LOVEMORE MBOFANA
and
MIKE CHIMENDE
and
GIFT CHITANYURE
and
SAMUEL SOKIRE
and
NETSAI SOKIRE
and
BATSIRAI CHIHWA
and
BLESSING TEMBA
and
MOSES CHIMUPENI
and
RICHARD TEMBA
and
GARIKAI KAMUTOTORA
and
ITAI NGONERA
and
TICHAONA MUTSATSA
and
CHARLES NGONERA
and
TATANDA CHIWAKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 15 September 2021.

Criminal Review.

In chambers

KWENDA J: In practice a judicial officer should resist the temptation to render a decision without satisfying himself or herself that such order is legally competent. This is particularly important in the magistrates court because magistrates court and magistrates do not have inherent powers. They can only exercise powers given by statute. In this case the magistrate sitting at Mutoko suspended warrants of arrest issued against the applicants at the instance of the High Court. This court had, through its Registrar in the exercise of a delegated judicial function, dismissed the applicants' criminal appeals for want of prosecution and ordered their apprehension in order for them to start serving their sentences following. The warrants were duly issued and executed but the magistrate intervened and freed the applicants after suspending the warrants of arrests. The release of the applicants came to my attention when I became seized with the applicants' joint application for an order making it possible for them to lodge a fresh appeal. I formulated the opinion that the release was procedurally irregular and directed that the file be placed before me for review.

The following is the background to the case. On the 25th May 2010 the applicants were convicted in the Magistrates' court sitting at Mutoko after pleading guilty to unlawfully prospecting for gold without a licence in contravening s 368(1) of the Mines & Minerals Act *[Chapter 20:05]*. All the applicants admitted that they were arrested while unlawfully prospecting for gold at Tambudze village, Chief Nyakuchena, Mudzi without a licence on 12 April 2010. The trial court did not find any special circumstances warranting the non-imposition of the minimum mandatory sentence and sentenced them, each, to imprisonment for two years.

The applicants were all not legally represented at their trial but they all appealed against sentence only through Messrs Nyamushaya, Kasuso & Rubaya legal practitioners. They noted the appeal on the 18th May 2010, on the face of it, out of time without condonation. The applicants did not prosecute the appeals resulting in the decision by the Registrar of this court treating them as having been abandoned. A minute by the Registrar of this Court dated 16 June 2020 Registrar of this court reads as follows: -

> "Please be advised that the appeal in the above matter has been deemed abandoned due to the fact that the appellants failed to prosecute the appeals in terms of the rules.
> Accordingly, the record is returned herewith together with this notice to the court a quo for you to issue a warrant of on the accuseds."

The Registrar was empowered in terms of rule 37(5) as read with r 37 (6) of the Supreme Court (Magistrate Court) (Criminal Appeals) Rules 1979 [now repealed and replaced by r 95(20) of the High of Zimbabwe Court rules 2021)] authorised the Registrar of this court to treat an appeal which has not been prosecuted in terms of the rules as having been abandoned by the appellant and consequently dismissed by this court and to notify the Prosecutor General and the trial court of that development. The Registrar was therefore correct in directing the Clerk of court to issue warrants for the apprehension of the applicants since their bail had lapsed by operation of the law upon determination of their appeals. The warrants were indeed issued and executed whereupon the applicants before the trial magistrate, one E Sibanda at Mutoko for committal to prison. As stated above the magistrate overruled the Registrar and ordered the immediate release of the applicants.

The applicants have now, from the comfort of their homes, filed this joint application through the chamber book for condonation and reinstatement of their appeals. I noted that their chamber application did not disclose the status of the accused persons following the dismissal of their appeals. I expected the chamber application to confirm that the applicants are in custody because their bail lapsed when their appeal was dismissed by this court. See s 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] quoted below: -

> "**123. Power to admit to bail pending appeal or review**
> (1) Subject to this section, a person may be admitted to bail or have his conditions of bail altered-
> (*a*) in the case of a person who has been convicted and sentenced or sentenced by the High Court and who applies for bail
> (i) pending the determination by the Supreme Court of his appeal; or
> <u>(ii) pending the determination of an application for leave to appeal or for an extension of time within which to apply for such leave;</u>
> <u>by a judge of the Supreme Court or the High Court;</u>
> (*b*) in the case of a person who has been convicted and sentenced by a magistrates' court and who applies for bail
> (i) where the record of a case is required or permitted, in terms of section 57 or 58 of the Magistrates Court Act [*Chapter 7:10*], to be transmitted for review, pending the determination of the review; or
> <u>(ii) pending the determination by the High Court of his appeal; or</u>
> (iii) 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 area of jurisdiction he is in custody:"

I have underlined the important ss 123 (1)(a)(ii) and 123 (b) (iii) deliberately.

Section 123 (b) (iii) is clear. A person admitted to bail pending appeal has got his bail terminated by operation of law immediately upon determination of his or her appeal. Therefore, even if he or she has the intention to apply for condonation or extension of time within which to appeal, he or she must submit to custody first. There is no provision for admission to bail before the right to bail is revived or extended by order of court. The Registrar was therefore correct in this case when he/she ordered the apprehension of the accused persons. In any event, the directive by the Registrar to direct the issuance of a warrant of arrest which I endorse for the reason of effectiveness, is just a necessary precaution. The accused person is expected to hand himself/herself in to serve the sentence as soon as his/her appeal is determined against him. For the avoidance of doubt the manner in which an appeal is determined, determines the status of the previously bailed convicted person. If he or she succeeds on appeal, all liberties are restored. Section 123 (1)(a)(ii) of the Criminal procedure and evidence Act may be confusing. Application for condonation, reinstatement of appeal or extension of time within which to appeal can easily be confused with application for leave to appeal. One does not require leave to appeal from the Magistrates court against conviction or sentence. In addition to that s 123 (b) (iii) only applies where a person who has been convicted and sentenced or sentenced by the High Court

A convict who wilfully fails to hand himself or herself in to serve a sentence whose appeal has been disposed of against him or her becomes a fugitive from justice. This court should not entertain applications by fugitives. There is a plethora of cases which are authority for the legal position that persons requiring relief from the court will not be heard for as long as they are in wilful disobedience of an order of this court. It gets worse if the disobedience relates to the same case. There is a need to purge one’s attempt first before seeking audience. Accordingly, with respect to each applicant I directed a query to the Registrar in the following terms

> “This is an application for extension of time within which to appeal
> The applicants’ appeal was dismissed on 16 June 2020.
>
> Before I entertain the application kindly find out whether the applicant has been accounted for since his bail lapsed at the time his appeal was determined (dismissed).”

On the 29 April the registrar responded as follows:

> “The above refers and your memo dated 20 April 2021.

> Kindly find attached copy of ruling from Mutoko Magistrates Court. The accused is out of custody as stated in the ruling of 28 December 2020 which cancelled the warrant of arrest."

In suspending the warrants of apprehension the trial magistrate reasoned as follows:

> "This is a ruling on an application for suspension of the execution of a warrant of arrest issued after an appeal by the accused persons was dismissed by the High Court for want of prosecution. The applicant has since approached the High Court and have applied for reinstatement of the appeal. The application for reinstatement has been filed in the record. In the record, there is also the State's response on the application for reinstatement. The state said they are not opposed to the reinstatement. The ruling has not been delivered because most judges are on vacation leave.
> I am of the view that what the court needs to consider in such an application is the reasons why the appeal was not prosecuted and the prospects of success in the reinstatement case.
>
> The reason given is that the legal practitioner who was handling the matter got deregistered and his law firm no longer practicing. This is a reasonable ground. The application for reinstatement is likely to succeed since the state is not opposed. I am convinced that there are reasonable grounds for this application to succeed. However, as for accused 11 and 14 they have already been arrested and the court confirmed the warrant of arrest ordering them to serve the sentence on that regard, the execution of their warrants can no longer be suspended once the court ordered is execution.
>
> Wherefore, the warrants of arrests for all the accused persons, save for accused 11 and 14 are hereby suspended pending a determination of the application for reinstatement of appeal at the High Court."

The magistrate court is a creature of statute and it exercises powers given by statute. Unfortunately, the trial magistrate did not cite any legal authority. I am not aware of any power given to a magistrate to suspend the apprehension of an accused person whose appeal had been dismissed. There is no procedure, even in this court, of admitting convicts to bail pending condonation or reinstatement of appeal or extension of time within which to appeal. The magistrate probably believes he has inherent power to grant bail.

This court or a judge the power to *mero motu* review proceedings of the lower court on any grounds of review which include a gross procedural irregularity which vitiates the proceedings irrespective of how this court or the judge becomes aware of the compelling need to review terminated proceedings. Section 29(4) of the High Court Act which provides as follows

> "(4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that

> any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review." ….

In the result there is a sound basis at law to set aside the decision by the trial court to suspend warrants issued at the instance of the High Court in the exercise of the power given to this court in terms of proviso (iii) to s 29 of the High Court Act.

It is ordered as follows:

1. The trial court's decision to suspend warrants of arrest issued against the accused persons 1,2,3,4,5,6,7,8,9,10,12 and 13 under CRB MTK 248-261/10 following the dismissal of their appeals be and is hereby set aside.
2. The clerk of court at Mutoko Magistrate court shall enforce the warrants and cause the apprehension of the accused persons by the Police to serve their sentences if they do not hand themselves forthwith.
3. The application for reinstatement under HC 6068/20 shall not be entertained until such time that the applicant concerned has purged his/her contempt by submitting to custody.

Manzunzu J agrees………………………………………...

Mudimu Law Chambers, accused's legal practitioners
Prosecutor General, respondent's legal practitioners