NORMAN GANDIDZANWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 September 2021

Application for leave to appeal against dismissal against conviction and sentence.

Applicant in person
R Chikosha, for the respondent

CHITAPI J: The applicant was convicted by the regional magistrate at Harare on 15 March 2017 on two counts of attempted armed robbery "as defined in s 189 as read with s 126 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] and on one count of possession of a fire-arm without a fire arms certificate as defined in s 4(1) of the Fire arms Act, [*Chapter 10:09*]. The details of the two charges of armed robbery were that, on 14 January 2017, the accused whilst armed with a pistol which is the subject of the charge of unlawful possession of a fire arm without a permit, threatened two complainants with the pistol at Pearl House, Samora Machel Avenue, Harare and tried to rob each of them respectively of a telephone handset and cash which was in the possession of each of the two complainants.

The applicant was convicted of the three charges. He was sentenced on the two counts of attempted armed robbery, taken as one for purposes of sentence to 8 years imprisonment. In respect to the third count of unlawful possession of a fire arm without a permit, the applicant was sentenced to 16 months imprisonment. Of the 8 years sentence aforesaid, 2 years were suspended on conditions of future good behaviour. Of the 16 months imprisonment for unlawful possession of a fire-arm, 4 months were suspended on conditions of future good behaviour. The effective sentences were therefore 6 years in relation to the two counts of attempted armed robbery and 12 months in relation to the count of unlawful

possession of a fire-arm without fire arms certificate. The two sentences were ordered to run concurrently, uncleaning that the applicant was to serve 6 years imprisonment.

The applicant was not satisfied with both his conviction and sentence. He noted an appeal to this court against both conviction and sentence. The whole appeal aforesaid was dismissed by HUNGWE and WAMAMBO JJ on 13 July 2018. The applicant is not satisfied with the dismissal of the appeal and has filed this application for leave to appeal to the Supreme Court. The leave to appeal which the applicant wishes to obtain is for him to appeal against both conviction and sentence. The applicant filed this application on 15 November, 2019. Before filing the application, the applicant had requested for a fully dressed judgment on the reasons for the judgment of the appeal court. In between, the applicant filed a bail application and also attempted to note an appeal to the Supreme Court on 4 April 2019 without leave. The bail application was unsuccessful.

An application for leave to appeal to the Supreme Court against the judgment of the High Court sitting a court of appeal is provided for in s 44(4) of the High Court Act, [*Chapter 7:06*]. The provisions of that section read as follows:

> "(4) Any person convicted and sentenced on a criminal trial by an inferior court or tribunal who is dissatisfied with the judgment of the High Court on an appeal against each conviction or sentence or with the judgment of the High Court on a review other than a review pursuant to s 57 of the Magistrates Court Act [Chapter 7:10], shall have the same right of appeal to the Supreme Court as is conferred by subsection (2) on any person convicted on a trial hold by the High Court."

The convicted person's right of appeal aforesaid is exercisable by the convict as of right or subject to restrictions imposed by the law. In this respect, the right of the convict to appeal in consequence of a conviction and/or sentence imposed by the High Court is qualified to the extent set out in ss 2 and 3 of the High Court Act. The provisions of s 44 apply *mutatis mutandis* to an appeal against the dismissal by the High Court of an appeal brought by an appellant who was convicted in the Magistrates Court and unsuccessfully appealed to the High Court against the conviction and/or sentence. The provisions of ss 2 and 3 of s 44 provide as follows:

> **"44 Right of appeal from High Court in criminal cases**
> (1) In this section—
> "judgment" does not include a decision of the High Court to reserve a question in terms of section *twenty-four* or *twenty-five*.

(2) A person convicted on a criminal trial held by the High Court—
(*a*) may appeal to the Supreme Court against his conviction on any ground of appeal which involves a question of law alone;
(*b*) may, with the leave of a judge of the High Court or, if a judge of the High Court refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact:
Provided that a person who appeals to the Supreme Court on a ground of appeal which involves a question of law alone may, without applying to a judge of the High Court, be granted leave to appeal by the Supreme Court should it appear to the Supreme Court on the hearing of the appeal that the ground of his appeal involves a question of mixed law and fact;
(*c*) may, if sentence of death or imprisonment for life has been passed upon him, appeal to the Supreme Court against his conviction or the sentence or both such conviction and sentence;
[Paragraph as amended by s. 21(1) of Act No. 8 of 1997]
(*d*) may, where the sentence to which he was liable on conviction was a sentence fixed by any law, appeal to the Supreme Court on the ground that the sentence passed upon him was not a sentence fixed by law in respect of the offence of which he was convicted;
(*e*) may, where the sentence to which he was liable on conviction was not a sentence fixed by law, and where sentence of death was not passed upon him, with the leave of a judge of the High Court or, if a judge of that court refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against his sentence or order of forfeiture or other order following on conviction.
(3) For the purposes of subsection (2), a ground of appeal that there was no or insufficient evidence to justify a conviction shall be deemed to be a ground of appeal which involves a question of fact alone."

The quoted provisions of s 44 of the High Court Act must be read together with the provisions of s 41A of the same Act. The provisions of s 41A provide as follows:

"41A Time for obtaining leave to appeal

(1) In any case where a person desires to apply to a judge of the High Court for leave to appeal, such application shall be submitted to the registrar of the High Court within such period and in such manner and form as may be prescribed by rules of court.

(2) If the applicant is in prison, an application in terms of subsection (1) may, within the time prescribed, be given to the officer in charge of the prison, who shall forward the application to the registrar of the High Court.

(3) A judge of the High Court, may extend the time for giving notice of intention to appeal or of submitting an application for leave to appeal, notwithstanding that the time for giving such notice or submitting such application has already expired."

The provisions aforesaid provide that the time limit for seeking leave to appeal is as set out by the rules of the court. Order 34 rr 262 to 268 provides for the time limits and procedure to apply for leave to appeal. The provisions thereof read as follows:

"**APPLICATION FORLEAVE TO APPEAL TO THE SUPREME COURT**

262. Criminal trial: oral application after sentence passed

Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed. The applicant's grounds for the application shall be stated and recorded as part

of the record. The judge who presided at the trial shall grant or refuse the application as he thinks fit.

263. Criminal trial: application in writing filed with registrar

Where application has not been made in terms of rule 262, an application in writing may in special circumstances be filed with the registrar within twelve days of the date of the sentence. The application shall state the reason why application was not made in terms of rule 262, the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted.

264. Service of written application on Attorney-General: written submissions by Attorney-Gener…

A copy of the application shall be served on the Attorney-General immediately after the application is filed with the registrar. The Attorney-General may file with the registrar written submissions on the applicant within two days of the date of service on him.

265. Consideration of application and submissions by presiding judge

Upon receipt of the application and the submissions of the Attorney-General, if any, the registrar shall place the matter before the presiding judge, in chambers, who shall grant or refuse the application as he thinks fit. The presiding judge may in his discretion require oral argument or any particular point or points raised and he may hear any such argument in chambers or in court.

266. Application for condonation for failure to apply timeously

Where an application has not been made within the said period of twelve days, an application for condonation may be filed with the registrar and served forthwith on the Attorney-General, together with an application for leave to appeal. The Attorney-General may, within three days of the date of the said service, file with the registrar submissions on both applications. The provisions of rule 265 shall apply to both such applications and submissions, if any.

267. Limititation of time for application for condonation

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

268. Where presiding judge not available to deal with application

If the presiding judge is not available to deal with any application hereinbefore referred to, it may be dealt with by any other judge."

It is not easy to apply the time limit rules and procedures set out in rr 262-267 in circumstances where the applicant seeks leave to appeal to the Supreme Court after the dismissal of his appeal by the High Court against conviction and/or sentence of the magistrates court. Rule 262 which provides for the making of an oral application for leave to appeal immediately after sentence has been pronounced presents practical difficulties in implementing where the appeal arises from a situation of a dismissal by the High Court of a magistrates court originating appeal. Firstly the decision intended to be appealed against would be a decision of two judges sitting on appeal. Ordinarily the judgment of the two judges bind a single judge. Section 44(2) (b) of the High Court provides that the leave of any single judge of the High Court, is required to be granted to a convict whose appeal was dismissed by the High Court on appeal where such convict intends to further appeal to the

Supreme Court and the intended appeal raises a question of fact alone or of mixed fact and law. Where the proposed appeal raised a question of law only, leave to appeal is not required. The same applies where the appeal is against conviction and sentence of death. The other instance where leave to appeal is not necessary is where the ground of appeal is that an incompetent sentence was passed in a case involving an offence where sentence upon conviction is fixed by law.

It is debatable whether it is ideal for the application for leave to appeal following the dismissal of an appeal by the High Court to be determined by a single judge as clearly, the judge would be reviewing the correctness of such judgment and expressing a judgment on whether the judgment on appeal is potentially wrong. Notwithstanding the view I express, the law as it stands has provided an exception to the principle that the appeal judgment binds a single judge so far as an application for leave to appeal against the judgment on appeal form a decision of the magistrates' court is concerned. The exception is that in such an application, the doctrine of *stare decisis* will not apply. It is my most respectful view that this area of procedural law may if the law makers may consider it advised, should be reflected upon and debated.

Reverting to the circumstances of this case, it is common cause that the applicant did not apply for leave to appeal immediately upon the dismissal of his appeal. The appeal court dismissed the appeal on the turn after submissions of the parties and noted that reasons for the order would be provided in due course. Needless to state then that the applicant did not have the reasons for judgment from which to decide whether it was advised to note appeal. The appeal was heard on 13 July 2018. The reasons for judgment were handed down on 13 February 2019. The applicant was completely out of time to apply for leave to appeal by the time that the reasons for judgment were handed down.

The applicant having failed to apply for leave to appeal as provided for in rr 262 – 266 was barred from applying for leave to appeal including applying for condonation of failure to apply for leave timeously unless the judge otherwise orders. In practical terms, the judge can only order otherwise upon application made to him for further condonation. In practice, it would be advisable that the indulgence sought in terms of r 267 be accompanied or conjoined with an application for condonation as envisaged in r 266 to avoid a multiplicity

of applications. The application for condonation should also be accompanied with the application for leave to appeal.

In casu the applicant filed this application for leave to appeal on 15 November, 2019. The application appears to have been misfiled within the system because there is correspondence on record showing that the application was not located. The record of proceedings itself was also not available. The applicant's application required that the indulgence of the judge is first sought in terms of rule 267 before the condonation application could be filed for in terms of r 266. In his application, the applicant averred that he filed the application late because he did not have the record of proceedings. Rule 267 does not set out the precise form that must be followed by the applicant who files an application out of time. However, it still remains the duty of the applicant regardless of the precise nature of the application not being provided, to allege and establish such facts and circumstances which precluded him or her from complying with the rules, as would persuade the judge to hold that the indulgence sought is merited in the interests of justice. Again the circumstances of each case must determine whether or not in any given application for the grant of the indulgence, the indulgence should be granted upon a judicious exercise of the discretion.

In casu, I was persuaded to indulge the applicant and to condone the late filing of the condonation application and to determine the application for leave to appeal in turn. I treated the application as a hybrid or mixed application as it were. In my view the ends or interest of justice in this case would be best served by adopting this approach. The applicant did not immediately obtain the reasons for judgment through no fault of his. The record itself could not readily be availed. Again the applicant could not be blamed for that. The application therefore has taken longer than what should have been a reasonable periods to be determined. Correspondence on record shows that the applicant never lost interest in his application because he followed up on the record and on the determination of the same.

The details of the charges on which the applicant was convicted were set out in detail in the record of proceedings and in the appeal judgment on p 2 of the cyclostyled judgment HH 141/19. In brief, there was an armed robbery committed at Pearl House, 61 Samora Machel Ave, on 14 January, 2017 involving two complainants who had engaged with the applicant in a foreign currency exchange deal. It was during the course of the purported transaction that the applicant produced a pistol and ordered the complainants to surrender

their cash and other valuables which the applicant through fear, surrendered to the applicant. The applicant denied any involvement nor being present at the scene. In other words his alleged involvement was a case of mistaken identity or an alibi as noted in the appeal judgment. The applicant was convicted on the basis that the court believed the state witnesses and disbelieved the defence of the applicant. The evidence of the State comprised testimonies of the two complainants, the security guards at Pearl House and the police officer who arrested the applicant. The complainants identified the applicant as the person who attempted to rob them and so did the security who saw the applicant enter Pearl House and booked the applicant in a different name.

On the other hand the applicant contended that he is the one who was a victim of a robbery. He testified that the complainants were the robbers who had observed him receiving US$700.00 from a relative. The complainants allegedly tracked him as he walked along Leopold Takawira Street. They told him that he had dropped his metal identity card. When he bent over to pick it up the complainants attacked him and robbed him of the money. A rowdy crown then attacked him. In other words according to the applicant he was the victim yet he found himself in the dock with his attackers or villains turned state witnesses as complainants.

I therefore proceed to consider the application for leave to appeal. The approach of the court in determining an application for leave to appeal is that the court will consider whether or not the intended appeal has prospected of success. In this regard the court takes into account the applicants proposed grounds of appeal. The applicant's grounds of appeal are not clear and concise as required by the rules of court. They are argumentative and in the nature of heads of argument. In the first ground the applicant averred that the appeal court misdirected itself to uphold his conviction on evidence which was contradictory. He averred that the State had failed to prove that the applicant was present at the scene. The appeal court dealt with this ground of appeal in detail and noted that whatever inconsistencies in evidence alleged by the applicant were of no great moment. The appeal court noted that the credibility and demeanour of a witness including the accused person during a trial is eminently the province of the trial court which has the advantage of observing witnesses testifying and forming impressions on their reliability.

The appeal court on p 3 of the cyclostyled judgment noted that the appeal court should not lightly interfere with the finding of demenaour and credibility made by a trial court. The court cited case law authority on the point including *S* v *Isolamo* 1985 (1) ZLR 62 at 63. The appeal court analyzed the trial record and the evidence of the State witnesses which is also set out in summary. The court noted that the evidence of the Security guard was compelling because he did not have prior knowledge or dealings with either the complainants or the applicant. He was an impartial witness who was only discharging his duties when he interacted with the applicant and complainants. Police on arrest searched him and found in the applicants' possession a metal identity card for Paidamoyo Mureriwa. The security guard had also allowed the applicant to sign in the applicants two accomplices whom he passed off as his brothers.

It was also the evidence of the security guard which the trial and appeal court accepted that the applicant had booked his entry into Pearl House using the name P. MURERIWA ON 13 January, 2017. The security guard saw the applicant in possession of the fire-arm as he fled from Pearl House followed by the complainants who were chasing him heading down Samora Machel Avenue. The applicants professed alibi was dismissed as untruthful because there was overwhelming evidence of the applicant's involvement in the attempted robbery. The applicant was placed at the scene by the security guard and the visitors book corroborated the security guard's evidence on the name allegedly used by the applicant. Further corroboration was to be found in the evidence of recovery of a metal identity card for Paidamoyo Mureriwa in the possession of the applicant upon arrest immediately after the commission of the attempted armed robbery.

I have not been able to find fault with the assessment of the evidence as noted by the appeal court. The evidence against the applicant was in my view overwhelming and read well in large measure. The trial court as noted by the appeal court could not have reached any other conclusion than the guilt of the applicant. The alleged inconsistencies in the evidence of state witness were of no great moment. If anything the inconsistencies in the evidence of State witness were of no great moment. If anything, the inconsistencies show that there had been no rehearsal of evidence by witness. The grounds of appeal as I indicated are in the nature of heads of argument wherein the applicant lists the discrepancies in evidence which he seeks to rely upon to argue that the State evidence was not reliable. He goes to great

lengths to show that there were time discrepancies in the evidence of the witnesses. However time was not of the essence but identification and its reliability. The arguments by the applicant in relation to the security guard and the arresting detail having fabricated evidence is not supported upon a reading of their evidence.

Ultimately, the proposed appeal was essentially based on the same ground of appeal which the appeal court dismissed which was that the trial court was misdirected to convict the applicant on unreliable and contradictory evidence. For the reasons set out by the appeal court, the trial court was not misdirected in its findings of demeanor since the reading of the evidence supported a finding of the state witnesses evidence being credible. It is my view that the intended appeal does not enjoy any prospects of success. To grant leave to appeal would amount to promoting an abuse of the court system.

There is no indication that the applicant intends to appeal against sentence. That being, the application is determined a follows:

> "The application for leave to appeal against the judgment of the High in case No. CA 188/17 being (judgment No. HH 141- 19) is hereby dismissed."

National Prosecuting Authority, respondent's legal practitioners