HH 66-2006
CA 68/06

RAFIQ KHAN
versus
THE STATE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 21 and 22 May and 6 June 2006

Chamber application

Advocate E Matinenga, for the applicant
R Tokwe, for the State

GOWORA J: The applicant was on the 28th April 1992 convicted by the Magistrate, sitting at Harare on two counts of receiving stolen property well knowing it to have been stolen. He was, as a result, sentenced as a result to 36 months imprisonment 12 months of which were suspended on condition of future good conduct on his part. He was immediately lodged in custody to serve his sentence. An application for bail to the Magistrate pending appeal was refused. On 29th April 1992, an application for bail pending appeal was lodged on behalf of the applicant with the Registrar of this Honourable Court. On 7th May 1992 the applicant was released from custody after being granted bail by this court. He was represented at the bail hearing by *Advocate Simpson*.

The appeal on which his release from prison had been premised has not been prosecuted since his release on 7th May 1992. As a result of a warrant issued against him, he was brought before a magistrate on 6 and 7 March 2006 for an enquiry into the status of his appeal and a determination as to whether or not he should not serve his sentence if the appeal had not been prosecuted. At the conclusion of the enquiry he was again lodged in prison to serve his sentence. An attempt to have those proceedings set aside by way of a review was unsuccessful before MAKARAU J who found that the applicant had not noted an appeal with the Supreme Court against his conviction and sentence. As a consequence she dismissed the application for review.

On 20th April 2006 the applicant filed this application. In it he sought an order condoning his failure to note an appeal against his conviction timeously and also sought to have his bail reinstated on varied conditions. When the matter was initially placed before me, I noted that the record of the proceedings relating to the criminal trial had not been attached. I directed that a transcript of those proceedings be availed to the court. I also directed that the application be served on the office of the Attorney-General. The response from the Attorney-General, which I will discuss in detail later, is to the effect that the application is not opposed.

Subsequent to the filing of these papers the applicant then filed a supplementary affidavit. In the affidavit, the applicant avers that, in fact, an appeal had been noted on his behalf and that the Notice of Appeal had been located by Advocate Simpson who had made the application for bail pending appeal on his behalf. In the premises, his view was that the application for condonation fell away and all I had to consider was the reinstatement of bail. I caused the legal practitioners to appear before me. I then indicated that as the document that had been submitted as the Notice of Appeal did not have the reference number of the Supreme Court, I required the comments of the Registrar of the Supreme Court and High Court as to its authenticity. I also required that the Attorney-General's views as to the authenticity of the document be sought and placed before me.

The substance of the report placed before me by the Registrar of this Court is that upon examination by him the document was found not to contain a Supreme Court number as is the norm if a matter is filed with the court. All cases, according to him, filed with any court in Zimbabwe are allocated case numbers on the process being issued by the court in question. An official stamp bearing the date of issue is then made on the face of the document. Although the document attached to the applicant's papers did indeed have a stamp of the Supreme Court, his view was that the stamp had discrepancies when compared with other documents issued out of that court during the same period.

Further to that, the Registrar noted in his report that when an appeal is filed with the Supreme Court, once a number is issued, the appellant is then supposed to serve a copy of the appeal in question on the court whose judgment is the subject of the appeal. This is done as an invitation to that court to prepare the record of the proceedings for purposes of the appeal. The clerk or registrar of that court then prepares the record and submits it to the registrar of the Supreme Court who then sets the matter down for hearing. It was his firm conclusion that the appeal had not been issued out of the Supreme Court.

The report from the Attorney-General was prepared by one E Chinyemba and one F Nyamadzawo, both from the records and information section of the department. Their comments are centered on the stamps appearing on the application for bail pending appeal and the Notice of Appeal itself. It is their conclusion that the stamps appearing on both documents as pertains to the office of the Attorney-General are genuine and authentic. They therefore confirm that the Application for bail pending appeal and the Notice of Appeal were served on their office at the same time on 29th April 1992.

Mr *Tokwe*, on behalf the Attorney-General submitted that he stood by the contents of the report and confirmed that the Notice of Appeal was indeed served on the Attorney-General. However, he argued, that the Notice of Appeal was served on the Attorney-General did not serve to validate the appeal.

I find myself in agreement. Under the then operative Supreme Court Rules 504 of 1979 as amended by S.I. 12/1992 an appellant was required to follow certain laid down procedures for the due noting of an appeal. In terms of section 22(1) of S.I. 540/1979 an appellant had to note his appeal against conviction and sentence, where he was legally represented, by lodging with the clerk of court which convicted and sentenced him, a notice in duplicate specifying the grounds of appeal and the address for service. An appellant was also required in terms of section 22(2) at the same time as the appeal

was noted, or at any rate no later than five days thereafter, to deposit with the clerk of court the estimated costs for preparing the record or in lieu of payment and with the concurrence of the clerk of court, to provide a written undertaking from him or his legal practitioners to pay such cost once it has been ascertained or determined. Subsection (3) provides for payment of the difference in the estimated cost and the actual cost of the record, provided payment must be effected before the appeal is heard. In terms of subsection (4) failure to comply with subsections (2) and (3) shall invalidate the appeal.

I did not hear the applicant claim that the papers produced before me were ever filed at the magistrates' court. In fact, ex-facie the document itself it is clear that it was never stamped by the magistrates' court. There was clearly therefore no payment for the preparation of the record as envisaged by subsections (2) and (3) respectively. The applicant also does not claim that his legal practitioners or himself paid for the costs of preparing the record or that a written undertaking was given for the payment of such cost. In the circumstances therefore, the appeal such as it was, would have been invalidated. My view is strengthened further by the fact that in terms of s 23 (1) the magistrate would have been required had an appeal been properly noted, to have set out a statement in writing of the facts which he found to be proved at the time. This would have been done within five days of the noting of the appeal. The record contains no such statement from the trial magistrate.

I accept that the applicant was granted bail properly pending appeal. Mr *Simpson* in whose 'archives' the Notice of appeal was found is an officer of this court. He is an eslinned and senior member of the Bar and I do not doubt in fact that the Notice of Appeal now before me was amongst his papers. I accept further that he had possession of the document for purposes of the bail application that he argued on behalf of the applicant. The fact of the matter however is that the proper procedures for noting an appeal were not followed. No case number was allocated to the notice and hence no record was opened at the Supreme Court. The Notice was not lodged with

the clerk of the court which convicted the applicant. This is in fact the view of the Registrar that the proper procedures for the noting of an appeal were not followed. It is for these reasons that notwithstanding the document bearing the stamp of the Supreme Court I am constrained to find that there is no appeal pending at the Supreme Court in respect of the conviction and sentence on the applicant.

When counsel initially appeared before me on 21st May 2006 I enquired of Mr *Matinenga* on the significance of paragraph 6 of the supplementary affidavit which in substance appeared to suggest that the applicant, having found a Notice of Appeal, was abandoning the issue of the condonation. On the actual date of hearing Mr *Matinenga* advised from the bar that the application for condonation had not in fact been abandoned. His view was that the court was still seized with the application in the event that it appeared that the appeal was no longer pending before the court. I therefore turn now to consider the application for condonation.

When determining an application such as this a court must look at the explanation by the applicant on the delay in making the application. Regard must also be had to the prospects of success of the appeal and a balance must be struck between these considerations. See *R v Vingirayi*[1].

The applicant lays all the blame for the fiasco that is his attempt to appeal on the legal practitioners who have had the dubious honour to represent him before now. He had instructed Mr *Fernandes* who had appeared for him at the trial to note an appeal and had been assured that it had been done. He paid *Fernandes* and was advised that nothing further was required from him. He did not even personally seek a copy of the appeal to satisfy himself that it had indeed been noted. This much is evident from the fact that he did not possess a copy of the Notice of Appeal allegedly noted on his behalf. He clearly evinced no interest in the outcome of the appeal as he did not realize that his chosen legal practitioner was no longer practicing and that his file had seemingly been archived. I believe that once he was granted bail he found no need to pursue the appeal until the conviction began to threaten

[1] 1969 (2) RLR 509

his source of livelihood. Were it not for the stamps that were found to be authentic by the office of the Attorney-General the applicant might well have had difficulty in convincing this court that the documents were filed with the Supreme Court. In this regard I also do not minimize the pursuasive nature of the affidavit from Mr *Simpson* which has a ring of truth and is a factor in my acceptance that indeed the papers were filed with the Supreme Court. I will therefore conclude that the explanation from the applicant in relation to the measures taken to note the appeal sounds plausible.

What has not been explained to my satisfaction is the failure to prosecute the same for fourteen years until it became a yoke on his neck. Where the delay in noting an appeal is considerable and inordinate as in this cas, the court must be certain that there are real prospects of success before allowing the application for condonation. See *R v Humanikwa*[2].

The applicant submits that his prospects of success on appeal are certain and attacks the nature of the evidence adduced against him at the trial in respect of both counts. His view is that the magistrate should not have convicted him on the evidence led at the trial as the prosecution had not discharged the onus that lay on it to prove his guilt. The Attorney-General in a statement filed in response to the application for condonation, whilst not accepting the applicant's explanation for the delay in prosecuting the appeal, nevertheless concedes that the applicant has prospects of success in the appeal. The Attorney-General is of the view that the conviction may be questionable as it was grounded on vicarious responsibility. Beyond stating that such a principle is not part of our criminal law in founding guilt, I make no further comment as the appeal is not before me. I consider however the concession by the Attorney-General to have been properly made. At best the conviction can be said to be questionable. I find therefore that the applicant has good prospects for success on his appeal against conviction. I will therefore condone his failure to note the appeal within the prescribed period.

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[2] 1968 (2) RLR 42.

Mr *Matinenga* had invited me, in view of the concession from the State, to deal with the matter in accordance with my inherent powers of review. I do not believe that I am empowered to go as far as that. It is within the capacity of the applicant to seek a review of the proceedings should that be the route he wishes to take. It would be overreaching the powers that I have to proceed from the application for condonation and review the trial proceedings. I will therefore restrict myself to the matter that is properly before me.

In the premises the application for condonation succeeds. The applicant's bail is reinstated albeit with amended conditions as appears in the draft order. An order in terms of the draft will issue.

Musunga & Associates, applicant's legal practitioners