ANUJ KUMAR RATHI KRISHNAN
v
THE PEOPLE

SUPREME COURT
MWANAMWAMBWA., WANKI, AND MUYOVWE, JJS.,
4th OCTOBER, 2011 and 21st OCTOBER, 2011.
(S.C.Z. Judgment No. 19 of 2011)

[1] Criminal law - Bail pending appeal - Conditions to be satisfied.

This was an appeal by the appellant against the refusal of the application by a single judge of the Supreme Court to admit the appellant to bail pending appeal.

Held:

1. An application for bail pending appeal before the Supreme Court ought to brought under section 332(1) of the Criminal Procedure Code, and not section 123 of the said Code.

2. It is settled law that bail is granted at the discretion of the Court.

3. For bail pending appeal to be granted, the Court must be satisfied that there are exceptional circumstances that are disclosed in the application.

4. The fact that the appellant due to delay in determining his appeal May, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what May, be presented as exceptional circumstances.

5. 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.

6. The decision in Stoddart v The Queen is still good law. And is quite instructive as to the principles applicable in applications for bail pending appeal.

7. It is not for the Court to delve into the merits of each ground. But it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim.

8. The fact that an applicant did not breach the bail conditions in the Court below, is not an

exceptional circumstance which can warrant to admit an applicant to bail pending appeal.

9. While it is a fact that the Supreme Court has a heavy work load in civil and criminal cases, it is possible for the appellant's case to be heard within a reasonable time.

10. Taking into consideration that criminal appeals are being disposed of at a fast rate by the Supreme Court, it is unlikely that the appellant would serve a substantial remainder of his sentence, and that he would serve the full sentence before his appeal is determined.

11. In terms of section 332(1) of the Criminal Procedure Code, the option therefore for a person who has not been released on bail pending appeal is to make a request to have the execution of his sentence suspended pending the hearing of his appeal. In fact, the provision makes it clear that refusal of bail precedes the request for suspension of execution of a sentence.

12. section 332(1) of the Criminal Procedure Code states that upon refusal of the application for bail, a request for suspension of a sentence should be made by the appellant.

Cases referred to:

1. Ex-Parte Blyth [1994] K.B. 532.
2. Stoddart v The Queen [No 1] N.R.L. (1949-1951) 288.
3. Joseph Watton [1979] 68 Cr. App. 293.
4. Musakanya and Another v Attorney General (1981) Z.R. 221
5. Sekele v The People (1990-1992) Z.R.5
6. Kayumba v The People SCZ/9/77/2011 (unreported)

Legislation referred to:

1. Criminal Procedure Code, cap 88, ss.123, 207, and 332(1)
2. Authentication of Documents Act, cap 75
3. Mutual Assistance in Criminal Matters Act, cap 98

Work referred to:

1. Supreme Court Practice Direction Number 2 of 1975.

M. Mutemwa of Messrs Mutemwa Chambers with Muyawala of Messrs Dzekedzeke and company for the appellant.
R.N. Nkhuzwayo, Deputy Chief State advocate in the Director of Public Prosecutions Chambers for the respondent.

MUYOVWE, J.S.: delivered the judgment of the Court. This is an appeal by the appellant against the refusal of the application by a single judge of the Supreme Court to admit him to bail pending appeal.

The brief background is that the appellant was on 12th November, 2009, convicted by the Subordinate Court at Lusaka of the offence of corrupt practice with a public officer, contrary to section 29 (2) of the Anti-Corruption Act. He was sentenced to four (4) years imprisonment with hard labour and subsequently appealed to the High Court. His appeal was dismissed by the High Court on 23rd May, 2011. The appellant then appealed to the Supreme Court. His application for bail pending appeal was thrown out by the High Court, hence his application to the single judge of the Supreme Court.

In her Ruling, the learned single judge of the Supreme Court considered the appellant's application which was brought pursuant to section 123 of the Criminal Procedure Code. She considered the appellant's affidavit in support of the application for bail pending appeal which stated, inter alia, that his application for bail pending appeal was rejected by the High Court on the ground that the appeal had no prospects of success. That he had filed further grounds of appeal, and he believed that his appeal had merit. That he was sentenced to 4 years imprisonment and he had already served one year of his sentence. That due to delays in hearing and determining appeals by this Court, he May, serve a substantial part of the remainder, if not the whole sentence before his appeal is finally determined. Further, that after conviction by the Subordinate Court, he was granted bail pending appeal, and he abided by the bail conditions.

The learned single judge of the Supreme Court, after considering the affidavit in support, also examined the three grounds of appeal contained in the Notice of Intention to appeal which grounds were considered by the High Court when determining the appellant's application for bail pending appeal. The learned judge noted that the
appellant had filed twenty-three additional grounds of appeal which were not considered by the lower Court at the time of refusal to admit the appellant to bail pending appeal. In this regard, she referred to the case of Musakanya and Another v The Attorney-General (4). She declined to consider each ground of appeal as this would entail her delving into the merits of the main appeal. However, a perusal of the grounds of appeal and the judgment led her to the conclusion that the prospects of success of the appeal were dim. She considered the cases of Stoddart v The Queen (2), and Ex-parte Blyth (1), and applied the principles laid down in the said cases. The learned single judge after considering the application as a whole found that there were no exceptional circumstances disclosed in this case, to warrant granting bail. So, she dismissed the application.

Dissatisfied with the Ruling, the appellant renewed his application to the full Court. Learned counsel for the appellant Mr. Mutemwa and Mr. Muyawala filed written submissions which were augmented with oral submissions by Mr. Mutemwa. It was submitted, inter alia, that section 332 (1) of the Criminal Procedure Code has two parts, one conferring discretion on the Court to grant bail, and the second part being mandatory at the request of the appellant. They cited the case of Sekele v The People (5), arguing that the appellant qualifies to be heard as he lodged his Notice of Intention to appeal, and that it is now in the discretion of the Court to grant bail. It was argued that in relying heavily on Stoddart v The Queen (2), the learned single judge of the Supreme Court disregarded the risks of delays in the criminal Justice system and submitted that this was an exceptional circumstance. They submitted that the learned single judge after perusal of the evidence concluded that the appeal has no prospect of

success. They pointed out that the case of Stoddart v The Queen (2), relies heavily on English decisions between 1912 and 1932 and yet in the latter the case of Joseph Watton (3), the Court of appeal held that bail could be granted in special circumstances: where it appears that prima facie the appeal is likely to succeed; where there is a risk that the sentence will be served by the time the appeal is heard and where the grounds of appeal are arguable. According to learned counsel, the Joseph Watton case (3) shows that the fact that the sentence would have been served by the time the appeal is heard constitutes a special circumstance. It was submitted that it is a notorious fact that the Supreme Court is burdened with a lot of work which leads to delays in the delivery of judgments.

It was submitted that the likelihood of success of the appeal lies in the strength of the grounds of appeal. They contended that there are serious points of law which need to be resolved by the Supreme Court such as: whether it was proper for the statement of Mrs. Shah to be excluded from evidence on the basis of the lawyer/client privilege; whether such privilege exists in criminal matters; whether circumstantial evidence relied upon by the prosecution was cogent to the extent of sustaining a conviction. It was contended that the grounds of appeal raise intricate and serious issues of law which require this Court to determine on the merits, and that to determine the issues prematurely would amount to speculation. They submitted that bail should be granted as there are special circumstances and grounds of appeal which raise important issues of law and that the appeal is likely to succeed.

They also addressed the second part of section 332 (1) of the Criminal Procedure Code. He noted that section 123 of the Criminal Procedure Code1 did not have a similar provision.

It was submitted that the second part of section 332 (1) of the Criminal Procedure Code is mandatory as it states that if bail is refused then at the appellant's request, the Court shall order that the execution of the sentence or order appealed against be suspended. That the effect of suspending the execution of sentence, as in the present case, would result in the appellant being released from custody. And that to harmonise the whole of section 332(1) of the Criminal Procedure Code, bail should be granted. Further, that the effect of the second part of section 332(1) of the Criminal Procedure Code, is to make the decision in Stoddart v The Queen (2), completely outdated thereby rendering the English authorities relied on inapplicable to the Zambian jurisdiction, save that these authorities allow the grant of bail.

They submitted that should the appeal fail, this application, or appeal should alternatively be considered as a request to have the execution of the four year prison sentence suspended pending appeal and release the appellant from custody.

In his oral submissions, Mr. Mutemwa emphasized that there are special circumstances in this case which should compel this Court to grant the appellant bail pending appeal. He submitted that had the single judge of this Court considered the submissions on Pages 97-112 of the record of appeal she would have found that the appeal was meritorious. He submitted that the learned single judge declined to consider the submissions on the ground that she would have held that the appellant would succeed.

Mr. Mutemwa alluded to the grounds of appeal which are enumerated in the Skeleton Arguments and submission on application for bail pending appeal filed herein and are found at page 97-112 of the Record of Appeal. He alluded to ground 5 which relates to section 207 of the Criminal Procedure Code, and which raises the question as to whose duty it is to comply with the said section? He also addressed ground 6 which alleges that the evidence of Kakoma Kanganja was hearsay evidence and inadmissible. And that this was conceded to by the Director of Public Prosecutions. Mr. Mutemwa submitted that the reason for drawing the Court's attention to the grounds of appeal was to show that the appeal had merit. Further, he alluded to grounds 9 and 10 which question the admission of documents which had not been notarized, as required by the Authentication of Documents Act, and that the Attorney-General did not waive his privilege under the Mutual Legal Assistance in Criminal Matters Act. He also referred to ground 11, which according to him, raises the issue of lawyer/client privilege, which is an important issue this Court will have to determine on hearing the main appeal.

Further, he submitted that the appellant was in his second (2) year of his four (4) year sentence. He contended that had the learned judge considered the workload of this Court, she would have realized that by the time the appeal is heard, the appellant would have served a substantial part of his sentence if not the whole sentence. He submitted that his client had not jumped bail during trial, but that he had gone to India on medical treatment and there was communication breakdown and when he returned, the Subordinate Court which had revoked his bail earlier, granted it to him. Mr. Mutemwa submitted that his client abided by the bail conditions in the lower Court, and will do so if he is granted bail by this Court.

Mr. Mutemwa invited this Court to interpret the meaning of the second part of section 332(1) of the Criminal Procedure Code. In response, Mrs. Kuzwayo objected to the application, arguing that the appellant has not established special circumstances to warrant his admission to bail in accordance with Stoddart v The Queen (2). She submitted that the learned judge was on firm ground in refusing to grant the appellant bail pending appeal. Mrs. Kuzwayo submitted that at page 12 of the Ruling it is evident that she perused the record and the two sets of grounds of appeal. And the judgment of the lower Court and concluded that there was no likelihood of success.

She also argued that the appellant has not shown that this Court is unable to hear his appeal within a reasonable time. As to the grounds of appeal referred to by her learned friend, she submitted that she was unable to comment, as this would be tantamount to arguing the main appeal. She argued that the duty of the single judge was not to look at the merit of each ground of appeal, but merely to see whether the appeal had a likelihood of success. However, on the ground relating to section 207 of the Criminal Procedure Code, which alleges that the appellant's rights were not read out to him by the trial Court, she argued that this is not tenable as he was represented during trial and was not, therefore, prejudiced by the fact that his rights were not read out to him.

We have considered the Ruling of the learned single judge, the appellant's written submissions, the oral submissions by both learned counsel and the skeleton Arguments filed herein at page 96-112 of the record of appeal.

First of all, we have observed that the application before the single judge of the Supreme Court was brought under section 123 of the Criminal Procedure Code. We are of the view, that the application should have been brought under section 332 (1) of the Criminal Procedure Code which specifically relates to bail pending appeal. We do not think that it is appropriate to bring an application for bail pending appeal before the Supreme Court under section 123 of the Criminal Procedure Code. The present application is properly before Court since the appellant has filed an appeal against conviction and sentence.

It is settled law that bail is granted at the discretion of the Court. For bail pending appeal to be granted, the Court must be satisfied that there are exceptional circumstances that are disclosed in the application. The fact that the appellant, due to delay in determining his appeal, May, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. For example in the Kayumba v The People (6) case, the appellant was sentenced to two years imprisonment and this was considered a short period such that by the time his appeal was heard, he would have served his sentence, hence the admission of the appellant to bail pending appeal. We must point out that each case is considered on its merits, depending on what May, be presented as exceptional circumstance. For example, if the Record of Appeal is voluminous and could take months to prepare, this can be considered an exceptional circumstance having regard to the length of the sentence. 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 such convict can be released on bail pending appeal. Mr. Mutemwa submitted that Stoddart v The Queen (2), is outdated especially in light of section 332 (1) of the Criminal Procedure Code[2]. We do not agree with him. We are of the firm view that Stoddart v The Queen (2), is still good law, and is quite instructive as to the principles applicable in applications for bail pending appeal. The learned single judge was on firm ground when she relied on Stoddart v The Queen (2), where it was held that:

"A convicted prisoner should not be released on bail pending appeal unless exceptional circumstances are disclosed."

In our view, the case of Joseph Watton (3) emphasises the fact that exceptional circumstances must be disclosed in an application for bail pending appeal. We note, however, that in that case, reference was made to special circumstances and these are: where it appears, prima facie, that the appeal is likely to succeed or where there is a risk that the sentence will be served by the time the appeal is heard. The learned single judge took these factors into consideration in arriving at her decision and we cannot fault her. However, as we shall explain below, we cannot consider the likelihood of success of the appeal. We intend to examine section 332 (1) of the Criminal Procedure Code later. The question is, in this case, are there any exceptional circumstances to warrant bail pending appeal being granted?

Regarding the prospects of success, the learned single judge of the Supreme Court declined to consider each ground of appeal separately and instead considered them in general. We agree with Mrs. Khuzwayo that it was not for the single judge to delve into the merits of each ground, but it sufficed that

she examined all the grounds and made her conclusion prima facie that the prospects of success of the appeal were dim. In his submissions, Mr. Mutemwa went to great length to highlight the grounds of appeal in a bid to convince us that the main appeal is likely to succeed. We are reluctant to go into the merits of the main appeal and we would rather concentrate on the merits of the appeal before us. We hold the view, that it will be prejudicial to both parties if we delve into the merits of the grounds of appeal filed in support of the main appeal.

Mr. Mutemwa did allude to the fact that his client did not breach the bail conditions imposed by the Court below. As observed by the single judge, this is not an exceptional circumstance which can persuade us to
admit the appellant to bail pending appeal.

During the hearing of the application, it was suggested to learned counsel by this Court that instead of pursuing interlocutory applications, it May, have been prudent to press for the expeditious preparation of the record of appeal. counsel informed us that he had been following up the issue of the preparation of the record of appeal with one of the Marshals in the Supreme Court. In this regard, we refer counsel to Supreme Court Practice Direction No. 2 of 1975, which relates to Record of Proceedings in Criminal and civil Matters. From the said Practice Direction, it is clear that records of appeal to the Supreme Court are prepared by the High Court, and are remitted to the Supreme Court for cause listing. Learned counsel can monitor the pace at which the record of appeal relating to his client's case is progressing by checking with the Assistant Registrar at the High Court, and not Supreme Court Marshals.

In connection to this, while it is a fact that this Court has a heavy work load in civil and criminal cases, it is possible for the appellant's case to be heard within a reasonable time. It was submitted by the State before the single judge of the Supreme Court that criminal appeals are now being disposed of quickly by this Court, and this is a fact. In fact, we believe that the record of appeal should be near completion stage considering that the appeal has already been heard by the High Court.

We also note that before the single judge, it was revealed that the appellant had served one year of his four year sentence. Taking into consideration the fact that criminal appeals are being disposed of at a faster rate, we do not believe that the appellant is likely to serve a substantial remainder of his sentence, or that he will serve the full sentence before his appeal is determined.

We now turn to examine section 332 (1) of the Criminal Procedure Code which provides as follows:

(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.
(emphasis ours)

Mr. Mutemwa invited us to interpret the 'second part' of the above section. According to Mr. Mutemwa's interpretation, a person whose sentence has been suspended in terms of section 332 (1) of the Criminal Procedure Code, should be released on bail pending appeal. We believe Mr. Mutemwa has misapprehended the said provision. In our view, the meaning is clear. Notably, the second part begins by stating: “or if such person is not released on bail,” which indicates that the question of release from custody cannot arise following the refusal of bail. The option, therefore, for a person who has not been released on bail pending appeal is to make a request to have the execution of his sentence suspended pending the hearing of his appeal. In fact, the provision makes it clear that refusal of bail precedes the request for suspension of execution of sentence. As regards the submission that this application be treated as a request to suspend the sentence, we do not consider it prudent that the said request should be made as an alternative within this appeal. section 332 (1) of the Criminal Procedure Code states clearly that upon refusal of the application for bail, then the request for suspension of sentence should be made by the appellant.

The plea to turn this application into a request for suspension of execution of sentence is, therefore, refused.

All in all, we find no merit in the application and we dismiss it.