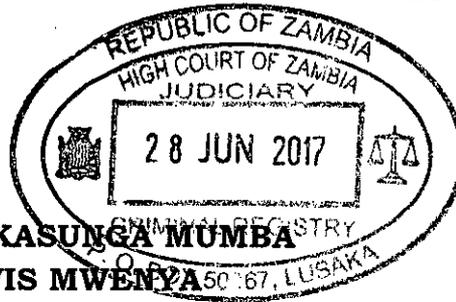


**IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

HPBA/17/2017



**SYDNEY KASUNGA MUMBA
LEWIS MWENYA**

V

THE PEOPLE

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 28th DAY OF JUNE,
2017**

*For the Appellants : Mr. Mateyo Kamanga, Anti - Corruption Commission
(ACC)*

For the Respondent : Mr. James Mataliro, Mumba Malila and Partners

R U L I N G

CASES REFERRED TO:

1. **Joseph Watton 1979 CR APP 293**
2. **Anuj Kumar Rathi Krishnan V People SCZ No 19 of 2011.**

LEGISLATION REFERRED TO:

1. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**

This is a Ruling on an application made by the appellants for an order to be admitted to bail pending appeal, brought pursuant to Section 332 (1) of the Criminal Procedure Code (CPC), Chapter 88 of the Laws of Zambia. Counsel for the appellants Mr. Mataliro relied on the affidavit filed in

support of the application on 9th June, 2017. He stated that the offences which the appellants were convicted of are bailable, and that the appellants are of fixed abode, and have families. Therefore they are not a risk factor, and that while the matter was before the Subordinate Court they had complied with the bail conditions that were set, until the matter was concluded, and they were convicted.

Counsel's further submission was that the appellants are ready to comply with the conditions that this court may set, if bail is granted in this matter. He also submitted that it is a matter of knowledge that the courts are clogged with matters, and appeals take long to be heard. Therefore it is in the interests of justice that the appellants should be granted bail pending appeal, until the appeal is determined. That if bail is denied, the appellants will suffer great prejudice as if they were to succeed on appeal, they would have served all or a substantial portion of their sentences.

Reference was made to the fact that the application was made before the trial court, and was denied, as there were no arguments to convince the court on the prospects of success of the appeal. However further grounds had since been filed, so the reasoning of the trial court was non-existent. That if the reasoning of the court was the only impediment, the further grounds had cured the problem. Counsel asked the court to exercise its discretion judicially, and noted that the respondent did not object to the application in the court below. In conclusion it was stated that no prejudice would be occasioned in granting the application.

In response Mr Kamanga on behalf of the Anti-Corruption Commission (ACC) opposed the application, arguing that bail is the security that is taken by the court to ensure that a person shall attend court when

required. That before granting bail, the court has to ensure that the applicant furnishes sufficient grounds, as the court is dealing with convicts, as was held in the case of **ANUJ KUMAR RATHI KRISHNAN V PEOPLE SCZ No 19 of 2011**.

It was submitted that in that case Hon Mrs Justice E.N.C Muyovwe had stated that it is important to bear in mind that in an application for bail pending appeal, the court is dealing with a convict, and sufficient reasons must exist before granting the bail. Mr Kamanga argued that his perusal of the affidavit filed in support of the application shows that paragraphs 1 to 12 recount the events, while paragraphs 12 to 17 of the said affidavit advance reasons why bail should be granted.

His argument was that paragraphs 13 and 14 do not advance sufficient or exceptional grounds warranting the grant of bail pending appeal to the appellants. That paragraph 15 states that the convicts have always availed themselves for trial, noting that in the **ANUJ KUMAR RATHI KRISHNAN** case cited above, the Supreme Court had guided that the fact that an applicant did not breach the bail conditions in the court below, is not an exceptional circumstance, warranting the admission to bail pending appeal.

With regard to paragraph 16, Mr Kamanga's submission was that it states that the appellants will abide by any conditions that the court will set which are reasonable. That this will not guarantee their attendance before the court, and it would therefore be unsafe to admit them to bail, as it was their understanding was that appellants will only abide by conditions that they will deem reasonable. He also stated that paragraph 17 of the affidavit states that appeals take long to be heard, and again with reference to the **ANUJ KUMAR RATHI KRISHNAN** case submitted

that it was guided in that case that bail is granted at the court's discretion, and governed by the prevailing circumstances.

He went on to argue that the appellants had argued general grounds, without stating why they should be granted bail pending appeal. That the **ANUJ KUMAR RATHI KRISHNAN** case had guided that while it is a fact that the courts have a heavy workload in criminal and civil matters, it is possible that an appeal may be heard within reasonable time, as appeals were being disposed of timely by the Supreme Court, and it was unlikely that the appellant would have served a substantial portion of the sentence by the time the appeal would be heard. Mr Kamanga had noted that the appellants in this case had not alluded to the prospects of success of the appeal, and therefore the application should not be granted.

Mr Mataliro in reply submitted that the principles elucidated in the **ANUJ KUMAR RATHI KRISHNAN** case were not cast in stone, but were merely directory, and apply in specific circumstances. That this had been acknowledged by Mr Kamanga when he had stated that each case should be dealt with according to its circumstances. He implored the court to look at the circumstances in this case as they are different from the **ANUJ KUMAR RATHI KRISHNAN** case.

On the special circumstances argued as should be present, before an applicant can be admitted to bail pending appeal, Mr Mataliro stated that these had not been demonstrated, contrary to the provisions of the Criminal Procedure Code, which empowers this court to grant bail pending appeal. He argued that as submitted by Mr Kamanga the most important consideration is the surety to the court, which security compels the attendance of the applicant before court.

As regards the argument that the appellants state in paragraph 16 of the affidavit in support of the application that they will only abide by conditions that they will deem reasonable, he stated that this was a flawed interpretation of the paragraph. Mr Mataliro submitted that the appellants in that paragraph state that they will abide by the conditions that the court will set, and hope that the same will be reasonable, meaning they pray for fair and affordable conditions, as opposed to reasonable conditions.

On the prospects of success of the appeal, it was argued that the further grounds filed show that the appeal has prospects of success. With regard to the aspect of the appellants having served a substantial portion of the sentence by the time the appeal will be heard, it was submitted that this is dependent on various circumstances, peculiar to each case. That the **ANUJ KUMAR RATHI KRISHNAN** case did not give guidance on how the substantial period can be arrived at, as the comments in the case were peculiar to that case. That Mr Kamanga had not made an undertaking on when the appeal in this matter will be heard, and the court was asked to take judicial notice of the fact that appeals take long to be heard. Mr Mataliro in conclusion reiterated his earlier submissions.

I have considered the application. Section 332 (1) of the Criminal Procedure Code provides that;

“332 (1) After the entering of an appeal by a person entitled to appeal, the appellate court, or the subordinate court which convicted or sentenced such person, may, for reasons to be recorded by it in writing, order that he be released on bail with or without sureties, or if such person is not released on bail shall, at the request of such person, order that the

execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal”.

The appellants filed the notice of appeal against their conviction on 19th May, 2017. They have therefore met the condition precedent to the granting of bail pending appeal, as provided in Section 332(1) of the CPC.

The reasons advanced in support the application are stated in paragraph 12 of the affidavit as being that the appeal has likelihood of success, and in paragraphs 14 to 16 it is stated that the appellants are not a flight risk, and have always availed themselves to the trial court, and are ready to abide by any reasonable bail conditions that shall be imposed by the court.

The affidavit in paragraph 17 states that as appeals generally take long to be heard, the appeal in this matter will be an academic exercise, if by the time it will have been heard, they would have served a substantial part of the sentence or the entire sentence.

In the case of ***ANUJ KUMAR RATHI KRISHNAN V PEOPLE SCZ No 19 of 2011*** cited by Mr Kamanga, it was held that bail is granted at the discretion of the court, and that for bail pending appeal to be granted, exceptional circumstances must be disclosed in the application. It was further held in that case that the fact that the appellant may have served a substantial part of his sentence by the time the appeal would have been heard, due to delay in determining the appeal, is one such exceptional circumstance. That each case is considered on its merits.

That case had referred to the case of ***JOSEPH WATTON 1979 CR APP 293*** which named the exceptional circumstances as prima facie that appeal is likely to succeed, or that there is risk that the sentence will be

served by the time the appeal is heard. The Supreme Court in the **ANUJ KUMAR RATHI KRISHNAN** case agreed with the State that it was not for the court to delve into the merits of each of the grounds of appeal, but that it suffices that the court examines all the grounds and makes a conclusion thereon, on the prospects of success of the appeal.

It is therefore my view going by the decision in the **JOSEPH WATTON** case cited above that the exceptional circumstances that must exist before bail pending appeal can be granted are that the appeal has likelihood of success, and that the appellant would have served a substantial portion or all of the sentence by the time the appeal will be heard. The fact that the appellant did not breach the bail conditions imposed by the trial court as seen from the **ANUJ KUMAR RATHI KRISHNAN** case is not an exceptional circumstance, warranting the grant of bail pending appeal.

Thus the question is whether in this matter, there is likelihood of success of the appeal, and whether the appellants would have served the entire or a substantial portion of their sentences by the time the appeal will be heard? Counsel for the appellants argued that they had since filed additional grounds of appeal which had cured the impediment advanced by the trial court in denying bail. As seen from the **ANUJ KUMAR RATHI KRISHNAN** case it is not for the court at this stage to delve into the merits of the appeal, but to examine all the grounds of appeal, and prima facie establish if there any prospects of success. A cursory perusal of the record shows that prima facie there prospects of success of the appeal are dim.

With regard to the appellants having served a substantial part, if not all of the sentences by the time the appeal is being heard, as rightly

submitted is dependent on a number of factors, which vary from case to case. The factors include the court's workload, time taken to prepare the record of appeal, bearing in mind the volume of the record, and the length of the sentence imposed on the appellant.

A perusal of the record shows that it is medium sized in terms of volume, and may not take a very long time to be processed. The appellants were sentenced to imprisonment terms of three years. By the time this period elapses the appeal would have been heard as the record as already seen is not voluminous, and will not take long to be processed. Having found that the prospects of success are dim, the fact the appellants may have served a substantial portion or all of the sentence by the time the appeal is being heard will not prejudice them in any way. Therefore the application for admission to bail pending appeal is accordingly denied.

DATED THE 28th DAY OF JUNE, 2017.

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**