

MADALISTO RANCHI
versus
STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 17 October 2018

Application for leave to Appeal and Bail Pending Appeal

Applicant in person
T Mapfuwa, for the respondent

CHITAPI J: The applicant applies for condonation of late noting of an application for leave to appeal against conviction and sentence in case No. CRB 212/16 now available under judgment HH 515/17. The applicant was convicted by TSANGA J of with assessors of murder as defined in s 47 (b) of the Criminal Law Codification & Reform Act, [*Chapter 9:23*] following a contested trial which was completed on 2 August 2017. He was sentenced to 20 years imprisonment. The applicant was required if minded to note an appeal, to apply orally for leave to appeal to the Supreme Court immediately after the pronouncement of sentence in terms of Order 34 r 262 of the High Court Rules, 1971. Failing the making of the oral application, the applicant would still have had 12 days from the date of sentence to make a written application for leave to appeal in terms of r 263. Failing compliance with r 263, the applicant could still utilize the provisions of r 266 in terms of which the applicant applies for condonation of failure to comply with rr 262 and 263. The extended period given in r 266 is subject to limitation of time in r 267 which provides as follows:

“267 Limitation of time for application for condonation

No application in terms of r 266 may be made after the expiry of twenty-four days from the date on which the sentence was passed, unless the judge otherwise orders.”

The applicant was represented by *pro-deo* counsel at his trial. Counsel did not make application for leave to appeal in terms of r 262 or 263. This application is brought by the applicant in person. It should therefore be considered under the provisions of r 267 because it was filed on 11 September 2018 well after the 24 days limitation provided for in r 267 and has in fact been filed a year and some days later. In filing the application, the applicant did not deal with the first issue that the court considers in such applications, which is for the applicant to explain or advance reasons why he did not comply with the rules. It appeared to me that it would not advance the interests of justice to dismiss the application for reasons of the omission because the applicant would still then file another application. I allowed the applicant to file a supplementary statement explained the reasons for his default. The applicant did so and explained that he had no resources to instruct a legal practitioner and was not aware of the procedures for noting an appeal to the Supreme Court after being notified that any intended appeal was now time barred.

The State did not oppose the application for condonation of the applicant's failure to timeously apply for leave to appeal. I consider the concession to be fair. It is a reality that convicts do not have access to free legal representation as of right as happens at trial when a *pro-deo* counsel is assigned. The *pro-deo* counsel's brief ends with the conclusion of the trial. The convicted person invariably becomes a self-actor in pursuing his or her rights of appeal. It is unfortunate that the system does not provide automatic *pro-deo* legal representation on appeal. It is unfortunate because it is after conviction and sentence that the processes and procedures become more difficult and require a trained hand in the form of a legal practitioner. The process of appeal is not a walk in the park because of *inter-alia* stringent rules governing the drafting of the appeal papers and records processing. So far as I am aware, whilst the convict whose case is on appeal does not have automatic audience to appear in person in the Supreme Court to argue the appeal, such convict can note the appeal in person. The system needs to be continuously fine-tuned to advance the interests of justice and fairness to the convict. The area of criminal appeals and the availing of counsel to prosecute the appeals as is done with trials must be revisited and improved upon.

Having condoned the late application, the court must consider whether or not to grant leave to appeal. Leave to appeal will be granted where the intended appeal is demonstrated to have prospects of success. The facts of the case are clearly set out by TSANGA J in case No. HH 515/17. The applicant struck his wife with an unknown object and the wife died from injuries sustained

thereby. The applicant's defence which the court rejected was that he lost control and assaulted the deceased after finding the deceased with a lover. The issue falling for the trial court's determination was whether or not the applicant acted under provocation and if proved, whether or not the provocation amounted to a complete defence. The trial court meticulously dealt with the evidence and dismissed the applicant's allegations of infidelity on the part of the deceased. The only issue that exercised my mind is the impact of feelings of jealous which the trial court considered to have played on the applicant's mind when he committed the offence. The court held that provocation as defence in situations where a spouse is killed because of adultery cannot find a place in our law because of the provisions of the Constitution particularly s 52 which guarantees the right of every person to personal security and outlaws violence from public or private actors. The pronouncement by the court in this regard has far reaching consequences in that it qualified the application and constitutionality of the defence of provocation as given in s 239 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. To this extent, because of the seeming contradiction and the fact that the applicant in his grounds of appeals seeks to impugn the court's findings that he did not act under provocation, the applicant must be allowed the opportunity to advance his arguments. It may well be that another court might find the presence of provocation arising out of feelings of jealousy and the court would then consider further whether a lesser verdict of culpable homicide could be retained if provocation is found established albeit not directly caused by the conduct of the deceased.

As against sentence, the applicant seeks to argue that the sentence of 20 years was excessive under the circumstances of the case. Having gone through the reasons for sentence, the learned judge dealt with sentence in two paragraphs and in particular considered that the applicant was guilty of "reckless murder". It may well be that the applicant may have the sentence interfered with if one considered that not much weight was placed on his personal circumstances including that he was motivated by jealous. The learned judge did not from the reasons for sentence appear to have given any weight to the jealousy factor. Under such circumstances there is scope for another court to come to a different sentence. It is in the interests of justice to allow the applicant to appeal against sentence as well.

The last issue I must deal with is that of bail pending appeal. In view of the findings made that the applicant as admitted by him killed the deceased, the only issue which arises on appeal is

whether provocation was proved and if it is available to the applicant as a complete defense. Provocation in terms of s 239 of the Criminal Law Codification and Reform Act, can never be a full defence to a charge of murder. At best it reduces the crime of murder to culpable homicide or at worst it is considered a factor of mitigation. The point made therefore is that the applicant on the facts of this case would not escape a substantial term of imprisonment even if his appeal succeeds to the extent that the verdict of murder is altered to culpable homicide.

The applicant must therefore continue to serve his sentence pending appeal. It would not be in the interests of justice that a break in serving a prison term which is the appropriate sentence save that its length may be reduced should be ordered through admitting the applicant to bail pending appeal.

Under the circumstance the following order which disposes of both case numbers CON 207/18 and B 1272/18 is made.

1. The application No. CON 207/18 for condonation of late application of leave to appeal is granted.
2. The application for leave to appeal against both conviction and sentence in case No. CRB 212/16 is granted and an extension of time is granted to the applicant to file his proposed notice and grounds of appeal within 10 days of delivery upon him of this order.
3. The Registrar shall ensure that the applicant is served with a copy of this order and should endorse proof of such service on record.
4. The application for bail pending appeal filed under case No. B 1272/18 is dismissed.

National Prosecuting Authority, respondent's legal practitioners