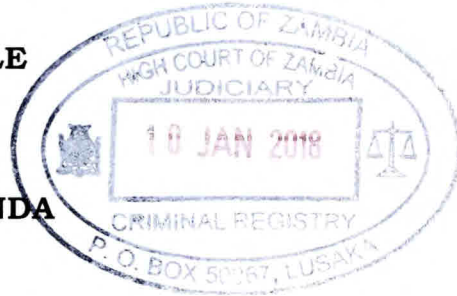


**IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

HPS/82/2017

THE PEOPLE
V
SAMSON BANDA



**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 10th DAY OF
JANUARY, 2018**

For the Applicant : Mr A. Banda, LM Chambers

For the State : Mrs S.M. Besa, State Advocate

R U L I N G

CASES REFERRED TO:

- 1. Joseph Watton 1979 CR APP 293**
- 2. Oliver John Irwin 1993-1994 ZR 7**
- 3. Anuj Kumar Rathi Krishnan V The People 2011 VOL 3 ZR 1**

LEGISLATION REFERRED TO:

- 1. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**
- 2. The Constitution of Zambia (Amendment) Act No 2 of 2016**
- 3. The Supreme Court Act, No 24 of 2016**
- 4. The Court of Appeal Act No 7 of 2016**

This is a ruling on an application made by the Applicant for the admission to bail pending appeal, pursuant to Section 332 (1) of the Criminal Procedure Code (CPC), Chapter 88 of the Laws of Zambia. At the hearing Counsel for the Applicant stated that they relied on the

affidavit filed in support of the application, and submitted that the case of **OLIVER JOHN IRWIN 1993-1994 ZR 7**, laid down the factors that a court needs to consider when granting bail.

Counsel went further to submit that one such factor is the likelihood of success of the appeal, which amounts to exceptional circumstances. That it was their submission that in this case there are such exceptional circumstances, as there is a likelihood of success of the appeal. It was further stated that at this stage the court is not under an obligation to delve into the merits of the success of the appeal, but it has power to examine the grounds of appeal in totality, and see if there is likelihood of success of the appeal. To this effect the case of **ANUJ KUMAR RATHI KRISHNAN V THE PEOPLE 2011 VOL 3 ZR 1** was relied on.

Counsel stated that the Supreme Court in that case held that it is not for the court to delve into the merits of each ground, but it suffices that all the grounds are examined, and it is concluded that prima facie, the prospects of success of the appeal are dim. That in this case contrary to State's assertion that there is no likelihood of success of the appeal, there are such prospects. It was prayed that the Applicant be admitted to bail pending appeal.

In response, Mrs Besa stated that they opposed the application, and relied on the affidavit in opposition. She also placed reliance on the case of **ANUJ KUMAR RATHI KRISHNAN V THE PEOPLE 2011 VOL 3 ZR 1**, relied on by the Applicant, and submitted that the reasons advanced by the Applicant are not cogent enough to warrant the application being granted. She further stated that appeals no longer take time to be heard, and the record for this case is not bulky, so that the Applicant would have served a substantial part of his sentence by the time the appeal would have been heard.

Counsel for the Applicant in reply told the court that the exceptional circumstance that they had raised is that there is likelihood of success of the appeal, and not that the convict would have served a substantial part of the sentence by the time the appeal would have been heard. He reiterated the prayer that the application be granted.

I have considered the application. Section 332 (1) of the Criminal Procedure Code pursuant to which the application has been made 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.”

This Section deals with applications for bail pending appeal where a person appeals to the High Court against the decision of the Subordinate Court. Section 336 of the Criminal Procedure Code on the other hand provides for bail pending appeal from decisions of the High Court to the Supreme Court. The Court of Appeal was however established by Article 130 of the Constitution of Zambia (Amendment) Act No 2 of 2016, and it has the jurisdiction to deal with criminal appeals from the High Court to the Court of Appeal, as provided in Article 131 of the said Constitution, as well as Sections 14 and 15 of the Court of Appeal Act, No 7 of 2016.

In this matter the Applicant was convicted for the offence of defilement by the Subordinate Court, and was committed to the High Court for sentence, which sentence I imposed on him on 30th October, 2017. He

applied for bail pending appeal on 23rd November, 2017. Section 14 (3) of the Court of Appeal Act No 7 of 2016 states that;

“A person convicted by a subordinate court and committed to the High Court for sentence shall, upon being sentenced by the High Court, for all purposes connected with that person’s rights of and procedural matters relating to the appeal, be considered to have been convicted and sentenced on trial by the High Court, and accordingly an appeal against such conviction and sentence shall lie to the Court.”

Section 336 of the Criminal Procedure Code deals with applications for bail pending appeal from decisions of the High Court to the Supreme Court. That Section no longer applies to appeals from the High Court to the Supreme Court, as Section 10 of the Supreme Court of Zambia Act No 24 of 2016, amended the procedure for criminal appeals by providing that appeals from the Court of Appeal shall lie to that Court. The Section states that;

“Section twenty-two of the principal Act is amended-

(a) in subsection (1)-

(i) by the deletion of the words “High Court” and the substitution therefor of the words “Court of Appeal”; and

(ii) by the deletion of the words “ three hundred and thirty-six of the Criminal Procedure Code” and the substitution therefor of the words “ eighteen of the Court of Appeal Act, 2016”; and....”

Section 18 (1) of the Court of Appeal Act No 7 of 2016 provides that;

18. (1) Where the High Court has, in exercise of its powers under section three hundred and thirty six of the Criminal Procedure Code, refused to admit an appellant to bail or to postpone the payment of a fine imposed on that appellant, the Court may, if it so considers, on the application of the appellant, and pending the determination of the appeal or application for leave to appeal to the Court in a criminal matter-

(a) admit the appellant to bail or, if not, on application by the appellant, direct that the appellant be treated as an unconvicted prisoner pending the determination of the appeal or application for leave to appeal, as the case may be; and”

Therefore any person who has appealed against the decision of the High Court in any criminal matter, and wishes to apply for bail pending appeal should do so pursuant to Section 336 of the Criminal Procedure Code, and not in line with Section 332 (1) of the said Criminal Procedure Code, as has been done in this matter. Coming to the merits of the application, the Applicant in paragraph 6 of the affidavit in support of the application states that the appeal has prospects of success, and in paragraph 7, states that he should be granted bail pending appeal, considering his health.

The affidavit in opposition to the application states that the reasons advanced by the Applicant are not cogent enough, and thereby revealing exceptional circumstances to warrant the application being granted, as there are no prospects of success of the appeal. Further that appeals no longer take long to be processed, more so that the Applicant's record is not bulky, and if the application is granted, it will be prejudicial to the State.

Both Counsel referred to the case of **ANUJ KUMAR RATHI KRISHNAN V THE PEOPLE 2011 VOL 3 ZR 1** on the factors to be considered when granting bail pending appeal. It was held in that case 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.

The case also held 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 therefore exist before such a convict can be released on bail pending appeal.

On what are special circumstances warranting a person to be admitted to bail pending appeal, the 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 would have been 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.

Thus the question is whether there are exceptional circumstances in this case which weigh in favour of the Applicant being admitted to bail pending appeal? His argument is that there is likelihood of success of the appeal, and that his health situation is also another factor. In looking at the prospects of success of the appeal, I am guided that I should examine

all the grounds as a whole, and make a conclusion that prima facie, there are such prospects of success.

I have perused the grounds of appeal as a whole, and it is my view that the prospects of success of the appeal are slim. On that basis I find that there are no exceptional circumstances that are present in this matter warranting the admission of the Applicant to bail pending appeal, and the health of the Applicant is not such a factor. The application therefore fails, and it is accordingly dismissed.

DATED THE 10th DAY OF JANUARY, 2018

 Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE