

NYASHA STANLEY KAZHANJE
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 9,13,14 October 2020 & 4 November 2020

Application for bail pending Appeal

H M Hashiti, for applicant
T Mapfuwa, for respondent

KWENDA J: On 30 August 2019 applicant was convicted in the Regional Court at Harare of corruptly concealing from a principal a personal interest in a transaction in violation of s 173(a) (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. He was sentenced on 3 September 2019 imprisonment for 3 years of which 2 years were suspended for 4 years on condition of good behaviour. He appealed against both conviction and sentence on 3 September 2019 under HCCA 582/19. He then applied for bail pending appeal which he was granted under HH 631/19. In granting the applicant bail TSANGA J observed as follows at p 6 of the cyclostyled judgment:

“The transaction which he [the appellant] is said to have concealed would logically have to have been in relation to the proposed Gwanda Solar Project which was to be carried out by Intratek. That was materially the subject matter of the transaction. It would seem to me unclear as to what transaction he carried out in relation to that project. There seems none at all. He may not have disclosed that he had interacted with Intratek in the past but it cannot be said on the basis of the facts that were argued that he had an interest in the subject matter of the transactions being the Gwanda Solar Project. Strictly speaking there was no evidence placed before the court *quo* that he had a personal interest in the Gwanda Solar transaction.”

The applicant’s appeal against conviction and sentence was set down for argument on 23 September 2020. At the hearing applicant’s counsel conceded that the grounds of appeal were invalid for non-compliance with r 22 of the now repealed Supreme Court (Magistrate Court) Criminal Appeals Rules 1979. The rules were repealed by the Supreme Court rules, 2018 but have

not been replaced. The practice and standards set by the repealed rules has been followed for 31 years and has become part of our common law as can be seen in several cases decided by this court. See *S v McNab 1980 (2) ZLR 280 (S)*, *S v Kwainona 1993 (2) ZLR 534*, *S v Jack 1990 (2) ZLR 66*. The appellant's appeal was fatally defective and was struck off by the Criminal Appeals Court on the 23rd September 2020 with the consent of appellant's counsel. The applicant was not present when his appeal was determined. The record reveals a brief exchange between the Criminal Appeals Court per CHATUKUTA and CHIKOWERO JJ and counsel for the applicant when the court enquired of counsel whether he knew of the consequences of the striking off of the appeal. Counsel acknowledged that, the applicant's bail had terminated and the applicant had an obligation to submit to custody to start serving his sentence.

Counsel was correct. Bail is a contract entered into between an accused/convict in terms of which the accused/convict enters into a recognisance undertaking to do any of the things required in terms of his/her recognisance in exchange for his or her freedom. See Blacks Law Dictionary 8th Edition [2004] at page 426

"2. The process by which a person is released from custody either on the undertaking of a surety or on his or her own recognizance. 3. Release of a prisoner on security for a future appearance; esp., the delivery of a person in custody to a surety <the court refused bail for the accused serial killer>. [Cases: Bail 39. C.J.S. Bail; Release and Detention Pending Proceedings §§ 2, 4-7, 31-32.] 4. One or more sureties for a criminal defendant <the attorney stood as bail for her client>. See BAILER(1). "As a noun, and in its strict sense, bail is the person in whose custody the defendant is placed when released from jail, and who acts as surety for defendant's later appearance in court.... The term is also used to refer to the undertaking by the surety, into whose custody defendant is placed, that he will produce defendant in court at a stated time and place." 8 C.J.S. Bail § 2 (1988)."

The recognisance entered into by the bailed person is straight forward in before sentence.

Before trial or sentence, the recognisance are usual the following: -

- (i) to appear and undergo further examination
- (ii) to counter any indictment or charge before a competent court
- (iii) to attend during the hearing of case and to receive sentence
- (iv) to accept service of summons or other notice of trial

It is therefore easy to account for the bailed person. However, the situation is different in the case of bail pending appeal. The law does not make it compulsory for the appellant to appear at the hearing if he/she is legally represented. It is up to the appellant to exercise the right to be

present. Several assumptions are made. Firstly, it is assumed the appellant's counsel will communicate the outcome of the appeal to the appellant. There is no way of knowing whether that in fact happens. There is no express statutory provision obliging counsel to do so. Secondly, it is assumed that, following the dismissal of an appeal for any reason, the appellant will submit to custody to serve the sentence. In my view that assumption should be reconsidered in criminal matters. Thirdly, there is no clear guideline as to what is a reasonable time within which the unsuccessful appellant should hand himself/herself in to serve his/her sentence.

In this case, instead of ensuring that the appellant submitted to custody as agreed at the appeal hearing on 23 September 2020, the applicant's counsel gave priority to ensuring that the applicant remained out of custody. He filed a fresh bail application on the 24th September 2020, the day following the date on which applicant's appeal was struck off, under HACC (B) 21/20. He simultaneously, filed an application for extension of time within which to appeal which would give him an opportunity to file new and valid grounds of appeal. The applicant appeared before me for the bail application. His application for condonation and extension of time within which to appeal had not been determined. It was pending before another judge. I noticed that the applicant's bail application was named "Application for bail pending appeal processes". There is no procedure known as 'appeal processes' in the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The ambiguity must have been deliberate because the application could not be classified in any one of the situations described in section 123 of the Criminal Procedure and evidence Act [*Chapter 9:07*].

"123 Power to admit to bail pending appeal or review

(1) Subject to this section, a person may be admitted to bail or have his conditions of bail altered—

(a)

(b) in the case of a person who has been convicted and sentenced by a magistrates court and who applies for bail—

(i) where the record of a case is required or permitted, in terms of section 57 or 58 of the Magistrates Court Act [*Chapter 7:10*], to be transmitted for review, pending the determination of the review; or

(ii) pending the determination by the High Court of his appeal; or

(iii) pending the determination of an application for leave to appeal or for an extension of time within which to apply for such leave;

by a judge of the High Court or by any magistrate within whose area of jurisdiction he is in custody."

There was therefore no legal basis for the application for bail pending what the applicant termed ‘appeal processes’ in HACC (B) 21/20. The dilemma which the applicant found himself in was that he could not name his application an application for bail pending determination of an appeal because his appeal had been determined *albeit* by way of being struck off. He could not name it an application for bail pending condonation and extension of time within which to appeal that again is not provided for. The applicant went as far as misleading the court that he was in custody. His Notice of appeal stated that “... the applicant (was) in custody.” At the hearing on 2 October 2020 I enquired whether the applicant was indeed in custody. Applicant’s counsel confirmed that the applicant was in custody and directed me to the portion of the draft Notice of Appeal which stated that the appellant was in custody. I was not satisfied. Accordingly, I ordered the State to verify the position and stood the matter down to 11.15 on the same day. When the matter came up again the State advised the court that the appellant was out of custody. Applicant’s counsel conceded that the appellant was indeed out of custody. Applicant’s counsel rose to submit that he had messages in his cell phone which had been sent to him in the past by the applicant, which proved that the applicant had handed himself in but neither the Police nor the court *a quo* had knowledge of the outcome of the appeal. I found the explanation unsatisfactory in the absence of documentation or correspondence by the legal practitioner to the Police or the trial court confirming that position. If counsel had been mindful of his undertaking to the Criminal Appeals Court following the determination of applicant’s appeal on 23 September 2020 he would have taken steps to ensure that the applicant submitted to custody before submitting a fresh bail application.

The applicant had therefore remained out of custody unlawfully for ten days after his bail terminated. There was a clear attempt to manipulate a loophole in our bail system to keep the applicant out of custody on bail which had terminated until such time that his freedom is sanitised by another bail order. The draft order sought that the applicant be freed on the same bail conditions that obtained before his appeal was struck off. The applicant had not redeemed the bail amount in anticipation of its extension. In view of the fact that condonation and leave to file a fresh appeal was still pending, that there was no appeal pending before this court and that the appellant was out of custody I ruled that the bail application before me on 2 October 2020 under HACC (B) 21/20

was unprocedural. I proceeded to strike it off with the consent of both the State and applicant's counsel.

The circumstances of the bail application filed by the applicant under HACC (B) 21/20 expose a loophole in our bail system with regards to bail pending appeal. All criminal processes from initial appearance in the Remand court up to sentence which require the presence of the person charged to be dealt with in accordance with the law. The situation ironically changes when bail is granted after conviction and sentence at a time when the presumption of innocence falls away. For some reason the system of bail pending appeal is based on utmost good faith. Sections 29 and 50 of the High Court Act [Chapter 7:06] contemplate that criminal reviews and appeals can be determined in the absence of the convict/appellant.

“50 Right of person to be present at hearing of his trial, action, application or appeal

(1) Every person, subject to subsection (2), shall be entitled to be present if he so desires at the hearing of his trial, action or appeal by the High Court or any application made by him to the High Court under this Act or rules of court.

(2) A person who is in custody, whether he is legally represented or not, shall not be entitled to be present at the hearing of his appeal by the High Court or any application made by him to the High Court in connection with his appeal without the leave of a judge of the High Court.

(3) The right of a person who is in custody to be present at the hearing of any matter referred to in subsection

(2) shall be subject to his paying all expenses of and incidental to his transfer to and from the place where the High Court sits:

Provided that a judge of the High Court may direct that he be brought before the High Court in any case where, in the opinion of the judge, his presence is advisable, in which event such expenses shall be defrayed out of moneys appropriated for the purpose by Act of Parliament.

(4) A person who does not appear himself or who is not legally represented may present his case and argument to the High Court in writing, and any case or argument so presented shall be considered by the High Court.

(5) The power of the High Court in the exercise of its appellate jurisdiction to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present.

yet the presumption of innocence falls away upon conviction.

The law does not impose express statutory obligations on the appellant or his/her legal practitioner following the determination of the appeal. While bail is terminated by the determination of an appeal, in practice, the unsuccessful appellant retains his/her freedom. The Criminal Appeals court has no control over what transpires after the determining an appeal. In practice the record is transmitted back to the station of origin where a warrant of arrest is issued. The warrant of arrest issued by the court of origin is submitted to the Police for execution. There are no systems audit

mechanism to ensure that the convict is accounted for. That should not be necessary if one takes into account the implications of the recognisance entered into by the applicant at the time of admission to bail pending appeal. It could be more effective for the Criminal Appeals Court which dismisses an appeal for any reason to expressly order the appellant to appear before the court *a quo* within a specified number of days for committal. However as observed above the powers of this court on appeal are confined to determining the appeal. See section 38 of the High Court Act [Chapter 7:06]

38 Determination of appeals in ordinary cases

(1) Subject to this section and section *thirty-nine*, on an appeal against conviction the High Court shall allow the appeal and quash the conviction if it thinks that the judgment of the court or tribunal before which the appellant was convicted should be set aside—

(a) on the ground that—

(i) it is unreasonable; or

(ii) it is not justified, having regard to the evidence; or

(b) on the ground of a wrong decision on any question of law; or

(c) because on any other ground there was a miscarriage of justice;

and in any other case shall dismiss the appeal.

(2) Notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be set aside or altered unless the High Court considers that a substantial miscarriage of justice has actually occurred.

(3)

In my view the gap in the law can best be addressed by the bail court which is at large to impose any bail condition on a case by case basis. The bail court may therefore, depending on the peculiarities of the particular case, impose a condition which either requires the appellant to be present at his appeal or to surrender himself/herself within a specified period in the event that his/her appeal is dismissed for any reason.

This court has on numerous occasions dealt with applications for condonation and execution of time within which to appeal by persons who remained out of custody after their appeals had been determined by either being struck of the roll or dismissed for want of prosecution. Such applications by fugitives should not be entertained. The system also falls short in that once a convicted person is admitted to bail there is no mechanism to ensure that he/she prosecutes his/her appeal timeously. The applications for condonation and extension of time within which to appeal are usually filed when persons whose appeals would have been dismissed realise that the Police are in hot pursuit. The legal provision based on utmost good faith is ancient and out of sync with

current realities. You do not get any person handing himself or herself in after losing an appeal. I have had to make the above observations because in this case the applicant remained unaccounted for, for ten days and the State was not even aware. It is the responsibility of the State and not this court to follow up execution of its judgments. The function of this court ends with the determination of a matter. The State must therefore put in place a mechanism to ensure that the judgments of this court on appeal are executed so that the criminal appeals system does not fall into disrepute.

The applicant handed himself to custody on the 2nd October 2020 at my behest. He remains in custody. His application for condonation and extension of time within which to appeal was granted on the 5th October 2020 by CHATUKUTA J. He then filed the present bail application on the 7th October 2020. The application is opposed by the State on the grounds that the appeal based on the new grounds of appeal against conviction and sentence lacks merit. I do not agree with the State because the issues raised by the appeal remain the same the only difference being that the wording has been revisited. The remarks by TSANGA J when she initially granted the applicant bail are still relevant on the aspect of prospects of success.

At the hearing of this application I disclosed to appellant's counsel my reluctance to re-admit the applicant bail pending appeal in view of his prior conduct and reluctance to hand himself in when his appeal was determined. Applicant's counsel suggested that I could impose the condition requiring the applicant to be present at the determination of his appeal. That discretion is implicit in s 50 of the High Court Act which empowers the Appeals Court to order the presence of the appellant if it deems it in the interests of justice. In the event that judgment is reserved at the appeal hearing the court can exercise its discretion to extend appellant's freedom.

I will exercise my discretion in the applicant's favour and admit him to bail in light of the following: -

1. TSANGA J, has already determined that the appellant has an arguable case on appeal.
2. The applicant was previously on bail pending appeal in the same case and he did not abscond.
3. He has been granted condonation and leave to file a fresh appeal and the new grounds are in compliance with the law.

4. He handed himself in when the court required him to do so and he is now in custody.
5. The apprehension arising from his past conduct can be catered for by a condition requiring his presence at his appeal.

In the result the applicant is granted bail pending appeal admitted to bail pending appeal in terms of the draft as amended

Mhishi Nkomo Legal Practitioners Applicant's legal Practitioners
Prosecutor General Respondent's Legal Practitioners