

SHADRECK KANONGORA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 8 November 2016, 16 December 2016 and 22 February 2017

Rescission of Bail Order and Application for Reinstatement of Appeal

L Mauya, for the applicant
I Muchini, for the respondent

CHITAPI J: In this matter I have to exercise the court's powers to rescind its order. The background facts are as follows:

1. On 2 November, 2016, the applicant filed an application for bail pending appeal following his conviction by the Regional Magistrate Eastern Division on a charge of rape as defined in s 65 (1) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]. He was sentenced to 12 years imprisonment with 3 years thereof suspended on the usual conditions of good behaviour.
2. On 8 November, 2016, I admitted the applicant to bail pending appeal with the State's consent. I perused the trial court's record and was satisfied that there were material inconsistencies in the evidence of the complainant. The State counsel properly conceded then and I agreed with him that the appeal had prospects of success. I was also satisfied that the applicant had discharged the onus imposed upon him on a balance of probabilities to satisfy the court that it was in the interests of justice that he be released on bail.
3. The applicant was admitted to bail on condition that he deposited US\$50.00 with the clerk of Chitungwiza Magistrates Court and reporting conditions of once a week at

Dzivarasekwa Police Station until the appeal was determined. The bail order was processed.

4. When the applicant sought to deposit the bail money, the clerk of court alerted the Registrar to the fact that the applicant's appeal was deemed dismissed for failure to file heads of arguments which the applicant was required to have filed by 15 September, 2016. The Registrar had returned the appeal records to the court of origin, Chitungwiza Magistrates Court.
5. The Registrar addressed a memorandum to myself in the following terms on 10 November, 2016.
 - “(i) The above mentioned applicant was granted bail pending appeal under case No. B 1185/16 on 8 November, 2016.
 - (ii) The said appeal under case Number CA 700/15 was dismissed by Registrar for failure to file heads of argument on 12 October, 2016.
 - (iii) The bail order granted on 8 November, 2016 has been overtaken by events since the appeal was dismissed on 12 October 2016.
 - (iv) We are therefore humbly asking for the Honourable Judge's directions.”
6. When the Registrar's memorandum was placed before me, I caused its contents to be brought to the attention of the applicant and State counsels and invited their comments on my intention to rescind the bail order which I had granted in the light of the alleged anomaly.
7. On 15 November, 2016, the applicant filed an application for reinstatement of appeal. The application for reinstatement was also referred to me for determination which made sense because I had already considered the record of proceedings at the time that I was determining the bail application pending appeal.
8. In determining the application for bail pending appeal, I was as already indicated persuaded that the applicant had good prospects of success on appeal. Such finding does not change in the face of the application for reinstatement of appeal. The applicant is however required to give a reasonable explanation for the default in complying with the rules of court. The heads of argument were due by 15 September, 2016. He was represented by another firm of legal practitioners, Nyikadzino and Associates at his trial. They are the ones who noted the appeal on his behalf.

The applicant averred that his erstwhile practitioners advised him not to expect an early hearing of the appeal since criminal appeals take time to be heard. The applicant did not receive notification of the Registrar's directive to file heads of argument and his erstwhile legal practitioners did not inform him of the same. The State does not oppose the application for reinstatement.

9. In applications for reinstatement of appeal for failure to comply with rules of court, it has been held that the following factors which apply to both civil and criminal appeals should be considered by the court-
- (a) the degree of non-compliance
 - (b) the explanation for it
 - (c) the importance of the case
 - (d) the prospects of success
 - (e) finality in case disposal
 - (f) convenience of the court

See *Solojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A); *Viking Woodwork (Pvt) Ltd v Blue Balls Enterprises (Pvt) Ltd* 1998 (2) ZLR 251.

In casu, the applicant is in custody. Whilst condonation for non-compliance with court rules is not for the mere giving, I am satisfied that this is a proper case to exercise the court's discretion in the applicant's favour more importantly because the applicant upon being notified of the lapsing of his appeal and despite his being incarcerated did not take too long to file the application for reinstatement of appeal. See *Commissioner of Inland Revenue v Burger*, 1956 SA 446 (A) at 449 G-H. There is no culpable conduct of his part given his limitations to information and liberty to act as a non-convicted person would enjoy.

With respect to the fate of the bail order which was granted in error, it should be rescinded. In response to the notification of the intention to rescind the bail order, the applicant in a letter dated 14 December addressed to the Registrar consented to the rescission of the bail order as the applicant's present legal practitioners were not aware that the appeal had been dismissed when they applied for bail pending appeal. Significantly, the applicant's legal practitioners noted that they had since prepared the applicant's heads of argument which would

be filed once the appeal was reinstated. This shows the seriousness and resolve which the applicant has in having the appeal determined.

The court in an application for bail has inherent and statutory power to recall its order or revisit it. Bail application proceedings are *sui generis* and inquisitorial in nature. Apart from the common law inherent power of the court to correct judgments issued in error, I do not see any impediment to the granting of the order sought since the applicant consents to the rescission and correction of the judgment which was granted through mistake common to all the parties.

In light of the foregoing, the justice of this case will be served by issuing the following order:

1. The order of this court admitting the applicant to bail pending appeal under case No. B 1185/16 dated 8 November 2016 be and is hereby set aside.
2. The applicant's appeal No. CA 700/15 which was deemed dismissed on 12 October, 2016 for failure to file heads of argument be and is hereby reinstated.
3. The applicant be and is hereby admitted to bail pending appeal consequent on the reinstatement of appeal No CA 700/15 on the following conditions –
 - (a) He shall deposit US\$50.00 with the clerk of court Magistrates Court, Chitungwiza
 - (b) He shall report once a week on Mondays at Dzivarasekwa Police Station until the appeal No. CA 700/15 is determined.
 - (c) He shall reside at 908 Tatenda Street, Dzivarasekwa, Harare pending the determination of the appeal No. CA 700/15.

Mauwa & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners