FARAI MANICHE
And
THE STATE

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 19 and 26 November 2020

Bail Application Pending Appeal

A Nyamukondiwa, for the Appellant
Mrs *J Matsikidze*, for the state.

MUZENDA J: This is an appeal against refusal of bail pending appeal filed in terms of s 121 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*

On 12 October 2020 the appellant was convicted at Nyanga Magistrate Court for contravening s 368 (1) as read with s 368 (4) of the Mines and Minerals Act after a plea of guilty. He was sentenced to the mandatory sentence of 2 years imprisonment.

On 15 October 2020 he filed a Notice of Appeal against conviction where in principle the appellant contended that the court *a quo* failed to sufficiently explain the charge and the essential elements of the offence as well as the facts to the appellant who was a self actor and as a result the conviction was not in terms of real and substantial justice.

On the same day appellant noted that appeal, he applied for bail pending appeal before the trial court. After hearing the application for bail pending appeal the learned magistrate analysed the law relating to such type of applications, that is the prospect of success on appeal and likelihood of abscondment by the applicant if released on bail. The lower court came to conclusion that the essential elements of the offence of prospecting without a licence were exhaustively explained to the appellant in sufficient detail, hence the chances of the conviction being set aside were remote to the extent of being non-existent. To the trial court, the appeal against conviction did not carry any prospects of success, as a result the application for bail pending appeal was dismissed.

On 16 November 2020 the appellant filed this appeal where he contends that the court *a quo* erred in ruling that there are no prospects of success on appeal against conviction and sentence. Appellant submitted that he was not a flight risk and was ready to pursue his appeal.

In addition it will be in the interest of justice that the appellant be afforded his freedom whilst pursuing his appeal.

The appeal is opposed by the state. The state submitted that s 115 c (2) (b) and 123 (1) of the Criminal Procedure and Evidence Act, (s*upra*) stipulate that the appellant bears the burden of showing on a balance of probabilities that it is in the interests of justice for him to be released on bail. *In casu*, the appellant has been convicted and sentenced which issues both have a bearing on the risk of abscondment, bail is no longer a right and it becomes a matter for discretion of the court which must consider the prospect of success on appeal, the likely delay in the hearing of the appeal, the seriousness of the offence for which applicant stands convicted and the sentence imposed by the court *a quo*.

The state contends that there is no misdirection on the part of the court *a quo* in dismissing the application for bail pending appeal and prays that the appeal be dismissed.

It is common cause that the appeal by the appellant on p 16 of the record is against conviction only. There is no appeal against sentence as portrayed in the bail statement of the appellant. On p 12 of the record of proceedings the court a *quo* explained the quintessence of the charge appellant committed and recorded the responses. Yes its observed that the court *a quo* used the word "searching" for minerals and asked the appellant whether he had a licence to search for minerals, he was also asked about the legality or lawfulness of such searching and he agreed to those elements that he was unlawfully searching for minerals. Judicial notice should be taken that the appellant was answering in vernacular through the interpreter and all the essential elements were explained to him. I am satisfied that the court *a quo* indeed judiciously performed its obligation in ensuring that the gravamen of the charge as well as the essential elements of the facts underlying the offence were explained to the appellant. Based on this the prospects of success on appeal against conviction are but pale if not non-existent.

In the case of *S v Malujwa* HB 34/2003 the appellant must establish that the court *a quo* misdirected itself and erred in dismissing the bail application for bail pending appeal. In this appeal before me, the appellant failed to do so. I do not see where the learned Magistrate failed to exercise his discretion in dismissing the application for bail pending appeal, the court *a quo* can not be faulted. The appeal against the dismissal of the application has no merit.

Accordingly he following order is retained.

The appeal against refusal of bail pending appeal is dismissed.

Chibaya & Partners, Appellant's legal practitioners
National Prosecuting Authority, For the State