year imprisonment was suspended for five years on condition that they do not within that period commit any offence involving dishonesty or violence at the person of another and for which upon conviction they are sentenced to imprisonment without the option of a fine. A further 6 months were suspended on condition of restitution. The applicants appealed to this court against both conviction and sentence. On 15 July 2015 the applicants instituted the instant application for admission to bail pending determination of their appeal against the judgment of the Magistrates Court. The application is opposed by the respondent.

The approach of the courts in an application for bail pending appeal is settled. The principles differ from those which apply where bail is being sought before conviction. In the case of *S* v *Tengende*1981 ZLR 445(S) at 448, Baron JA said:

> "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."

See also *S* v *Labuschagne*2003 (1) ZLR 644(S) at 649A-B.

In *S* v *Dzvairo*2006 (1) ZLR 45(H) at 60E-61A, Patel J lucidly recited the relevant

principles as follows:

> "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 on appeal 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 *Dzawo*1998 (1) ZLR 536(S) at 539E-F.

The allegations against the applicants were that on 23 September 2013 in the evening the complainant was inside his room seated on a bed when the applicants pounced upon him. One of them covered the complainant using a T-shirt, and gagged his mouth. The other applicant and the accomplices searched the complainant's suitcase and stole cash amounting to US$312. In the struggle which ensued the complainant managed to uncover himself and observed the applicants who were known to him. Although they managed to subdue him he had already identified them. The fact of the robbery and how it was committed were not in dispute. The only issue was the identity of the assailants. The learned Magistrate concluded that the applicants were positively identified by the complainant. That conclusion cannot be impeached. The applicants were known to the complainant and were identified through a source of light which was brought by the applicants themselves. It was not suggested why the complainant would seek to make false allegations against the applicants. In my view, the complainant's identification of the applicants cannot be faulted. The applicants' case that they were mistakenly identified enjoys no prospect of success in the circumstances of this case. I find no inconsistencies in the testimony of the complainant. The description of the light which was in the possession of the applicants presents no inconsistency at all, but if that were the case, that matter would be immaterial. The fact was that there was some light.

The sentence imposed is not out of proportion to the offence with which the applicants were convicted. This was a robbery case. Physical violence was used. The complainant was

left unconscious by the applicants. The applicants have not shown that a lesser penalty than that which was imposed by the Magistrate was warranted.

In the circumstances, the application for bail pending appeal is without merit. It is accordingly dismissed.

Nyika Legal Practitioners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners