

Rex Respondent v Chetty Applicant
1943 AD 321

Appellate Division

1943. March 2, 18.

WATERMEYER, A.C.J., TINDALL, J.A, CENTLIVRES, J.A, and FEETHAM, J.A.

Flynote

Criminal procedure. --- Appeal to Appellate Division. --- Delay in noting appeal. --- Negligence of attorney. --- Condonation.

Headnote

Though there had been great delay in noting and prosecuting an appeal to the Appellate Division from a decision of a Provincial Division dismissing an appeal from a conviction in a magistrate's court, such delay was condoned, the Provincial Division having granted leave to appeal from the conviction which was a serious one and the delay having been caused by the negligence of the accused's attorney.

Case Information

Application for an order condoning the failure of the applicant to lodge notice of an appeal within the time prescribed by the Rules of Court and for leave to proceed with the appeal.

The facts appear from the judgment of FEETHAM, J.A.

J.N.C de Villiers, for the applicant.

F.P van Gass, K.C., Attorney-General, O.F.S., for the Crown.

Cur. adv. vult.

Postea (March 18th).

Judgment

FEETHAM, J.A.: The applicant was, on the 3rd October, 1941, convicted in the magistrate's court, Pretoria, of receiving stolen property well knowing it to have been stolen, and was sentenced to five months' imprisonment with hard labour. He appealed against the conviction to the Transvaal Provincial Division, which dismissed his appeal on the 9th January, 1942. Application was made to the Transvaal Provincial Division for leave to appeal to this Court. This application came before two Judges of the Transvaal Provincial Division, neither of whom had taken part in the hearing of the appeal; the *Attorney-General* did not oppose the application, and leave was granted. Under Rule 6(2) of the Rules of the Appellate Division it was the duty of the appellant to lodge notice of appeal with the Registrar of the Court within twenty-one days after the order for leave to appeal had been granted by the Court appealed from. This requirement was not complied with, and the application now made is for an order condoning the failure to lodge notice of appeal within the time prescribed, and authorising the applicant to proceed with his appeal.

The applicant states in his petition that he "at all material times

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desired and intended to prosecute the appeal, and was at all times under the impression that the necessary steps thereto were being taken on his behalf by his Pretoria attorney whom he had instructed to proceed with the appeal." It appears from affidavits filed by this attorney that he had acted as attorney for the applicant in the trial in the magistrate's court, and in the appeal to the Transvaal Provincial Division, and that he received instructions to note and prosecute an appeal against the judgment of the Transvaal Provincial Division; but that he was not aware that, after leave to appeal had been granted by the Transvaal Provincial Division, it was necessary to file a notice of appeal. It is

apparent from the attorney's affidavits, and also from the correspondence which took place between the attorney and the Registrar of this Court in July and August, 1942, that during the period of nearly six months which elapsed between the 9th January, 1942, and the 2nd July, 1942, the attorney, though he was supposed to have the appeal in hand on behalf of his client, took no trouble to acquaint himself with the requirements of this Court as to such an appeal, and that, even after such requirements had been indicated to him by the Registrar in a letter of the 4th July, he still failed to take steps to comply with them.

It is stated in the petition that the fact that the time allowed for lodging the required notice of appeal had expired was brought to the notice of the attorney by a message received by him from the *Attorney-General* on or about the 24th April, 1942, requiring his client, the applicant, to surrender himself to the police to serve his sentence. Even after that the attorney delayed until the 2nd July, 1942, before sending a notice of appeal to the Registrar of this Court, together with the applicant's petition asking for condonation of the failure to lodge the notice within the time prescribed, and a verifying affidavit, which was dated 27th April, 1942; even then, as pointed out to him by the Registrar, the requirements of the rules as to the lodging of necessary papers through an attorney practising at Bloemfontein, and the furnishing of type-written copies of the petition, were not complied with. The papers connected with the application were not properly lodged until the 25th November, 1942.

No reasonable excuse has been offered by the attorney for the delay which ensued after the 24th April, 1942, before the necessary papers were finally lodged on the 25th November, 1942. He says

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that his client lost the copy of the record which had been handed to him, at some date which is not specified, for the purpose of obtaining Counsel's opinion as to the advisability of prosecuting the appeal, that he was for some months unable to obtain another copy owing to difficulty in tracing the whereabouts of the original record, and that he thought it was advisable, if not essential, for this Court to be furnished with copies of the entire record when the application was made for condonation. The rules, however, do not require that, when application is made for condonation of delay in giving notice of appeal, copies of the record should be furnished to the Court, and any difficulty that may have been experienced in obtaining copies of the record cannot therefore be regarded as affording a sufficient reason for the prolonged delay, more than six months in duration.

So far, however, as appears from the papers before us, the applicant himself was not responsible for the delays which have occurred, save in so far as he continued to allow his case to remain in the hands of an attorney who had shown himself unworthy of his confidence, and, in view of the serious nature of the conviction recorded against the applicant, and of the fact that he was given leave to appeal by the Transvaal Provincial Division, the application for condonation is now granted, and leave is given to proceed with the appeal, subject to the requirement that the record must be lodged with the Registrar within one month of the date of the order now made.

It may be well to add that the Pretoria attorney concerned should recognise that, as this application only became necessary as the result of his negligence, he will not be justified in making any charge against his client for services rendered by him in connection therewith. If a similar matter should come before the Court again, we shall have seriously to consider whether we should not call upon the attorney concerned to show cause why he should not himself be ordered to pay the costs of the application.

WATERMEYER, A.C.J., TINDALL, J.A and CENTLIVRES, J.A, concurred.

Application accordingly granted.

Applicant's Attorneys: *M. Levy*, Pretoria: *Lovius & Shtein*, Bloemfontein.