

SIMON FRANCIS MANN
versus
THE STATE

HIGH OF COURT ZIMBABWE
OMERJEE J
HARARE, 11 and 19 January 2011

CRIMINAL APPEAL

Mr *Samkange*, for appellant
Mr *Masamha* , for respondent

OMERJEE J: On 28 July 2004 the appellant was arraigned before the Provincial Magistrates Court, Harare on two charges. Firstly, he was charged with contravening s 4 (2) (b) of the Firearms Act [*Cap 10:09*]. Secondly, he was charged, with contravening s 13 (1) (e) of the Public Order and Security Act [*Cap 11:17*].

The appellant tendered a limited plea of attempting to contravene s 4 (2) (b) of the Firearms Act. The State declined to accept such limited plea. In respect of count two he tendered a plea of guilty and he was duly convicted on his own plea. The State proceeded to trial in respect of count one. After considering the evidence led, the court *a quo* returned a verdict of guilty of attempting to contravene s 4 (2) (b) of the Firearms Act.

On 10 September 2004 the court *a quo* sentenced the appellant as follows:-

In respect of count one 3 years imprisonment. In respect of count two 4 years imprisonment. The sentences were to run consecutively. In addition the court ordered the forfeiture of USD180 000 being the money paid for the purchase of the weapons, the subject matter of both counts. A further forfeiture order of a Boeing 727 aircraft brought into the country at the behest of the appellant intended to be used to ferry weapons out of Zimbabwe was made by the trial court.

In these proceedings, the appellant was represented by Mr *Samkange*

On 24 September 2004, the appellant through his legal practitioners noted an appeal against both conviction and sentence. He also instituted formal review of proceedings before this court in November 2004. In those papers as amended, the appellant sought a reduction in respect of the sentence imposed. But in his submissions to the reviewing court he sought also to challenge the propriety of conviction in respect of count one. CHITAKUNYE J in the course of the review confirmed the conviction in respect of both counts. The learned judge

also made an order that the separate sentences were to run concurrently. The net effect of this order was that the appellant was sentenced to four years imprisonment. (*See case number HC 12397/04*)

It is common cause that the appellant's legal practitioners filed Heads of argument on 16 December 2005 in respect of the appeal. In these Heads the appellant's legal practitioner took issue with the propriety of the sentence imposed only and made no submissions in regard to conviction.

The State responded in its Heads filed on 6 January, 2006. The appellant it is not in dispute served his full sentence before the appeal was prosecuted. Following the institution of formal extradition proceedings, the appellant was then extradited to the requesting country in or about January, 2008.

This appeal has been pending since the latter part of 2004. Heads of argument on behalf of both the appellant and respondent respectively were filed by early January 2006. It is a trite proposition of the law that the appellant's legal practitioners bear an onus to ensure the expeditious hearing of a matter awaiting appeal. A period of five years has elapsed without the appeal being heard. Significantly, no reasons, let alone cogent reasons have been advanced by the appellant's legal practitioners for the inordinate delay in the hearing of this case. Furthermore, no reasons are discernible from the record for the lengthy delay that has occurred.

There is a letter from the appellant's legal practitioners dated 1 September 2006. Part of the letter, which was addressed to the criminal registrar reads as follows:

"We refer to the above notice of hearing in which you indicated that the appeal will be heard on 14 September 2006, could you please remove it from the roll because Mr *Samkange* will be engaged in the High Court in the matter of the *State vs Dr C. Kuruneri* which has been set down to be heard from 11 September to the end of September 2006.

Our client would want our Mr *Samkange* to personally argue the appeal on his behalf. Please note that there will be no prejudice to the State because our client is already serving sentence, which he is appealing against and is due for release on 11 May 2007. Should he advise to us to have the matter heard before completion of the sentence we will approach you for a new set down date. In the interim period please keep it in abeyance."

It is apparent from the narration of events that there has been an inordinate delay in the prosecution of this appeal. Such delay is attributable to the appellant through his legal practitioner Mr *Samkange*. The appellant served the sentence imposed upon him and he has since departed from this jurisdiction. It follows that the lengthy delay of five years before

prosecuting an appeal against sentence renders such proceedings to be of academic interest. In *casu* the appellant's legal practitioners' quest to have this appeal determined after a delay of five years constitutes abuse of court process. Such conduct is not expected of a senior and experienced legal practitioner like Mr *Samkange*.

To compound matters the appellant's legal practitioner Mr *Samkange* on 5 January 2011 filed a Notice of Withdrawal with the Registrar in the following terms:

"Take notice that the appellant hereby withdraws its appeal filed with this court on 24 September 2004 and each party bears its own costs."

A day later on 6 January 2011 the same legal practitioner filed a Notice of withdrawal where strangely it is stated as follows:

"Take Notice that the appellant hereby withdraws his appeal against sentence only filed with this court on 24 September 2004 but persists with the appeal against conviction."

The lengthy and detailed Heads of Argument filed by Mr *Samkange* on 16 December 2005 are restricted to an appeal against sentence only and do not allude to the issue of conviction. There is no appeal against conviction in these Heads of Argument. The effect of the Notice of withdrawal filed by Mr *Samkange* of 5 January, is that there is no appeal pending before this court. There is no application as required by law for reinstatement of this appeal.

Instead, Mr *Samkange* filed a notice of withdrawal against sentence only in which he purports to reinstate the appeal against conviction. In view of this turn of events this court *mero motu* raised the issue as to whether or not there was an appeal pending before this court. At the hearing Mr *Samkange* was at pains to justify this defective appeal on the ground that the original notice of appeal also challenged the appellant's conviction.

However, when it was pointed out that his original Heads of Argument never dwelt with the issue of conviction, Mr *Samkange* accepted that to be so and stated he took full blame for the anomaly. He also conceded that the initial grounds of appeal were inadequate and thus he filed "additional grounds" a day before the hearing.

It is trite that there are rules of court that govern when a notice of appeal should be filed or when it can be amended. When this was pointed out to Mr *Samkange*, he submitted that there is no rule governing the amendment of a notice of appeal. He made this submission in support of an "addendum to the grounds of appeal against conviction." That was filed a day before the hearing together with an addendum to the Heads of argument.

Despite the withdrawal of the appeal Mr *Samkange* also submitted that a criminal appeal does not lapse. Again, having been pressed on the fact that the original Heads of argument did not address the purported appeal against conviction, Mr *Samkange* then submitted that he ought to have applied for condonation of late filing of Heads of argument titled “appellant’s addendum to heads of argument”.

This court is of the view that there is clearly no proper appeal pending before this court. The filing of these additional documents demonstrates clear abuse of court process on the part of Mr *Samkange*. For that reason this court is unable to entertain this purported appeal.

After all these anomalies were put to Mr *Samkange*, he ultimately sought a postponement in order for him to file an application for condonation. In the view of this court Mr *Samkange*’s conduct lacked the ethical standards expected of a senior legal practitioner. Such conduct smacks of a clear disregard and disdain of court rules and proceedings. It reveals tardiness and shoddiness on his part.

Such conduct constitutes a clear abuse of court process. The Registrar is directed to furnish a copy of this judgment to the Law Society of Zimbabwe.

MUSAKWA J: Agrees.....

Messrs Byron Venturas & Partners, appellant’s legal practitioners
Attorney General’s Office, respondent’s legal practitioners