**IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE**

**MSCA Criminal Appeal No. 3 of 2020**

(Being High Court of Malawi, Principal Registry, Criminal Appeal No. 38 of 2018

and being Criminal Case No. 427 of 2017, First Grade Magistrates' Court sitting at Mulanje)

**Between:**

**Thomas Mzunga..... Appellant/Applicant**

**And**

**The Republic.....Respondent**

**Coram:Honourable Justice A.C. Chipeta SC, JA**
Maele, of Counsel for the Appellant/applicant
Chisanga/Msume, Principal and Senior State Advocates, of Counsel for the Respondent
Minikwa/Masiyano, Court Clerks

**RULING**

On 4th August, 2020, as Motion Judge, I perused an *ex-parte* Summons taken out by the applicant, Thomas Mzunga. It was premised on Order I rule 4 of the Supreme Court of Appeal Rules. In it he sought the leave of

the Court to dispense with the application of Order I rule 18 of the Supreme Court of Appeal Rules in an application for bail pending appeal which he intends to take up in this Court should his present application be successful. The applicant's intention is to avoid having to first take up that application in the High Court before he can bring it here.

Order I rule 18 above-cited requires all applicants in matters that fall both under the jurisdiction of the High Court and the jurisdiction of this Court to at first instance take up such matters in the High Court and not in this Court. Applications for bail pending appeal that have been made to this Court have this far been construed as falling under the jurisdiction of both the High court and this Court. This is why they have been subjected to the procedure Order I rule 18 has put in place for such category of applications. This Court has thus been quite insistent and persistent in most of its decisions in such applications in demanding that applicants must first start in the High Court before they can be accepted as having ripe business for this Court in such matters.

In my evaluation of the applicant's *ex-parte* Summons, I felt that there would be something amiss if I dealt with it, as suggested, without getting the respondent involved. The applicant was asking to be allowed to by-pass the High Court in taking up a first instance application for bail pending appeal in this Court. In light of the law as this far understood and also in the light of the numerous precedents that have followed in the path of this understanding, the applicant's proposal appeared to me to be quite radical. I thus felt that I needed to take the respondent's views into account if I was to decide it properly. I ended up ordering the application in question to become *inter partes,* and that it be called for hearing on 14th August, 2020.

As it is, the applicant's summons is supported by an affidavit. It is also supported by skeleton arguments. The applicant's story is that he first

appeared in the Court of the First Grade Magistrate sitting at Mulanje, where he was tried, convicted, and sentenced to a term of 14 years' imprisonment for the offence of defilement. He appealed against both his conviction and sentence to the High Court, but his appeal was dismissed *in toto.* The applicant then says, that he next appealed to this Court against the High Court's determination. According to him, as of now his appeal is merely awaiting the appointment of a date for its hearing by the Court.

*Vis-à-vis* the intent the applicant has just evinced to apply for bail pending appeal, he says that initially he did not believe that the appeal he had lodged had any prospects of success. As such, he did not bother to apply to the High Court to consider releasing him on bail pending the said appeal. Of late, however, he says he has revised his thoughts on the matter of bail. The judgment the Supreme Court of Appeal pronounced on 14th July, 2020 in the case of **Chimwemwe Chimbanga vs Rep** MSCA Criminal Appeal No. 13 of 2017 concerning proof of age in the case of victims of defilement is the one that has given the hope that his appeal actually rather enjoys high prospects of success.

Now, although the applicant has made up his mind to apply for bail pending appeal he indicates that he is worried that procedurally, as per Order I rule 18 above-referred and the many precedents there are on this subject, he must first lodge that application in the High Court, even though his appeal record is already in this Court. At this late stage of his case he finds this both unnecessary and cumbersome to have to go through such an ordeal. He does not see why in the circumstances the Court cannot use Order I rule 4 of the Supreme Court of Appeal Rules to dispense with the provision that compels him to take his intended application to the High Court so that he gains the freedom to just present that application for bail directly in this Court. He pointed out that the Order and rule just referred to gives this Court the power, where the interests of justice so require, to in any other way depart from applicable

rules. It is his contention that invoking this provision to his advantage and thereby enabling him to, as it were, employ a short-cut path in reaching this Court, will not only be prudent but that it will also be in the interests of justice.

The respondent, which is the State, is opposed to the applicant's proposal and application. It has, in this regard, filed both an affidavit and skeleton arguments in response. Let me mention that as the hearing of the application was about to start, this party withdrew paragraph 9 of the affidavit it had filed. That paragraph had been to the effect that in this matter the respondent had neither been served with the substantive (*record of*) appeal nor with the notice of appeal. By withdrawing the statement contained in that paragraph, therefore, to me meant that the respondent was conceding not only that it was aware that the applicant had appealed against the judgment of the High Court, but also that it had been duly served with all the relevant appeal documents in the said case. I will, therefore, proceed on the assumption that this is the concession the respondent has made.

Following this, the respondent's stand remained one that it was opposed to the applicant's summons. Its main argument against the applicant's prayer for an order allowing him to dispense with the requirements of Order I rule 18 herein in the filing of his intended bail application, was that on the facts and circumstances of this matter doing so would not be in the interests of justice. In this argument what I did not get, however, were the particulars of the facts and the circumstances the respondent had just alluded to. Despite taking this opposing stance, however, the respondent did acknowledge that the applicant had the right to take up the kind of application he had brought to this Court. All the same, in the end it the respondent's prayer was that the application herein must be denied, and that the applicant should consequently first take his intended application for bail pending appeal to the High Court instead of hoping that he can just present it in this Court.

Having read and heard all the arguments the parties have presented me with in this application, I wish to remind them of certain statements that made in the early part of this ruling. I said that applications for bail pending appeal have *this far* been construed by this Court as falling under the concurrent jurisdiction of the High Court and of this Court. At this juncture let me reveal that I used the words *this far* advisedly. I also said that on account of that construction, this Court has repeatedly held that notwithstanding this concurrence of jurisdiction, applicants in such matters are not free to just choose which Court they will take their application to in multiple choice style. Their choice of forum is governed by what Order I rule 18 of the Supreme Court of Appeal Rules has in store for them as to which Court they must approach first before trying out the next Court. *Vis-à-vis* my use of the words *this far* in reference to the understanding of the law and procedure that has dominated our handling of these manners I will revert shortly.

For now, however, if we go by this prevailing understanding, I would say that the applicant is on point in recognizing that only a summons of the type he has brought to Court can free him from the obligation to take his intended first instance application for bail pending appeal to the High Court before he can be allowed to file it in this Court. Again, proceeding on the same understanding, I would equally say that the applicant has correctly identified and chosen Order I rule 4 as the magic provision for pursuing the relief of exemption from the yoke of Order I rule 18 that is currently hanging around his neck. Thus, if I were to solely determine this application on the conventional understanding of the law and the procedure we have to date been abiding by, the only I would by now be left with to answer before concluding my determination would be whether the reasons the applicant has advanced before me by way of justifying his application do or do not amount to what can, under Order I rule 4 herein, be seen as something that would *in the interests of justice*

justify my ordering a departure from the procedure set by Order I rule 18 herein.

Speaking candidly, my answer to this remaining question, if I had no choice but to answer it, would undoubtedly have been in the affirmative. This means that I would have readily held that the applicant should be exempted from the need to go back to the High Court with his intended application considering his case record is here merely waiting to be given a date of hearing. It follows that I would have permitted him to bring such first instance application for bail to this Court notwithstanding what Order I rule 18 requires. However, as it turns out, I am of the mind that it is irrelevant for me to answer that question. With what I have found after reverting to the drawing board of the legal provisions that are critical in this situation, I can no longer proceed on the understanding of the law and the procedure we have *this far* gone by. This is because of a legal impediment I have discovered in the course of my determining this application.

I must say that had this legal barrier surfaced earlier in my mind, and before I had heard the application, I should ordinarily have raised it with the parties so that they could have considered it and addressed me on it. Since, however, it only occurred to me in the course of preparing my ruling in the matter, which was well after I had become *functus officio* in relation to the hearing of this application, the question is whether or not I should shelve my new stand on the status of the law and procedure to another opportune day or occasion. I have struggled long and hard with this question, but in the end I have come to the decision that, I cannot ignore and pretend that my perception of the law and procedure on the subject of applications for bail pending appeal have not significantly changed. Since my new views touch upon the law and the procedure that will directly impact on the application the applicant intends to bring to Court following this ruling, I cannot postpone pronouncing them just because I did not have the chance to obtain the parties' comments on

them. It is for this reason, therefore, that I will not determine this application on the understanding the law and procedure that has been the norm *this far*. I will instead determine it in line with what I now believe to be the correct way of comprehending the available law and procedure.

I must confess that this application, although looking somewhat simple to the extent that the applicant thought it fit for disposal by *ex-parte* procedure, has given me a great opportunity to revisit the legal provisions that are material in matters of bail pending appeal in all instances where an appeal has been filed from a High Court decision to this Court. This is regardless of whether the appeal in question emanates from the High Court's exercise of original jurisdiction or from its exercise of appellate jurisdiction. This revisit to the primary provisions on the subject has had a profound effect on how I now believe they should be understood and interpreted. The first is Section 359 of the Criminal Procedure and Evidence Code (Cap 8:01) of the Laws of Malawi, hereinafter referred to as the CP and EC. It empowers the High Court to consider bail applications made by persons who have, in criminal proceedings, filed a notice of appeal to this Court *pending the hearing* of such an appeal. The second legal provision is Section 24(1) of the Supreme Court of Appeal Act (Cap 3:01) of the Laws of Malawi, which empowers this Court to consider bail applications from like-positioned appellants but *pending the determination* of their appeals.

It is these two legal provisions that we have so far understood to be conferring concurrent jurisdiction between the High Court and this Court. It is further due to the construction we have ascribed to the said provisions that we have ended up holding that the Order I rule 18 procedure applies to them. In consequence of this we have pronounced a chain of precedents that warn all would-be applicants not to dare side-step the High Court if what they have is a first instance application for bail pending appeal. After this re-reading and revaluation I am at a loss

as to how we ended up comprehending these two provisions as creating concurrent jurisdiction over these matters in both the High Court and this Court.

My going through Sections 359 of the CP and EC and 24(1) of the Supreme Court of Appeal Act once again and digesting them afresh, tells me that we have erred in our manner of construing them. A close examination of the same clearly shows me that although they both tackle the subject of bail pending appeal, in reality they deal with different aspects and/or different stages of that species of bail applications. It ought to be plain on an honest reading of these provisions that whereas Section 359 of the CP and EC gives to the High Court the jurisdiction to tackle applications for bail pending appeal when the appeal in question is *pending a hearing,* in contrast to this the jurisdiction Section 24(1) of the Supreme Court of Appeal Act confers on this Court specifically targets applications for bail pending appeal that are made *pending the determination* of the concerned appeals.

Certainly it cannot be that *pending hearing* and *pending determination* can be understood to be one and the same thing. They are obviously two different things, and each of them have a specific Court that has jurisdiction over the applications that arise in its circumstances. There is, therefore, no concurrent jurisdiction here between these two Courts. How we ended up holding, therefore, that in these two scenarios there is a convergence of jurisdiction between our Court and the High Court, inn my judgment, does not seem to directly flow from the manner the provisions were couched. We have erred in seeing concurrent jurisdiction where it does not exist, just as we erred in concluding that Order I rule 18 applies to them.

I suppose it may well be that it all started somewhat innocently by our Courts accepting and entertaining an adventurous application by one applicant, later followed by many others, headed : "Application for Bail

Pending the *Hearing and Determination* of an Appeal" as I have seen on quite a number of occasions. Not suspecting that this type of heading carries the inherent error of mixing up in one application what are supposed to be two different applications falling under the jurisdictions of two different Courts, as Courts, might have lent credence to the supposition that all applications for bail pending appeal are one, and that whether they are taken out before the hearing of the appeal or before the determination of the appeal they can be pursued both in the High Court and in the Supreme Court. In case this is the origin, then we must realize that we have gone astray and must regain our bearings.

In truth, therefore, my fresh look at these provisions tells me that an application for bail *pending (the) hearing* of an appeal falls under the CP and EC, and that it belongs to the High Court. When it is determined, it ought to end there and not come not come to this Court as a repeat application. When bail has been refused in the High Court it should not suddenly be viewed as an application over which the Supreme Court of Appeal also has concurrent jurisdiction for it to be entertained under guise of Order I rule 18. This is because the type of applications for bail pending appeal that belong to the Supreme Court of Appeal fall under that Court's parent Act, and they are applications that must only be made *pending the determination* of an appeal, and not applications *pending the hearing* of such appeals.

Now, I think if we had paid attention to this fine distinction between the above legal provisions, and between the distinct jurisdictions they confer on each of these two Courts, we really should not to have concluded that there is co-ordinate jurisdiction between these two superior Courts over bail applications pending appeal, as the category that comes before *hearing* the appeal is High Court business and the category that comes before *determining* the appeal belongs to the Supreme Court of Appeal. In the absence, therefore, of concurrent jurisdiction between these two courts, Order I rule 18 of the Supreme Court of Appeal Rules, cannot be

applied wholesale to bail applications pending appeal. Our involving the Order and rule in question in such matters must have been a product of a hurried equating of the different and distinct jurisdictions Sections 359 of the CP and EC and 24(1) of the Supreme Court of Appeal Act separately confer on different and distinct Courts.

It is my new understanding of these provisions, therefore, that applications for bail *pending hearing* an appeal must only be taken up in the High Court. The Supreme Court of Appeal has no jurisdiction over them. Likewise, it is my present understanding that applications for bail *pending* the *determination* of an appeal must only be taken up in this Court. The High Court has no jurisdiction over them. As such, the jurisdictions of these two Courts being different one from the other, the question of any applicant being required to seek the leave of the court to be exempted from obeying Order I rule 18 does not arise. One need not apply to dispense with a legal provision that does not apply to him.

I am well aware that these new views of mine are liable to bring in instability in a jurisprudence in such applications that was beginning to settle and to almost sound like gospel truth. Be this as it may, my sincere belief is that when a new discovery in the interpretation of the law has been made, it should not be stifled or muted from germinating. Rather, it should be pronounced and shared so that jurisprudence can be given a chance to grow instead of being left to remain static or stale. That said, while my determination of this application would in this instance have been to allow the applicant to dispense with Order I rule 18 if my views on concurrent jurisdiction had not changed, and that I would thus have permitted the applicant to bring his intended first instance application for bail pending the hearing of his appeal directly to this Court, I sincerely cannot now come up with that kind of determination. To me a person in the position of the applicant simply needs to look for guidance as to which Court is right for his needs from the legal provision his application best suits and falls under. He will suffer no ambiguity in discovering the

law has already appointed for him. After making all these observations , I have no choice but to dismiss the applicant's summons for leave to dispense with Order I rule 18 herein, which I now do and rule accordingly.

Made in Chambers (*Open Court per Covid-19 Judiciary measures*) the 21st day of August, 2020 at Blantyre

**A.C. Chipeta SC**
**JUSTICE OF APPEAL**