LEE SEUNGHYUN
and
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 16, 17 & 18 November, 2016

Bail pending appeal

T Mpofu, for the applicant
Mrs *S Fero*, for the respondent

CHITAPI J: The applicant applies for bail pending appeal. He was convicted by the magistrate at Harare on 3 October, 2016 on a charge of contravening s 3 (1) of the Gold Trade Act [*Chapter 21:03*]. In terms of the provisions of the aforesaid section, an unlicensed or unauthorized person either under the Gold Trade Act (the Act) or the Mines and Minerals Act [*Chapter 21:05*] is prohibited from dealing in or possessing gold either as a principal or agent. Section 3 (2) of the Act, casts the onus of proving that the person charged under s 3 (1) falls within the class of persons who may possess or deal in gold in terms of the Act, upon the accused or charged person. Section (3) of the Act provides for a mandatory sentence of not less than 5 years up to 10 years to be imposed upon an accused convicted of contravening section 3 (1) aforesaid, if there are no special circumstances to justify imposing a lesser penalty. If the convicting court finds that special circumstances exist in the particular case to justify a lesser penalty than the mandatory penalty, the court shall be obliged to record the special circumstances. A finding of special circumstances will have the effect of allowing the convicting court, a discretion to impose a sentence of "imprisonments for a period not exceeding five years or a fine not exceeding level nine or twice the value of the gold that is the subject matter of the offence, whichever is the greater or to both such fine and such imprisonment". In the event that a convicting court has imposed a mandatory penalty where no special circumstances have been found to exist, no part of such sentence should be suspended. So much about the purport of the offence of dealing or possessing gold as

provided for in s 3 of the gold. The offence is viewed by the legislature as a very serious one and the courts are similarly guided.

In casu, the applicant who is a South Korean national was arrested on 31 August, 2016 at Harare International Airport. He checked in to depart Zimbabwe for his home country, South Korea. His hand luggage was subjected to a security search by Civil Aviation security officials. A substance which later turned out upon investigation to be a smelted gold button was found in the applicant's hand luggage. The gold button was weighed and costed. Its weight was put at 100.68 grammes and its value put at US$3 724 00. The applicant did not fall within the class of persons listed in s 3 (1) of the Act who may possess or deal in gold.

On 12 September, 2016 the applicant was admitted to bail pending trial by Zhou J under case No. B961/16. The conditions which he imposed appear from the bail order a copy of which is attached to this application as Annexure "A". Subsequently, on 3 October, 2016 and after some delays caused by the need to arrange for an interpreter versed in the applicant's language and a change of legal practitioner, the applicant's case was dealt with as a guilty plea in terms of s 271 (2) (b) of the Criminal Procedure & Evidence Act[*Chapter 9:07*].

The applicant was convicted on his plea to contravening s 3 (1) of the Act. The Magistrate made a finding that there were no special circumstances to warrant the imposition of a sentence lesser than the mandatory sentence. He reasoned that his hands were tied and he sentenced the applicant to 5 years imprisonment and ordered the gold button forfeited to the State.

The applicant filed a notice and grounds of appeal against sentence on 4 October, 2016. In the main, the grounds of appeal are aimed at faulting the finding by the magistrate that there were no special circumstances in the case. The applicant has also in an "amended notice and grounds of appeal" filed on 4 November, 2016 indicated that he intends to move the appeal court to alter his guilty plea to not guilty. The applicant has in the proposed notice of amendment sought to expand on the grounds of appeal by giving them more detail. The issue of whether or not the proposed amended notice of appeal will be allowed is an issue for the Appeal Court. For purposes of this application, the court takes note of the proposed amendment as an indication of the applicant's *bona fides* to pursue his appeal with conviction.

In an application for bail pending appeal, s 115 C (2) (a) of the Criminal Procedure & Evidence provides as follows

"115 C Compelling reasons for denying bail and burden of proof in bail proceedings

(1) ……

(2) Where an accused person who is in custody is respect of an offence applies to be admitted to bail-

(a) ……

(b) After he or she has been convicted of the offence, he or she shall bear the burden of showing, on a balance of probabilities, that it in the interests of justice for him or her to be released on bail."

This provision was introduced by s 28 of Act No 2 of 2016. The provision is in line with how the courts have always dealt with applications for bail pending appeal with regards to onus. The onus to demonstrate that bail pending appeal should be granted has always been reposed upon the appellant see *S* v *Macmillan* HH 11/2007; *Ncube* v *S* HB 159/13.

In *Ncube* v *S* (*supra*) MAKONESE J held that the onus which is upon the applicant is for him or her to prove on a balance of probabilities that the grant of bail will not endanger the administration of justice. TAGU J in *Kudakwashe Machangara* v *S* HH 16/16 in dealing with an application for bail pending appeal quoted Supreme Court authorities and stated as follows on p 2 of the cyclostyled judgment:

> "The main consideration in an application of this nature is whether or not there are prospects of success on appeal. As was submitted by the State, in *State* v *Williams* 1980 ZLR 466 AD, also reported in 1981 (1) SA 1170 at 1173 FIELDSEND CJ put the test as follows:-
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> > '…..the approach should be to allow liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly the two factors are inter-connected because the less likely are the prospects of success the more inducement there is on the applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail'
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> This position is acknowledged by both the applicant and respondents' counsels. See also *S* v *Dzawo* 1998 (1) ZLR 536 (S) and *S* v *Manyange* 2003 (1) (1) ZLR 21 (H)"

The applicant has submitted that the learned magistrate erred in law in finding that the applicant had not proved that the gold in question had been lawfully acquired by the applicant in "Ghana as evidenced by the documents which were generated from Ghana allowing the applicant to export the gold from that country. In his brief reasons for sentence the magistrate stated as follows:

> "The documents which the accused has produced from Ghana have a quality (sic) of 106 grams of gold yet the gold which the accused was found in possession of is 100.68g. this shows that the paperwork which the accused produced relates to some other gold which is not the one before this court.

> One would then wonder why accused would tender a plea of guilty if he believed that he was lawfully in possession of the gold.
>
> I have therefore not found any special circumstances on the case warranting a departure from the minimum mandatory sentence. The courts need to send a clear message to those who illegally take gold from Zimbabwe to other countries.
>
> In the absence of special circumstances my hands are tied to the minimum mandatory sentence."

The record reveals that the applicant tendered and produced by consent exhibits in the form of certificates from the Ghana Foreign Exchange Authority; Ghana Customs Division and other documents of origin showing that the applicant had the authority of Ghanaian authorities to possess and export from Ghana a gold bar weighing 106 grammes. The applicant argued that this is the same gold which he was arrested in possession of and formed the subject of his trial. It was submitted on the applicants' behalf that the gold was not from Zimbabwe and that he was a *bona fide* possessor of the gold who believed that the paperwork which he obtained from Ghana would ensure that he would not encounter any problems in transit. The prosecutor confirmed that the documents which the applicant produced were genuine and had been confirmed to be so. The prosecutor however submitted that the variance in the weight of the gold as shown on the documents from Ghana and the weight determined in Zimbabwe was proof that the gold which the applicant was in possession of could not be the one from Ghana. The magistrate unfortunately and wrongly in my view bought this argument and adopted the prosecutor's reasoning.

The applicant argues that the magistrate erred in his finding. The respondent's counsel has conceded that the magistrate's findings were based on conjecture and submitted that the applicant has prospects of success on appeal in arguing his case against a finding of no special circumstances and the consequent imposition of the mandatory sentence. I am persuaded that the concession by State counsel that the applicants' appeal has bright prospects of success has merit and was well taken.

In my view, once the State and court had accepted the applicants documents of exportation of gold from Ghana and the applicant had insisted that the gold he possessed was the same gold that he was authorized to possess by Ghanaian authorities, the onus to disprove the accused's assertion shifted to the State. The State could not disprove the assertion beyond a reasonable doubt by pointing to a variance in weights. A lot more was required. Weighing machines for example are assized differently. There was no evidence that the weighing machine used in Ghana and the one in Zimbabwe were the same let alone similarly assized. It

was therefore unsafe to simply use the variations in weight as proof that the applicant was lying. The prosecutor wrongly treated a difficult case as a simple one. In the worst case scenario, it could even have been necessary to adduce evidence from Ghana to disprove the appellant's assertion.

The other seeming misdirection by the magistrate was to reason that because the applicant pleaded guilty, it meant that he could not escape a finding of no special circumstances. The applicant pleaded guilty to being in possession of the gold in Zimbabwe without a permit issued in terms of the laws of Zimbabwe. Such plea did not necessarily mean that the circumstances of his possession of the gold could not amount to special circumstances. I am persuaded that the magistrate misdirected himself in so reasoning and the appeal court may take a different view of the facts. The applicant accordingly has good prospects of success on appeal.

It leaves me to deal with the issue of the likelihood of the applicant absconding. The applicant was admitted to bail pending trial by this court and abided by the bail conditions. Whilst the situation is admittedly now different in that he is a convict, I must accept that the applicant did not abuse the privilege of bail before his trial. The applicants' prospects of appeal are good as I have pointed out. He has a fixed abode since an associate of his has deposed to an affidavit committing to accommodate the applicant until his appeal is determined.

The State Counsel has also properly conceded that whilst appeals no longer take long to be determined, it would not be in interests of justice to allow the continued incarceration of the applicant in the circumstances since his prospects of success of appeal are good. The concession by State counsel is proper. If an applicant/appellant demonstrates bright prospects of success on appeal and the court is convinced or persuaded that he will not abscond, it would not be in the interests of justice to refuse bail simply because the hearing of the appeal may be around the corner. This is more so with respect to cases where the prospects of appeal are such that there is likelihood of the prison term being set aside and substituted with a non-custodial term. The argument will otherwise be different where the prospects of success are based on a likely reduction in the length of a sentence where the envisaged sentence to be likely substituted would fall within the period by which the appeal would be likely to be determined.

Finally, I have to determine the bail conditions. It is trite that this is a function of the court and it exercises a discretion. Like every judicial discretion, it must be exercised

judiciously. This can only be achieved after considering all the circumstances of the case and the convict. The court should impose suitable bail conditions which in any given case will safeguard the interests of justice. I have considered the applicants' draft order which the State Counsel has consented to. I have considered that the applicant paid a bail deposit of US$100-00 when he was granted bail pending trial by ZHOU J. The applicant has upped the amount to US$500-00. The upward variation is reasonable in the circumstances taking into account that in any event the button of gold valued at just over US$3 700-00 remains in the custody of the State. The applicant was reporting once a week at the nearest police station to where he was ordered to reside before trial. I consider that it is proper to increase the frequency of this reporting.

Accordingly the application for bail pending trial succeeds and the following order shall hereby issue:

1. The applicant is admitted to bail pending the determination of his appeal No. CA 656/16.
2. He shall deposit the sum of US$500-00 with the Clerk of Harare Magistrates Court.
3. He shall reside with Jin Young Song at Greenwood Lodge, 19 Josiah Chinamano Avenue, Harare until his appeal is determined.
4. He shall report at Harare Central Police Station on Mondays and Fridays between 6.00am and 6.00pm.
5. He shall surrender his passport no. M24533765 to the Clerk of Harare Magistrates Court.

Moyo & Jera, applicant's legal practitioners
National Prosecuting Authority, respondents' legal practitioners