

REPORTABLE: (24)

ROBERT GUMBURA
v
THE STATE

SUPREME COURT OF ZIMBABWE
BHUNU JA
HARARE FEBRUARY 10, 2021 & APRIL 1, 2021

Applicant in person

R Chikosha, for the Respondent

Application for bail pending appeal.

Judgment No. SC 25/21
Criminal Appeal No. SC 05/21

CA 110/14

s 123(d)(i) (i)
CRB 1899/13

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BHUNU JA: The applicant approaches this Court in terms of s 123(d)(i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] with an application for bail pending appeal. He initially approached the High Court with the same application. The court *a quo* declined jurisdiction and deferred the application for determination by this Court.

Factual background

The applicant is the owner and pastor of a Christian church. He is a convict serving a 20-year term of imprisonment. He was convicted in the Regional Magistrates Court on 4 counts of rape as defined in s 65 of the Criminal Procedure and Evidence Act and 1 count of contravening s 26 of the Censorship and Entertainments Control Act [*Chapter 10:04*].

The Regional Magistrates' Court sentenced him to 50 years' imprisonment of which 10 years were suspended for a period of 5 years on the usual conditions of good behaviour. He appealed to a panel of two judges of the court *a quo* against both conviction and sentence with some measure of success. The appeal against conviction was found to be without merit and dismissed. He was however partially successful in respect of the sentence which was reduced to an effective 20-year imprisonment. Aggrieved by the dismissal of his appeal against conviction he noted an appeal to this Court with leave of the court *a quo*.

Pending the determination of his appeal to this Court, the appellant applied to a single judge of the court *a quo* for bail pending appeal. The learned judge *a quo* declined jurisdiction arguing that sitting as a single judge he was ill-suited to review a judgment of two judges of the same court. In his reasons for judgment at p 4 of the judgment he reasoned that:

“In my interpretation, the default position is that where an applicant has noted an appeal to the Supreme Court against conviction and sentence on trial by the High Court has been sentenced by the High court bail pending appeal should be made to a judge of the Supreme Court. Although the provision speaks to a judge of the Supreme Court or the High Court, the default position is that the Supreme Court judge is the first point of call failing which a High Court judge may determine the application. Even if I am wrong in my interpretation, a situation may arise as in the instant case where I am asked to determine prospects of success on appeal where the High Court on appeal exhausted its jurisdiction. In my respectful view, it is only jurisprudentially proper that a Supreme court judge should be the one to determine the bail pending appeal where the appeal relates to a judgment of the High Court granted on appeal. I must come to the conclusion that the interests of justice and procedural and substantive fairness dictates that I defer to a judge of the Supreme Court to hear the bail application in terms of s 123 (1) (a) (i) of the Criminal Procedure and Evidence Act.”

On the basis of such reasoning the learned judge *a quo* issued the following order:

“Consequently, the application for bail pending appeal is struck off the roll. The applicant if advised may direct the application for determination by a judge of the Supreme Court.”

Analysis of the facts and the law.

With all due respect, the learned judge misconstrued what was required of him in respect of the application before him. He was not being asked to review the judgment of the two- judge panel *a quo*. He was simply being asked to determine the applicant's suitability for bail pending appeal without determining the merits of the appeal. The requirements of an application of this nature are well known. All that he was required to do was to assess the applicant's prospects of success and the likelihood of prejudicing the ends of justice bearing in mind that the applicant is a convict who has lost the presumption of innocence. In the case of *Kilpin v S*¹ this Court held that the principles governing the granting of bail after conviction are different from those governing the granting of bail before conviction. After conviction the presumption of innocence falls away.

In *Williams v S*² the court however went on to hold that:

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“Even after conviction the courts should lean in favour of liberty if this would not endanger the interests of justice. The prospects of success on appeal must be balanced against the interests of the administration of justice.”

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In determining whether or not the learned judge *a quo* had the necessary jurisdiction to hear and determine the application for bail pending appeal against an appeal judgment of the court *a quo*, it is necessary to traverse and interrogate the jurisdiction of the High Court.

An application for bail is essentially a civil matter founded on a criminal case. Section 13 of the High Court Act [*Chapter 7:06*] confers on the court *a quo* unlimited original jurisdiction over all persons and civil matters in Zimbabwe. Beyond that, it is trite

¹ 1978 ZLR 282 (A)

² 1980 ZLR 466 (A)

that the High Court has unlimited inherent jurisdiction over both civil and criminal matters save where its jurisdiction is specifically limited by statute. Over and above its inherent jurisdiction s 171 of the Constitution clothes the High Court with unlimited original jurisdiction over all civil and criminal matters.

The meaning and import of inherent jurisdiction has been the subject of courts and scholarly interpretation. In *Martin Sibanda and Anor v Benson Chinemhute and Anor*³ MAKARAU J as she then was described the concept in graphic imagery as a building open to all citizenry with all its doors and windows open. In *Dardale Investments (Private) Ltd v Econet Wireless Private) Limited*⁴ DUBE J weighed in with a simple but comprehensive definition of the concept of inherent jurisdiction when she said:

“Inherent power is unwritten power which superior courts are endowed with. Inherent power gives the court wide ranging and all-embracing powers to deal with any matter that may be placed before them. This means that a court of inherent jurisdiction has default powers which it can exercise in the absence of express power and deal with all areas of law and all procedural matters involving the administration of justice.”

The learned author Jerold Taitz⁵ describes inherent jurisdiction as the unwritten power without which the court is unable to function with justice and good reason as a superior court modelled on the lines of an English Superior Court.

It is therefore plain, that clothed with inherent jurisdiction the High Court in the absence of any statutory prohibition has the necessary jurisdiction to hear and determine an application for bail pending appeal against an appeal judgment of that court.

³ HH – 131/14

⁴ HH – 656/14

⁵ *The inherent jurisdiction of Supreme Court*, (Cape Town South Africa ; Juta Publishers 1985.

Statutory jurisdiction of the High Court to determine bail pending appeal.

Apart from its inherent jurisdiction the court *a quo* is granted specific statutory power to hear and determine applications for bail pending appeal under s 123 (1) (a) (i) of the Criminal Procedure and Evidence Act. The section provides as follows:

“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
 - (ii) 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 Supreme Court or the High Court;

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As can be seen, the above section grants the relevant courts the power to grant bail pending appeal without excluding or qualifying the High Court’s power to grant bail pending appeal. What this means is that it is at large to exercise its unlimited inherent and statutory jurisdiction to hear and determine any application for bail pending appeal without any let or hindrance.

The learned judge *a quo* therefore misinterpreted the section to mean that the applicant should first approach the Supreme Court before approaching the High Court. That interpretation of the law is clearly untenable and illogical as it turns the hierarchy of the courts upside down. This is for the simple reason that in terms of s 171 as read with s 169 of the Constitution the High Court is primarily a court of first instance whereas the Supreme Court is basically an appellate court. Matters naturally flow from the High Court to the

Supreme Court and ultimately to the Constitutional Court. Doing otherwise as suggested by the learned judge *a quo* will be contrary to law and against common sense and logic for one does not climb a tree from the top but from the bottom going up. Likewise, cases must start from the lower courts going to the higher courts. The learned judge *a quo* was therefore duty bound to complete the application before him without abdicating his responsibility.

In any case, there is no law which permits the learned judge to defer uncompleted bail matters before him for adjudication by this Court as if it was a court of first instance. The deferment was therefore grossly irregular, unprocedural and contrary to law.

Disposition.

That being the case, the learned judge misdirected himself and fell into grave error. His order deferring the application to this Court cannot stand on account of serious irregularity. Having said that it will be necessary to invoke the provisions of CR 5R(2) of the Supreme Court Act [*Chapter 7:13*] and set aside the order of the court *a quo*. The section confers jurisdiction on this Court to intervene on review to correct such irregularities whenever they come to this Court's attention.

In the result it is ordered that:

1. The court *a quo*'s order declining jurisdiction and deferring the application for bail pending appeal to this Court be and is hereby set aside.
2. The matter be and is hereby remitted to the court *a quo* for determination of the application for bail pending appeal.

The applicant appeared in person.

The Prosecutor General's Office, the respondent's legal practitioners.

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