PARDON CHIGWADA
and
BRIAN DARRYKEN
and
BLESSING MAVHUNGA
and
DOMINIC MASIKA
and
KUMBIRAI CHAKEZHA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 17, 25 April 2014

APPEAL AGAINST REFUSAL OF BAIL PENDING TRIAL

M. Nyatsoma, for the applicant
I. Muchini, for the respondent

CHIGUMBA J: This is an appeal against refusal of bail pending trial, based on the allegation that the trial court misdirected itself in dismissing the application for bail without offering the appellants, who were not legally represented, an opportunity to be heard. The relief that the appellants seek, is the setting aside of the refusal to admit them to bail, and their admission to bail, on the following terms:

IT IS ORDERED THAT THE APPELLANTS:

1. Pay the sum of US$50-00 each to be deposited with the clerk of court, Harare Magistrates Court.

2. Reside at their given addresses until the matter is finalized.

3. Not interfere with witnesses.

4. Report once a week on Fridays between 6am to 6pm at Chitungwiza police station until the matter is finalized.

The appellants were charged with robbery, as defined in s 126 of the Criminal Law (Codification and Reform Act) [*Cap 9:23*], (hereinafter referred to as the Code), it being alleged, on the Form 242, request for remand form, that, on 28 March 2014, at 1800 hours, they teamed up and hatched a plot to steal from Garikai Nyanga, of house number 2752 Unit 'C' Seke, Chitungwiza. It was alleged further, that they proceeded to Chitungwiza in a bus registration number ABB 0965, and that, first, second, and third appellants grabbed the complainant and dragged him into their bus where fourth and fifth appellants were waiting. Appellants allegedly produced police identification cards, identified themselves as police officers and accused the complainant of selling airtime without a valid licence. It was alleged that the appellants drove around Chitungwiza while they robbed the complainant of US$320-00 cash and airtime recharge cards for Econet, Telecel, and NetOne valued at US$150-00. They then allegedly shoved the complainant out of the bus and drove away. Complainant recorded the registration number of the bus and reported the matter to the police the following morning.

On 29 March 2014, the complainant identified the vehicle used, leading to the arrest of the appellants. Nothing was recovered. The appellants were allegedly positively identified by the complainant. Detective Sergeant D. S. Tsodzo is the Investigating Officer in this matter. He deposed to an affidavit, on the first of April 2014, in which he stated his reasons for opposing the admission of the appellants to bail pending trial. He said that the appellants were likely to interfere with witnesses and or evidence. He said there was a 'high likelihood' that they would interfere with witnesses since they were public transport operators who resided in the same area as the witnesses. He stated that the stolen property has not been recovered, that cases of this nature are on the increase and that the appellants were likely to commit further offences if admitted to bail. Lastly, he stated that the chances of conviction were high, which would likely induce the accused to abscond.

On 1 April 2014, at the initial remand hearing, the fifth appellant was represented by his counsel Mr. *Chagwiza*. On 2 April 2014, at the hearing of the application for bail pending trial, Mr. *Chagwiza* submitted that there were no other witnesses other than the complainant so the state's allegation that the appellants were likely to interfere with witnesses was baseless and

without foundation. He submitted that there was no real likelihood of interference with the complainant. On the likelihood that if admitted to bail further offences would be committed, it was submitted that, that in itself is not a reason to deny bail, especially in the absence of evidence of propensity to commit similar offences. It was submitted that the fifth appellant was a mother of minor children, with ties to the community, who was not likely to abscond if admitted to bail. It was submitted that she had no external links, no travel documents, and no means of survival outside Zimbabwe. It was submitted that she is of fixed *abode* and that she cooperated with the police investigation. Finally, it was submitted that she denied taking part in the commission of the offence, but had been in the vehicle in question for transportation purposes, since it was a commuter omnibus. She was a passenger on the commuter omnibus when the other appellants were arrested.

The first appellant told the court that he has three children aged 1, 3, and 7 years old, that he is a sole breadwinner, that this was his first court appearance, that he is of fixed *abode* residing at the support unit. The second appellant told the court that he is a family man with two children aged 3 and 5 that he has to provide for his family that he can report at St Mary's police station, that he has no external ties, and that this was the tenth time he was appearing in court. The third appellant told the court that he is a family man with two children aged 2 and 2 years, that he is the sole breadwinner, that he has extended family dependants to take care of, and that he is of fixed *abode*. The fourth appellant told the court that he is a family man with three children, that he can report at St Mary's police station, that he is the sole breadwinner, that he has no travel documents and no intention of leaving the country, that this was the first time he has ever been arraigned before the courts, and that he can report to Chitungwiza police station.

Counsel for the respondent, in opposing the admission of the appellants to bail, relied on the case of *S* v *Biti* 2002 (1) ZLR 115*,* as authority for the proposition that, in deciding the question of admission to bail pending trial, a court must consider the seriousness of the offence, be guided by the character of the charges, the strength or weakness of the state case, the likely penalty in the event of a conviction, and weigh these factors against the assurances by the accused that they will stand trial. It was submitted that the court should strike a balance between the interests of the accused to personal liberty, the presumption of innocence, s 50 of the Constitution which stipulates that unless there are compelling reasons accused is entitled to be released pending trial.

It was submitted on behalf of the respondent that the interests of justice would not be served by the admission of the appellants to bail because: the offence is serious, the likely penalty severe, there is overwhelming evidence, the appellants were positively identified by the complainant, no probable defence was offered except by the fifth appellant, all five appellants acted in common purpose and there is a nexus in regard to all five, in the commission of the offence. Counsel for the respondent referred the court to the case of *Attorney General* v *Phiri* 1987 (2) ZLR 33 and relied on it as authority for the proposition that:

> "The fundamental principle governing the court's approach to the granting of bail is that of upholding the interests of justice. This requires the court, as expeditiously as possible, to fulfill its function of safeguarding the liberty of the individual, while at the same time protecting the administration of justice and the reasonable requirements of the State. The mere possibility of the accused committing further crimes, standing alone, would not be sufficient to outweigh the accuser's right not to be deprived of his freedom."

The trial court's bail ruling was as follows:

> "All the 6 accused face a charge of robbery. The allegations being that whilst acting in concert and common purpose they dragged the complainant into their bus and forcibly took from him property valued at US470 which was not recovered. The state alleges that accused 5 and 6 are girlfriends of accused 1 and 4 respectively. Defence counsel for accused 5 told the court that accused 5 and 6 were just passengers in the kombi and that he gathered that accused 1, 2, 3 and 4 had intended to recover their money from the complainant. The fact that accused 5 is a girlfriend of accused 4 has not been challenged. A look at the totality of the facts shows that one cannot rule out commission purpose. The state relies on the complainant who identified the accused and also the bus which was used in the commission of the offence. The strength of a state case if coupled with the seriousness of the offence charged are good grounds to deny an accused bail. In this case the offence is serious and very prevalent nowadays such that it attracts a severe prison term. The state's case is strong because the accused were positively identified by the complainant and the totality of the surrounding circumstances suggest common purpose between all the accused. The appreciation that a severe sentence is likely given the strength of the state case is likely to induce flight as such it will not be in the interests of justice to release the accused on bail. Accordingly the application for bail in all the 6 accused, are hereby dismissed".

This court must consider whether the appellants successfully discharged the onus on them, and adduced sufficient evidence before the court *a quo*, that, on a balance of probabilities, they are suitable candidates for admission to bail pending trial. In terms of s 117 of the Criminal

Procedure and Evidence Act, the court *a quo* was enjoined to consider various factors, which include:

> "(i)the ties of the accused to the place of trial; (ii) the existence and location of assets held by the accused; (iii) the accused's means of travel and his or her possession of or access to travel documents; (iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor; (v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee; (vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions; (vii) any other factor which in the opinion of the court should be taken into account;".

And

> "(i) whether the accused is familiar with any witness or the evidence; (ii) whether any witness has made a statement; (iii) whether the investigation is completed; (iv) the accused's relationship with any witness and the extent to which the witness may be influenced by the accused; (v) the efficacy of the amount or nature of the bail and enforceability of any bail conditions; (vi) the ease with which any evidence can be concealed or destroyed; (vii) any other factor which in the opinion of the court should be taken into account".

The court must then weigh the interests of justice against the right of the accused to his personal freedom, with particular emphasis on the likely prejudice he would suffer were he to be detained in custody. In the South African case of *S* v *Mbaleki* 2013 (1) SACR 165*,* it was held that:

> "….it must necessarily follow, on an analysis of the evidence as a whole, the probative value of the statements produced by the appellants and the burden of 'exceptional circumstances' that rested on them, that they had not succeeded in demonstrating that the lower court was wrong and that the decision to refuse bail should be set aside. (Para [13] at 169d.)"

In another South African case *S* v *Diali* 2013 (2) SACR 85*,* the court found that:

> "…on a conspectus of all the evidence, together with the apparent strength of the state's case, and the possibility of two terms of 15 years' imprisonment, the magistrate had not erred in coming to the conclusion that it would not be in the interests of justice to allow the appellants to be released on bail. Appeal dismissed. (Paras 20–21 at 89D–E)

The respondent is opposed to the admission of the appellants to bail, on the basis that the court *a quo* did not misdirect itself as alleged or at all, that there were no gross irregularities in the court *a quo*'s findings, and that, consequently, its decision cannot be interfered with. This

court's jurisdiction to determine an appeal in criminal matters, from an inferior court or tribunal, is found in s 34 of the High Court Act [*Cap 7:06*] The principles to be applied in considering whether the decision of an inferior court should be interfered with, are found in the case of *Barros & Anor* v *Chimpondah* 1999 (1) ZLR 58*,* where the Supreme Court stated that:

> "the finding by the trial judge that there were no special circumstances for preferring the second buyer above the first was an exercise of judicial discretion. The exercise of this discretion may only be interfered with on limited grounds. It is not enough that the appellate court thinks that it would have taken a different course from the trial court. It must appear that some error had been made in exercising the discretion, such as acting on a wrong principle, allowing extraneous or irrelevant considerations to affect its decision, making mistakes of facts or not taking into account relevant considerations."

It was submitted on behalf of the appellants that the trial court misdirected itself by not affording first to fourth appellants an opportunity to be heard. A perusal of the record of proceedings of the court *a quo* will show that this is an incorrect allegation. Each appellant clearly made submissions in support of the application to be admitted to bail pending trial, and the submissions were recorded at record pp 4-5. There is no merit in the allegation that the court *a quo* misdirected itself by not affording the appellants an opportunity to be heard. Can it be said that the court a *quo* made any error in exercising its discretion, such as acting on a wrong principle, allowing extraneous or irrelevant considerations to affect its decision, making mistakes of facts or not taking into account relevant considerations? It was submitted that the court *a quo* misdirected itself by considering only the seriousness of the offence and failing to consider other relevant factors.

A perusal of the bail ruling at record p 8 by the court *a quo* does not support these averments made on behalf of the appellants. The court *a quo* took into consideration:

- That the allegation that accused 5 is a girlfriend of accused 4 was not challenged.
- That the totality of the facts made it impossible to use out commission purpose.
- That the state had a strong case based on the evidence of the complainant who positively identified the accused and the vehicle used in the commission of the offence by its licence plate.

- That the strength of the state case, when coupled with the seriousness of the offence are good grounds to deny bail. See *S v Hudson* 1980 (4) SA 145
- The offence is now prevalent and there is need to protect society from being preyed upon by commuter bus operators
- That the severity of the penalty on conviction was likely to induce flight.

The right of an accused to his personal liberty pending trial, is enshrined in the Constitution of this country. So is the right of every citizen in Zimbabwe to be protected by the state. It is always difficult to consider the admission of an accused to bail pending trial, when the offence that he is charged with has become prevalent, and society is in an uproar about this menace. Every day we are bombarded with news reports of vulnerable members of society who board commuter omnibuses and diligently pay their fares for their intended destination. These commuters literally place their lives into the hands of these drivers and bus conducters (mahwindi). It is like playing the game of Russian Roulette, one can never tell whether the driver or bus conducter is a person of good character or of ill repute. One cannot tell if the driver and bus conducter are merely playacting, putting up a front as being legitimate providers of transport to members of the public. These days, if lady fortune fails to favour one on any particular day, and without any warning, commuters may find themselves being driven to a bushy area where they may be quickly and efficiently, usually under duress and accompanied by threats of violence, divested of their wordly goods, money, jewellery, mobile phones, handbags, shoes, or everything on their person.

The *modus operandi* is to have some of the gang members posing as female passengers in order to induce commuters to get onto the Kombi, most people will feel safe when they see women on board. It's our duty to balance the competing interests between the rights of victims of criminal activity and the alleged perpetrators of those offences, bearing in mind that the balancing act necessitates a consideration of all the surrounding circumstances, without giving too much weight to one factor as opposed to another. It is also important to note that the court must consider the evidence placed before it, and decide the level of probative value that it should properly accord to such evidence. The question of onus is also very material, applicants for admission to bail pending appeal must always be cognizant of the importance of discharging the onus incumbent on them, on a balance of probabilities, that they are suitable candidates for

admission to bail. Courts must always be willing to allow such petitioners, a real chance to present evidence in their quest to discharge this onus.

It is my view that the trial court did not misdirect itself as alleged or at all, so this court has no basis on which it can substitute its discretion for that of the court a *quo*. In the absence of evidence of an error on the part of the court *a quo* in refusing to admit the appellants to bail, this appeal cannot succeed. It has no basis, and no foundation. The court did not find merit in the alleged misdirections on the part of the court *a quo* that it did not give the appellants an opportunity to address it and apply for bail pending trial, that it only relied on the seriousness of the offence alone in refusing to admit the appellants to bail pending trial. Accordingly, the appeal against refusal of bail pending trial is dismissed.

Gumbo & Associates, Applicant's Legal Practitioners
Prosecutor General, Respondent