ROBERT MARTIN GUMBURA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 5 January, 2021

Bail pending appeal and bail pending condonation

Applicant in person
A. Bosha, for the respondent

CHITAPI J: I would not have composed a written judgment but for the need to clear the confusion within the applicant's misunderstanding of procedure to assert his liberty rights. The background to the applications B 1725/20 and B 1892/20 is as follows.

The applicant was convicted by the regional magistrate sitting at Harare on 4 October, 2017 on four counts of rape. Consequent on the conviction, the applicant was sentenced to fifty years imprisonment. Ten years of that sentence was suspended for five years on conditions of future good behavior. The effective sentence imposed was therefore forty years imprisonment. The applicant noted an appeal against both conviction and sentence to this court. On 5 August, 2020, this court sitting on appeal dismissed the applicant's appeal against conviction. As against sentence, the appeal succeeded to the extend that the sentence imposed by the regional magistrate was reduced to twenty five years imprisonment with five years thereof suspended on condition of future good behavior. The applicant was therefore to serve an effective sentence of twenty years imprisonment. The appeal to this court was determined under case no. CA 110/14.

The applicant was not satisfied with the decision of this court on appeal in case no. CA 110/14. He however delayed in taking steps to further appeal this court's decision to the Supreme Court. On 7 September, 2020 the applicant filed under case no. CON 319/20, a chamber application for condonation of late noting of an application for leave to appeal to the Supreme

Court. The application was placed before MUSHORE J, who on 23 October, 2020 granted the applicant leave to appeal against conviction only. In the order made, MUSHORE J inter alia ordered in paragraph 2 as follows:-

> "2. Applicant be and is hereby granted leave to file his notice and grounds of appeal against conviction only through the Supreme Court Registrar within 10 days from the date of this order."

It is of course a requirement in terms of section 44 (4) that a person convicted by an inferior court to the High Court and has appealed to the High Court against conviction or sentence or both, and is dissatisfied with the decision of the High Court, and wishes to appeal further to the Supreme Court, should first obtain leave of a judge to appeal if the appeal is based on a question of fact or mixed fact and law. If the appeal is based on a question of law only, no prior leave to appeal is required.

The High Court Act does not provide for the granting of ancillary or consequential orders upon the grant of leave to appeal to the Supreme Court. For posterity, I need to make a passing comment in regard to the quoted order of MUSHORE J aforesaid. It needs a non-prejudical correction to it. It directs the applicant to note the appeal through the Registrar of the Supreme Court. In terms of rule 18 (3) of the Supreme Court Rules S1. 137/18 a notice of appeal to be filed consequent upon the grant of leave to appeal by this court, is directed at and filed with the Registrar of the High Court and copy thereof then filed with the Registrar of the Supreme Court. I have indicated that there is no prejudice to anyone and the order of MUSHORE J is corrected in paragraph 2 by the deletion of the word "Supreme" and replacing it with the word "High".

The applicant prior to being granted leave to appeal out of time filed on 16 October, 2020 an application for bail pending the determination of the leave to appeal application. The application was overtaken by events in that with condonation being granted, there was no longer bail pending condonation to contend with.

The applicant only noted the appeal against conviction on 5 November, 2020 under case no. SC 476/20. The appeal is currently pending determination by the Supreme Court. In case no. B1892/20 the applicant applies for bail pending the determination of that appeal. He filed the application on 6 November 2020 and headed it "bail pending appeal to the Supreme Court against

conviction only." The application for bail pending appeal is anchored on the principal consideration of whether or not the proposed appeal has prospects of success. It would be illogical and not in the interests of justice to grant bail pending an appeal which is predictably deemed to fail. It is on the other hand logical and in the interests of justice to grant bail pending appeal where the proposed appeal has merit and may likely succeed provided however that there are no indications that the applicant for bail pending appeal may abscond. The applicant averred that his appeal has prospects of success and relies on eight grounds of appeal set out in the notice and grounds of appeal.

The State counsel opposed the application on two grounds. Firstly counsel contended that the application for bail was improperly before the court because the applicant did not seek leave to appeal first. Counsel is mistaken because leave to appeal as has been noted was granted by MUSHORE J. The appeal is in fact properly pending before the Supreme Court. The other ground of objection is that there are no prospects of success on appeal against conviction.

The determination of whether there are prospects of success on appeal in this matter presents jurisprudential challenges. The applicant's appeal against conviction was dismissed on appeal by this court on the basis that it had no merit. The decision on appeal is binding upon a single judge. It would procedurally be improper in my view for the single judge to have to review the appeal court's decision and make a pronouncement on the correctness of the judgment given on appeal.

To interrogate the jurisprudential or legal quagmire, it is noted that section 44 (4) of the High Court Act only grants a right of appeal to the Supreme Court against the decision of the High Court on appeal upon a decision of an inferior court. The right of appeal given is to be exercised in the same manner as if the decision on appeal was a decision of the High Court on trial before the High Court. The provisions of the law on the grant of leave to appeal have not taken into account that leave to appeal would be in relation to an appeal judgment wherein two or more judges sat. Should such leave not be sought from the two judges is a question that comes to mind. As the law stands however section 44 (4) implies that a single judge is permitted to grant leave to appeal.

I respectfully suggest that the law is revisited so that there is clarity on procedure as it appears illogical that a single judge reviews the appeal court decision and qualifies the judgment.

I have however also considered the provisions of section 123 (1) (a) of the Criminal Procedure and Evidence Act. Which provides as follows:

> "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) In the case of a person who has been convicted and sentenced by the High Court and who applies for bail –
>
> (i) Pending the determination by the Supreme Court of his appeal; or
>
> (ii) 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 Supreme Court or the High Court."

In my interpretation, the default position is that where the applicant has noted an appeal to the Supreme Court against conviction and sentence on trial by the High Court or has been sentenced by the High Court, bail pending appeal should be made to a judge of the Supreme. Although the provision speaks to a judge of the Supreme Court or High Court, the default position is that the Supreme Court judge is the first point of call failing which a High Court judge may determine the application. Even if I am wrong in my interpretation, a situation may arise as in the instant case where I am asked to determine prospects of success on appeal where the High Court on appeal exhausted its jurisdiction. In my respectful view, it is only jurisprudentially proper that a Supreme Court judge should be the one to determine the bail pending appeal where the appeal relates to a judgment of the High Court granted on appeal. I must come to the conclusion that the interests of justice and procedural and substantive fairness dictate that l defer to a judge of the Supreme Court to hear the bail application in terms of section 123 (1) (a) (i) of the Criminal Procedure and Evidence Act.

Consequently the application for bail pending appeal is struck off the roll. The applicant if advised may direct the application for determination by a judge of the Supreme Court.

National Prosecuting Authority, respondent's legal practitioners