GARIKAYI GWAZE
versus
THE STATE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 28 and 29 September and 18 October 2011

Bail Application

J K oto, for the applicant
A Masamba, for the State

GOWORA J: The applicant was convicted by the Magistrates Court Bindura of one count of rape. He was sentenced to an effective term of imprisonment of 12 and half years. He has appealed against the conviction and sentence. In June 2010 he filed an application for bail pending appeal with this court. It was dismissed. At the time the application was filed he was not represented. He has now filed another application for bail pending appeal on the basis of a change in his circumstances. These are tabulated in the statement accompanying the application to be the following.

When the applicant made the initial application he was not represented. The application was partly dismissed because the state believed that the appeal was going to be heard quickly as the record had been transcribed. New revelations however had shown that the appeal was unlikely to be heard soon and therefore the application was being brought on the basis of changed circumstances occasioned by the delay in hearing the appeal by this court. It was suggested that these developments constituted new facts which had not been placed before the court at the time that the initial application was heard. It therefore was incumbent upon the court to reconsider its stance in view of the fact that the appeal could not e heard more that a year after it had been filed. In addition a number of visits to the court had shown that there was no

reasonable ground to believe that the appeal could be heard any time soon, and certainly not during 2011.

At the hearing of the application the State in the guise of Mr *Masamba* raised a point *in limine* to the effect that the application was not properly before the court. He submitted that an application for bail pending appeal had been dismissed by this court in June 2010 and that the applicant had not appealed against such dismissal. He argued further that the applicant had chosen to approach the High Court instead of first approaching the magistrates court that convicted him and that further to that after the application was dismissed by this court, he should have sought leave to appeal against the dismissal. He called into question the changed circumstances that the applicant sought to rely on in the current application.

Mr *Koto* on behalf the applicant contended that the application was properly before the court in that it was premised on s 123 (1) of the Criminal Procedure and Evidence Act [*Cap 9:07*]. He contended further that indeed there now existed facts which were not before the court that heard the initial application and that the point *in limine* had not been well taken.

S 123 (1) is to the following effect:

"**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 –

(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 s 57 or 58 of the Magistrates Court Act [*Cap 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;

Provided that-

(ii) where an application in terms of this subsection is determined by a judge or a magistrate, a further application in terms of this subsection may only be made, whether to the judge or magistrate who has determined the previous application or any other judge or magistrate, if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which may have arisen or been discovered after that determination."

In raising the point *in limine* Mr *Masamba* sought reliance on *S* v*Dzawo* 1998 (1) ZLR 536. Mr *Koto* was correct in pointing out that the authority relied on does not apply to the circumstances of this application. *S* v *Dzawo* dealt with appeals under s 121 against decisions wherein a judge or a magistrate had denied an applicant bail. It is pertinent to note that GUBBAY CJ did make reference to s 123 (1) in his judgment. In my view his remarks in relation to that section appear to have been obiter. The appeal before their lordships was concerned with the provisions of s 121 and not 123. It is also pertinent to note that his remarks therein were concerned with the rights of an applicant to approach the either the magistrates' court or the High Court for bail pending appeal and depending on where such an applicant applies first an appeal might lie to the Supreme Court. His remarks cannot be read to mean that there is no application on changed circumstances where an applicant convicted in a magistrates court is seeking bail pending appeal.

The section under which the applicant has brought the present application relates to applications for bail pending review or appeal after a conviction either by the High Court or a Magistrates Court. The proviso to the subs (b) seems to suggest that an application is available on the grounds of changed circumstances relating to newly discovered facts which had not been placed before a judge or magistrate who determined the initial application. My reading of the section leads me to conclude that this application is only available to an applicant who has been convicted by a magistrates court.

It is my view that the Act permits the bringing of an application for bail pending appeal on changed circumstances. The point *in limine* is therefore not well taken and it is dismissed. The application is properly before this court.

Koto and Company legal practitioners, applicant's legal practitioners