REPORTABLE ZLR (51)

Judgment No. S.C. 94/2000
Crim. Appeal No. 197/99

THE ATTORNEY-GENERAL v (1) JOHN SANDERS SPENCER

(2) SAVVAS GEORGIOU

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
HARARE, SEPTEMBER 11, 2000

M Majuru, for the appellant

No appearance for the respondents

GUBBAY CJ: Under the provisions of s 13(1) of the Supreme Court Act [*Chapter 7:13*] the Attorney-General sought and obtained leave to appeal against the judgment of the High Court quashing the convictions and sentences of the respondents on a joint charge of attempted extortion.

Subsequent to the conclusion of the trial in the regional court the respondents, who had been sentenced to five years' imprisonment with labour, half of such period being conditionally suspended for five years, were granted bail by the High Court pending the determination of the appeal they had noted on 5 June 1998. Among other conditions, each was required to report twice weekly at Avondale Police Station.

The first respondent is a citizen of the Republic of South Africa, ordinarily resident in Louis Trichardt. He entered this country on 29 June 1997 and

was alleged to have committed the offence on 1 July 1997. He was arrested on 8 July 1997. The second respondent is a Zimbabwean national. At the material time he was living in Bindura.

The appeal was set down for hearing on 18 May 1999. On 5 January 1999 the legal practitioner who was acting for the second respondent filed a notice of renunciation of agency. He had learnt that in violation of the conditions of bail the second respondent had fled the jurisdiction and did not intend to return. This fact was brought to the attention of the two Judges to whom the hearing of the appeal had been assigned.

Shortly before the hearing the State was advised that the first respondent was also in breach of the conditions of bail, in that he was failing to report his presence to the police.

When the appeal was called on 18 May 1999 there was no appearance for the first respondent; that there was no appearance for the second respondent was understandable and expected. Counsel for the State applied for the appeal to be dismissed for want of prosecution. The High Court, however, postponed the hearing to 20 May 1999 so as to afford the first respondent's legal representative an opportunity to explain his non-appearance. The hearing was then further postponed to the following day.

On 21 May 1999 the first respondent's counsel informed the court that he had been unaware that his client had not been reporting his presence to the police.

He stated further that he had attempted without success to contact the first respondent at his last known address. The latter's whereabouts were totally unknown. He was allowed to withdraw from the appeal.

Although the respondents were in default, counsel for the State was directed to argue the merits of the appeals. Having heard him, the High Court delivered an *ex tempore* judgment in which it upheld the appeal of the first respondent. It noted that the appeal of the second respondent had lapsed for want of prosecution, as he had unlawfully left the country and estreated his bail. Nonetheless, in the purported exercise of its powers of review, the High Court set aside the conviction and sentence of the second respondent as well.

I entertain not the slightest doubt that in proceeding to hear the appeal and in making the orders it did, the High Court fell into error.

The well-established principle is that a person seeking to establish his rights in a court of law must come to the court with clean hands. A fugitive from justice is one who has deliberately put himself beyond the reach of the law by going into hiding or fleeing the country. The law denies its protection to such persons. See *Mulligan v Mulligan* 1925 WLD 164 at 167; *Maluleke v Du Pont NO & Anor* 1966 RLR 620 (A) at 624A; *S v Neill* 1982 (1) RLR 142 (H) at 145 E-F. To do otherwise would be to stultify the process of the law.

The High Court appreciated that it had no discretion to hear the appeal of the second respondent. Undoubtedly his action in fleeing signified that he was not

prepared to accept or abide by the judicial process of the country. He had set the law in defiance.

The real issue, in relation to the second respondent, is whether the proceedings in the regional court were susceptible of review. Plainly they were not automatically reviewable at the instance of the High Court. The second respondent had been defended by a legal practitioner at his trial. Consequently the proceedings that constituted his conviction and sentence did not have to be sent on review unless specifically requested within three days of the hearing. See proviso (ii)(a) to s 57(1) and s 57(2) of the Magistrate's Court Act [*Chapter 7:10*]. This was not done, so the proceedings were not reviewable in the normal course of events. See *S v Neill supra* at 148A; Reid-Rowland *Criminal Procedure in Zimbabwe* at 27-3.

With respect to the first respondent, the information placed before the High Court did not prove conclusively that at the date the appeal was heard he had actually fled the jurisdiction. Certainly he had failed to comply with the conditions of bail. Mr *Majuru*, who appeared for the Attorney-General, assured this Court that the first respondent was no longer within the country. But he was unable to say precisely when he had departed. It is very probable that he did so before 18 May 1999, the day when he must have known the appeal was set down for hearing. Of course if he was then in the country, but in hiding, he still would be considered to be a fugitive from justice. See *Maluleke v Du Pont NO & Anor supra* at 626F.

In *S v Moshesh & Ors* 1973 (3) SA 962 (A) the South African Appellate Division was advised that the first appellant had failed to report to the

police at Mount Frere as required, and his family had left the residence at Mount Frere and all his belongings had been removed. Attempts to trace the first appellant had been in vain. Acting on such information, the court held the first appellant to be a fugitive from justice (see at 963 C-E). And in *S v Isaacs* 1968 (2) SA 184 (A) the appellant, who was in breach of bail by failing to report and whose family professed to have no knowledge of his whereabouts, but who was thought to have left South Africa for Europe, was found to be "plainly a fugitive from justice" (see at 185 F-G).

It is my view that these decisions support the submission advanced in this matter that where the information available to the State points to the probability that an appellant has unlawfully left the jurisdiction prior to the hearing of the appeal, or is in hiding, he is deemed to be a fugitive from justice.

However, even if I am wrong in this regard, I consider that the High Court ought not to have heard the appeal of the first respondent. There was no appearance before it. The first respondent's counsel had withdrawn his representation; and correctly so. In the second place, the first respondent was in contempt of the condition of bail set by the High Court requiring him to report to the police. No explanation was forthcoming as to the reason for such disobedience; and his whereabouts were unknown. In such circumstances, the High Court was not in a position to exercise its discretion in the first respondent's favour and hear the appeal. Until the first respondent was found and had made some effort to purge his contempt of the bail order he had no right to obtain from the court the relief sought by the appeal.

I express no opinion on the merits of the appeal. Whether the High Court was correct or not in quashing the convictions is not a relevant consideration. It suffices to underscore that by their conduct neither respondent was deserving of any relief.

In the result the appeal must be allowed. The most appropriate order, in substitution for that made by the court *a quo*, is that:

"The appeal is struck off the roll."

See *S v Neill supra* at 149B; *Maluleke v Du Pont NO & Anor supra* at 624I; *Stopforth v Minister of Justice & Ors* 1999 (2) SACR 541 (SCA) at 540j-541a.

EBRAHIM JA: I agree.

SANDURA JA: I agree.