DAVID EDWARD GARDNER
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 22 July 2008.

Bail Appeal

Mr J Samkange for applicant.
Mr M Mugabe for respondent.

MAKARAU JP: The appellant was convicted on two counts of contravening s 3 (1)(b) of the Sexual Offences Act [*Chapter 9.2*] and on one count of contravening s 7 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*]. On each count he was sentenced to 8 months imprisonment. Of the total 24 months, 12 were suspended on condition of good behaviour, leaving an effective sentence of 12 months. Dissatisfied with the conviction and sentence, the appellant noted an appeal to this court attacking both the conviction and the sentence.

Immediately after the trial, the appellant applied for bail pending appeal to the trial magistrate. The application was dismissed. He now notes an appeal to this court against that refusal of bail pending appeal.

In dismissing the application for bail pending appeal, the trial court, in a cursory and rather brief ruling, found that the appeal has no prospects of success. The court went on to stress that it was adhering to its reasons for judgment and sentence.

In very useful obiter in *S v Dzawo* 1998 (1) ZLR 536 (S), which remarks are now invariably cited by counsel as representing the law on bail applications pending appeal, GUBBAY C J (as he then was) singled out two main factors as primary considerations in an application for bail pending appeal. These are the risk of absondment and the prospects of success on appeal. Other factors to bear in mind in such applications are the right of the individual to liberty and the potential length of the delay before the appeal can be heard.

It is pertinent in my view at this stage to mention that the trial court did not all advert to the other factors mentioned by GUBBAY CJ in *S v Dzawo* (*supra*). In this regard, the trial court misdirected itself by limiting itself to just one factor.

In my view, the four factors referred to by the learned judge in *S v Dzawo* (*supra*) are but the two conflicting interests that the procedure of bail seeks to reconcile. These are the right of the applicant to his liberty and the interests of the due administration of justice. In this regard, one can do no better than refer to the remarks by the same learned judge in *Aitken & Another v Attorney – General* 1992 (2) ZLR 249 (S) at 252 G where he had this to say:

> "The basis purpose from society's point of view of the procedure known as "bail" is to strike a balance between two conflicting interests- liberty of the accused, and the requirement of the State that he stand trial to be judged and that the administration of justice be safeguarded from interference or frustration. This proposition is amply supported by authority".

In my view, the right of the applicant to his liberty is easy to define and understand. In applications for bail pending trial, the right of the individual to his liberty is reinforced by the presumption of innocence and the State bears the onus of proving that the interests of justice will be prejudiced by granting the applicant bail. In applications for bail pending appeal such as the appeal before me, because the presumption of innocence will have ceased to operate in favour of the liberty of the applicant upon conviction, the onus shifts and rests with the applicant to show that the interests of justice will not be prejudiced by his or her admission to bail. (See *S v Manyange* HH 1/03).

The concept of the interests of justice and the due integrity of the due administration of justice that is sought to be protected in bail procedures is in my view easy to repeat and pay lip service to (following the authorities), but difficult to define and apply. It is in my view not a single aspect or feature that one can point at and discern in each case.

The securing of the attendance of the applicant at the hearing of the appeal is one aspect of the due administration of justice. Thus, where there is a real risk that the applicant will abscond and not stand trial, the interests of justice would have been prejudiced by granting bail to such an accused. This is easy to envision. Again where evidence will be tempered with and investigation frustrated by an accused because he is out of custody, the interests of justice would have been prejudiced by the granting of bail to the accused. Not so obvious are instances where the integrity of the administration of justice will fall into disrepute if bail is granted to an accused person. This brings into play the elusive concept of justice as understood by society. In my view, where the granting of bail will result in uproar from society for one reason or another, the court should be slow to grant bail in an effort to safeguard the interests of justice and the integrity of the justice delivery system as perceived by the public which the court seeks to serve. Thus for instance, a serial rapist or murderer who

is unlikely to abscond may not be granted bail immediately upon his arrest for to do so may affront the public's notion of justice and the purpose of the justice delivery system. On the other hand, to deny bail to an accused who is later exonerated on appeal will equally bring the administration of justice into disrepute.

I now turn to consider the appeal before me by first identifying the factors that I must take into account. These are the risk of the appellant absconding and prosecuting the appeal and the integrity of the administration of justice system.

In *casu*, whilst the respondent submitted that there was likelihood of the appellant absconding if granted bail, the trial court did not make any ruling on this. It denied the application on the basis that there are no prospects of success on appeal. In the appeal hearing before me, no submissions were made in this regard.

While accepting that the appellant is a British national, holding a British passport, that fact alone in my view does not prove that he will abscond and not prosecute his appeal. In this regard, I take into account that the appellant has already served a portion of his sentence and that it is highly unlikely that the appeal court will send him back to finish the unserved portion of his sentence in the event that his appeal does not succeed.

Of much sway in this application in my view are the unchallenged remarks by the Chief Recorder that it will take his office some time to transcribe the voluminous record of proceedings for appeal purposes. The appellant has been sentenced to an effective 12 months imprisonment. Due to delays that are likely to be experienced in having the record of proceedings transcribed, he is likely to serve the entire term of imprisonment before the appeal is heard.

Without in any way attempting to influence the discretion of the appeal court that will hear the appeal against sentence in this matter, it would appear to me that there is scope for a different opinion in this matter. It is trite that the noting of an appeal against sentence invariably opens a wide scope for a different opinion and especially in matters of indecent assault where the sentences have ranged from fines through community service to imprisonment. The chances that a different court will assess a different penalty are high. In the circumstances, it will be a sad day for justice in this jurisdiction if the appellant were to be sentenced differently on appeal but after he had served the whole or a large portion of the prison term because he was denied bail pending the appeal.

On the basis of the foregoing, it is my view that the applicant has discharged the onus on him that there are positive grounds why he should be admitted to bail. Due to the delay it will

take to bring the matter on appeal as opposed to the short prison term that the appellant has been sentenced to, it is not in the interests of justice or to the integrity of the administration of justice that he be denied bail. The appeal therefore succeeds and the following order is made:

1. The appellant is hereby admitted to bail.
2. The appellant is to deposit the sum of $5trilion with the Clerk of Court, Harare Magistrates court.
3. The appellant is to surrender his passport to the clerk of court until this appeal is determined.

Byron Venturas & Partners, appellant's legal practitioners.
Attorney –Generals' Office, respondent's legal practitioners.