MADALISTO RANCH
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 22 January 2019 & 30 January 2019

Bail Pending Appeal

Applicant in person
T Mapfiwa, for the respondent

CHITAPI J: After considering the papers filed in the application for bail pending appeal by both the applicant and the respondent and hearing oral submissions, I find no merit in the application. My brief reasons for holding this conclusion appear hereunder.

The applicant is a convict serving 20 years following his conviction by this court for the crime of murder on 2 August 2017. Under case No. CON 207/18 the applicant applied for leave to appeal out of time. I granted his application and my judgment relative thereto is captured as HH 674/18. I also disposed of the applicants' bail application pending appeal which he had filed under case No. B 1272/18. That application was nonsuited because no valid appeal was pending. The applicant at that stage could only apply for bail pending the determination of the condonation application.

In judgment No. HH 674/18 I expressed myself as follows in the penultimate and last paragraphs before granting condonation and dismissing the purported bail application pending appeal;

> "The applicant must therefore continue to serve his sentence pending appeal. It would not be in the interests of justice that a break in serving a prison term which is the appropriate sentence save that its length may be reduced should be ordered through admitting the applicant to bail pending appeal."

Notably, I expressed myself clearly that the applicant was guilty of causing the death of his wife and that even assuming that the Supreme Court would be persuaded to alter the verdict of murder to culpable homicide should the plea of provocation succeed, the applicant would not escape serving a substantially long term of imprisonment. In that premise, I determined that it would not be in the interests of justice to admit him to bail pending appeal.

I have considered the notice and grounds of appeal filed under case No. SC 844/18. They do not detract or derogate from the draft grounds of appeal which I considered when granting the application for leave to appeal against conviction and sentence.

In his application for bail based on changed circumstances the applicant presents arguments which attack the trial court's judgment and sentence. It is the same judgment which I considered when granting the applicant leave to appeal. The findings which I made on the interests of justice being served by ordering that the applicant should continue to serve his sentence pending appeal were based on that judgment and the evidence on record. Neither myself or any other judge of this court can review the of my determination made upon a consideration of the trial court record as the *functus officio* doctrine binds me and this court's judges.

Whilst an applicant whose bail application has been dismissed as in *casu* can make further application for admission to bail, such application can only be properly entertained by the court if it is based on changed circumstances. Section 123 (1) in proviso (ii) thereof provides that a subsequent application for bail may only be made if "…such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination." In *casu*, there is no new fact or circumstance which has arisen since I made my order as would warrant that I review my previous order dismissing the applicant's bail application. The only new fact is that the applicant has since complied with my order to file his appeal within the given period in the order.

The filing of the notice of appeal does not change the judgment and evidence on record which led me to determine that the interests of justice will be served by ordering that the applicant should continue to serve his sentence pending appeal. The applicant cannot place before me his proposed argument on appeal as constituting changed circumstances because he argued the same when he applied for leave to appeal. If he then did not articulate his proposed arguments in full at that time, he cannot do so now based on the same record unaltered. Changed circumstances do not arise from a realization of a missed point and seeking to submit it when such point could have been raised but for the applicant's indiscretion or want of want of astuteness The applicant does not enjoy the right to have a second bite of the cherry so to speak.

It should also be mentioned that the mere fact that a convict has been granted leave to appeal does not translate to an automatic right to the grant of bail pending appeal. Whilst prospects of success are considered in an application for leave to appeal in as much as they are similarly considered in an application for bail pending appeal, there is more that the court considers in the latter scenario. The law is clear on this point in s 123 of the Criminal Procedure & Evidence that factors mentioned in s 117 come into play mutatis mutandis. In *casu*, instead of exhausting his energies on pursuing bail pending appeal which this court will not grant in the absence of the applicant establishing changed circumstances, the applicant should, having fought so hard to obtain leave to appeal, now focus his energies on ensuring the speedy disposal of his appeal. In the event that he is dissatisfied with the judgment on this court, he can of course subject to following procedures for appeal, appeal to the Supreme Court.

For the above reasons, it is ordered that the application for bail pending appeal founded on changed circumstances be and is hereby dismissed.

National Prosecuting Authority, respondent's legal practitioners