VALENTINE SHULA MUSAKANYA AND ANOR v THE PEOPLE (1983) Z.R. 96 (S.C.)

SUPREME COURT (in Chambers)
GARDNER, A.G. D.C.J.
31ST JANUARY AND 4TH FEBRUARY, 1983
(S.C.Z.) JUDGMENT NO. 3 OF 1983
APPLICATION NO.s 20 AND 21 OF 1983

p97

Flynote

Criminal Law and Procedure - Capital offence - Conviction of - Application to be treated as an unconvicted prisoner and granted bail - Possibility of.
Criminal Law and Procedure - Capital offence - Conviction of - Application for stay of execution - Necessity.
Criminal Law and Procedure - Capital offence - Conviction of - Filing of notice of appeal - Possibility of before sentence.
Criminal Law and Procedure - Appeal - Filing notice - Mandatory nature of - s. 123 (5) of the Criminal Procedure Code.
Courts - Supreme Courts - Jurisdiction - s. 336 of the Criminal Procedure Code read with s. 22 of the Supreme Court Act - Procedure there-under.

Headnote

The two applicants appealed against the trial court's refusal to hear their applications to be treated as unconvicted prisoners pending appeal against conviction on the grounds that, the first applicant's notice of appeal was filed before sentence while the latter had filed no notice at all. The first applicant also made a submission for a stay of execution pending appeal. The actions arose out of ss. 336 of the Criminal Procedure Code and 22 of the Supreme Court Act.

Held:

(i) The provisions of s. 336 of the Criminal Procedure Code must be read as a whole and since a person convicted of a capital offence cannot reasonably be admitted to bail he also cannot independently be treated as an unconvicted prisoner.

(ii) An application for an order of a stay of execution is unnecessary since s. 18 (7) (b) of the Supreme Court Act effectively protects the party until such time as his appeal has been determined or abandoned.

(iii) An applicant can in open court and without a written summons file a notice of appeal after conviction but before sentence since the sentence is mandatory and an appeal can only lie with regard to conviction; however it is procedurally proper for the court to decline to hear the application until after pronouncing sentence.

(iv) Under s. 123 (5) of the Criminal Procedure Code, the trial court is not obliged to hear an

application under s. 336 of the same code unless a notice of appeal has been filed.

(v) The Supreme Court has jurisdiction to hear an application under s. 22 of the Supreme Court Act only where the trial court has efectively refused an application under s. 336 of the Criminal Procedure Code.

Legislation referred to:

Criminal Procedure Code, Cap. 160, ss. 123 (1), (5), 169 (2), 336 (1), (2).

p98

Supreme Court Act, Cap. 52, ss. 18 (1) (b), 22 (1).

For the 1st applicant: J. Mwanakatwe and B. Willombe, M. M. W .and Co.
For the 2nd applicant: G. Chilupe, Jaques and Partners.
For the respondent: J. A. Simuziya, D. P. P. and G. M. Sheikh, Senior State Advocate.

Judgment

GARDNER, AG. D.C.J.: This is an application on behalf of the 1st applicant for a stay of execution and an order that the applicant be treated as an unconvicted prisoner pending the determination of his appeal. For convenience the application was heard together with the application on behalf of the 2nd applicant for an order that the applicant be treated as an unconvicted prisoner for the period that the execution of his sentence has been stayed by law.

The history of this matter is that the applicants, together with others, were convicted of treason and sentenced to death on the 20th of January, 1983. After the learned trial judge had delivered the judgment and pronounced convictions he asked all the accused persons if they or their counsel wished to address him on matters which could be drawn to the attention of His Excellency the President to guide him in the exercise of the prerogative of mercy. At this stage counsel for the 1st applicant applied for a stay of execution and an order that the 1st applicant should continue to be treated as a detainee pending the determination of his appeal. The learned trial judge said that he wished to deal with mitigation and the application together, and the hearing was then adjourned until 1500 hours. Prior to 1500 hours, counsel for the 1st applicant filed a notice of appeal and at 1500 hours made a further application as before.

The other accused persons or their advocates then responded to the learned trial judge's request for submissions to be laid before the President in the exercise of his prerogative of mercy and some of the advocates, including counsel for the 2nd applicant, made applications for stay of execution under the provisions of section 336 of the Criminal Procedure Code. The learned trial judge then dealt with the question of stay of execution and sentence and referred to section 336 of the Criminal Procedure Code. He raised doubts as to whether section 336 applied to sentences of death and ruled that, under section 169 (2) of the Criminal Procedure Code, a judgment included sentence and, as an appeal could only be lodged after the court had delivered judgment, the lodging by Mr Mwanakatwe of his client's notice of appeal was premature and the application should he made by summons after sentence and after the appeal had been properly lodged.

At the hearing of the present applications the learned Director of Public Prosecutions railed a

preliminary objection as to the jurisdiction of the Supreme Court. It was pointed out that section 22 of the Supreme Court Act, which is the only section under which an order can be made by that court for an applicant to be treated as an unconvicted prisoner, reads in the fires lines as follows:

> "22 (1) Where the High Court, in exercise of its powers under section 336 of the Criminal Procedure Code, refuses to admit
>
> p99
>
> appellant to bail or to postpone the payment of a fine imposed upon him, the court may . . . "

The section then gives power to the Supreme Court to make various orders including an order that a convicted person shall be treated as an unconvicted prisoner pending the determination of his appeal. It was argued that the wording of this section indicated that it could only be used after an application had been made under section 336 of the Criminal Procedure Code and had been refused by the trial court. In this case, it was argued, there was no refusal of an application but only an indication by the trial judge that he was not prepared to hear the application until formalities laid down by him were complied with.

In reply, Mr Mwanakatwe, on behalf of the 1st applicant, argued that he had made an application under section 336, that his application was in order and that the refusal by the learned trial judge to deal with like application amounted to a refusal of the application. In support of this argument Mr Mwanakatwe pointed out that as the sentence after the conviction for treason is a mandatory death sentence, no appeal lies from such mandatory sentence, and, as an appeal lay only against conviction, he was procedurally correct in making his application before the sentence had been passed and that he was also correct in filing a notice of appeal against conviction after the conviction. He also argued that in any event the Supreme Court had inherent jurisdiction to hear the application.

Without any decision being made at that stage as to the jurisdiction of the Supreme Court, Mr Mwanakatwe and Mr Chilupe were allowed to continue with their applications on the merits.

Mr Mwanakatwe indicated that, the applicants were also detainees, that prior to their convictions they were treated as such, and their treatment was better than that afforded to prisoners treated as unconvicted prisoners. At this stage Mr Simuziya stated that all detention orders had been revoked and there was no question of detainee conditions applying to the applicants.

The application made by Mr Mwanakatwe for an order that the 1st Applicant was entitled to a stay of execution was made, according to Mr Mwanakatwe, because, despite the provisions of section 18 (1) (b) of the Supreme Court Act which provides for a stay of execution of any sentence of death, until any appeal had been determined or abandoned, the applicant was under the threat of execution because he was forced to wear prison uniform and housed in the penal block at a maximum security prison, and he required an order of the Supreme Court to ensure the stay of execution.

I have no hesitation in finding that the stay of execution provided for by section 18 (1) (b) of the Supreme Court Act effectively protects the 1st applicant until such time as his appeal has been

determined or abandoned, and the application for an order of a stay of execution by the Supreme Court is unnecessary.

p100

In arguing the merits of the application it is Mr Mwanakatwe's argument that, although section 123 of the Criminal Procedure Code provides that no person accused of murder or treason may be granted bail by the trial court (whereas others may be granted bail at any stage of the proceedings before such court), section 336 of the Criminal Procedure Code does not exclude applications for bail after convictions for capital offences. Section 336 reads as follows:

"336. (1) The High Court may, if it deems fit, on the application of an appellant from judgment of that Court and pending the determination of his appeal or application for leave to appeal to the Supreme Court in criminal matter -

(a) admit the appellant to bail, or if it does not so admit him, direct him to be treated as an unconvicted prisoner pending the determination of his appeal or of his application for leave to appeal, as the case may be; and

(b) Postpone the payment of any fine imposed upon him.

(2) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and, subject to any direction which the Supreme Court may give to the contrary in any appeal, the time during which the appellant, if in custody, is treated as an unconvicted prisoner under this section, shall not count as part of any term of imprisonment under his sentence. Any imprisonment under the sentence of the appellant, whether it is the sentence by court of trial or by the High Court in its appellate jurisdiction or the sentence passed by the Supreme Court, shall, subject to any directions which the Supreme Court may give to the contrary, be deemed to be resumed or to begin to run, as the case requires -

(a) if the appellant is in custody, as from the day on which the appeal is determined;

(b) if the appellant is not in custody, as from the day on which he is received into goal under the sentence."

(No. 47 of 1955 as amended by G.N. No. 303 of 1964 and No. 23 of 1971).

Section 22 of the Supreme Court Act is in the same words except that sub-section (1) begins with the words set out at the beginning of this order. Mr Mwanakatwe made his application under section 22 of the Supreme Court Act, and be also invoked the inherent jurisdiction of this court. The argument on behalf of the 1st applicant was that section 336 of the Criminal Procedure Code and section 22 of the Supreme Court Act had the effect of providing that, even if convicted person had no right to be admitted to bail, an application could be made under the sections for treatment as an unconvicted prisoner pending appeal.

Mr Chilupe, on behalf of the 2nd applicant, applied under section 22 of the Supreme Court Act for an order that the 2nd applicant be treated as an unconvicted prisoner pending the determination of his appeal; but he conceded that, although he had made an application to the learned

p101

trial judge at the same time the application made by Mr Mwanakatwe, he did not file notice of intention to appeal. He argued that, as the learned trial judge had declined to hear applications regardless of whether or not notices of appeal had been filed, the Supreme Court had power under section 22 to dead with the application.

Mr Chilupe also argued that applications can be under section 336 of the Criminal Procedure Code and section 22 of the Supreme Court Act even though the conviction was for a capital offence and that, even if the trial court and Supreme Court were bound to refuse bail, both courts had jurisdiction to make the alternative order that an applicant should be treated as an unconvicted prisoner. It was also argued that as the 2nd applicant had been treated as a detainee during the course of his trial it would only be fair to treat him as such pending appeal.

The learned Director of Public Prosecutions argued reply that the Supreme Court could not have jurisdiction until a, valid application had been. made before the trial court, but he conceded that if the learned trial judge was wrong in declining to hear the application on the grounds either that the application was made before the judgment was completed, or the notice of appeal was filed before the judgment was completed, then the provisions of section 22 would apply, because declining to hear and application was tantamount to refusing the application. The learned Director also argued, however, that the learned trial judge had not been wrong in declining to hear the applications and that there was no provision for an application under section 336 of the Criminal Procedure Code to be made in court without a written summons. It was argued that in the case of the 1st applicant where the notice of appeal bad been filed prematurely and in the cast of the second applicant where no notice of appeal ha been filed at all at the time of the application to the learned trial judge, section, 123 of the Criminal Procedure Code provided categorically that the trial court had no power to grant bail before the entering of an appeal. The learned Director argued that it would be absurd to hold that, although section 123, which excluded applications for bails for capital offences at any stage of the proceedings before the trial court, the same trial court could, after such proceedings, grant bail in capital offences under section 336 of the Criminal Procedure Code. The learned Director also referred to sub-section (2) of section 336 of the Criminal Procedure Code which related to terms of imprisonment and fines argued that section 336 should be read as a whole in which event it was clear that none of the provisions of section 336 could apply to prisoners convicted of capital offences.

In reply Mr Mwanakatwe reiterated that section 336 of the Criminal Procedure Code gave a trial court two powers, one to grant bail in appropriate cases and two, in cases where bail was inappropriate, to make an order for treatment as an, unconvicted prisoner. As to the method of making application, under section 336, it was argued that there was no necessity to issue a summons as ordered by the learned trial judge, and that an application could be made on verbal notice in court before the trial court rose.

p102

I will deal first with the question of jurisdiction, and hold that, so far as the 2nd applicant is concerned, the trial court could not have entertained any application under section 336 of the Criminal Procedure Code, because no notice of intention to appeal had been filed prior to the

application. Section 123(5) of the Criminal Procedure Code provides that no trial court shall have power to release a convicted person on bail before the entering of an appeal. I am aware that, in the past, courts have exercised their discretion to hear an application for bail either on an undertaking by counsel to file notice of appeal, or conditionally upon the filing of a notice of appeal, but, on the strict interpretation of the law, a court has the right to refuse to entertain an application until notice of appeal has been filed.

As to the first applicant, I hold that, in view of the fact that the applicant can only appeal against conviction, the filing of the notice to appeal after conviction but before sentence was not premature, and, although it was procedurally perfectly proper for the learned trial judge to decline to hear the application until he had finally disposed of the case by pronouncing sentences, the application by the first applicant after the conviction was order, and, as it was made in open, court before the trial judge rose, there was no need for a written summons.

I am concerned as to whether the learned trial judge, by declining to hear the application in open court, was in effect refusing an application under section 336 in the context of the provisions of section 22 of the Supreme Court Act. The wording of the section states that "where the High Court has in exercise of *its powers under section* 336 *of the Criminal Procedure Code*, refused to admit an appellant to bail . . ." an application may be made to the Supreme Court. If the High Court declines to hear an application under section 336 of the Criminal Procedure Code there could be a doubt as to whether it can be said that the High Court has exercised its powers under that section. I am unable to accept Mr Mwanakatwe's argument that this court has an inherent power to hear this application. Section 22 specifies the circumstances in which this type of application can be made and there is no inherent power to go beyond such provision. However, I have seen the record of proceedings before the trial court and I note that, before pronouncing sentence, the learned trial judge said "I refuse the application at this stage." In favour of the applicant I hold that, in the circumstances of this particular case, the words used amounted to a refusal in terms of section 22 of the Supreme Court Act, and I accordingly have jurisdiction to hear the application of the first applicant.

Having considered the provisions of section 123 (1) of the Criminal Procedure Code I am satisfied that the provisions refer only to the time when a person is in custody of the police pealing trial, or in the words of the section, "at any stage of the proceedings before such court", that is the trial court. Although section 336 of the Criminal Procedure Code does not specifically state that it is not applicable to cases in which a

prisoner has been convicted of murder or treason, there are reasons for construing that section as hung the same effect as section 123. I agree with the learned Director that section 336 must be read as a whole and sub-section (1) cannot be read in isolation from sub-section (2). Sub-section (2) provides that the time during which an appellant is admitted to bail or, subject to directions to the contrary, the time during which an appellant is treated as an unconvicted prisoner shall not count as part of any term of imprisonment under his sentence. Apart from the provisions as to postponement of payment of fines the section deals exclusively with relief from sentences of imprisonment. Whilst I agree with the learned Director that it would be absurd to hold that bail may be granted

after conviction for capital offences, that is not a relevant consideration construing the section as a whole which can only be read as referring to either fines or sentences of imprisonment. That part of the section which gives powers to the court to make an order for treatment of an applicant as an unconvicted prisoner cannot be implemented independently of the remainder of the section and consequently such an order cannot be made in the case of prisoner who has been sentenced to death. The applications by the 1st and 2nd applicants are dismissed.

Applications dismissed

_____