

REPORTABLE ZLR(19)

THE ATTORNEY GENERAL
v
(1) ALEC MUCHADEHAMA (2) CONSTANCE GAMBARA

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 15, 2012 & MARCH 20, 2014

E Nyazamba, for the applicant

B Mtetwa, for the respondents

Before **MALABA DCJ**, in chambers.

This matter was placed before me in chambers as an application for condonation and extension of time within which to appeal from a decision of a judge of the High Court. The decision refused leave to appeal to that court from a decision of a Magistrate discharging the respondents of a criminal charge at the close of the case for the prosecution. The question arose as to whether there was any provision granting the Attorney General the right to appeal.

The decision on the question raised is that there is no statutory provision giving a right of appeal from a decision of an intermediate Court of Appeal like the High Court refusing leave to appeal to it from a decision of a subordinate tribunal.

The decision on the question is by a single judge sitting in chambers. It became necessary to enter into the question for the purposes of determining whether or not the proceeding in chambers was a proper application for condonation and extension of time within which to appeal as claimed by the Attorney General. The question whether there is a right to appeal should ordinarily be decided by the Supreme Court constituted by a minimum of three judges.

On 14 December 2009, a magistrate, acting in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Cap. 9:07*] (Criminal Procedure & Evidence Act), found the respondents not guilty of the crime of contempt of court in contravention of s 182(1) of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] with which they had been charged. The magistrate had found, at the close of the case for the prosecution, that there was no evidence on which a reasonable court acting carefully, might properly convict the respondents of the offence charged or any other offence of which they might be convicted on the same charge.

The allegations against the respondents were that they acted in common purpose, and unlawfully caused three accused persons to be released on bail with knowledge of an order of a judge of the High Court prohibiting the release of the accused. It was alleged that each or both of them intentionally impaired the dignity, reputation or authority of the court.

The first respondent, is the legal practitioner who represented the three accused persons in an application for bail before a judge of the High Court. Bail was granted on 9 April 2009. The representative of the Attorney General invoked the provisions of s 121(3) of the

Criminal Procedure & Evidence Act by notifying the judge, immediately after the decision admitting the accused persons to bail that he wished to appeal to a judge of the Supreme Court against the decision.

Section 121(3) of the Criminal Procedure and Evidence Act provides that once the notification of the wish to appeal is given to the judge, immediately after the decision admitting an accused to bail, the decision is suspended for a period of seven days. The Attorney General or his representative is required to obtain leave to appeal from a judge of the High Court or if a judge of that court refuses to grant leave, from a judge of the Supreme Court, within the period of seven days. If leave to appeal is granted and the notice of appeal filed within the seven days, the person admitted to bail remains in custody until the appeal is determined.

It is important to appreciate the fact that, under s 121(a) of the Criminal Procedure and Evidence Act the Attorney General or his representative, is not obliged to exercise the right to appeal within seven days of the decision admitting an accused person to bail being suspended. He or she should do so, if he or she wants to benefit from the effect of the suspension in terms of s 121(3).

The Attorney General applied to a judge of the High Court for leave to appeal on 14 April 2009. The application was on a certificate of urgency because he appreciated that the appeal to a judge of the Supreme Court had to be lodged within seven days of the decision admitting the accused persons to bail. No explanation was given for the decision not to apply for leave to appeal soon after invocation of the provisions of s 121(3) of the Criminal Procedure and

Evidence Act on 9 April 2009. The judge, who was not the judge who admitted the accused persons to bail, granted leave to appeal on 17 April 2009. The first respondent went to the Supreme Court that day and verified that no notice of appeal had been filed.

Acting on the basis that leave to appeal had been granted after the expiry of seven days and that no notice of appeal had been filed at the Supreme Court, the first respondent approached the office of the Registrar of the High Court asking that orders admitting the accused persons to bail be prepared.

The second respondent was the clerk to the judge who granted leave to appeal. She got the orders which had already been signed and handed them to the first respondent. On the authority of the orders, bail was paid at the Magistrates Court on behalf of the accused persons. They were released from custody on 17 April 2009.

At the trial of the respondents, the state witnesses accepted the respondents' contention that the seven days expired on 16 April 2009. The prosecution had alleged in the charge that the order granting leave to appeal specifically directed that the order by which the accused persons were admitted to bail was to be suspended until the appeal was determined. The copy of the judgment showed that the learned judge simply confined himself to granting leave to appeal.

The learned judge must have been aware of the fact that his powers were limited to granting leave to appeal only. The question whether or not the accused persons remained in

custody pending determination of the appeal, was pre-determined by the legislature in terms of s 121(3)(b) of the Criminal Procedure & Evidence Act. The learned judge must have understood that he could not alter that legal position by leave to appeal granted at any time after the expiry of the seven days prescribed under s 121(1)(a).

A judge who grants leave to appeal timeously, does not have to order that the accused person should remain in custody until the appeal is determined. He or she does not have to order that the decision admitting an accused person to bail is suspended by the granting of leave to appeal. The law itself, makes provision for the imposition of that disability on the accused person under s 121(3) of the Criminal Procedure & Evidence Act.

The learned magistrate was alive to the fact that contempt of court is a specific intent offence. She was aware of the fact that s 121 of the Criminal Procedure & Evidence Act, required leave to appeal to be granted within seven days after the date an accused is admitted to bail. She took into account the concession by the State witness who is a prosecutor, that the period of seven days expired on 16 April 2009 without leave to appeal having been granted. She also took into account the fact that a wrong interpretation of the law could not justify a finding of intention to impair the dignity, reputation or authority of the court.

The learned magistrate, found on the facts, that in waiting until the expiry of the period of seven days and acting to have the accused persons released from custody on bail on 17 April 2009, the respondents could not be found by a reasonable court acting carefully on the evidence, to have had the intention to impair the dignity, reputation or authority of the judge who

granted leave to appeal on 17 April. There was, according to her, no evidence to prove intention as an essential element of the offence. She made the pertinent observation of the fact that what was in issue, was whether or not, the time limits prescribed by the relevant statute had been complied with, for the State to have benefitted from the effect of s 121(3) of the Criminal Procedure and Evidence Act. The learned magistrate even made the finding that the notice of appeal to a judge of the Supreme Court had not been filed.

Applying to the facts, the principles of law enunciated in the cases of *Attorney General v Bvuma & Anor* 1987(2) ZLR 96(S), *Attorney General v Mzizi* 1991(2) ZLR 321(S), *Attorney General v Tarwirei* 1997(2) ZLR75(S) and *State v Tsvangirai and Others* 2003(2) ZLR 88(H), the learned magistrate concluded, at the close of the case for the prosecution, that there was no evidence that the respondents committed the offence charged or any offence of which they might be convicted thereon and returned a verdict of not guilty.

Section 198(4)(b) of the Criminal Procedure & Evidence Act gives the Attorney General, a conditional right to appeal to the High Court, if he is dissatisfied with a decision of a magistrate finding an accused not guilty of an offence charged at the close of the case for the prosecution. He or she must first obtain leave to appeal from a judge of that court. Leave may be granted or refused. The effect of the restriction is that a right of appeal is not available, unless leave to appeal is granted.

The application for leave to appeal was made to a judge of the High Court eight months after the decision of the Magistrates Court. On 28 October 2010 a judge of the High

Court refused leave to appeal, on the ground that there were no prospects of success on appeal. The Attorney General was not immediately perturbed by the decision.

Eleven months after the decision by the learned judge denying leave to appeal, the laggard representative of the Attorney General made what is called an application for condonation and extension of time within which to appeal against the decision of the judge of the High Court. Mr *Nyazamba* for the applicant, suggested that the jurisdiction for entertaining the application was to be found under r 19(1) of the Rules of the Supreme Court 1964 (“the Rules”). Mrs *Mtetwa* for the respondents, argued that the rule applied to cases in which the High Court would have exercised jurisdiction and a right to appeal to the Supreme Court lay with leave of a judge of that court or if refused, with leave of a judge of the Supreme Court.

Rule 19(1) provides that:

“(1) A person who has been refused leave to appeal by a judge of the High Court may within ten days of the date when leave to appeal was refused, or within fifteen days of conviction whichever is the later date, apply to a judge for leave to appeal.”

Rule 19(1) falls under Part IV of the Rules which provides under r 16, that provisions of that Part shall apply to “criminal appeals from the High Court”. Rule 16 limits the application of r 19(1) to the application for leave to appeal in respect of appeals from decisions of the High Court in criminal matters, where that court would have been exercising its own jurisdiction. Rule 19(1) is clearly concerned with refusal of leave to appeal against a conviction by the High Court. The right to appeal in respect to which leave must be applied for, is given to the person convicted of a criminal offence by the High Court. Refusal of leave to appeal to the

High Court, cannot be said to be a decision in a criminal matter before the High Court. The refusal of leave has the effect of preventing the proceeding coming into existence in the High Court.

Rule 19(1) of the Rules of the Supreme Court, cannot provide justification for the purported application for condonation and extension of time within which to appeal against refusal by a judge of the High Court to grant leave to the Attorney General to appeal to that court, against a decision of a Magistrates Court in terms of s 198(3) of the Criminal Procedure & Evidence Act.

It is necessary to consider the meaning of the terms of the provisions of s 198(4) (b) of the Criminal Procedure & Evidence Act, and take into account the purpose of the section. The consideration leaves no doubt in the mind, that giving a right to appeal from a decision of a judge of the High Court refusing leave to appeal to that court from a decision of a Magistrates Court made in terms of s 198(3), would defeat the whole object of giving a judge of the High Court the power to decide on the merits whether to grant or refuse leave to appeal to that court.

When a right to appeal is given, subject to the condition that leave to appeal be granted, it is clear that the intention of the legislature is that some tribunal must have the power to decide, whether the right to appeal should be given or not. The object is to protect the process of the appellate court from frivolous and unnecessary appeals by means of an exercise of a screening power. A right to appeal may be given by statute or conditionally as a result of a grant

of leave to appeal. Where the granting of leave is the chosen method of acquiring a right to appeal unless leave is granted, the right does not arise.

The legislature gave, in terms of s 198(4)(b) of the Criminal Procedure & Evidence Act, the power to consent to or refuse the right to appeal against a decision of the Magistrates Court under s 198(3), to a judge of the High Court. No other tribunal has that power. The matter was entrusted and intended to be entrusted to his or her discretion. It is for the judge of the High Court alone, in the exercise of his or her jurisdiction, to look at the merits of the application for leave to appeal to that court and decide in the proper exercise of discretion to grant or refuse leave to appeal. In this case, the decision itself refusing leave was well within the judge's discretion and the reason that the appeal lacked all merit a wholly proper basis for the decision.

Once a decision has been made in terms of a provision to that effect, refusing leave to appeal to a court, that should end the matter and there is no appeal from that court. The clear intention of the legislature, which the Supreme Court must respect, is that the decision of a judge of the High Court refusing leave to appeal to that court in the exercise of jurisdiction must be final. No legislative enactment provides for an appeal against a decision of a tribunal entrusted with the power to grant or refuse leave to appeal.

What is ordinarily provided for, is an application for leave to appeal to the court that has the jurisdiction to hear and determine the appeal, if leave is refused by the court against whose decision the appeal is to lie. It is always a judge of the court to which the appeal lies who

has the last say on the matter. In this case it was a judge of the High Court who had the first and last say on the issue of leave to appeal. An application is not an appeal. It is, therefore, a principle in our legal system that no right of appeal lies to an ultimate Court of Appeal against a decision of an intermediate Court of Appeal refusing leave to appeal to it in the exercise of its jurisdiction on the merits.

The rationale for not providing for a right of appeal against refusal of leave to appeal is obvious. The object of giving the tribunal power to grant or refuse leave to appeal, is to enable it to control what the court should hear and *ipso facto* prevent frivolous and unnecessary appeals that would taint the process of the intermediate appellate court. That object would be defeated if the Supreme Court would also enter the question whether on the merits, the case was fit for appeal to the intermediate appellate court. The introduction of the “filter” requiring leave would be pointless. There would, in fact, be two appeals in every case in which in the ordinary course of things there would be one.

The intention is that there should be one decision to grant or refuse leave in respect of one right of appeal. If a right to appeal against the refusal of leave were given, there would be nothing to stop a party against whom leave to appeal has been granted also appealing against the decision granting leave. This would be the case because there is no provision in any enactment to the effect that no appeal would lie from a decision of a judge of the High Court granting leave to appeal. The Supreme Court would find itself having to again entertain the same question, whether the intermediate court of appeal should have granted or refused leave to

appeal. That would reduce the provisions of s 198(4) of the Criminal Procedure and Evidence Act to an absurdity. It is considerations of judicial comity which should operate in this aspect.

The principles to be applied in the determination of the question whether an appeal lies against a decision of an intermediate court of appeal refusing leave to appeal to it, were enunciated by LORD HALSBURY LC as far back as 1891 in *Lane v Esdaile* (1891) AC 210 at pp 211-2. The decision has been hailed as the “foundation stone” (to borrow the words of BAYDA C.J.S. in *Morgan v Saskatchewan* (1991) 82D.L.R. (4th) 443 at 445a) for these principles. The application of the principles has the effect of eliminating a potential source of delay in the finalization of litigation. The decision has been followed in other English common law jurisdictions.

The principles were expressly adopted by the Supreme Court of Canada in *Canadian Utilities Ltd v Deputy M.N.R. for Customs & Excise* (1964) 41D.L.R. (2d) 429 and *Ernewein v M.E.I.* (1980), 103 D.L.R. (3d)I. The judgments of the English Court of Appeal in *Aden Refinery Co. Ltd v Ugland Management Co. Ltd* [1986] 3 W.L.R. 949 and *Richards v Richards* [1989] 3 W.L.R. 748 confirm that the principles enunciated in *Lane’s case supra* are still the law in England.

In *Canadian Utilities case supra* CARTWRIGHT J at p 435 said:

“It appears to me to have been consistently held in our Courts and in the Courts of England that where a statute grants a right of appeal conditionally upon leave to appeal being granted by a specified tribunal there is no appeal from the decision of that tribunal to refuse leave, provided that the tribunal has not mistakenly declined jurisdiction but has reached a decision on the merits of the application.”

In *Ernewein's case supra* LASKIN C.J.C. writing for the majority at p 6 said:

“The scheme of appellate review by intermediate appellate Courts, whose decisions in turn are appealable here, distinguishes between cases where the appeal to them is as of right and where the appeal cannot come on to be heard unless leave to appeal is previously obtained. In the one set of cases the intermediate appellate Court cannot refuse to hear the appeals but in the other set it is empowered to screen out those cases which it decides not to hear on any of the issues sought to be brought forward for hearing on the merits. In my view, an ultimate appellate Court like the Supreme Court of Canada should respect this differentiation prescribed for Courts below and should recognize that the legislative policy which supports the differentiation is to leave it to the intermediate appellate Court to decide, where leave to appeal is a precondition of an appeal to it on the merits, whether it will entertain it. If it decides that it will not, that should end the matter so far as any further appeal here is concerned unless there is more commanding language than is found in ss 31(3) and 41(1) to warrant this Court’s interference with what is a discretionary determination to refuse to allow an appeal to proceed.”

At p 8 the learned Chief Justice of Canada makes the observation that:

“The logic of LORD HALSBURY’S observation that if a refusal to give leave to appeal is appealable so must be the granting of leave is unassailable. Indeed, what it points up is an obliteration of the distinction in the operation of an intermediate appellate Court between cases which it chooses to hear on the merits and those in which it either refuses to grant leave or those in which, leave having been granted, an appeal is sought to be taken further from the refusal or grant, as the case may be.”

In *Richards case supra* at p 753 LORD DONALDSON OF LYMINGTON M.R.

said:

“In my judgment what *Lane v Esdaile* decided, and all that it decided, was that where it is provided that an appeal shall lie by leave of a particular court or courts, neither the grant nor refusal of leave is an appealable decision.”

In *re Housing of the Working Classes Act 1890 Ex parte Stevenson* (1892) 1QB

609 at p 611 LORD ESHER M.R. said:

“Wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given.”

Applying the principles in the determination of the question raised by this application it is clear that there is no legislative enactment which gives the Attorney General a right of appeal to the Supreme Court from the refusal by a judge of the High Court of leave to appeal to that Court, from a decision of a magistrate finding an accused not guilty of a criminal offence at the close of the case for the prosecution. The effect of a refusal by a judge of the High Court of leave to appeal to that court renders the decision by the Magistrates Court final. There was no legal basis for the purported application for condonation and extension of time within which to appeal. A party cannot seek condonation for non compliance with a rule that does not exist or one the party is under no duty to obey by reason of his or her peculiar circumstances. There cannot be an extension of time within which to appeal where there is no right to appeal. It is a principle of law that procedures should be used for the purposes for which they were created.

The matter is struck off the roll with costs.

Attorney-General's Office, applicant's legal practitioners

Messrs Mtetwa & Nyambirai, respondent's legal practitioners