THE STATE
versus
KIZITO MUTSURE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 21 July, 31 July, 3 August, 10 August, 19 September & 3 October 2018

Application for leave to appeal and Bail Pending Appeal

O Marwa, for the accused
S W Munyoro, for the State

CHITAPI J: Following the passing of sentence in this case whose judgment is now unreported under case no HH 458/18, the accused's counsel Mr *Rubaya* advised the court that he had instructions to make an application for leave to appeal. An application for leave to appeal is made in terms of order 34 of the High Court Civil Rules. The application by Mr *Rubaya* was being made pursuant to r 262 in terms of which the convict makes an oral application immediately after sentence for leave to appeal. The grounds for making the application should be stated and recorded as part of the record. I indicated to Mr *Rubaya* then that I had no problem with him making the application. He then indicated that he also wished to apply for bail pending appeal. I enquired as to the conditions of bail which were in place prior to sentence. I indicated then that it was best for him to first prepare his appeal because I could only be placed in a position to properly determine both applications once the proposed notice and grounds of appeal was to hand.

There appears to have been some confusion and perhaps I did not quite express myself clearly in relation to how I proposed that the applications should be handled. To set the record straight, I determined that the application for leave to appeal should be determined at the same time as the application for bail pending appeal and that Mr *Rubaya* should prepare his proposed notice and grounds of appeal because both applications were predicated on the soundness of the proposed grounds of appeal. It was within this understanding that I acted in terms of section 123 (1)(a)(ii) of the Criminal Procedure and Evidence Act, *Chapter* 9:07 and admitted the convict to

bail pending the determination of the proposed application for leave to appeal and postponed argument on the application to 31 July 2018 on which date I would also hear and determine the application for bail pending appeal, assuming of course that the application for leave to appeal was successful.

I must confess that I find rule 262 to be somewhat an onerous, if not unrealistic or unreasonable rule. It may well operate to derogate from the proper exercise of the right of the convict to the promotion exercise his or her right to appeal to a higher court against conviction and sentence as guaranteed by the constitution in section 70(5)(b) of the constitution. Section 70 (5) (b) provides for the right of appeal by a convicted person "subject to reasonable restrictions that may be prescribed by law" I however express my reservation on the reasonableness of rule 262 as far as its timing is concerned. My reservation arises from my own doubts as to how effectively accused's counsel can be of assistance to the court and the convicted person in his or her ability to be able to properly compose, formulate and articulate meaningful or considered grounds for the application immediately after sentence. Invariably, the judgment proposed to be appealed against and sentence may have involved difficult questions of law and references to decided cases which counsel may not be familiar with. Counsel cannot in such circumstances be expected to properly address the merits of the application for leave to appeal without going through cases relied upon for the conviction and/or sentence. The result of poor preparedness is that the accused may be prejudiced by reason of the dismissal of an application for leave to appeal which could well have been granted but for counsel's handicap in not getting sufficient time to prepare and make meaningful submissions. It may therefore be agreed that rule 262 does not promote the right of the convict to be given adequate time to prepare for such important application.

In expressing my disquiet with r 262, I do so fully aware that r 263 provides for the filing of a written application for leave to appeal within 12 days of the date of sentence. Such application is made in "special circumstances" It must be accompanied by an explanation why leave to appeal was not applied for in terms of r 262 . There is a further requirement that the proposed grounds of appeal and grounds for contending that leave to appeal should be granted must form part of the application. Rule 263 therefore provides an exception to r 262 and the convict must show special circumstances why application was not made orally after sentence. Rule 262 being the default rule presents the further problem that it is worded in peremptory terms. It provides that "in a criminal

trial in which leave to appeal is necessary application for leave to appeal shall be made orally immediately after sentence has been passed."

The approach which I adopted in deferring argument on the application for leave to appeal was to enable counsel to prepare to make meaningful submissions in support of the application after properly applying their minds to the reasons for judgment and sentence. I do not read r 262 as requiring that the oral application for leave to appeal should once commenced be made and argued to finality on the day it is made. Making an application and the court finalizing it are two different processes. It appeared to me that it fell within the provisions of the rule for defence counsel as he did to indicate for the record that he was under instruction to note an appeal against both conviction and sentence as the convict was not satisfied with the conviction and sentence. The making of the application therefore commenced by the indication by counsel that he was seeking for leave to appeal. Adjourning the application for submission of argument on the application to a convenient date would not be and was not in violation of r 262 because as I have stated, the application does not have to be determined to finality there and then. Even if I am wrong in my interpretation of r 262, I would still hold that r 262 as with any other rule is subject to the court or a judges' discretion to condone, direct or authorise a departure from the rules including granting an extension of any specified period in the interests of justice. Having observed as above, I nonetheless initiate debate and interrogation of r 262 because applying it strictly may lead to a failure of justice in that once a case has been finalised, it becomes a serious and involved matter to seek leave to appeal as such leave is dependent upon the convict showing prospects of success on appeal. Counsel must prepare thoroughly for such applications and r 262 should be interpreted and applied in such a manner that it allows for the convict to make an informed and not a rushed application.

Leave to appeal is a tool of case management. It is based in the doctrine that there must be finality to proceedings where such proceedings have been properly adjudicated by a court clothed with the necessary jurisdiction. Frivolous and vexatious appeals constitute an abuse of the judicial process and amount to a waste of judicial time and state resources because human capital is deployed to deal with appeals which are filed *mala fide* with the want of merit being apparent. Applications for leave to appeal should therefore not be perfunctorily handled by counsel because they impact on the convicts right to have the judgment and sentence imposed by this court being

brought on appeal. If this court refuses leave to appeal, it means that the convict's right to appeal is no longer exercisable unless the refusal is set aside by a judge of the Supreme Court. This applies to appeals involving matters of fact or of mixed fact and law. Appeals based on any ground which involves a question of law alone do not require leave. Such appeals based on law only are few and in between. It therefore lends credence to my concern that leave to appeal should, holistically considered not be required to be applied for immediately after sentence as the issues on which counsel is required to apply his or her mind to are varied and involved. Rule 262 therefore presupposes that counsel who has just listened to and noted the reasons for judgment and sentence must be able to there and then interrogate those reasons for judgment, make a reasoned decision whether or not an appeal has prospects of success, seek the views of the convict and persuade the court that there are prospects of success on appeal. Even the experienced advocate would find r 262 very onerous to contend with. The point made is therefore simply that it is expecting too much to require the accused or defence counsel to have properly applied counsel's mind to any proposed grounds for taking the court's judgment and sentence on appeal without adequate reflection and carrying our research.

Be that as it may, the court postponed the continuation of arguments on the application. In respect of the liberty status of the accused, the court as already alluded to exercised its discretion in terms of s 123 (1) (a) of the Criminal Procedure & Evidence Act which provides for the admission to bail of a convicted and sentenced accused pending the determination of such person's application for leave to appeal or for an extension of time within which to apply for leave to appeal. The State counsel consented to the admission of the convict to bail. The accused did not default court on any single court day and after conviction he presented himself subsequently for sentence. Since the accused had not evinced any intentions to take flight, I was satisfied that I could give him the benefit that he was unlikely to abscond the making of his application for leave to appeal as it was his gateway to have his case placed before the Supreme Court to argue against his conviction and sentence. The accused was ordered to abide by the bail conditions obtaining prior to and during his trial pending the decision on his application for leave to appeal.

Arguments in the applications were made on 10 August, 2018 following further postponements on 31 July, 2018 and 3 August, 2018 which were occasioned by the unavailability of the State counsel who was indisposed. Mr *Marwa* stood in for Mr *Rubaya* who had handled the

accused's defence during the trial. Mr *Marwa* submitted that he was fully briefed to argue the application in as much as he had acquainted himself with the judgment HH 458/18. Mr *Marwa* submitted that the test applied by the courts in determining whether or not to grant leave to appeal is whether or not the accused has demonstrated that the intended appeal enjoys prospects of success. He made reference to the judgments *S* v *Mc Gowan* 1995 (2) ZLR 81 and *S* v *Mabhena* 2007 (1) SALR 482.

Section 70 (5) of the Constitution provides for the right of a convict, subject to reasonable restrictions, to appeal against conviction and sentence to a higher court in addition to having the case reviewed by such higher court. Rule 262 of the High Court Rules is one such restriction as it makes the right to appeal conditional upon the grant of leave to appeal. I am in agreement that in the main, the court considers the prospects of success and risk of abscondment. Put simply, the accused must satisfy the court that the appeal court might take a different view of the matter. In *R* v *Boya* 1952 (3) SA 574 at 577, the South African Supreme Court defined a reasonable prospect of success as meaning that

> "…..the Judge who has to deal with the application for leave to appeal must be satisfied that on the findings of fact or conclusions of law involved, the Court of Appeal may well take a different view from that arrived at by a jury or by himself and arrive at a different conclusion."

In *R* v *Kuzwayo* 1949 (3) SA 761 at 765, the South African Supreme Court stated that "In that process, the Judge must disabuse his mind of the fact that he himself has no reasonable doubt as to the guilt of the accused; he must ask himself whether there is a reasonable prospect that the Judges of Appeal will take a different view." See generally *Chen Shaoliang & Anor* v *Zhou Haixi & Anor* HH 90/17. The South African quoted cases are in tandem with the approach which obtains in this jurisdiction. In *AG* v *Muchadehama* SC 23/2014, it was held that the object of giving the trial court or tribunal the power to grant or refuse leave to appeal was to "prevent frivolous and unnecessary appeals that would taint the process of the intermediate appellate court." The Supreme Court referred to the process as providing a "filter" mechanism whereby hopeless appeals are not allowed to clog the appeal court. In essence therefore the Supreme Court was merely restating the position that the intended appeal must be demonstrated to have prospects of success.

Mr *Marwa* would have been best advised to have prepared the draft notice and grounds of appeal before hand since time had passed from 26 July, 2018 when sentence was pronounced to

the date of making the application, which was two weeks later. Mr *Marwa* orally outlined the proposed grounds of appeal against conviction as follows:

(a) that the conclusion reached by the court that the accused doused the deceased with paraffin was a misdirection as there was no evidence to that effect.

(b) that the court misdirected itself in finding that the deceased died of fire-burns in the absence of a post-mortem report.

(c) that the court erred in admitting hearsay evidence as an exception on the basis of *res gestae* in circumstances where the State did not prove the pre-requisites for the admissibility.

(d) The court misapplied rules governing circumstantial evidence and inferred that the deceased was murdered in the absence of evidence from which to draw the inteference.

(e) The court wrongly rejected the accused's defence as inherently improbable in circumstances where evidence supported the defence.

In amplification of his arguments, Mr *Marwa* submitted that the accused had put in issue every averment made against him by the State including the cause of death. He submitted that the fact that the first attending doctor's affidavit showed the assessed degree of burns at 35% and the second doctor at 76% was an issue which diluted the veracity of the medical evidence. The court dealt with this issue at length in its judgment and noted that the cause of death was not put into issue by the accused. What the accused averred was that he was not the one who set the deceased on fire. The main issue for determination at the trial was whether or not it was the accused who inflicted the burn injuries from which the deceased died.

As to the rest of the grounds of appeal, Mr *Marwa* submitted that they were self-explanatory. He emphasized that in relation to the evidence of *res gestae*, the court erred in not finding that the deceased's utterances were not made spontaneously with the infliction of the injuries. He submitted that the deceased had time to reflect before making utterances pointing to the accused as her assailant. Again, the court adequately dealt with this issue and reasoned that the determination as to whether or not a *res gestae* utterance is simultaneous with the instant reaction to an act committed upon the victim is dependent on the circumstances of each case. The court reasoned that the deceased's naming of the accused as her assailant was spontaneous in the

circumstance because she made it immediately to an on seeing the first person who came to her aid and this was shortly after she had just come back to the veranda of the house from the water tap where she had doused the flames engulfing her with water. The ground of appeal that the court wrongly held that the accused poured paraffin and lit the deceased and the further ground that the court erred in disbelieving the accused account can be said to amount to one ground in essence as the argument made in regard thereto is the same. The court adequately dealt with the evidence and the matters raised.

The applicant also submitted through Mr *Marwa* that he was seeking leave to appeal against the sentence of 13 years imprisonment which the court imposed. Mr *Marwa* argued that the court imposed a disturbingly severe sentence in circumstances where it had made a finding that the mitigatory circumstances outweighed the aggravating circumstances. This submission was incorrect because quite to the contrary the court took a dim view of the conduct of the accused and intimated that had there been no delay in prosecuting this case, a sentence in the region of 18 years imprisonment would have been appropriate.

The State counsel submitted that the proposed grounds of appeal had prospects of success. The only issue he took with Mr *Marwa* was on the ground of appeal pertaining to the non-production in evidence of the post-mortem report. State counsel submitted that the ground had no merit because the court in its judgment elaborately dealt with the issue. The State counsel submitted that he found the judgment enlightening because he had thrown in the towel when he conceded the application for the discharge of the applicant at the close of the state and equally did not further his arguments even after the defence case. It will remain a mystery to me that the State counsel did not appear to be intent on putting strenuous argument in the matter.

Be that as it may, the decision as to whether leave to appeal should be granted is a decision for the judge. The fact that the State counsel conceded that the intended appeal enjoys prospects of success does not bind the court. As with any concession made by the State in criminal court applications made in the course of a trial, the concession is subject to scrutiny by the court and where it is found not to be well informed, the court will refuse the State's concession. The rationale for this rule is a matter of common sense. Once a case has commenced, the court is seized with it and concessions which are not in the interests of justice should not influence the court in decision making and must be refused. Where a concession made by the State is refused by the court and the

effect of the refusal is that the trial proceedings have to continue, the State can invoke its powers as given in s 12 (1) (c) of the National Prosecuting Authority Act [*Chapter 7:20*] and discontinue the prosecution. The States power in this regard is restated in s 8 (b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. The State counsel was not helpful to the court in this case and he ought to have exercised his options as above instead of making groundless concessions.

That said, I have agonized over the merits application. I am in no doubt that the court adequately dealt with the matters raised by the applicant as grounding his heads of the intended appeal. It is all very easy to hold that there are no prospects of success, yet one must accept that another court may have a different view of the correctness of the conclusions which the court came to on the facts. The conviction in this matter was based on circumstantial evidence. Circumstantial evidence is not any weaker or less reliable than direct evidence. It can actually turn out to be more reliable because it involves a consideration of a large number of proven facts and the drawing of the most reasonable inference from such facts taken together. Due to the fact that various inferences can be drawn and the court then excludes them and settles for what it considers as the only reasonable inference to be drawn, this leaves scope for argument as to whether the appeal court may not draw a different inference and hold that it is the one which the trial court should have drawn.

I have therefore considered that applying the criteria that unmeritorious appeals should be excluded from swamping the appeal court whilst meritorious appeals should not be excluded from being placed before the appeal court where there are reasonable prospects of success, the intended appeal in this case is not doomed to predictable dismissal. Leave to appeal ought to be granted both against conviction and sentence because there is a sound and rational basis to hold that the appeal has prospects of success.

The next issue falling for consideration is whether or not to admit the applicant to bail pending appeal. In this regard, I am mindful that the mere fact that leave to appeal is granted does not translate into an automatic grant of bail pending appeal. The state counsel did not oppose the application for bail pending appeal. His attitude was predictable in the light of his earlier concessions on not just the innocence of the applicant but his prospects of success on appeal.

In terms of s 115C (2) (b) of the Criminal Procedure and Evidence Act, in a bail application made after conviction, the convict bears the burden of showing on a balance of probabilities that

it is in the interests of justice for such convict to be released on bail. The upshot of the provision is simply that bail is not granted as of right to the convict. The convict must make a case for it. In the consideration of such an application, there are two outstanding factors which the court should consider. These are the prospects of success and the likelihood of the applicant absconding. Where, as in this case, the applicant stands convicted of a serious offence and has been sentenced to a long imprisonment term, the court needs to be satisfied that the risk of abscondment has been discounted. The court should however lean in favour of granting bail if there is no risk of the applicant absconding. See *S* v *Williams* 1981 (1) SA 1170 (ZAD).

The applicant has since his conviction and even after sentence whilst awaiting the determination of this application availed himself to the court. If he did avail himself after sentence before the grant of leave to appeal, it does not appear that there can be sound grounds to fear that he may abscond and not pursue his appeal to finality. The applicant also complied with his bail conditions from the time that he was granted bail and was out of custody throughout the period to date. He is a 56 years old adult and is a businessman and farmer. He has resided in Zimbabwe since birth. He does not have previous convictions other than the current one. The present case is one of passion. There is no likelihood that the applicant will pose a danger to society. Under the circumstances the applicant has discharged the onus to show that it is in the interests of justice that he be admitted to bail pending appeal.

The following order shall issue:

a) The applicant is granted leave to appeal against the conviction and sentence in case no. CRB 51/18 with such appeal being filed within 4 days of this order.
b) The applicant is admitted to bail pending the filing and determination of the appeal on the following conditions;
    i. He deposits $1 000.00 with the Registrar of High Court, Harare.
    ii. He resides at Plot 14 Waterbell, Chivhu.
    iii. He reports at Chivhu Police Station every first day of each and every successive month between 6.00 am and 6.00 pm.

Rubaya & Chatambudza – applicant's legal practitioners
National Prosecuting Authority – respondent's legal practitioners