IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRIM) NO. 04/2019

HELD AT MASERU

In the matter between

TELLO MOTHOBI	**1ST APPELLANT**
MOEKETSI MOTHEPU	**2ND APPELLANT**
MOTEBANG SEHLABAKA	**3RD APPELLANT**
LETELE RAMOTSEOA	**4TH APPELLANT**
LETHOLA MOTHOBI	**5TH APPELLANT**
TSEPO MAROLE	**6TH APPELLANT**
FANI MAPHASA	**7TH APPELLANT**
RAMAFIKENG MOTSIE	**8TH APPELLANT**
KARABO MASTER NYAKANE	**9TH APPELLANT**
TEBOGO SHELANE	**10TH APPELLANT**

and

DIRECTOR OF PUBLIC PROSECUTIONS	**RESPONDENT**

CORAM: DAMASEB AJA
MUSONDA AJA
CHINHENGO AJA

HEARD: 12, 16 AND 22 OCTOBER 2020
DELIVERED: 30 OCTOBER 2020

Summary

Appellants charged with murder in High Court but convicted of assault with intent to cause grievous bodily harm and sentenced each to fifteen years imprisonment;

Appellants making application for bail pending appeal to the high Court - application refused;

Appellants appealing against High Court decision but failing to show material change of circumstances as required by Rule 12(5) of Court of Appeal Rules 2006 or otherwise showing they are entitled to bail on any other basis – Appeal dismissed

JUDGMENT

CHINHENGO AJA:-

Introduction

1. This is an appeal against a decision of the High Court (Mahase ACJ) refusing to admit the appellants to bail pending appeal to this Court. The appellants were charged with murder in the High Court but they were convicted of assault with intent to cause grievous bodily harm. They were accordingly each sentenced to fifteen years imprisonment.

2. The appellants committed the offence of which they were charged and convicted on 17 September 2009. It took ten years for the trial to be completed. The saving grace is that the appellants were on bail pending completion of the trial. The judgment of the trial court was delivered on 20 March 2019. The appellants then applied for bail pending appeal.

Bail was refused. The judgment refusing bail pending appeal was delivered on 27 February 2020. The record of proceedings relating to the bail pending appeal in the High Court does not show that it was prepared by the office of the DPP as required by the Rules. That is regrettable especially in light of the fact that the record placed before us was in a truncated form with pieces of it being sent to us at different times. For this reason, we readily granted the appellants' application for condonation of the late filing of the appeal. Appellants' counsel must have encountered difficulties associated with the preparation of the record.

Criminal nature of bail application and preparation of record

3. The record of proceedings in the High Court is not yet available. I must assume it is the office of the Director of Public Prosecutions (DPP) that is responsible for this state of affairs. A bail appeal is a criminal proceeding and the DPP must prepare the record of proceedings. Rule 7(1) of the Court of Appeal Rules 2006 places the responsibility of preparing the record on the DPP. It provides that-

> "The appellant or his attorney in civil matters **and Director of Public Prosecutions' office in criminal matters** shall be responsible for the preparation of court records and shall be liable to an adverse order of

costs including an order *de bonis propriis* in the event of dereliction of this duty."

Appellants application for bail pending appeal and grounds of appeal

4. After their conviction and sentence and the refusal of the High Court to grant bail pending appeal the appellants appealed to this Court against that decision. The notice of appeal clearly states that the appellants were aggrieved at the High Court decision refusing to admit them to bail pending appeal. It states-

> "APPEAL AGAINST REFUSAL OF BAIL PENDING APPEAL
>
> KINDLY TAKE NOTICE THAT appellants herein appeal against refusal of bail pending appeal which was delivered on the 27th February 2020 by Her Ladyship Mrs M. Mahase Acting Chief Justice on the grounds herein attached."

5. The appellants grounds of appeal, if they can be described as such, are not at all properly formulated. They appear at p.2 of the record and read as follows-

"1. Appellants were charged with murder and finally were convicted of assaults (sic) with intent to do grievous bodily harm.

2. Appellants were sentenced to 15 years (fifteen) imprisonment without an alternative of a fine.

3. It is appellants submission that as first offenders they were entitled to an option of a fine.

4. A sentence of fifteen (15) years for assaults has induced a sense of shock to the accused, and it is completely out of proportion with verdict."

6. In my view the above grounds of appeal against refusal of bail pending appeal are in fact an attempt to come up with grounds of appeal against sentence. They are replicated at pp 6-7 of the record. The replicated grounds appear to me to have been drawn up by appellant's counsel at a time when they were contemplating a direct application to this Court for bail pending appeal before the application for bail pending appeal to the High Court was either lodged or heard. They are similar to the grounds of appeal at p 2 of the record in all material respects, the only difference being the fourth ground which reads:

"The Court is invited to take judicial notice of the fact that since the Court of Appeal session will not take place

for the April sitting of 2019 coupled with the usual delays to prepare the record of proceedings, the appellants be afforded justice to be granted bail pending appeal, especially when the 2018-2019 financial years will operate under the worst financial constraint ever."

Difficulty with appeal: non-compliance with rules

7. This Court was at pains to appreciate how appellants' counsel handled this appeal. The record of proceedings was generally not in order. We postponed the hearing of the appeal twice during the session as an indulgence to the appellants in order for their counsel to put their house in order. We noted from the outset that appellants' counsel had not formulated proper grounds of appeal as shown above and as such there were no real grounds of appeal to be considered by this Court. Appellants' counsel had not complied with Rule 4(4) which requires a notice of appeal to state the part of the judgment or order being appealed against, if the appeal is not against the whole judgment. He had failed to state concisely and clearly the grounds of objection to the judgment or order of the High Court, or to set out findings of fact or conclusions of law that the appellants were objecting to, as required by Rule 4(4)(b). He did not file an affidavit together with the notice of appeal as required by Rules 3 and 12 of the Court of Appeal Rules 2006. As a result the DPP also did not file any answering affidavit.

Provisions in rules and Crown position

8. The rules of this Court are quite elaborate. Rule 12(1), for instance, provides that a person who has been convicted in the High Court of a criminal offence and who has lodged a notice of appeal may apply to the Court of Appeal for bail by means of a notice of motion supported by necessary affidavits and serve such notice on the DPP. Subrule (5) of Rule 12 provides that where bail has been granted or refused by the High Court the applicant to the Court of Appeal must show a material change of circumstances in order for that court to entertain the appeal. Rules 12 (1) and (5) are of critical importance to this appeal. They provide as follows:

> "(1) A person who has been convicted in the High Court of a criminal offence and who has lodged a notice of appeal may apply to the Court [Court of Appeal] for bail by means of a notice of motion supported by necessary affidavits.
>
> ….
>
> (5) The application for bail shall not be made to the Court [Court of Appeal] if bail has been granted or refused by the High Court unless the applicant shows that there has been a material change of circumstances since the grant or refusal of bail by the High Court."

9. The DPP's representative submitted that the appellants had failed to comply with Rule 12(5) in that they had not shown

that there has been a material change of circumstances since the refusal of bail by the High Court. The question that exercised our minds is whether this subrule applies to a situation such as this, where, after conviction, the appellants applied to the High Court for bail pending appeal and were unsuccessful and they then appealed to this Court against such refusal. In my view, subrule 12(5) places a stricture on applications for bail pending appeal in order to avoid accused persons applying for bail without regard to the fact that they have been convicted and sentenced by a superior court that has also properly considered the facts, the evidence and the law before coming to conclusions and that bail pending appeal has also been refused by that Court after careful consideration.

10. Rule 12(5) requires that if the High Court has refused bail pending appeal, the applicant therefor must show a material change of circumstances to justify the intervention of the Court of Appeal. The subrule must therefore be complied with. Accordingly the appellants must show a material change of circumstances to succeed on appeal. This, the appellants' counsel did not even attempt to do. On this basis alone the appeal is liable to be dismissed.

11. The DPP's representative was not clear as to what the outcome should be where the appellants have failed to show the existence of a material change of circumstances. She referred us to the case of *Motloung and Others v R*, 1970-1979

LAC 107 in which this Court considered the propriety of an appeal to this Court against a judgment of the High Court refusing to grant bail pending appeal having regard to s 10(1) of the Court of Appeal (Basutoland) Proclamation 72 of 1954. The headnote sums up the position of the law very clearly. It states:

> "Held, that in terms of s 10(1) of the Court of Appeal (Basutoland) Proclamation 1954 the legislator conferred jurisdiction on the first instance upon the Court of Appeal to hear bail applications pending appeal made to it directly; that the subsection did not, either expressly or by implication, confer on that Court jurisdiction to hear an appeal against refusal by the High Court to grant bail pending appeal, such appellate jurisdiction being conferred by s 3(1) of the 1954 Proclamation only respecting a person tried by the High Court and appealing against his conviction;
>
> Held, further concerning appellants' alternative request acceded to by the Crown that the appeal be treated as an application for bail pending appeal made directly to the Court of Appeal, that such application must be refused for the reasons, first, that the Court of Appeal had no jurisdiction to hear an application made to it for release on bail under s 10(1) of the 1954 Proclamation where application has already been made to the High Court and refused; and secondly, that there was in fact

no material change in circumstances of the appellants since their application was refused in the High Court.

Held, in the result, the appeals must be struck off the roll."

12. In my view, the position of the law has not changed. The scheme under Rule 12 of the Court of Appeal Rules is this. In terms of Rule 12(1), where a person has been convicted in the High Court and has lodged a notice of appeal, he or she may make a direct application to the Court of Appeal for bail pending appeal by way of a notice of motion supported by affidavits. Such an application will be entertained by the Court of Appeal on first instance. The other route an applicant for bail pending appeal can take is to apply to the High Court for him or her to be admitted to bail by that court, pending appeal. The stricture associated with taking this route is in Rule 12(5), that if bail has been granted or refused by the High Court, no application may be made to the Court of Appeal against that High Court decision unless the applicant shows that there has been a material change of circumstances since the grant or refusal by the High Court.

13. It seems to me that at some point the appellants toyed with the idea of making a direct application to the Court of Appeal. They must have abandoned that route when they eventually obtained a hearing date in the High Court. To my

mind, the initial lack of decisiveness as to the route to take explains why the appellants' papers posed some difficulty in understanding the approach they adopted. The result of taking the application for bail pending appeal to the High Court is that the appellants can now only be entertained by the Court of Appeal if they can show a material change of circumstances since the refusal of bail by the High Court.

14. At the hearing, we became quite conscious of the fact that the handling of the appeal by appellants' counsel left a lot to be desired. We therefore adopted a very indulgent approach and allowed counsel to make submissions on the merits. Rule 4(5) of the Court of Appeal Rules permits this Court, in exercise of its discretion, to allow an appellant to argue or rely on grounds not set forth in the notice of appeal. This subrule goes further to provide that in deciding the appeal the court "may do so on any grounds whether or not set forth in the notice of appeal and whether or not relied upon by any party." We thus eschewed a technical and legalistic approach. However the appellants did not, as was done in *Motloung,* request that their application be treated as an application for bail pending appeal made directly to the Court of Appeal. Even if they had done so their application would meet the same fate as that in *Motloung.*

Appellants contentions

15. The main contention of appellants' counsel, as we understood it, was that the learned judge *a quo* erred in failing to recognise that, as first offenders convicted of assault with intent to do grievous bodily harm, and not of murder as initially charged, they were likely to receive a non-custodial sentence on appeal against sentence, and for that reason, the learned judge should have admitted them to bail pending appeal. In other words, the contention was that the appellants have good prospects of success on appeal. Appellants' counsel was however unable to cite a single case authority in Lesotho in which a non-custodial sentence was passed for assault with intent to cause grievous bodily harm.

16. The second submission was that the appellants were on bail pending trial and that although they were facing a serious charge of murder then, they did not abscond. It was therefore unlikely that they would do so now that they are anticipating a non-custodial sentence in substitution of the custodial sentence. He prayed for admission of appellants to bail on payment of M500.00 as bail bond.

17. In their application to the High Court for bail pending appeal, the notice of motion and affidavit in support thereof appearing at pp 29-33 of the record, the appellants had set out other factors for consideration by the judge *a quo,* some of which do not appear to have been addressed by the learned judge. At paragraph 8.3 of the affidavit the appellants state that they have "exceptional health circumstances as they

have to undergo regular medical check-up"; they had been attending remand court without fail; they co-operated with the police during the investigations; they are Basotho "who have strong family bonds in Lesotho as well ..as married and have children to look after", and they are "self-employed and have employees at their workplaces".

Opposition by Crown

18. In her opposing submissions Crown counsel pointed out the inadequacies of the appellants' appeal to which I have referred above and, in particular, the issue arising from Rule 12(5). She contended that the appeal should be struck off the roll. She drew the Court's attention to the fact that the Crown filed a cross-appeal against the verdict. In the cross-appeal, the Crown will argue that "on the overwhelming evidence" before the High Court, as the Crown sees it, the appellants should properly have been convicted of murder and not assault with intent to cause grievous bodily harm. The Crown is therefore going to seek to upset the verdict and have it substituted with one of murder. In light of this, it was submitted, if the appellants were granted bail, they were likely to be induced to abscond by the prospect of a conviction on a more serious offence.

Reasons for refusal of bail in High Court

19. The learned judge in the court *a quo* stated that the reasons for sentence "have been clearly articulated in the written judgment." Unfortunately we do not have that written judgment and we are unable to benefit from the reasoning of the High Court. The learned judge accepted the DPP's submissions that the principles applicable in an application for bail pending trial are different from those applicable in an application for bail pending appeal. She accepted the general proposition that for an accused person to be admitted to bail "very strong reasons are required" because "it is a well-known principle of law that an application for release on bail is not and cannot be automatically granted". In specific regard to bail pending appeal she said-

> "[7] Indeed, for the Court to depart from the general rules have to be provided for the trial court which has convicted and sentenced the accused persons to grant an application for bail pending appeal where a custodial sentence has been imposed as in the instant case.
>
> [8] To grant such an application is an exception rather than a rule, for it is presumed that the accused, having been tried by a court of competent jurisdiction, have had a fair trial and ought to start serving their sentence forthwith.
>
> [9] It is not readily granted as when the application is one for release on bail pending trial. Of course, each

case has to be treated on its own unique circumstances. In the current application, the trial court has made observations from the demeanour of each accused (now petitioners) as well as having formed an opinion of their credibility."

20. In refusing to grant bail pending appeal, the learned judge came to the conclusion that the admitted fact that the appellants were on bail pending trial "is not an exceptional circumstance" that would entitle them to bail pending appeal. She rejected the appellants' contention that the Crown will not succeed in the cross-appeal. She opined that the assault on the deceased, the throwing of his body into a river and other aggravating circumstances of the case are such that

> "there is a likelihood that another court may convict them of a more serious offence and impose a heavier sentence. The prospects of success alluded to on their behalf are very unlikely due to the strong adduce [evidence] and the sentences imposed upon them are lengthy."

Factors to be considered in application for bail pending appeal

21. Generally speaking the *onus* lies on the appellants to show, on a balance of probabilities that their admission to

bail would not prejudice the interests of justice. Where, as in this case, the appellants have been sentenced to a long term of imprisonment the court must take this into account in determining whether they should be admitted to bail. Such determination must be made on the understanding that it can never be the only factor to keep the appellants in custody pending their appeal. In *S v Fourie* 1973 (1) SA 100 the court was considering an application for bail pending trial and its observations therein are equally applicable to an application for bail pending appeal – that there must be some cognisable indication that the applicant will abscond. MILNER J therein at 101G-H stated:

> "It is a fundamental requirement of the proper administration of justice that an accused person stand trial ***and if there is any cognizable indication that he will not stand trial*** if released from custody, the Court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence. (Cf *S v Mhlawli and Others*, 1963 (3) SA795 (C) at p 796B-c.) ***But if there are no indications that the accused will not stand trial*** if released on bail or that he will interfere with witnesses or otherwise hamper or hinder the proper course of justice, he is *prima facie* entitled to and will normally be granted bail."
>
> [***emphasis is mine***]

22. A cognizable indication that an applicant for bail pending appeal may arise from evidence tending to show that the applicant will abscond in order to avoid serving a long custodial sentence. Generally there are two main factors to consider in an appeal against a refusal of bail brought by a person already convicted and sentenced. The first is the likelihood of abscondment. In my view an inference can legitimately be drawn of the likelihood of abscondment where the sentence of imprisonment is a long one, as in this case. The second is the prospects of success of an appeal in respect of both conviction and sentence. In so considering the court must always bear in mind the right of the individual to liberty and the potential length of the delay before the appeal can be heard.

23. The appellants have been sentenced to long terms of imprisonment. The Crown has cross-appealed against the conviction and will seek to secure a verdict of murder. I think that the likelihood of the verdict being altered to murder is, in the circumstances, likely to induce appellants to avoid serving a more severe sentence that may be imposed following upon a verdict of murder. The potential of this happening can be a real inducement. Another consideration here is the prospects of success by the appellants, not only in resisting the alteration of the verdict but also in securing a non-custodial sentence. In the absence of the record of proceedings it is not possible to form any really good idea of the prospects on the first issue. The judge *a quo* seems to be

of the view that chances exist for the alteration of the verdict to one of murder. I have no basis to disagree with her but I do not think it will be safe to go along with her assessment without the benefit of perusing the record of proceedings. What I consider to be some indication that the verdict may be altered is the position of the DPP. She has lodged a cross appeal and that cannot be for ill-considered reasons. As stated by the highest court in Zimbabwe in *S v Chikumbirike* 1986 (2) ZLR 145 (SC), courts ordinarily pay proper and serious regard to the position taken by an officer of the court as responsible as the DPP. The DPP exercises a position of great responsibility and authority. The courts trust her to exercise that position with the proper measure of restraint and regard for the rights of accused persons and so, reposing that confidence in the DPP, the courts will attach, not conclusive weight, but proper weight to the position taken by the DPP. In lodging the cross-appeal, the DPP must be trusted that she has properly weighed the evidence in the trial and advisedly concluded that the evidence was overwhelming, as submitted by her representative, to justify a verdict of murder.

Conclusion

24. My consideration of the provisions of Rule 12 of the Court of Appeal Rules and the merits or lack thereof of the submissions of appellants' counsel inevitably lead to the conclusion that this appeal cannot succeed. The appellants

failed to show that there has been a material change of circumstances as required by Rule 12(5).

25. I have pondered over the question what the proper order should be where the Court is satisfied that the appellants have not shown that there is any material change in circumstances to warrant the involvement of the Court of Appeal as provided in rule 12(5). In *Motloung* the Court struck the appeal off the roll because it correctly held that it had no jurisdiction in the matter. If the failure to establish changed circumstances is viewed as a jurisdictional issue then a striking off the roll is a proper order. However if the failure to establish changed circumstances is viewed as an issue of the merits of the appeal, as I think it can be so viewed, then a dismissal of the appeal is also a proper order. In this appeal we heard submissions on the merits. The appellants failed to show that there has been a change of circumstances since the refusal of bail by the High Court. The failure relates to the merits of the appeal. Their submissions before us amounted to no more than a rehash of the submissions they made to the High Court. I will, accordingly, dismiss the appeal and not strike it off the roll.

26. Due to the particular difficulties we encountered in dealing with this appeal, we were constrained to receive submissions on all the issues raised by the appellants. Leaving aside the result consequent on a consideration of Rule 12(5), the appellants still fell short on showing that they

are not likely to be induced to abscond by the prospect of a conviction for murder should the cross-appeal succeed. They did not rely on any authority for the submission that a conviction of assault with intent to cause grievous bodily harm may merit a non-custodial sentence. Such a conviction, it seems trite, attracts a custodial sentence, a proposition we put to counsel and he was unable to convince us otherwise. This means that that the appeal cannot, in any event, succeed.

27. For the above reasons, the appeal is dismissed.

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M H CHINHENGO

ACTING JUSTICE OF APPEAL

I agree:

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P T DAMASEB

ACTING JUSTICE OF APPEAL

I agree:

_____

DR P MUSONDA

ACTING JUSTICE OF APPEAL

FOR APPELLANTS: ADV K LESUTHU

FOR RESPONDENTS: ADV L MOFILIKOANE