Pandirker v Republic

Court:	High Court of Malawi
Bench:	Honourable Justice Chatsika
Cause Number:	Criminal Appeal Number 55 of 1972
Date of Judgment:	April 18, 1972
Bar:	Savjan and Cochrane, Counsel for the Applicant Okigbo, State Counsel, Counsel for the Respondent

Head Notes

Criminal Procedure - Right to be heard

Summary

1. The Applicant, who was charged in the First Grade Magistrate's Court, Thyolo, with causing death by dangerous driving, was convicted and sentenced to a fine and a four-year driving disqualification. The Applicant applied to the magistrate to stay the disqualification order pending his appeal against the conviction and sentence, but the application was refused. The Applicant then made a similar application to the High Court. The Applicant argued that the magistrate had not exercised his discretion judicially, and that he was not a menace on the road as he had driven without further incident for eleven months since the order was made. The State opposed the application in

principle, arguing that the Applicant had not shown any "exceptional and unusual circumstances" of hardship that would arise if the order were put into effect immediately.

2. The Court held that there is an important distinction between the practice of granting bail pending trial and bail pending appeal. In the case of bail pending trial, the accused is presumed innocent, and bail will be granted provided the court is satisfied that the accused will appear for trial. However, in the case of a post-conviction application, the accused has already been convicted, and bail will only be granted where exceptional circumstances are shown. Applying this principle to the stay of a disqualification order, the Court found that such an order would only be stayed pending an appeal if exceptional and unusual circumstances of hardship were shown. The Court held that the Applicant had failed to prove such circumstances. The Court reasoned that if there was an overwhelming probability that the substantive appeal would succeed, it would have considered the application more favourably. Since the Applicant's counsel admitted there was no such overwhelming probability and the appeal could be heard in a reasonably short time, the application was dismissed.

Legislation Construed

- Road Traffic Act (Cap. 69:01) (s 51, 123(4))
- Criminal Procedure and Evidence Code (Cap. 8:01) (s 355)

Judgment

This is an application made on behalf of the applicant to stay the operation of an order made in terms of s. 123(4) of the Road Traffic Act (cap. 69:01), disqualifying the

applicant from holding or obtaining a driving licence for a period of four years, pending the hearing and determination of his appeal to the High Court against conviction and sentence.

The applicant appeared before the Court of the First Grade Magistrate at Thyolo on a charge of causing death by dangerous driving, contrary to s.123 of the Road Traffic Act. He was convicted of the offence and sentenced to pay a fine of K160.00 and in addition an order was made in terms of sub-s (4) of this section disqualifying the applicant from holding or obtaining a driving licence for four years. It is in respect of this order that the application was made.

Counsel for the applicant submitted the application in the following terms: “

1. That I was appearing in the above case for the defence

2. That on February 28th, 1972, the learned magistrate found my client guilty of the offence of causing death by dangerous driving contrary to s.123(1) of the Road Traffic Act, and imposed a fine of K160 and disqualified my client from holding or obtaining a driving licence for a period of four years.

3. That notice of appeal was filed on February 28th, 1972 on behalf of my client, appealing against the conviction and sentence.

4. That I, on behalf of my client, am applying for the order regarding his licence to be stayed pending the hearing of the appeal."

At the hearing of the application it was argued on behalf of the applicant that the application is made in terms of s.51 of the Road Traffic Act read with s.355 of the

Criminal Procedure and Evidence Code [cap. 8:01). It was submitted that a similar application was made before the magistrate and that the magistrate, in refusing the application, merely stated as follows: "This [s.51 of the Road Traffic Act] is not mandatory and so the operation of the order is not suspended." Counsel argued that the provisions of s.51 of the Road Traffic Act and s.355 of the Criminal Procedure and Evidence Code are discretionary and that a court must exercise the discretion when invoking these two provisions judicially. It was argued further that the magistrate in the instant case did not give any reasons for refusing the application and merely stated that the section was not mandatory and proceeded to refuse the application.

On behalf of the applicant it has been submitted that he has been driving for nine years without any traffic conviction. It was further argued that the offence which is the subject of the disqualification was committed in March 1971 and that judgment in the case was passed in February 1972. During the interval between March 1971 and February 1972 the applicant had been driving and had not committed any traffic offences. It was argued, therefore, that he is not a menace on the road and consideration should be given to staying the order for disqualification to enable him to drive until his appeal against conviction to the High Court has been determined.

Counsel for the State opposed the application in principle and argued that, in order to succeed in this application, the applicant must show that there are exceptional and unusual circumstances which would cause undue hardship if the order were to be put in operation immediately. No such exceptional and unusual circumstances had been advanced by counsel for the applicant and counsel could find no reasons to support the application.

In *R. v Leinster (Duke) (2),* the applicant was convicted at the Central Criminal Court of obtaining credit without disclosing that he was an undischarged bankrupt. He was granted a certificate of appeal and he made an application to the court to be released on bail pending the hearing of the appeal. It was argued by his counsel that the trial court did not take a serious view of the offence and that the appeal could not be held until after some time, and that the result would probably be that, unless bail was granted, the applicant would have finished his term of detention before his appeal was heard. The application was refused and Sankey, J. in refusing the application stated as follows (17 Cr. App. R. at 148):

"*This Court has frequently laid down that it will not grant bail unless there are exceptional andunusual reasons; and there are no such reasons in this case, and the Court will not grant thisapplication.*"

[These words do not appear in the report of the case at 87 J.P. Jo. 536.]

In *R. v Howeson (1),* the applicants were convicted of aiding and abetting the director of a company in the publication of a false prospectus. They were sentenced to 12 months' and 9 months' imprisonment respectively. They both applied to be released on bail pending the hearing of their appeals. It was argued forcibly by counsel for the first applicant that the applicant was a man of many business activities and had many affairs which required to be wound up, and that the case being of great complication it would be useful if he could have free access to his legal advisers in the preparation of his appeal. It was further argued that he had been granted bail throughout the time of his trial and had previously reported to surrender his bail when required to do so. The Director of Public Prosecutions did not support or oppose the application but left the matter entirely to the court. In a short ruling by the court the judge stated as follows (25 Cr. App. R. at 168):

"*The Court sees in this case none of those exceptional circumstances which alone justify thegranting of bail by this Court, and the applications must be refused. There is every reason toanticipate that the hearing of the appeals will not be postponed for long.*"

In *Raghbir Singh Lamba v R. (3),* the applicant had been convicted in the magistrate's court and sentenced to imprisonment. He filed an appeal and applied for bail pending the hearing of his appeal. The main grounds in support of the application were that the case was a complicated one, and the appeal could more easily be prepared if the applicant was on bail. It was submitted that the applicant was of previous good character and that his continued detention would cause hardship to his dependants. The application was refused for the reasons that the above grounds did not reveal any of those exceptional circumstances which would justify the granting of the application.

An application for stay of an order such as this one is analogous to an application for bail pending an appeal. It is important to bear in mind the difference between an application for bail pending trial and an application for bail pending the determination of an appeal. Criminal courts have always considered the former favourably, whereas exceptional and unusual circumstances have got to be proved before the latter can be granted. Before a person is convicted of any offence he is deemed to be innocent and provided the court is satisfied that the accused person will report at his trial it will not find it necessary to deprive him of his freedom unreasonably. The reverse is true with a person who has been convicted because until the conviction is quashed by a superior court he is deemed to be guilty and does not deserve the free exercise of his freedom.

In the instant application it is to be observed that the order the operation of which the applicant is asking this court to stay, was mandatory One of the reasons which would justify this court, if "exceptional circumstances" had been proved, to grant it, would be whether or not there were chances that the substantive appeal against conviction would succeed, and in this respect the court would go even further to see that there were chances of the appeal against conviction being successful in its entirety and that the appellant would not be found guilty of any other or lesser offence under the Road Traffic Act. If, on the examination of the record, I had thought that there was an overwhelming probability that the substantive appeal would succeed, and had these exceptional circumstances been proved to this court, I would have considered this application much more favourably. Counsel for the applicant has, himself, admitted that he cannot submit that there are such overwhelming probabilities that the appeal would succeed. As I have observed already, counsel did not argue a single point which would prove exceptional circumstances in this case to justify granting the application. I have further observed that the record is not a long one and the appeal papers can be prepared and the appeal set down for hearing within a reasonably short time. I can therefore find no justification for allowing this application to stay the operation of the order for disqualification. The application must therefore be refused.