VIKAS MAVHUDZI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 25 AND 31 MARCH 2011

L Jamela assisted by *Ms L Chanaiwa* for appellant
T Makoni for the respondent

Bail Application

NDOU J: The appellant was refused bail by a Bulawayo Magistrate. He is not happy with denial of bail hence this appeal. The background facts are the following. The appellant is charged with contravening section 22(2) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] i.e. "subverting a constitutional government". It is briefly alleged that on 24 February 2001, he urged and suggested to the Prime Minister Mr Morgan Tsvangirai to take over or attempt to take over the government by unconstitutional means by sending an email on the Prime Minister's facebook social network. It is the contents of this email message that forms the charge in this case. The message reads "I am overwhelmed don't know what to say PM, what happened in Egypt is sending shock waves to all dictators around the world. Worth emulating hey." From the facts alleged in the state outline, the state case is based purely on this message. The message has been described by the state as "a security threat message to Prime Minister …"

The magistrate refused the appellant bail on the following reasons:-

> "Having listened to submissions of both the state and the defence counsil [*sic*] this court is of the view that it would not be in the interest of justice to grant the accused bail at this stage. It is this court's view that although the accused is presumed to be innocent until proven guilty, the seriousness of the charge which accused is facing, the safety of the public and the security of the state cannot be overshadowed y the liberty of an individual. The court also has no reason to believe that the assumption that accused may continue sending messages to people urging them to revolt against the government is a remote possibility. Neither is there any mechanism which this court may put in place to bar the accused from doing so. In the circumstances bail is accordingly refused."

This appeal is directed at this finding by the magistrate's court. It is trite that in absence of misdirection or irregularity the court *a quo's* discretion in denying appellant bail cannot be assailed.

In the magistrate's court, the state called viva voce testimony of the Investigating Officer Detective Sergeant Nyathi in support of its case. His reasons for opposing bail were that the appellant may abscond as he is unemployed and that he may continue sending similar messages. In his reasons, the trial magistrate did rule that there is a risk of abscondment. He gave the following reasons i.e. seriousness of the offence, threat to security and risk of commission of similar offences.

It is trite that the seriousness of the offence is not itself a reason to deny accused bail. The seriousness of the offence has to be viewed in conjunction with other factors. The court a quo misdirected itself by making the seriousness of the offence the overriding factor to refuse the appellant bail – *Aitken & Anor* v *Attorney General* 1992 (1) ZLR 255 (S) and *S* v *Hussey* 1991 (2) ZLR 19 (S). In the latter case it was stated that "… to disregard this very well founded principle and to incarcerate an individual purely because he faces a serious offence would be in disregard of this very valid and important principle and respect for the law and social condemnation of those who break is."

In *Attorney General* v *Kanada* HH-200-90 it was rightly stated – "… the seriousness of the offence charged is not per se a reason to refuse bail. The fundamental principle governing the court's approach to bail is to uphold the interests of justice. This requires the court, as expeditiously as possible to fulfill its function of safeguarding the liberty of the accused person as enshrined in section 13 of the Constitution, while at the same time protecting the administration of justice and the reasonable requirements of the state." See also *S* v *Biti* 2002 (1) ZLR 115 (H). Bail is not punitive by nature. In light of the foregoing misdirection I am at liberty as far as bail is concerned.

On the question of the likelihood of commission of further similar crimes, this is no more than a mere assumption unsupported by any evidence. The state should support its assertions with cogent reasons – *S* v *Hussey, supra*. In this case the offending email was sent to the Prime Minister on 24 February 2011. The appellant was arrested on 28 February 2011. No further email messages were sent to anyone in those four days. The appellant had sufficient time to make up follow-up messages. He did not do so. The court a quo fell into error by failing to follow these guiding principles from precedents.

Looking at the facts the granting of bail accompanied by stringent conditions will meet the justices of the case. It is accepted the offence is serious. There is no evidence that this fact alone would induce the unemployed appellant to abscond. Other conditions would serve as

deterrence from sending similar messages. The appellant now knows the seriousness of his conduct from his incarceration. He now knows the futility of sending such messages under anomity from the detection of the present offence. He was arrested notwithstanding the fact that he sent the message concealing his identity.

Accordingly, the appeal succeeds. I set aside the order of the court a quo and grant the appellant bail as follows:

1. That the appellant deposits the sum of US$200 with the Deputy Registrar of High Court, Bulawayo.
2. That the appellant resides at 948/2 Old Magwegwe, Bulawayo until the finalization of the matter.
3. That the appellant shall not interfere with state witnesses or temper with state evidence.
4. That the appellant reports three times a week, on Mondays, Wednesdays and Fridays between 6.00 am and 6.00 pm at Magwegwe Police Station.
5. That the appellant shall not leave 40 kilometres radius of Bulawayo Main Post Office without a written authority by a Bulawayo magistrate.

Zimbabwe Lawyers for Human Rights, appellant's legal practitioners
Criminal Division, Attorney General's Office respondent's legal practitioners