THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER JSC)

CRIMINAL APPLICATION NO. 1 OF 2003

BETWEEN

ARVIND PATEL.....APPLICANT

AND

UGANDA.....RESPONDENT

RULING OF ODER JSC.

This is an application brought under rule **5** of the Supreme Court Rules for an order granting bail **to** the applicant pending the determination of his appeal to this Court in a criminal case.

The applicant's affidavit filed with the application shows that the applicant was convicted, after a trial, of the offence of conspiracy to murder c/s 201 of the Penal Code, and sentenced to 5 years imprisonment by the Chief Magistrate's Court of Buganda Road, Kampala, on 9.3.1999. He subsequently appealed to the High Court against the conviction and sentence. That appeal was dismissed on 16.3.2001. His appeal to the court of Appeal was also dismissed, on 31.10.2002. He further appealed to this court and the appeal is pending determination. He is 52 years old. Due to that age, he said in the affidavit that he is unable to withstand prisons condition. The offence with which he was charged did not

involve personal violence. During his trial and the hearing of his appeals by the two courts below he was released on bail and never absconded.

Mr. Michael Akampurira, the applicant's learned counsel argued three grounds in support of the application. The first was that due to the busy schedule of work in the Supreme Court there was a possibility of substantial delay in hearing the appeal. He contended that although the appeal has already been set down for hearing on 2.7.2003, it might still take about three months from now before judgment in the appeal is delivered. The second is that the appeal is not frivolous. It has a reasonable possibility of success. It is based on a point of law, which is that the applicant's trial was conducted by three Magistrates. This was contrary to section 142 of the Magistrate Courts Act 1970. In the circumstance, this court will have to interpret the provisions of that section for purposes of guiding the lower courts. In case that ground of appeal is upheld, the purpose of the appeal would be defeated if the applicant is not granted bail.

Thirdly learned counsel submitted that rule 5(2) of the Rules of the Court empowers it to grant the application bail pending the determination of the appeal.

Learned Counsel pointed out that there is a lack of authorities of this Court indicating the criteria on which the Court exercises its jurisdiction under this rule. He would therefore rely on the case of Merali vs. Republic (1972) EA 47 in which the High Court of Kenya listed down the criteria which should be applied generally, to applications for bail pending appeal. Learned Counsel also referred the court to Chinambhai vs. Republic (1971) E.A. 343. He contended that the criteria laid down in the Merali case (supra) are all present in the instant application. The learned counsel then informed the court from the Bar that the applicant is a permanent resident of Uganda, though not a citizen. Citizenship is not a condition for bail. He also said that the applicant is a married man with a family, resides in his own house on plot 12 Kimera Road, Ntinda Kampala, and has no record of previous conviction. The learned counsel also introduced to the Court prospective sureties for the applicant if he were granted bail. They are Mr.Praful Patel and Mr. Henry Makmot, both well-known citizens of this country and businessmen. Mr. Makmot was a minister in a previous government in this country.

Mr. Ndamaranyj Ateenyi, state attorney, represented the D.P.P. He opposed the application. He submitted that the ground of a possibility of substantial delay is not applicable to the instant case because the appeal has been set down for hearing within two weeks. It is mere speculation by the applicant that it may take two to three months for the appeal to be completed. This court has a constitutional duty to dispose of cases expeditiously. The learned state attorney conceded that the appeal is based on points of law, but he contended that its possibility of success is minimal because the grounds of appeal raised on the third appeal are substantially the same as those that were argued in the first and second appeals, where they failed. Regarding the applicant's arguments that if bail is not granted the appeal shall be rendered nurgatory, because the applicant will have served a substantial part of the sentence, the learned State Attorney contended that the argument is speculative because it pre supposes that the appeal will succeed. Going by the results of the previous two appeals such a presumption has no foundation.

The learned state attorney conceded that the fact that the applicant had complied with conditions of bail granted to him by the three courts below is a factor in his favor but it should not influence this court to grant him bail. Unlike during trial, when the appellant was presumed innocent, he is now a convicted person. Moreover during his appeals in the High Court and the Court of Appeal the applicant had expectation to be successful in his appeals unlike now which is the third and final appeal. Learned state attorney further submitted that while the applicant was not involved in personal violence, he was convicted of conspiracy to murder, which is a worse offence than one involving personal violence.

This court has jurisdiction to grant bail to any convicted person, who has lodged a criminal appeal to court before the appeal is determined. Rule 5 (2) (a) of the Supreme Court Rules provides:-

> **"Subject to sub rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -**
>
> **(i) in any criminal proceedings, where notice of appeal has been given in accordance with rule 55 and 56, order that the appellant be released on bail pending the determination of the appeal."**

This is a discretionary jurisdiction, which should be exercised judiciously. I have not laid my hands on any decision of this Court in which the application of this rule has been considered. However, there are a few reported decisions of the High Court of Tanzania, of Uganda and of Kenya, in which bail applications pending appeals by convicted persons have been considered. Since such cases are relevant to what conditions should apply to bail applications pending appeal, they are nevertheless, of persuasive value. In my view, principles which govern granting of bail pending the determination of an appeal by any appellate court should be the same, whether it is the High Court in its appellate jurisdiction, the Court of Appeal or the Supreme Court. The earliest of the reported cases is the Tanzanian case of **Raghbir Singh Lamba VS. R.** (1958) E.A. 337. In that case, the applicant having been convicted and sentenced to imprisonment filed an appeal. The main grounds of the application for bail were that an appeal from a magistrate in Tanganyika was comparable to an appeal in England from Petty Sessions, in respect of which bail is commonly granted; that the case was complex and the appeal could more easily be prepared if the applicant was on bail; and the previous good character of the applicant and the hardship to his dependants. It was held by Spry Ag.J. (as he then was) and of the High Court of Tanganyika at that time) that: (i) principle to be applied was that bail pending appeal should only be granted for exceptional and unusual reasons: **R V Leinster (Duke), 17,Cr.App.R.147** and **R VS.. A.B. (1926) TLR** (R) **118** applied. (ii) neither the complexity of the case nor the good character of the applicant, nor the alleged hardship to his dependants justified the grant of bail, but had the court been satisfied that there was an overwhelming probability that the appeal would succeed, the application would have been granted. This strict approach appears to have influenced Sheridan J (as he then was) in the Ugandan High Court case of Girdhar Dhanji Masrani VS. R (1960) 1960 E.A. 320. In that case Sheridan J (as he was) did not agree with what Lewis.J said in an earlier case, in which Lewis J had ordered:

> **"In my opinion the modern practice as to bail should be this. In bailable offences an accused should normally be granted bail unless there are exceptional circumstances against it, for example;**

(i) Where there is a real likelihood that the accused will not appear at the trial;

(ii) Where there is a real likelihood of the offence being committed while the accused is on release.

(iii) Where the accused has previous convictions. The old rule as to "special circumstances" was from a harsher age and I am for a more humane approach. Bail is therefore granted." In the Girdhar Dhanji Masirani case (supra), the law which was relevant to the case before Sheridan, J (as he then was) was section 333(2) of Ugandan Criminal Procedure Code, which provided:

"The High Court or the subordinate Court which convicted an appellant may, if it sees fit admit an appellant on bail pending the determination of his appeal."

When considering the application of that section Sheridan, J (as he then was) said that court had a discretion on the matter. He disagreed with Lewis's J's order in the earlier case, because that order, which I have reproduced verbatim in this ruling, appeared to apply more to the considerations which should govern the grant or refusal of bail before conviction than after. Different principles must apply after conviction. The accused person has become a convicted person and the sentence starts to run from the date of his conviction. In the case before Sheridan,J (as he then was) the applicant for bail had received a sentence of 18 months imprisonment and if he were granted bail pending appeal he might be sorely tempted to abscond at any cost. Sheridan,J's ruling in **Girdhar Dhanji Masrani** (supra) then continued.

" It is unfortunate that some delay must occur before this appeal is heard but that, in itself, is not a ground for granting bail at this stage. It is with diffidence that I do not follow the order of Lewis, J, but consider that the previous practice of this court in being guided by the United Kingdom precedents in exercise of its discretion on these applications to be correct. This application is refused." I agree with view expressed by Sheridom J (as he then was) in the case of Girdhar Dhanji Masirani (supra) that different considerations should apply in application for bail before conviction and those which apply before the determination of an appeal already lodged.

In another case, **Chimambhai -Vs- Republic (No 2) (1971) E.A. 343**, the appellant had been convicted of handling stolen goods and had appealed against conviction. He was 40 years old, married with children, without prior conviction. His passport was with the police. During the hearing of the case, he had been on bail, and had surrendered every time, even though he knew that the minimum sentence for offence was 7 years imprisonment. He had given the police full co-operation. The applicant applied for bail pending appeal. Harris J. of the High Court of Kenya, held in his court ruling on 14.11.1969 that:

(i) anticipated delay in hearing of the appeal together with other factors could constitute good grounds for granting bail pending appeal (Akbarali Juma Kanji (1946) 22 (I) K.R. 17 followed).

(ii) In the circumstances bail would be allowed.

The basis on which Harris J, granted bail in the Chimambhai case (supra) was stated in his ruling. It may be summarised as follows: -

The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases. As to the measure of that recognition the decision in Kanjis case,(1946), 22, K . L R 17, is directly on the point. There, two persons had been convicted of assault causing actual bodily harm and sentenced to terms of imprisonment. Each appealed against both conviction and sentence and applied to the magistrate for bail pending the hearing of the appeal. The magistrate granted bail to one of the appellants but not the other, where upon the latter applied to the court by way of appeal from such refusal. Although in his judgment the judge said that it was not the practice to grant bail to an appellant after he had been convicted and sentenced to imprisonment except in very exceptional circumstances, he went on, nevertheless, to illustrate what he considered

would be circumstances justifying the granting of bail to such an applicant. The mere fact of anticipated delay in hearing an appeal, he said, was not of itself exceptional circumstance but might become one when coupled with other factors, and he added that the good character of the appellant together with such an anticipated delay might constitute an exceptional circumstances.

The particular circumstances in that case by virtue of which it was considered that bail should be allowed were:

1. **that the appellant was a first offender;**
2. **that his appeal has been admitted in hearing, showing thereby that it was not frivolous ,**
3. **that there would probably be a delay of six or eight weeks before the appeal could be heard by which time the appellant would have served more than one fourth of his sentence.**
4. **that the co-accused and fellow - appellant who was in no respect in a different position from him had been allowed bail.**

In the **Chimambhai** case (supra) the relevant circumstance corresponding to those in the Kanjj case (supra) may be summarized as follows:

(1) **the applicant was a first offender;**

(2) **the appeal had been admitted to hearing;**

(3) **it might be expected that it would take between twelve and twenty-four weeks before the appeal was heard; and**

(4) **the offence of which the applicant had been convicted, unlike the offence in Kanji's case (supra), was not one involving personal violence.**

In the **Chimambhai**, case (supra) Harris J concluded: "The principal damage against which the court must guard in granting of bail pending appeal, is of course, that the appellant may in the meantime either abscond or commit further offences, while, unlike the case of granting bail before trial, there is usually no damage of his destroying evidence

or interfering with witnesses In regard to the possibility of his absconding a material consideration is the length of the term of imprisonment against which the applicant is appealing, for clearly the longer that term the more likely is he tempted to abscond and possibly to leave the country. In Kanji's case, the sentence was one of only a few months whereas here it is one of seven years. Nevertheless it seems to me that this may be more a question of conditions to be imposed rather than one of the granting of bail in itself, and in the present case the applicant's passport, I understand, has already been seized by the police. Further more his sentence of seven years is the statutory minimum term of imprisonment for the offence and accordingly when the applicant surrendered to his bail at the time of the trial he then knew that if convicted and sentenced to imprisonment the term would not be of shorter duration. For these reasons taking everything into account, I granted the application and directed that the applicant might be released on bail""
I agree with what Harris.J said in that case.

In the case of **Merali vs Republic (1972) EA 47**, another Kenyan High Court case, the applicant, who had been convicted on an exchange control offence on his own plea of guilty filed an appeal claiming, inter alia, that the plea was equivocal. He then applied for bail pending appeal. Harris. J, of who heard and allowed the bail application, considered a number of decided cases, including **Kanji** (supra) **Lamba** (supra) and **Chimambhai** (supra) and listed four criteria which are proper to be applied generally to all applications for bail pending appeal. They are:

1. **the character of the applicant.**
2. **the possibility of a substantial delay;**
3. **whether the offence of which the applicant was convicted involved personal violence;**
4. **that the appeal is not frivolous and has a reasonable chance of success.**

In my view, considerations which should generally apply to an application for bail pending appeal as indicated by the cases above referred to may be summarized as follows:

(i) the character of the applicant;

(ii) whether he/she is a first offender or not;

(iii) whether the offence of which the applicant was convicted involved personal violence;

(iv) the appeal is not frivolous and has a reasonable possibility of success;

(v) the possibility of substantial delay in the determination of the appeal.

(vi) whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any).

In my view it is not necessary that all these conditions should be present in every case. A combination of two or more criteria may be sufficient. Each case must be considered on its own facts and circumstances. In the instant case, one of the grounds put forward by the appellant's learned counsel is that there is a possibility of indefinite delay in hearing the appeal. Since the applicant's second appeal was dismissed by the Court of Appeal, he has spent nine months in prison. By the time the appeal is completed, he will have served a large part of the term of imprisonment. In my view, this ground should be considered in the context that the appeal has already been set down for hearing on 2.7.2003, which is only 15 days away. Although it cannot be said with certainty when the Courts decision will be given after the hearing of the appeal, I do not think that there will be an indefinite delay before the appeal is disposed of. The criteria of substantial delay therefore does not apply to the instant case. Regarding the possibility of success of the applicant's appeal, neither the grounds of appeal, nor the record of appeal was attached to this application, which I think should have been done. In considering an application for bail pending appeal the only means by which the Court can assess the possibility of success of the appeal is by perusing the relevant record of proceedings, the judgment of the Court from which the appeal has emanated, and the memorandum of the appeal in question. In the absence of the relevant documents in the instant case, therefore, I am unable to say whether the applicant's appeal has a reasonable possibility of success. However, I think that the appeal is not frivolous since it has already been admitted for hearing and a certificate allowing the appeal, as a third appeal, has been issued by the Court Appeal.

It is contended that he applicant's character is an important consideration in the instant application. The appellant is a first offender, he has complied with all the conditions for

bails granted him by the three courts below. He never absconded. Further, the offence of which he was convicted did not involve personal violence. These are, in my view, factors favourable to the appellant. Regarding non involvement of personal violence I think that although the offence of conspiracy to murder, of which the application was convicted, did not involve the appellant personality harming the complaint physically, the conspiracy was meant to inflict the ultimate harm on the applicant. In the circumstances I think that the factors which strongly weigh in favour of bail for the appellant is his character, the most important of which are that he is a first offender; he did not jump bail or abscond when he was released on bail by the three courts below. Further his appeal is not frivolous. This is strengthened by the fact that he has a permanent abode and that substantial sureties are willing to ensure his presence -in Court as and when he is required to do so. In the result, I would grant this application and release the applicant on bail on the following conditions.

(a) Payments by him of cash bail of shs 5,000,000.

(b) Surrender to the Registrar of this Court the applicant's passport.

(c) The applicant should report to the Registrar of this Court every fortnight at 8.45 am, beginning on 2nd July 2003, when his appeal shall come up for hearing.

(d) Mr. Paul Patel and Mr. Henry Makmot should be the applicant's sureties, to secure his attendance in Court whenever he is required to do so.

(e) The said sureties should each bind himself by signing a bond (not cash) of shs. 10,000,000

It is so ordered.

Dated at Mengo this 17th day of June, 2003.

A.H.O. ODER

JUSTICE OF SUPREME COURT