

JAISON MAX KOKERAI MACHAYA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 9 MARCH 2021

Application for leave to appeal

A. Muchadehama, for the applicant
K. Jaravaza, for the respondent

DUBE-BANDA J: The applicant seeks leave to appeal to the Supreme Court against the judgment of this court handed down on 5th January 2021. The grounds upon which leave to appeal is sought, are listed extensively in the application and will therefore not be repeated herein. The main contentions of the applicant are that:

1. The court *erred* and misdirected itself in denying the applicant bail pending appeal;
2. The court also *erred* in holding that there were no prospects of success when there were such prospects of success on both conviction and sentence.
3. The court further *erred* in denying the applicant bail pending appeal on the basis that if granted bail he would abscond when no evidence existed that he would abscond.

The facts are these. The applicant and his co-accused were arraigned before the Provincial Magistrate's Court, sitting in Gweru, on a charge of criminal abuse of duty as public officers as defined in section 174(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The allegations against them were briefly as follows: that on a date unknown to the prosecutor, but during the period extending from 2012 to December 2017, at Gokwe Town Council, the applicant and his co-accused, one or both of them, being public officers in the exercise of their functions as such, intentionally acted contrary to or

inconsistent with their duties as public officers or omitted to do anything which it was their duty as public officers to do, in that they unlawfully took stands that had been allocated to the Ministry of Local Government, Rural and Urban Development as commonage by Gokwe Town Council and for the purposes of showing favour to Striations World Marketing Company diverted and offered the said stands to Striations World Marketing Company and later sold the stands to members of the public. Applicant and his co-accused pleaded not guilty, and after a protracted trial, they were both convicted and sentenced to 48 months imprisonment of which 18 months were suspended on the usual conditions.

Aggrieved by both conviction and sentence applicant and his co-accused noted an appeal to this court and such appeal is still pending under cover of case number HCA 90/20. Both made an application for bail pending appeal before the trial court. The trial court refused to admit them to bail pending appeal. Applicant and his co-accused then noted an appeal, against the trial court's refusal to admit them to bail pending appeal. Applicant's appeal was dismissed by this court, while the appeal of his co-accused was successful. See: *Jason Max KokeraiMachaya and ChibururuChisainyerwa v The State* HB 302/20.

I caused the parties to be informed, *via* the Registrar's office that I intend to dispose of the application for leave to appeal without an oral hearing. The parties were invited to file heads of argument, and to specifically address the question whether, on the facts of this case, and in terms of section 121 (8) of the Criminal Procedure and Evidence Act [Chapter 7:09], and the case of *S and Others v Chiyangwa* SC1/04, applicant has a right of appeal to the Supreme Court. In his heads of argument, applicant makes the following submissions:

1. In terms of section 121(8) Criminal Procedure and Evidence Act [Chapter 7:09], (CPEA) there is no automatic right of appeal to the Supreme Court against the refusal by the High Court to grant bail determined as an appeal against the Magistrates' Court's refusal to grant bail pending appeal.
2. However, this does not mean that the High Court is the final arbiter in such matters. An applicant can still appeal to the Supreme Court provided he gets leave to appeal to the Supreme Court from the said High court.

I do not agree. In *S and Others v Chiyangwa SC1/04* it was held no appeal lies to the Supreme Court from an order of a High Court judge sitting as an appeal judge in a bail application. Where a person applies for bail in the magistrates' court and the application is refused he or she is only entitled to a single appeal against this decision to the High Court. Section 121(8) CPEA removed the right of the person concerned, who had appealed to a judge of the High Court against the bail decision of a magistrate to take the judge's decision, subject to leave, on appeal to a judge of the Supreme Court. The court said:

I have no doubt in my mind that subs (8) of s 121 deprives any party – both the accused person and the Attorney-General – of any right of appeal against any order made by a judge in terms of subs (5) of s 121 of the Act. Thus, when a judge of the High Court hears a bail application in the first instance he is exercising his power in terms of s 121(1) and whatever decision he makes is appealable. However, when he hears a bail application as an appeal judge he does so in terms of s 121(5) of the Act and any order he makes when sitting as such is not appealable because of the provisions of subs (8) of s 121.

Applicant applied for bail in the magistrates' court and the application was refused, he appealed to the High Court, and the appeal was dismissed. As was held in *S and Others v Chiyangwa (supra)* no appeal lies to the Supreme Court from an order of a High Court judge sitting as an appeal judge in a bail application. This point is dispositive of this matter. This court cannot even start to engage with the merits of the application, when no right of appeal exists.

Disposition

In the result, I order as follows:

- 1 . The judgment of this court dated 5th January 2021 is not appealable.
- 2 . This application be and is hereby struck off the roll.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners
Prosecutor-General's Office, respondent's legal practitioners