THE ATTORNEY-GENERAL
versus
MUNYARADZI GWISAI
and
ANTONATOR CHOTO
and
TATENDA MUNDAWARA
and
EDSON CHAKUMA
and
HOPEWELL GUMBO
and
WELCOME ZIMUTO

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 16 January 2013

Application for Leave to Appeal

HUNGWE J: In this case the respondents were convicted, in the magistrate's court on 19 March 2012, of conspiracy to commit public violence as defined in s 188 as read with s 36 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. The Respondents were sentenced each to pay a fine of US$500, 00 or, in default of payment to undergo 10 months imprisonment. In addition they were each sentenced to 24 months imprisonment of which 12 months were suspended on conditions of good behaviour and the remaining 12 months were suspended on condition that each accused performs 420 hours of community service.

The Attorney-General was aggrieved by the sentence as he was of the view that it was far too lenient. The Attorney-General made application for leave to appeal against this sentence by way of a Chamber application on 5 April 2012. To this Chamber application was appended the draft notice and grounds of appeal as is required by the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, Statutory Instrument 504 of 1979 ("the Rules"). The application for leave to appeal was out of time. Notwithstanding this anomaly no application for an extension of

time within which to apply for leave to appeal out of time was made nor was an application for condonation of the late filing of the application for leave to appeal made as is required by the Rules.

In the heads of argument filed on behalf of the Attorney-General the admission is made that there has been no compliance with the Rules. This court is urged in those heads, to condone the lack of compliance with the Rules by the Attorney-General on the basis that Rule 5 permits a departure from the Rules when this is in the interests of justice. The submission lacks merit. The appeals Rules are clear and categorical. In terms of Rule 15 of the Supreme Court (Magistrate's Court) (Criminal Appeals) Rules, 1979, where the Attorney-General wishes to appeal against a sentence passed by a Magistrates' Court, he shall as soon as possible, and in any event not later than ten days from the date when that sentence is passed, apply for leave to appeal. The court has no discretion in the matter as this is a peremptory requirement. Where there has been a failure to comply with the peremptory provisions of the Rules, a party guilty of such failure to comply must, if it is minded to pursue the proposed appeal, apply for leave. It is only then that the court may exercise its usual discretion. The applicant has not elected to do this.

There are other deficiencies in the applicant's case.

There is nothing on the papers before me showing that the applicant caused to be placed before the clerk of the court for onward transmission to the trial magistrate the application for leave to appeal together with the draft grounds of appeal for the magistrate's comments. (Rule 15 (b)). There is no proof that the magistrate was afforded an opportunity to comment on the draft grounds as he was obliged to do in terms of Rule 16. Ordinarily, the clerk of court would have signalled that the papers have been placed before him for his attention by placing his official stamp on all copies of the applications before they are forwarded to the Registrar of this court. The clerk of court would have had to comply with the Rules by ensuring that the manuscript copy of the record of proceedings is placed before me for consideration of the application for leave. (Rule 16(2)). As matters stand, what is before me for the determination of the application for leave to appeal against sentence are just the reasons for judgment and those for sentence. Without the full transcript or at least the manuscript of the trial proceedings, it is difficult for a court seized with such an application, to make a determination of the question whether the applicant has bright prospect for success. The failure to comply with the Rules has hamstrung the

determination of the matter for which application is made. The failure to comply with the Rules must be laid at the applicant's door.

In the unlikely event that I am wrong in the view that I hold that this matter stands to be dismissed for the above reasons, I proceed to consider the merits of the application before me.

The right of the Attorney-General to appeal against the inadequacy of the sentence is an unusual one. It does not exist either in South Africa or in England and there have been few cases in this country where such a right was successfully claimed and exercised. There is therefore very little guidance to be found as to the principles to be followed when the Attorney-General invokes this right. Section 62(1) sets out the general parameters within which the Attorney-General may exercise his right of appeal against sentence. It states:

"**62 Attorney-General may appeal to High Court against sentence**

(1) If the Attorney-General considers that the sentence imposed in any criminal case by a court is—

(a) incompetent in law, he may appeal to the High Court against that sentence; or

(b) inadequate—

(i) in the light of the findings of fact made by the court and the nature of the charge; or

(ii) because it was based on findings of fact for which there was no evidence or on a view of the facts which could not reasonably be entertained;

he may, with the leave of a judge of the High Court, appeal to the High Court against that sentence."

[Subsection as amended by section 7 of Act 9 of 1997]

Two grounds of appeal are available to the Attorney-General in a case where he wishes to exercise his right of appeal against sentence. First, he may argue that the sentence is incompetent at law. Second, he may argue that the sentence imposed by the magistrate is inadequate either in the light of the findings of fact made by the court and the nature of the charge; or because it was based on findings of fact for which there was no evidence or on a view of the facts which could not reasonably entertained. Alternatively, he may raise both grounds of appeal against sentence in appropriate circumstances. Where the incompetence of the sentence is raised, in my view, this will be easy of demonstration as the powers of that Court are strictly circumscribed by the Magistrates Court Act, [*Cap 7:10*). Where, however, the ground of appeal raised is that of

inadequacy of the sentence, then a heavier onus exists on the Attorney-General not only to demonstrate the inadequacy of the sentence imposed, but also to show that in imposing such a sentence, the court misdirected itself in light of the findings of fact made by the court and the nature of the charge or because it was based on findings of fact for which there was no evidence or because it was based on a view of the facts which could not reasonably entertained.

Presently, the draft grounds of appeal do not in any way encompass matters specifically set out in s 62 (1) of the Magistrates Court Act, [*Cap 7:10*].

The first ground relies on the averment that the sentence imposed "is manifestly lenient to the extent that justice was actually denied to the community."

The second ground purports to decry the failure by the magistrate to pass a sentence of imprisonment since, it is said, the law provided that a person convicted of conspiracy to commit a crime shall be liable to the same punishment to which he or she would have been liable had he or she actually committed it.

The third ground speaks to trivializing the crime for which the respondents have been convicted of. It is said that the court *a quo* ought to have considered that "the conspiracy would have resulted in the occasioning of public violence in aggravated circumstances and that the motive driving the conspiracy was the overthrow of constitutional government."

In my view the correct approach to adopt regarding such an appeal is whether the appellant has any prospect of success in light of the requirement set out in the s 62(1) of the Act. In applying this test it is important to recall the words of FIELDSEND CJ in *Attorney-General* v *Chagwiza* 1982 (2) ZLR 165 @ p168:

> "[The Attorney-General] will also have to bear in mind that, just as in appeals by convicted persons against sentence, the appeal court will not interfere merely because it would itself have imposed a different sentence. The approach is substantially the equivalent of that applied in appeals against the severity of sentence: before a sentence will be increased it must be found to be manifestly inadequate: *Attorney-General* v *Tobiwa and Ors*, 1980 ZLR 192. It is well recognised that sentence is primarily a matter for a trial court which has had an opportunity of seeing precisely the type of person with whom it is dealing - a very important factor in assessing sentence. An appeal court will be even more reluctant to increase a sentence than to reduce one because of the hardship to the convicted person who may have reconciled himself to his initial punishment. And

> this reluctance becomes greater if the sentence has already been served and an increased sentence would result in a person who had been released being recalled to serve further imprisonment."

The right of appeal should, therefore, be used with circumspection, and there are three main situations where it is appropriate -

(1) where a magistrate has adopted an entirely erroneous view of the law;

(2) where a sentence is so inadequate as not to do justice to the community as a whole; and

(3) where, because of special circumstances, such as the prevalence of a particular type of offence, a higher scale of penalties is called for than that being applied. (See *Attorney-General* **v** *Chagwiza* 1982 (2) ZLR 165 @ 167 (per FIELDSEND CJ)).

It seems to me that the purported draft grounds of appeal were mooted on the basis of a perceived inadequacy of the sentence since there is no allegation of incompetence of the sentence. The grounds of appeal, therefore, ought to have been brought strictly within s 62(1) (b) of the Magistrate's Court Act since they will be considered within the strictures imposed by that section. Without "clearly and specifically" setting out in which respect the magistrate's findings of fact regarding sentence could be impugned, as required in terms of Rule 22(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979, I am of the firm view that the Attorney-General's prospects of success on appeal are less than dim.

It should also be borne in mind that the appeal court's approach will be, substantially, that before a sentence will be increase it must be found to be manifestly inadequate. The court will be more reluctant to increase a sentence than to reduce one, particularly if a prison sentence has already been served. If the Attorney-General wishes to ensure that a particular convicted person should serve a longer sentence of imprisonment than that imposed by the magistrate, he must act quickly and take the matter up as a matter of urgency.

In my view the correct approach to adopt when considering an application for leave to appeal should not be based on whether an appeal is arguable or not, but on its prospects of success. Support for this approach is based on sound and persuasive authority. In *R* v *Baloi* 1949 (1) SA 523 (AD) CENTLIVRES JA (as he then was) stated at 524:

"In the present case RAMSBOTTOM J granted leave to appeal because

> 'some, at any rate, of the grounds which the accused wishes to raise, or which it is wished to raise on his behalf, seem to me to be fairly arguable.'

That, however, is not the test to be applied. It is true that in *Scott* v *New Minerva Syndicate Ltd* 1911 AD 369 at p 371, one of the grounds on which an application for leave to appeal was granted was that the case was fairly arguable and that in *R* v *Wessels* 1933 AD 395 STRATFORD ACJ said that:-

> "if the appeal involves a question of law on which the guilt of the accused depends, leave will be granted if that question is an arguable one".

In both those cases the judgment was *ex tempore*, but, in any event, those cases can, in view of the decision in *R* v *Nxumalo* 1939 AD 580, no longer be regarded as laying down the true test. In *R* v *Nafte* 1929 AD 333 at p 338, CURLEWIS JA said:

> 'Whether a point is unarguable or not is somewhat vague and is not very appropriate'.

The same applies to the word 'arguable' and the phrase 'fairly arguable'. The word 'arguable' is misleading unless it is made clear that it is used 'in the sense that there is substance in the argument advanced on behalf of the applicant' - (per TINDALL AJP in *Beatley's Trustee* v *Pandor & Co* 1935 TPD 365 at p 366), for there are very few cases which are not arguable in the wide meaning of the word."

In my opinion, the test to be applied when considering an application for leave to appeal under s 62(1) of the Magistrates' Court Act is whether the Attorney-General has a reasonable prospect of success on appeal. If he has, then leave to appeal should be granted. If he has not, then leave to appeal should be refused.

Applying the above principles to the present application, I am satisfied that the Attorney-General's appeal does not enjoy any prospect of success. In the result I make the following order:

"The application for leave to appeal against sentence be and is hereby dismissed."

Attorney-General's Office, applicant's legal practitioners
Mbidzo, Muchadehama & Makoni, respondents' legal practitioners