

IN THE COURT OF APPEAL OF ZAMBIA CAZ/09/56/2017
HOLDEN AT KABWE/LUSAKA
(Criminal Jurisdiction)

BETWEEN:

KINGSTONE MAKUNGU



APPLICANT

AND

THE PEOPLE

RESPONDENT

Before: Hon. Madam Justice C.K Makungu in Chambers

For the Applicant: Mr. S. Mweemba Legal Aid Counsel of Legal Aid Board.

For the Respondent: Mr. M. Mulenga-Senior State Advocate - National Prosecutions Authority.

RULING

Cases referred to:

1. *Faustin Kabwe & Aaron Chungu v The People* (2011) ZR 186 Vol 2
2. *Anujkumar Rathi Krishnan v The People* SCZ Appeal No.19 of 2011
3. *Joseph Watton* (1979) 68 Cr.App.293

Legislation referred to:

1. *The Court of Appeal Act No. 7 of 2017 – Section 18 (1)*

This is an application for an Order of admission to bail pending appeal made pursuant to Section 18 (1) of the **Court of Appeal Act** ⁽¹⁾. It is supported by an affidavit sworn by the Applicant. The

gist of the said affidavit is that the Applicant was convicted for the offence of incest and sentenced to 20 years imprisonment with hard labour. Dissatisfied with the lower court's decision, the Applicant has lodged an appeal before us. The lower court dismissed an application for bail hence this renewed application. That there is a likelihood of success of the main appeal; He has terrible blood pressure, arthritis and acute anaemia which requires serious medical attention and that his incarceration will be fatal and injurious to his health; further that during trial, he was on bail and he is able to provide credible Zambian Sureties and abide by the bail conditions that this Court might impose.

In his oral submissions in support of this application, learned counsel for the appellant Mr Mweemba relied on the Affidavit in support of this application. He further relied on the case of **Faustin Kabwe & Aaron Chungu v The People** ⁽¹⁾ where the High Court held that where an applicant applying for bail raises health related issues, there exists the obvious tension between the health concern of the applicant and the potential risk of flight and therefore a reasonable balance needs to be struck between the two factors. He in this respect, argued that the applicant was not a flight risk. It was therefore Counsel's prayer that the application be granted for reasons that no prejudice would be occasioned on either party.

There is no affidavit in opposition. However, the learned senior state advocate Mr. Mulenga strongly opposed the application *viva*

voce. He conceded that bail is given at the discretion of the Court and stated that when granting bail pending appeal, there is need for the applicant to advance sufficient grounds because the Court is dealing with a convict. He contended that the applicant in this case has not advanced sufficient reasons to warrant exercise his admission to bail. On the issue of the likelihood of the appeal succeeding, he relied on the case of **Anujkumar Rathi Krishnan v The People**⁽²⁾ wherein it was 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 a conclusion is made that *prima facie* the prospects of success are dim.

His further submissions were that the lower Court had considered the application for bail and the prospects of the appeal succeeding. Considering the 20 years custodial sentence imposed, there is a high chance that the appeal will be heard within a short period before a substantial part of the sentence is served. As regards the applicant's health, it was Mr. Mulenga's argument that the applicant could receive medical attention whilst in custody as other inmates do. In conclusion, he submitted that the mere fact that the applicant was on bail during trial cannot be regarded as an exceptional circumstance to warrant bail. To fortify his argument he relied on the case of **Anujkumar Rathi Krishnan**⁽²⁾ wherein it was held that; ***unlike bail pending trial, bail pending appeal is granted with reservation because the applicant is a convicted person and***

the conviction is good unless and until an appellate Court quashes it.

I have considered the affidavit evidence filed on behalf of the applicant and the oral submissions made by both advocates to whom I am indebted. **Section 18 (1) of the Court of Appeal Act** ⁽¹⁾ provides *inter alia* as follows:

“(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

From the above provisions of the law, this application is competently before me. As rightly submitted by both advocates, the applicant must advance sufficient grounds to convince the court to grant him bail pending appeal. I must state that being an appellate Court, I am not bound to follow the High Court

decision in the case of **Faustin Kabwe and Aaron Chungu**⁽¹⁾ cited by counsel for the applicant.

As pronounced by the Supreme Court in a plethora of authorities some of the instances when bail pending appeal may be granted are as follows:

- i. Where it appears, prima facie, that the appeal is likely to succeed; or*
- ii. Where there are exceptional circumstances disclosed by the applicant;*
- iii. Where there is a risk that the sentence or a substantial party thereof will be served by the time the appeal is heard.*

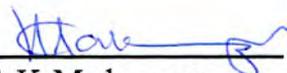
In the application for bail in the Court below, the learned trial Judge took these factors into account. Therefore I cannot fault him. The applicant has argued that the main appeal is likely to succeed because one of the grounds that has been advanced is as regards corroboration. I find that it would be prejudicial to both parties if I delved into the merits of the appeal at this stage of the proceedings.

As regard the applicant's contention that he was on bail during trial and as such he is not a flight risk, I agree with the Respondent submissions and adopt the position taken in the **Krishnan**⁽²⁾ case. My considered view is that there are no

exceptional circumstances to warrant the grant of this application. It is noteworthy that the hearing of the main appeal will not be delayed considering that criminal matters before this Court are being disposed of within reasonable periods of time. It is therefore unlikely that the applicant will serve a substantial part of his sentence before his appeal is heard.

On the issue of illness, the Medical Report that has been produced was issued by a private clinic called P.J's Primary Medical Centre. It is not in my view convincing. Be that as it may, his medical condition can be managed from the Clinic at the Prison and in case of an emergency the prison authorities will most likely take him to the hospital. For this reason stated above, I find that there are no exceptional circumstances to warrant the grant of bail pending appeal. I find no merit in this application and accordingly dismiss it.

Delivered at Lusaka this th 12 day of ^{OCT} 2017


C.K Makungu
COURT OF APPEAL JUDGE