

FIDELIS NDAWANA
and
TINASHE NDAWANA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 14 January 2021 & 12 March, 2021

Bail Pending condonation of late noting of appeal and extension of time to appeal and condonation of late noting of appeal

Applicant in person
A Muziwi, for the respondent

CHITAPI J: A short judgment in this application is considered necessary in order to clear confusion which may arise on account of the orders which I shall make. It is therefore necessary to give a brief background to this application.

The two applicants were jointly charged with two counts of the offence of stock theft as defined in s 114 of the Criminal Law (Codification & Reform), Act [*Chapter 9:23*]. They were each convicted as charged on 13 February 2015 by the magistrate sitting at Guruve Magistrates Court. The applicants were sentenced on the first count to 16 years imprisonment each with 5 years of that sentence suspended on condition of future good behaviour leaving an effective sentence of 11 years imprisonment. On the second count, they were each sentenced to 10 years imprisonment. The total effective sentence was 21 years after the learned magistrate ordered that the 10 years in the second count should run consecutively with the sentence in the first count. The applicants were therefore to serve an effective 21 years imprisonment. The applicants were legally represented at their trial.

Following on the conviction and sentence, the applicants' legal practitioners noted an appeal against conviction on 20 February 2015. The notice of appeal was prepared by Messrs Tavenhave & Machingauta, Legal Practitioners. It is franked with the official stamp of the Clerk of Court Guruve who also signed on the stamp imprint to confirm the authenticity

thereof. The notice of appeal was however not filed in turn with the Registrar of this Court. In terms of subr (5) of r 21 of the Magistrates Court Criminal Appeals Rules S.I 504/1979, a copy of the notice of appeal which will have been filed with the Clerk of Court which convicted the appellant as accused thereat, “shall be sent to the Registrar.” There is no time bar given for sending the copy of the notice of appeal to the Registrar. There is equally no specific provision which provides for the effect of the failure or delay in sending a copy of the notice of appeal to the Registrar of this court. I should note here that at their trial, the applicants were represented by a different form of legal practitioners, Messrs Mutuso & Mhiribidi Attorneys. The relevance of the change in legal practitioners will become apparent in due time in this judgment.

The applicants as self-actors, under case No. B 1825/20, filed an application headed “bail application pending leave determination.” In the body of the application they indicated that the application was founded on the provisions of s 123 (b) (ii) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] which provides for the making by a convict of an application for bail pending review or appeal. The application was however on the face of it incompetent because there was nothing to indicate that the applicants had any pending appeal or review. It was the easiest of tasks to therefore dismiss the application as non-suited. However, having noted that the applicants were self-actors who could be victims of their ignorance of the law and noting that the Court being a court of justice has a duty to aid the realization of justice by assisting self-actors to have their matters determined on merits than on technicalities, I engaged the applicants to understand where they were coming from and what they intended to achieve.

The applicants submitted that it was through advice from other inmates to file an application for bail. They also indicated however that they had a pending application for condonation of late noting of appeal. The application was filed under case no. CON 155/20. I asked the Registrar to avail the record CON 155/20. On perusal of the record, I noted that the application CON 155/20 was still pending determination. The record had not been referred to the judge because according to a letter from the registrar addressed to the applicants, the application could not be referred to the judge in the absence of a record of proceedings which the applicants were asked to furnish and file.

The trial record was however subsequently sent to the Registrar by the Clerk of Court. Upon perusal of the original record, it was noted that the applicants contrary to what they stated in the condonation application, had a pending appeal filed on 20 February, 2015 at Gurusu Magistrates Court by Messrs Tawenhawe & Machingauta legal practitioners. The applicants expressed ignorance of the notice of appeal. They surmised that a relative (s) must have engaged the legal practitioner to note the appeal without advising them. The applicants after being given an opportunity to peruse the notice and

grounds of appeal adopted it but indicated that they also intended to appeal against sentence. The and the notice of appeal was against conviction only.

Upon perusal of the trial court record, I observed that on 28 August, 2015, the resident magistrate had written a letter to the Registrar to dismiss the applicants' appeal on the basis that transcription of record costs had not been paid. In terms of the relevant provisions of the Supreme Court (Magistrates Court) Criminal Appeal Rules, S.I 504 of 1979, a failure to pay for the transcription of the record of trial proceedings for purposes of appeal invalidates the notice of appeal. It was confirmed that the Registrar did not take procedural steps to dismiss the appeal as requested, quite understandably so because no appeal record had been opened as copy of the notice of appeal had not been sent to the Registrar of High Court as provided for in sub rule (5) of r 22 of S.I 504/1979. In my reading of the sub rule (5) aforesaid, the duty to send a copy of the notice of appeal to the Registrar is that of the Clerk of Court. Be that as it may, the appeal remains valid to date albeit being against conviction only. The application for condonation or leave to appeal out of time against conviction was therefore unnecessary since the applicants already have a pending appeal against conviction.

The applicants in their condonation application indicated their intention to appeal against sentence. The respondent submitted in this regard that the sentences imposed on the applicants were appropriate and that the magistrate did not misdirect himself. In particular, it was stated that the magistrate properly determined that there were no special circumstances to motivate imposition of a sentence less than the mandatory minimum sentence. The applicants in their proposed grounds of appeal submitted that the sentences imposed were excessive because the applicants are first offenders and bread winners for their families. They submitted that that the imposition of just the mandatory minimum sentence would have been sufficient.

In casu, the magistrate determined that there were no special circumstances to avoid imposing of the mandatory minimum sentence. I have considered the magistrate's reasons for sentence. There is really no justification which was given by the magistrate for imposing a sentence of 16 years imprisonment in the first count. The sentence would be just 2 years shy of doubling the mandatory minimum sentence. Even on the second count, there was no justification given for imposing 10 years imprisonment when the mandatory minimum sentence is 9 years though the upper limit is 25 years imprisonment. A mandatory minimum sentence is considered by the legislature as the lowest deterrent sentence. There has to be cogent justification given to exceed it. There is as observed, no such compelling justification which was given by the magistrate. There are therefore prospects of success against sentence and leave to appeal out of time against sentence will be granted because in addition to the prospects

of success I do accept the applicants explanation for delay in making the condonation application being their indigence to engage lead representation and lack of knowledge that they could seek condonation until they learnt of the availability of this route when judges visited prison and addressed prisons encouraging them to pursue their appeal and review rights if not satisfied with their convictions and sentences.

I have considered how best, the application can be disposed of without creating confusion since there will now be two separate notices of appeal against conviction and sentence respectively. I consider that it is advised for the convenience of both the applicants and the appeal court that an appeal incorporating consolidated grounds of appeal against conviction and sentence will be convenient to deal with. The order I make will therefore be as follows to dispose of both case NOs B1825/20 and CON 155/20.

1. The application for bail pending condonation of the application to note appeal out of time is invalid. In consequence it is struck off the roll.
2. The application for condonation of late noting of appeal (CON155/2) is struck off the roll in so far as it pertains to the appeal against conviction. As against sentence the application is granted.
3. For purposes of expediency and good order in the processing of and hearing of the appeal, the applicants are granted leave to file a fresh notice of appeal against both conviction and sentence.
4. The fresh notice of appeal as aforesaid shall be filed within 10 days of the date that the Registrar services the applicants with a copy of this judgment.
5. The applicants are additionally granted a certificate to prosecute appeal in person.

National Prosecuting Authority, respondent's legal practitioners