ZARIKA UMALI
and
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU AND CHIKOWERO JJ
HARARE, 5 and 7 September 2022

Application for leave to appeal

F Murisi, for the applicant
R Chikosha, for the respondent

CHIKOWERO J:

1. This is an application for leave to appeal to the Supreme Court.
2. The applicant was convicted of attempted murder as defined in s 47 as read with s 189(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
3. The magistrates court sitting at Karoi sentenced the applicant to 4 years imprisonment of which 2 years imprisonment was suspended for 5 years on the usual conditions of good behaviour.
4. He appealed against both conviction and sentence.
5. We heard the appeal on 5 September 2022 whereupon, at the conclusion of argument, we delivered an *ex tempore* judgment dismissing the appeal in its entirety.
6. Mr Murisi, on behalf of the applicant, made an oral application for leave to appeal to the Supreme Court against our decision to uphold the conviction.
7. In response, Mr Chikosha did not advert to the merits of the application. Instead, he raised an objection to the effect that the application was premature. The applicant, who had been on bail pending the determination of the appeal, had now been convicted. His status had changed. He had to first of all regulate his status before he could apply for leave to appeal. In other words, since the dismissal of the appeal automatically terminated his bail, and not being present at the hearing of the appeal, the applicant could not be making an application

for leave to appeal without first of all complying with the exigencies of the judgment dismissing his appeal. Mr Chikosha prayed that we strike off the application from the roll.

8. Mr Murisi argued that there is no law requiring an appellant who is legally represented to be present at the hearing of his appeal. Accordingly, a reading of s 94(8) and (9) of the High Court Rules 2021 permitted the applicant to proceed in the manner he had done.
9. There certainly is a gap in the law. Section 194(1) of the Criminal Procedure and Evidence Act [Chapter 9:07] (the code) makes it mandatory for an accused to be present at trial. Only when he so conducts himself as to make the continuance of the proceedings in his presence impracticable may the court order that he be removed and direct that the trial proceed in his absence.
10. There is no equivalent provision to s 194(1) of the Code in respect of appeals. We think that the lawmaker may consider closing this loophole.
11. In terms of s 194(2) of the Code if an accused absents himself during the trial without leave, the Court may direct a warrant to be issued to arrest him and bring him before the Court forthwith. In practice, a warrant of arrest is invariably applied for and issued. The trial Court has no discretion in the matter. What s 194(2) of the Code entails is that the trial cannot proceed in the absence of an accused who absents himself from trial without the leave of the court.
12. Again, there is no equivalent provision to s 194(2) of the Code in respect of appeals. To preserve the integrity of the criminal justice system, the lawmaker may consider enacting the appropriate statutory provisions.
13. In the meantime, we must deal with the objection to the present application.
14. This court has inherent power to regulate its own proceedings.
15. We pause to observe that had the court which admitted the applicant to bail pending appeal included a condition that the applicant should be present at the hearing of the appeal the situation which now confronts us would not have arisen. Further, we think also that the court order for bail pending appeal should be part of the appeal record the same way that an order for leave to appeal out of time is part of the appeal record. This is so because the former also has something to do with the appeal.

16. Our view is also that, with or without a bail condition requiring an applicant to be present at the hearing of his appeal, there is nothing precluding the Registrar to couch a notice of hearing in such a way as to require even an appellant who is legally represented to be present at the hearing of his appeal.
17. The foregoing observations aside, we agree that the application for leave to appeal is not properly before us.
18. The applicant should have foreseen that the court may determine his appeal at the hearing. He should have been present so that, in the event of the appeal failing, and he were minded to seek leave to appeal, he would have properly instituted such a proceeding. An application for leave to appeal is a fresh proceeding. It is not a continuation of the appeal. We became *functus officio*, in respect of the appeal which was before us, the moment that we rendered judgment thereon.
19. That the application for leave to appeal is a proceeding different from the appeal determined by us is also borne out by the fact that the applicant will be serving, even if he eventually obtains leave to appeal, and proceeds to note such appeal, unless he obtains bail pending the determination of that appeal.
20. Having fallen back on this Court's inherent powers to regulate its own proceedings, we are satisfied that the application for leave to appeal is not properly before us. This is a criminal matter. It is not, for instance, an opposed civil application where the presence of legally represented litigants is unnecessary. The applicant is neither in prison, serving his sentence, nor present before us to enable us to deal with his application on the merits.
21. In the result, the application for leave to appeal to the Supreme Court be and is struck off the roll.

22. The Registrar is directed to avail a copy of this judgment to the Law Society of Zimbabwe for distribution to all law firms to enable legal practitioners to ensure that their clients (appellants or respondents in criminal matters) are present in Court at the hearing of such appeals.

CHIKOWERO J:……

ZHOU J: ……I agree

Murisi and Associates, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners