ATTORNEY GENERAL

Versus

GILBERT MABUSA

And

FADZAI DECEMBER

And

MOLLY CHIMHANDA

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 16 DECEMBER 2011

T Makoni for the appellant
K. Ncube for the respondents

Judgment

MATHONSI J: The three respondents are being charged with contravening section 25 (1) (b) as read with section 25 (2) of the Public Order and Security Act [Chapter 11:17] (POSA) and contravening section 37 (1) (b) of the Criminal Law Code [Chapter 9:23]. Alternatively, they are charged with contravening section 33 (2) of the Criminal Law Code.

The penalty for breaching section 25 of the POSA is a fine not exceeding level 12 or imprisonment for a period not exceeding 1 year or both. The penalty for breaching section 37 (1) (b) of the Criminal Law Code is a fine not exceeding level 10 or imprisonment for 5 years or both. That of contravening section 33 of the Criminal Law Code is a fine not exceeding level 6 or imprisonment for a period not exceeding 1 year or both.

The respondents were arrested on 5 December 2011 when they presented themselves to the police. They appeared on initial remand at Gwanda Magistrates' Court on 7 December 2011 and were admitted to bail. They were ordered to pay a bail deposit of US$50,00.

Immediately after being granted bail the appellant invoked the provisions of section 121 (1) of the Criminal Procedure and Evidence Act [Chapter 9:07] giving notice of his intent to appeal to this court against the judgment of the Magistrates' Court granting the respondents

bail. That way, the appellant succeeded in keeping the respondents in custody where they have remained until now.

Section 121 of the Act provides:-

"1. Subject to this section and to subsection (5) of section 44 of the High Court Act [Chapter 7:06], where a judge or magistrate has admitted or refused to admit a person to bail –

(a) The Attorney General or his representative, within 7 days of the decision; Or

(b) The person concerned, at any time,

may appeal against the admission or refusal or the amount fixed as bail or any conditions imposed in connection therewith.

2. …

3. A decision by a judge or magistrate to admit a person to bail shall be suspended if, immediately after the decision, the judge or magistrate is notified that the Attorney General or his representative wishes to appeal against the decision, and that decision shall thereupon be suspended and the person shall remain in custody until –

(a) if the Attorney General or his representative does not appeal in terms of subsection (1) –

(i) he notifies the judge or magistrate that he has decided not to pursue the appeal; or

(ii) the expiry of seven days

whichever is the sooner; or

(c) If the Attorney General or his representative appeals in terms of subsection (1), the appeal is determined."

The appellant noted an appeal to this court as notified on the following grounds:

"(a) The court *a quo* erred in not giving sufficient weight to the fact that the respondents know the source of the CDs in question. Their release would

result in further production and distribution of the material which is the foundation of all 3 counts.

(b) The court *a quo* erred by not imposing/attaching any other condition to the bail thereby (*sic*) the respondents are at liberty to abscond, interfere with witnesses and commit similar offences."

The allegations against the respondents are that on 24 November 2011 at Gwanda Hotel, they convened a public meeting the discussion of which was of a political nature, without notifying the police as provided for in section 25 of the POSA. It is further alleged that during that meeting they distributed DVDs of the Media Monitoring Project Zimbabwe containing abusive or insulting content intending to provoke a breach of peace.

In the alternative, they are accused of undermining the authority of or insulting the President in that the DVDs they allegedly distributed carried messages which undermined or insulted the President.

Following a full hearing of the bail application the court *a quo* reasoned as follows:-

> "It is trite law that where the state elects to oppose bail on the basis that the bail applicant is a flight risk, then as with other grounds for opposing bail, a bald assertion is not enough. The court was guided on this by Supreme Court judgment in the case of *State* v *Learnmore Jongwe* 2002 (2) ZLR 209 (S). In terms of this judgment the court has considered the character of the charges against accuseds and the penalty provision. Will also consider the apparent strength of the state case. Clearly up to now there is no evidence that the accuseds are likely to run away and not stand trial. In other words they have not so far conducted themselves in such a way that it can be reasonably concluded that should they be given bail they will try to run away and not stand trial. … The state alleges accuseds may further distribute some CDs if released on bail and that these CDs which have similar content to those in question are in Harare. This is a mere suspicion by the state that since accused 2 and 3 brought CDs to Gwanda from Harare there must be more where the others came from. The police in more than two weeks have not made a single move to recover them. The court would not accept this as a ground to refuse accuseds bail."

The court *a quo* also considered the fact that the matter was brought for remand after the police had "compiled a full docket meaning all witnesses have had statements recorded and the issue of them being interfered with by the accused does not arise".

I have already made reference to the fact that the penalty for all the charges preferred against the respondents is, first and foremost, a fine. It is trite law that where a statute provides for a penalty of a fine and an alternative penalty of imprisonment the sentencing court must give effect to the fine first. Imprisonment is always reserved for extremely serious breaches or repeat offenders – *AG* v *Ndlovu & Ors* HB-159-10 at pages 3 – 4.

The above excerpt of the judgment of the court *a quo* shows that it was alive to the penalty likely to be visited upon the respondents if convicted. Surely where a bail applicant is likely to be sentenced to a fine, any risk of abscondment is completely non-existent.

The first ground of appeal in the matter suggests that the appellant has an apprehension that the respondents are likely to commit further offences if granted bail. The court *a quo* considered that issue and concluded that it was "a mere suspicion" not supported by fact. The appellant had an opportunity at the first instance to lead evidence to sustain his apprehension that offences may be committed in future. He did not take advantage of that opportunity contenting himself with placing reliance on the public prosecutor's unsubstantiated "say so" from the bar. That did not find favour with the court which dismissed the argument.

The second ground of appeal relating to the decision not to impose bail conditions against interference with witnesses is regrettably without merit either. The court *a quo* took into account the fact that investigations had already been completed and that there was no chance of interference whatsoever given that statements had been recorded from witnesses. Submissions made before that court to that effect were not challenged whatsoever by the prosecution. For that reason the findings of the court *a quo* were proper.

It has not been shown that there was any misdirection on the part of the court *a quo* in admitting that respondents to bail and in not imposing stringent conditions to the bail. Quite to the contrary, the record of proceedings clearly illustrates that the court *a quo* applied its mind sufficiently to all the relevant factors and came to the conclusion that the respondent should be admitted to US$50,00 bail and nothing more.

The grounds of appeal which the appellant relies upon, are spectacularly devoid of merit. Section 121 of the Criminal Procedure and Evidence Act, gives the appellant power to veto the grant of bail to an accused person. It accords the appellant a discretion to prevent the release of a person who has been granted bail in situations where he intends to appeal that decision. To the extent that it interferes with the liberty of a person who has been admitted to bail, that discretion should be exercised judiciously because the legislature, in its wisdom, entrusted the appellant with huge powers.

For that reason, it is unacceptable for any representative of the Attorney General to shoot up the moment bail is pronounced and invoke section 121 without applying his/her mind to the basis for such invocation. I have said that there is no merit in the grounds for appeal which do not show any misdirection at all on the part of the court *a quo*. In fact those grounds are legendary by their lack of merit.

One is therefore left wondering whether the appellant's representative did apply his mind at all. The abuse of section 121 to keep persons in custody who have been granted bail has tended to bring the administration of justice into disrepute. It must be discouraged by all means and the time has come to announce to law officers prosecuting on behalf of the Attorney General that section 121 should be invoked only in those situations where there is merit in the appeal.

Admitting a person to bail is the judicial discretion of the magistrate or judge. An appeal court can only interfere with that discretion where it is shown that there was a misdirection or that the discretion was exercised injudiciously. Whichever way, persons who have been properly granted bail should not be kept longer in custody merely as a way of punishment. That is an improper exercise of the discretion given to the Attorney General by section 121.

In the present case, even if the respondents are convicted they are likely to be visited with a fine. Therefore the seriousness of the offence or lack of it, leads to the conclusion that a moderate bail deposit is called for.

This is what the court *a quo* ordered and in my view there is absolutely nothing wrong with that.

Accordingly, I order as follows; that:

1. The appeal be and is hereby dismissed.
2. The decision of the magistrate to grant the 3 respondents bail pending trial in the sum of US$50,00 stands.
3. The said US$50,00 should be deposited by the respondents to the Assistant Registrar of the High Court, Bulawayo.

Criminal Division, Attorney-General's Office, applicant's legal practitioners
K. Ncube & Associates, respondents' legal practitioners