

DUMEZWENI MAHLANGU

**versus**

THE STATE

HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 6 JUNE AND 9 JUNE 2016

*T. J. Tsvangirai* for the applicant

*W. Mabaudhi* for the respondent

### **Bail Application**

**MATHONSI J:** The applicant is a police detective based at CID Law and Order section in Kwekwe. He was convicted about 9 years ago on 30 August 2007 of culpable homicide by the Regional Court in Gweru and sentenced to 6 years imprisonment of which 2 years imprisonment was suspended on condition of future good behavior.

The applicant noted an appeal against both conviction and sentence on 4 September 2007. After noting the appeal he launched an application for bail pending appeal on 18 September 2007 which the state conceded resulting in this court admitting him to bail pending appeal by consent on 3 October 2007.

It is not clear what happened after that but on 20 March 2016, almost 9 years later, the registrar of this court advised on the demise of that appeal by reason of failure to pay for the transcription of the record. He wrote:

“You noted an appeal against conviction/sentence. Despite noting the appeal you have failed or neglected to pay for the preparation of the record in terms of Rule 22(2) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules.

The appeal is accordingly deemed abandoned and is hereby dismissed as failure to comply with Rule 22 (2) of the above mentioned rules has invalidated the noting of the appeal in terms of Rule 22(4).”

With that the record was returned to the magistrates court in Gweru for execution of the sentence. The applicant says he never saw the letter from the registrar until he was arrested pursuant to a warrant of arrest issued on 26 April 2016. He was picked up thereafter and is currently detained at Whawha Prison in Gweru having commenced serving his sentence.

On 6 May 2016 the applicant filed an application for reinstatement of the appeal against conviction and sentence which application is yet to be determined. There is a story in that application told by both the applicant and his legal practitioner, Josiniah Maupa as to how the prosecution of the appeal failed including the sickness and the eventual death of Maupa's personal assistant assigned the responsibility of conveying the file to another law firm of the applicant's choice in terms of his instructions, which is really not the subject of the present inquiry. For our purposes, it is noted that an application for reinstatement of the appeal has been noted and that prior to the dismissal of the appeal in terms of the appeal rules, the state had conceded that it had prospects of success.

The applicant has now come to court seeking his admission to bail pending the hearing of his application for reinstatement of the appeal and the subsequent appeal if the application is successful. Now the state has swung round to oppose the application. The only ground for opposition is that the application for reinstatement has not been determined and as such the application is incompetent, given that there is no appeal pending.

What happened is that a police raid at House number 48 Simon Mazorodze Road Athlone Gweru by a squad of four police detectives from CID Kwekwe on 8 January 2004 at about 1300hours, went horribly wrong. The police officers were looking for a dangerous armed robber who was known to be armed with three guns including a machine gun. When raiding the house the officers had corked their weapons in readiness.

During the course of the operation, the applicant was assigned to guard some of the occupants of the house gathered by the swimming pool who included the 12 year old victim, as a search of the house was being conducted. He had his service pistol under his armpit when it accidental discharged fatally wounding the 12 year old boy. He was charged with culpable

homicide, convicted and sentenced aforesaid. It is that conviction and sentence which he is contesting in the appeal court.

The main state witness was Angela Ncube, the wife of the suspected armed robber who confirmed that her husband was on the run. Although emotionally charged that witness confirmed the facts I have outlined above. In my view, even if the conviction is upheld, it would be extremely difficult to justify the sentence that was imposed for what was clearly an unfortunate shooting by a police officer in the *bona fide* execution of his duties. There is no doubt therefore that the appeal has bright prospects of success.

I have to decide however whether an application for bail pending the reinstatement of an appeal dismissed in terms of rule 22 (4) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979 is competent. *Mr Mabaudhi* who is advancing the argument that it is incompetent, has not directed me to any authority to that effect.

In terms of r22 (2) and (4);

- “2. The applicant shall, at the time of the noting of an appeal in terms of subrule (1) or within such period thereof, not exceeding five days, as the clerk of the court may allow, deposit with the clerk of the court the costs as estimated by the clerk of the court of one certified copy of the record in the case concerned;

Provided the clerk of the court may, in lieu of such deposit, accept a written undertaking by the appellant or his legal representative for the payment of such cost immediately after it has been determined.

- 3 ----.  
 4. Any failure to comply with the provisions of subrule (2) or (3) or any undertaking made in terms of the proviso to subrule (2) shall invalidate the noting of an appeal.

Provided that a judge of the Supreme Court may give leave for a fresh appeal to be noted.”

It is not clear how the applicant lost his appeal but what is clear is that it was invalidated in terms of the foregoing rules, which rules allow a judge to give leave for a fresh appeal to be noted. The applicant has already made an approach to the court in that regard and a decision is yet to be made.

Section 123 (1) (b) (iii) of the Criminal Procedure and Evidence Act [Chapter 9:07] provides:

“Subject to this section, a person may be admitted to bail or have his conditions of bail altered in the case of a person who has been convicted by a magistrates court and who applies for bail 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 jurisdiction he is in custody.”

So a judge may admit to bail a person who has applied for leave to appeal or for an extension of time during which to appeal. I have already said that rule 22(4) reposes upon a judge the power to grant leave to file a fresh appeal in the case of an appeal that has been invalidated by failure to pay for the record of proceedings. It must follow therefore that such an application for leave or for reinstatement whichever way one decides to call it, falls squarely within the ambit of s123 (1) (b) (iii) of the Criminal Procedure and Evidence Act, as being one of the instances where bail can be granted.

The approach taken by the state that it is incompetent to seek bail pending leave to reinstate an appeal is not only simplistic, it also overlooks the clear provisions of the Act. I conclude therefore that it is indeed competent to make such a bail application and that I am empowered to grant it.

As that was the only basis for opposing bail, it follows that the applicant has made a case for the relief that he seeks. In fact there is merit in the application because there are prospects of success on appeal. The courts would not want to appear to impede police officers in the execution of their duties by assessing their conduct with a magnifying glass of high power. The business of policing a society infested with dangerous criminals that Zimbabwe has become, is already onerous as it is without the courts complicating it.

Mistakes do happen all the time, and must be penalized as mistakes. At the same time I am sure the courts would want to strike a balance that will ensure that police officers are able to discharge their duties without the shackles of armchair critics.

In the result, it is ordered that:

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HCB 68-16  
XREF HCA 259-07  
XREF HCB 234-07

1. The applicant be and is hereby admitted to bail pending the outcome of the application for reinstatement of the appeal against conviction and sentence, and if the application is successful, the determination of the appeal itself, on the following conditions;
  - (a) He deposits an amount of US\$100-00 with the registrar of the High Court, Bulawayo
  - (b) He continues to reside at ZRP Main Camp, Kwekwe until both the application for reinstatement of appeal and the subsequent appeal are finalized.

*Dube-Tachiona & Tsvangirai*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners