REPORTABLE ZLR (4)

Judgment No. SC 7/04

Crim. Appeal No. 266/02

WILLIAM PETER GEORGE SYLOW v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, JANUARY 26 & FEBRUARY 12, 2004

E W W Morris, for the appellant

V Shava, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which declined to hear the appellant's appeal to that court on the ground that the appellant was a fugitive from justice and did not, therefore, have the requisite *locus standi in judicio*.

The factual background is as follows. On 19 April 2000 the appellant, a dentist and an Australian national, was convicted by the regional magistrate's court on fourteen counts of theft by conversion. All the counts were treated as one for the purpose of sentence and he was sentenced to five years' imprisonment with labour, of which three years' imprisonment with labour was conditionally suspended. He noted an appeal against the conviction and sentence, and was released on bail by the High Court pending the outcome of the appeal.

In terms of the conditions of his release on bail, he was required, *inter alia*, to surrender his travel documents to the registrar of the High Court ("the

registrar"), and report at the Harare Central Police Station once per week on a fixed day and within a stipulated period.

Subsequently, on 2 November 2000 the appellant's bail conditions were varied by the High Court to enable him to travel out of the country between 2 November and 30 November 2000, and between 15 December 2000 and 10 January 2001. As a result, his passport was returned to him on the understanding that he would return it to the registrar on or before 10 January 2001.

When the appellant failed to return to the country by that date, the Attorney-General filed an application in the High Court on 27 February 2001 seeking: (a) the estreatment of the appellant's cash bail; (b) the calling in of the appellant's surety; and (c) the issue of a warrant of arrest against the appellant. The order sought was granted on 16 March 2001.

However, before that date the appellant's legal practitioner wrote to the Attorney-General on 2 March 2001, informing him that the appellant had fallen ill in Switzerland, but did not furnish the Attorney-General with any medical certificate confirming the allegation of the appellant's illness. Thereafter, on 10 April 2001 the appellant's legal practitioner again wrote to the Attorney-General, indicating that although the appellant intended to return to Zimbabwe he was still ill. In reply, the Attorney-General informed the appellant's legal practitioner on 12 April 2001 that if the appellant intended prosecuting his appeal he had to return to Zimbabwe.

Subsequently, on 11 July 2001 the appellant's legal practitioner filed a court application in the High Court on behalf of the appellant, with the founding

affidavit having been sworn to by the appellant in Switzerland on 22 June 2001. Annexed to the founding affidavit was a copy of an undated medical certificate in which it was stated, *inter alia*, that the appellant was in "a severe anxiety depressant state", was under treatment, and was unfit to travel.

In the court application, the appellant sought the following order:

"1. The respondent shall ensure that the court record required to enable the applicant to prosecute his appeal under case reference no. B655/2000 is completed by no later than one month after the date of this order.

2. On completion of the said record, the appeal shall proceed in accordance with the Rules of this Honourable Court, save that should the applicant be absent from Zimbabwe on the date fixed for the hearing of the said appeal he shall produce evidence of his current medical condition to the court hearing the appeal so as to enable it to determine whether or not the appeal should proceed in his absence.

3. The warrant of arrest issued by this Honourable Court on the 16th March 2001 shall not be enforced pending the determination of the said appeal and shall be deemed to have been cancelled at the conclusion of the said appeal if the applicant's conviction or the sentence of imprisonment is set aside."

That order was later granted on 17 January 2002 after the Attorney-General's representative defaulted in filing his heads of argument and the State was barred.

Subsequently, the appeal was set down for hearing by the High Court on 14 May 2002, but was postponed and later heard on 25 July 2002, when the court determined that the appeal could not be heard in the absence of the appellant from the country as he was a fugitive from justice. Aggrieved by that decision, the appellant appealed to this Court.

The issue in this appeal is whether the appellant is a fugitive from justice. If he is, the appeal cannot succeed because a court will not entertain actions by persons who put themselves beyond its reach by going into hiding or fleeing the country.

Thus in *S v Neill* 1982 (1) ZLR 142 (H) at 145 E-F SQUIRES J said the following:

> "But the appellant is a fugitive from justice in the sense that, having been convicted by a court of this country, he has fled its jurisdiction and, by doing so, has effectively set its laws at naught. Whatever his motive was for so acting, he has shown by so doing that he is not prepared to accept or abide by decisions of our system of courts and the effect of those decisions if they should be to his serious disadvantage. And, by fleeing the country and still prosecuting his appeal, he is wanting to seek the relief which is available from these courts, but without being prepared to submit himself to them if he is unsuccessful."

See also *S v Moshesh and Ors* 1973 (3) SA 962 (AD) at 964B.

In order to determine whether the appellant is a fugitive from justice it is necessary to examine the reasons given by him for his failure to return to the country. He advanced two main reasons. The first was the state of his health, which allegedly made him unfit to travel; and the second was the fear associated with his personal security if he returned to the country. I shall deal with the two reasons in turn.

As far as the state of his health is concerned, the following averments appear in a statement annexed to the founding affidavit:

> "In July and September 2000 the bail conditions were relaxed to allow Dr Sylow to travel overseas. … In October 2000 the Attorney-General for

> unknown reasons opposed further travel. The matter had to be brought before the High Court. After five hearings, where the State opposed Dr Sylow leaving the country, the High Court judge finally allowed further travel in November and December/January 2001.

At this stage, nine months after the trial, the transcript was still not prepared. This deadlock, combined with the ever-deteriorating political and legal climate in Zimbabwe and the fear of political bias in his case, put Dr Sylow and his family in Geneva under considerable stress. Doctor Sylow found his health severely affected.

In January 2001, fearing that a mental breakdown was imminent, Dr Sylow therefore travelled to Geneva to be with his family. He was already under the care of a clinical psychologist and his doctor, and taking medicines for acute depression. …"

It is clear from the above averments that the appellant left Zimbabwe in January 2001. This must have been before 10 January 2001, the date by which he was supposed to have returned to Zimbabwe and surrendered his passport to the registrar. I say so because in his founding affidavit he avers as follows:

> "11. … my condition worsened to such an point that on January 10, when I was supposed to return to Zimbabwe, as required by my bail conditions, I could not do so.
>
> 12. My state of health was at this stage very poor and I communicated this to my legal practitioners in January 2001, after my arrival in Geneva, to advise them about the situation and my incapacity to return to Zimbabwe …".

Although the appellant does not indicate the date on which he left for Geneva, it must have been only a few days before 10 January 2001. In my view, before he departed he must have been aware that he was not going to return to Zimbabwe before 10 January 2001. He should, therefore, have discussed the matter with his legal practitioner and instructed him to seek from the High Court an extension of the period of his absence from the country. The fact that he did not do so is significant.

Secondly, bearing in mind the appellant's allegation that before he left for Geneva he was under the care of his doctor and that of a clinical psychologist, and was taking medicines for acute depression, it is surprising that no medical affidavits were annexed to the founding affidavit confirming those allegations. Instead, a copy of an undated medical certificate, issued by a doctor in Geneva, was annexed. The same doctor issued another certificate in May 2002, stating that the appellant's condition had not changed. The certificate was produced in the court *a quo* and was before this Court.

Thirdly, if it is true that shortly after his arrival in Geneva the appellant informed his legal practitioner in Zimbabwe, in January 2001, about the state of his health and his inability to return to Zimbabwe, it is difficult to understand why his legal practitioner did not file an affidavit confirming that. In addition, it is difficult to understand why the appellant's legal practitioner did not write to the Attorney-General in January 2001 informing him about the appellant's inability to return. Instead, he first wrote to the Attorney-General about the appellant's ill health in March 2001, about two months after the date by which the appellant should have returned to the country.

In the circumstances, I am satisfied that the state of the appellant's health is not a valid reason for his failure to return to the country by 10 January 2001.

I now wish to deal with the second reason advanced by the appellant for his failure to return to the country, which was fear for his personal security.

In a statement dated 30 April 2001 the appellant avers as follows:

> "Doctor Sylow is now finding himself in a situation where a warrant of arrest is issued against him. He receives hate mail threatening him and his family. His company has been robbed of all its funds and closed down. Friends and colleagues have been physically threatened and attacked and told not to assist him. His main accusers … appear to openly ally themselves with lawless elements, so far condoned by the political establishment and police, to extort money from Dr Sylow and further damage him and the Dental Clinic. In this climate and against the background of increasing lawlessness and the lack of police protection, he hears that his return to Zimbabwe would place him in direct danger and be most prejudicial both to his safety and health."

In my view, the fear has been grossly exaggerated. The appellant could easily return to this country without being noticed by any of the people he allegedly fears. In addition, he could stay in a hotel in Harare or elsewhere and wait for the determination of his appeal by the High Court, again without being noticed by any of the people he allegedly fears.

However, even if the appellant harboured the fear alleged by him, in my view, that would not assist him. It would simply show that the appellant had intentionally placed himself beyond the reach of the law.

Thus, in *Chetty v Law Society, Transvaal* 1983 (1) SA 777 (T), Chetty's fear of harassment by the security police did not prevent the court from finding that he was a fugitive from justice. The facts in that case are set out in the headnote as follows:

> "The applicant was at the instance of the respondent Society struck off the roll of attorneys when he had failed to appear before the Council of the Society to answer certain complaints which had been levelled against him. The Society learnt that the applicant had fled the country and was in the neighbouring State of Botswana en route to London. From the papers filed, it was apparent that he did not intend to return to the Republic. The applicant applied for the rescission of the judgment and order, and condonation of his failure to answer timeously the complaints levelled against him.

> ***Held***: that the applicant had become a fugitive from justice by putting himself beyond the reach of the law and therefore could not claim the protection of the Court."

At 780 A-C O'DONOVAN J considered Chetty's fear of harassment by the police and said:

> "The applicant denies having left the country to avoid the consequences of any misconduct on his part as an attorney. He has given a detailed account in the affidavit filed by him in support of the present application, of the harassment to which he says he was subjected at the hands of the Security Police and which he claims led to his decision to leave the country. It must, however, have been clear to the applicant that, through flight out of the Republic, on the eve of a meeting that he had undertaken to attend, he would avoid the processes of investigation in which the Law Society was engaged, and any proceedings arising thereout, and the inference is in my view inescapable that this result was intended by him, whatever other factors may have motivated him."

I am, therefore, satisfied that the appellant did not advance any valid reason for his failure to return to this country. The inescapable inference must, therefore, be that he did not return because he intended placing himself beyond the reach of the law so that if his appeal did not succeed he would not return to the country to serve the prison sentence. He is, therefore, a fugitive from justice, and the court *a quo* correctly declined to hear his appeal.

In the circumstances, the appeal is dismissed.

CHEDA JA: I agree.

GWAUNZA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners