

ALFRED M. PENSADO  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 7 September 2017 and 3 November 2017

### **Bail Pending Appeal**

*T Munodawafa*, for the applicant  
*E Nyazamba*, for the State

CHITAPI J: On 14 July, 2017, the applicant was convicted by the magistrate at Chegutu Court on two counts of theft as defined in s 113 of the Criminal Law Codification and Reform Act), [*Chapter 9:23*]. The applicant was sentenced to 18 months imprisonment on the first count with 6 months suspended on conditions of good behaviour. On the second count he was sentenced to pay a fine of \$100-00 or in default to serve a prison term of 3 months.

Following conviction, the applicant engaged the services of his present legal practitioner to note an appeal against both conviction and sentence on his behalf. The appeal was duly noted on 26 July, 2017 to this court and is pending under case No. CA 464/17. Following on the noting of appeal, the applicant's legal practitioners filed this application for bail pending appeal.

The application for bail pending appeal was filed on 2 August, 2017 and set down for hearing on 4 August, 2017. The application has attached to it the record of proceedings comprising the typed charge sheet, state outline and the trial court's recordings of the proceedings. The trial court's recording is in long hand. To the credit of the senior magistrate Mr Chauromwe, his handwriting can with reasonable exertion of the eyes be decipherable compared to some atrocious handwritings which judges have to contend with when going through records on automatic review. In fact some handwritings of magistrates are so difficult to comprehend that the judge wonders whether the magistrate can read what he or she has written if asked to do so. In such instances a typed transcript becomes necessary. I do not propose to chide magistrates to improve on their handwritings, save to just gently remind them

that since most of the cases they deal with end up on review by the High Court judges, it is important that despite the pressure they work under, they assist the court by writing legibly.

On 4 August, 2017, the application *in casu* was postponed by CHIGUMBA J to 11 August, 2017 by consent of both State and defence counsels. The reason for the postponement was endorsed as “SR” which abbreviations are used by judges to refer to “State response”. On 10 August, 2017 respondents counsel Mr *Nyazamba* filed an “SR” headed “NOTICE”. He indicated therein that he could not file a response on the merits because the “record of proceeding” was not transcribed and was not legible. He further indicated in the notice that he would on that account apply for the matter to be postponed “to such time when a transcribed record would be available.”

At the hearing on 11 August, 2017, the applicant’s counsel applied for the matter to be postponed for two weeks to allow him time to arrange for the record of proceedings to be transcribed. I asked counsel whether he was definite that the record has been transcribed since the process was not under his control. Counsel did not convince me that there was any basis to hold that the transcript would be available by that time. I therefore removed the matter from the roll and directed that counsel could set down the matter once he had obtained and filed the transcript.

I have indicated that the magistrate’s handwriting in all fairness was readable. The handwriting must have been legible as well to the applicant’s counsel because he was able to peruse it and prepare the notice and grounds of appeal. In both the notice of appeal and the bail statement, the applicant’s counsel criticised the magistrate’s judgment. He could only have appropriately done so because he read the record of proceedings. Therefore, the applicant’s counsel and myself found the record to be legible. State counsel did not find the record to be legible. It would be unfair to hold that he was lying in saying that he found the handwriting illegible. People are gifted differently and this extends to matters of sight. Since the State counsel could not make out the magistrate’s handwriting and the applicant’s counsel consented to the matter not being dealt with until he availed the transcript, I obliged the applicant’s counsel and removed the matter from the roll.

I would like to however comment on other bail relating issues including the transcription of records from the lower courts for purposes of determining bail applications pending appeal. The powers of the appeal court and here I refer to the High Court and Supreme Court to consider and where merited to admit a convict to bail pending appeal, review or related processes derive from s 123 (1) (a) and (b) of the Criminal Procedure and Evidence Act

[*Chapter 9:07*]. The provision does not specify the procedure to be followed in such applications.

The procedure to be followed in bail applications in the superior courts is provided for in the High Court (Bail) Rules 1991, S.I. 109/91 and in the Supreme Court (Bail) Rules 1991, S.I. 290/91. The two sets of rules need revisiting and amending to bring them in line with the changes in the law and more specifically with recent amendments to the Criminal Procedure and Evidence Act. For example, the Criminal Procedure and Evidence Amendment Act No. 9 of 2006, ss 106, 111, 111A and 112 of the Criminal Procedure and Evidence Act. The repealed sections are referred to in the bail rules. Bail is now provided for in Part IX of the Criminal Procedure and Evidence which covers ss 115C to 135. The latest amendment to the Criminal Procedure and Evidence Act is s 115C introduced by s 28 of The Criminal Procedure Amendment Act No. 2/2016.

The bail rules remain part of the statute book and have not been repealed. The content of the repealed sections has been carried into the new sections. In other words the old repealed sections dealt with bail at various stages of the criminal justice system. Those stages remain in force. There are certain matters which in my view are critical to the bail institution which no longer appear to be of importance to legal practitioners, the State prosecutors and I daresay the judges and the Court. Lest, I invite the wrath of the superior courts to the High Court, when I refer to judges I confine my observations and comments to the High Court and my fellow judges in the High Court where I sit.

In line with the paramount duty imposed on courts by s 165 (1) (c) of the Constitution safeguard human rights and freedoms and the rule of law, the High Court has embraced the duty by according recognition to the importance of the institution of bail. This is evidenced by the fact that administratively, the authorities have designated a special court, the “Bail Court” to sit every day of the week, public holidays and weekends excepted. The daily sitting of this court is in recognition of the constitutional requirement to safeguard the rights of accused persons as given in the Declaration of Rights in Chapter 4 of the Constitution and fundamentally as provided in Part 2 of the said chapter which lists Fundamental Human Rights and Freedoms. Sections 49, 50, 51, 68, 69 and 70 without limit can broadly speaking be said to be relevant one way or another in safeguarding or guaranteeing the right of accused persons both unconvicted and convicted in the administration of the criminal justice system. I do not propose to interrogate the provisions of the said sections in detail.

I pick out constitutional provisions, ss 44, 45 and 46. They read as follows:

“44 Duty to respect fundamental human rights and freedoms

The State and every person, including justice persons, and every institution and agency of the government at every level must respect protect and fulfil the rights and freedoms set out in this Chapter.

Application of Chapter 4

- (1) This chapter binds the State and all executive, legislative and judicial institutions and agencies of government at every level.
- (2) This chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it.
- (3) Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this chapter to the extent that those rights and freedoms can appropriately be extended to them.

Interpretation of Chapter 4

- (1) When interpreting this chapter, a court, tribunal, forum or body –
  - (a) Must give full effect to the rights and freedoms enshrined in this Chapter.
  - (b) Must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular the principles and objectives set out in section 3;
  - (c) Must take into account international law and all treaties and conventions to which Zimbabwe is a party
  - (d) Must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and
  - (e) May consider relevant foreign law;  
In addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.”

In so far as the constitutional provisions I have quoted are concerned, the thread which runs through them is that the Constitution emphasizes the respect and promotion of human rights and freedoms. I have said that with regards to bail, the judiciary which is central to the protection and fulfilment of the rights and freedoms has designated a permanent court to specially deal with bail applications in the High Court.

On the many occasions that I have presided in the bail court, I have observed that there is laxity by the State prosecutors in prioritizing the disposal of bail applications despite the urgency which must be accorded to them as they are a process of respecting, promoting and protecting the rights of accused person including convicted persons who petition the court to assert their rights in relation to the grant of bail. The bail rules provide for urgency in the processing of a every application. In fact ss 5 and 7 respectively of the High Court and Supreme Court Bail Rules provide that the Registrars of those courts should set down bail applications and bail appeals with “utmost urgency”. Officers in charge of prisons are required by the provisions of the Bail Rules to likewise play their part by ensuring that facilities and application documents are provided to inmates wishing to make bail applications or bail appeals. In all fairness therefore, one must accept that institutionally, the state has put in place adequate

legislation to promote the exercise of bail rights by accused and convicted persons. Administratively, a daily special court as already indicated has been designated to deal with bail applications. I have always referred to the bail court each time my turn comes to preside in it as the “Freedom Court.” Every person wants to be free I should also mention that the Bail Rules provide for the court or the judge to direct, condone or authorize a departure from the rules including granting an extension of periods in the rules where the court or judge “is satisfied that the departure is required in the interests of justice.” The flexibility of procedure granted to the court or judge in dealing with bail applications is again testimony to the acceptance by the law maker that the pursuit and safeguard of liberty rights should not unnecessarily be impinged by procedural technicalities.

I have already expressed my concerns that the bail rules are not being followed. Section 5 of the Bail Rules provide details of what a bail application made either before or after conviction should cover. Section 6 relates to bail applications brought on appeal following the refusal by the magistrate to admit the applicant to bail either before or after conviction and sentence. Section 7 deals with appeals by the Prosecutor General. Section 7 does not concern me in this judgment in this judgment because different considerations apply to it in that the magistrate whose decision is appealed against is required by the rule to prepare and file a response to the appeal.

I draw attention to s 5 (4), 6 (4) of the bail rules. They are similarly worded and read as follows:

- “5.4. At least three hours before the hearing of an application for bail, the Attorney General (now Prosecutor General) shall cause the following documents to be filed with the Registrar–
- (a) his written response to the application.
  - (b) a copy of any comments which he has been able to elicit from the magistrate who is presiding or who presided over the applicant’s trial where the trial has commenced or been completed; and where practicable, shall cause a copy of his response to be served on the applicant or the applicants’ legal practitioners.
- “6.4 At least three hours before the hearing of an appeal referred to in sub rule (1), the Attorney General (now Prosecutor General) shall cause the following documents to be filed with the registrar–
- (a) his written response to the appeal; and
  - (b) a copy of any comments which he has been able to elicit from the magistrate whose decision is the subject of the appeal, and where applicable, shall cause a copy of his response to be served on the appellant or his legal practitioner.

My interpretation of the rules is that there is no legal requirement for an applicant seeking bail pending appeal to file the full transcript of proceedings in respect of which he appeals. The common thread in rules 5.4 and 6.4 above is that the prosecutor is the one who

should elicit the comments of the magistrate who is presiding or has presided over the proceedings. In my judgment, the bail pending appeal application is not to be mistaken for the appeal hearing itself where a full record is a pre-requisite. While it appears to have become the norm and practice to require that an applicant seeking bail pending appeal must file and serve the State Prosecutor with the record of proceedings, I have not been able to lay my hands on any rule which sanctions the provision of the full record or transcript of trial court proceedings as a condition precedent to the determination of a bail application pending appeal. So far as I am aware and basing on my experience as State and later defence counsel appearing in the Supreme Court in cases involving the refusal to admit the applicant to bail, the judges usually directed counsel to provide the judgment of the court whose decision was being brought on appeal. Back then in the 90's all appeals from the magistrates court lay with the Supreme Court. With the changes in the law which made the High Court, the appeal court for cases from magistrates courts, the High Court applies the same rules which the Supreme Court was applying. It appears to me then that the same practice of requiring the applicant to at least provide a copy of the judgment coupled with the magistrate's comments elicited by the prosecutor should suffice for purposes of determining a bail application pending appeal.

Whilst the provision of a court record would be of great assistance, it cannot be said that its absence would disable a court from determining the prospects of success on appeal where the judgment appealed against has been availed and the magistrate's comments obtained. I therefore find that the practice of requiring applicants who apply for bail on appeal against the refusal by the magistrate to admit them to bail or for bail pending appeal after conviction and sentence, to file a full record of proceedings is not a requirement of the law as presently legislated. The practice results in delays in the disposal of these bail applications and clearly defeats the legislative intent that bail applications be treated with "utmost urgency" not just urgency. The practice also makes the process expensive because where a transcript has to be prepared, the applicant pays for it in addition to paying for the preparation of the record for purposes of appeal where the applicant has noted an appeal against conviction and/or sentence. The bail court roll is invariably unnecessarily clogged with postponed applications for bail pending appeal or appeals against the refusal by the magistrate to admit the applicant to bail. The reason given in the majority of cases is that the record in the court *a quo* is awaited. Unrepresented convicts suffer the most because they cannot easily make arrangements for preparation of the record for purposes of making their bail applications on appeal to this court because of their incarceration. This court should not in my view be complicit in creating hurdles

to the speedy determination of bail applications. Bail applications should be dealt with taking into account the bail rules which appear to have fallen into disuse. The rule of law requires that rules are followed.

*In casu*, the applicant was legally represented and I must assume that his rights were adequately protected. I did not find it necessary to raise the issue of the availability or absence of the magistrate's court record because applicant's counsel did not raise objection and is the one who moved for the postponement. This judgment has therefore been written as a reminder that Bail Rules and Procedures be followed as legislated. Bail is a liberty issue guaranteed by the constitution and procedures not provided for by rules of court should not be manufactured by the State counsels to delay the disposition of bail applications. The court must be guided by its rules. I will end by stating that it should be left to the discretion of the court where it considers it necessary to order that the full record of proceedings be first prepared and availed before it can determine the bail application on appeal from the refusal by the magistrate to admit an accused person to bail or where the applicant applies for bail pending appeal. The State counsels should not be allowed as of right to demand that there be availed a record of proceedings before they can respond to the application. Equally, the argument normally advanced by the State Prosecutors in such applications that the applications for bail are not properly before the court on account of the absence of a full transcript of the record is bad in law and unfortunately has been elevated to a rule of procedure. I have not found the rule sanctioning this requirement from the relevant legislations on bail. I therefore stress the need for the court to give effect to the rules of court and promote the rights of accused and convicted persons as guaranteed by the Constitution.

This judgment is to be taken as a reminder to the magistrates that the Bail Rules imposes a duty on them when requested by the Prosecutor/State counsel to provide their comments for the assistance of this court where an accused who had been denied bail by the magistrate appeals against that decision. The same applies where the accused who has been convicted by the magistrate applies for bail pending appeal to this court after conviction and sentence. It also applies to appeals against the refusal to grant the accused person bail pending appeal where such application has been made before the magistrate.

I will accept that the duty to provide comments as contemplated in the Bail Rules will add to the already onerous duties reposed on the magistracy as they must hear cases in a congested court roll and write judgments. Unfortunately, as judicial officers, judges included, laws must simply be followed and the Bail Rules are not an exception. The judiciary has to

carry the burden, heavy as it is. Magistrates must henceforth expect to be requested for their comments in bail applications as required by the rules and they should treat the requests and answer them with utmost urgency. In this way, this court will be enabled to speedily dispose of bail applications as mandated by law. The current practice of requiring transcripts as discussed herein is causing a back log of bail matters awaiting hearing. Such a scenario should not obtain and unfortunately arises from counsel created law which the court should not sanction.

I accordingly direct the Registrar to avail copies of this judgment to the Chief Magistrate, The Prosecutor General and the Secretary of the Law Society so that they conscientize the magistracy, prosecution and legal practitioners of the need to adhere to the provisions of the Bail Rules as they have not been abrogated or repealed. In this way this court will be enabled to speedily dispose of bail application as mandated by law. The current practice of requiring transcripts as discussed herein is causing a back log of bail matters awaiting hearing. Such a scenario should not obtain an unfortunately arises from counsel created law which the court should not sanction.

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