TAFADWA CHIMBWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 15 and 18 July 2008

BAIL PENDING APPEAL

Mr C Tafireyi for applicant
Mr A Masamha for respondent.

MAKARAU JP: The applicant was convicted by a magistrates court sitting at Mbare on a charge of contravening section 113 (1) (a) and (b) of the Criminal Law (Codification and Reform) Act Chapter 9.23. He took property belonging to the complainant intending to permanently deprive the complainant of her control, possession and ownership of such property or in such circumstances that he realized that there was real risk that the complainant would be permanently deprived of her control, possession and ownership of the property. He was sentenced to 36 months imprisonment with 12 months suspended on conditions of good behaviour and restitution.

Dissatisfied with the outcome of the trial, the applicant noted an appeal to this court against both conviction and sentence.

He then filed this application for bail pending appeal.

The application was opposed.

In *casu*, the applicant argues that the respondent did not prove its case against him beyond reasonable doubt and thus, he has prospects of success on appeal against the conviction.

During the trial, it was alleged against the applicant that he stole property belonging to the complainant by smashing the passenger window of her vehicle as she stopped in compliance with a traffic light against her at the intersection of Simon Mazorodze Road and Willowvale Road, in Southerton, Harare. The applicant is alleged to have stolen three mobile phones, and cash amounting to Zim$1,2 billion, R2000 and other personal belongings that

were in a black purse. Upon his arrest, the three mobile phones were recovered from the applicant.

At the trial of the matter, the applicant denied the charges. The complainant is the sole witness who testified on behalf of the State. She gave evidence as to how the property was stolen from her. She further testified that she identified the complainant as the person who stole from her car.

In his defence, the applicant alleged that he was given the phones by one Mbidzo to sell. He was given the phones around 8.00 p.m. After selling the phones, he was given one as a token of appreciation. Whilst still in custody, the complainant requested for her bad back and he arranged for his relatives to give the bag to the complainant. The complainant also recovered some of her property from the police station after it was left there at his instance.

The applicant raised two main arguments during the bail hearing as justifying why he should be granted bail pending appeal. Firstly he argued that Mbidzo should have been called to refute applicant's story as to the origins of the mobile phones. Secondly, he argued that the state failed to prove its case beyond reasonable doubt as it only relied on the evidence of a single witness.

I am unable to agree that the applicant has discharged the onus on him to show that he is entitled to bail pending appeal. (See S v Manyange HH1/03).

In my view, the evidence on record is cogent enough to ground a conviction, thereby diminishing the prospects of the applicant succeeding on appeal. It is trite that one of the factors that a court has to take into account in considering an application for bail pending appeal is the prospect of the appeal being upheld. The other factors are the likelihood of the applicant absconding, the delays that are likely to ensue before the appeal is heard and the right of the applicant to his liberty pending determination of the appeal. (See *S v Dzawo* 1998 (1) ZLR 536 (S)).

The only relevant factor that falls for consideration in this application is the applicant's prospect of success on appeal. It has not been argued that he is likely to abscond or that the setting down of the appeal will be delayed to such an extent that he will serve the entire or a large portion of the prison term before the appeal is determined.

It is clear form a reading of the record that while the applicant tries to explain his possession of the mobile phones, and falsely so in my view, he fails to proffer an explanation as to how his relatives had in their possession the complainants' bag which was recovered

from his house after his arrest. He also fails to explain how at his instance, the other items stolen from the complainant were recovered and left at the police station for the complainant to collect. These items were stolen together with the mobile phones that he falsely alleged were given to him by Mbidzo to sell.

It is also clear from the record that the evidence regarding the recovery of the other items is not in dispute as it is given by the applicant himself in his defence outline.

In the circumstances of the matter, it is my view that there was no need on the part of the State to call the evidence of Mbidzo.

It is my further view that the recovery of the stolen property from the applicant and the testimony of the single witness were sufficient to ground a safe conviction in the matter. The applicant argues and correctly so in my view, that the complainant may not have been able to positively identify the applicant during the commission of the offence. It is common cause that the offence occurred at night and that the applicant was not previously known to the complainant.

Whilst the trial court appears to have erroneously accepted the identification of the applicant by the complainant, this in my view does not detract from the cogency of the other evidence against the applicant including his own defence outline that places the stolen property in his hands and under his control.

The applicant has also sought to argue that the State did not prove its case beyond reasonable doubt as it relied on the testimony of a single witness. It is trite that the testimony of one witness in our law is sufficient to ground a conviction. In any event, the testimony of the complainant in this matter found corroboration from a most unlikely source, the applicant himself.

In arguing the prospects of success in an application for bail pending appeal, it is not in my view enough for an applicant to raise individual features of the State case that may be unsatisfactory as did the applicant before me. He or she must prove that the totality of the evidence led against him or her at the trial does not justify the subsequent conviction bearing in mind always that the burden resting on the State in criminal matters is proof beyond a reasonable doubt and not proof beyond any shadow of doubt.

It is trite that the procedure of bail is meant to strike a balance between the liberty of an individual and the due administration of justice. However, after conviction, the liberty of the individual loses some of its weight and the due administration of justice becomes the stronger

factor. It is further trite in my view that once an applicant has been convicted and sentenced, he is not as of right entitled to his liberty as the presumption of innocence ceases to operate in his favour upon conviction. The onus then falls on him to show the court that he is entitled to his liberty pending the determination of the appeal. It is not enough for a convicted applicant to show that he will not abscond if granted bail pending appeal. He must prove that the interests of justice and the integrity of the justice delivery system will not be prejudiced if he is released on bail pending appeal.

In my view, the applicant in *casu* has failed to discharge the onus that rested on him. The application cannot succeed.

In the result, I make the following order:

The application is dismissed.

Jessie Majome & Co, applicant's legal practitioners.
Attorney –General's Office, respondent's legal practitioners.