

INNOCENT DINK SHANA MUNYANYI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 21 & 23 October 2015

Bail appeal

T Chakurira, for the appellant
B Taruvinga, for the respondent

MAWADZE J: This is a classic case in which they are compelling reasons to justify the continued detention of the appellant pending trial. It was quite apparent that Mr *Chakurira* for the appellant was justifiably constrained in making any meaningful submissions in favour of the appellant. The task before him was clearly onerous.

The appellant's application for bail pending trial was dismissed by the Provincial Magistrate sitting at Harare on 31 July 2015. The appellant has now petitioned this court appealing against the court *a quo*'s decision to deny him bail pending trial.

The appellant is facing a charge of Fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]

The broad allegations against the appellant can be summarised as follows;

It is alleged that on 22 June 2015 the appellant placed an advertisement in the Herald newspaper selling a double storey house Number 438 Borrowdale Brooke, Harare measuring 1438 square metres and that title deeds number 5052/11 were available. The contact details for those willing to buy the stand were given as cell numbers 0772 580 734. The complainant responded to the advertisement and the appellant allegedly sent his accomplice one Peter Shuro who is still at large to accompany the complainant to view the stand. The complainant showed interest in the stand whose selling price was given as US\$260 000 and engaged a legal practitioner Mr Tendai Ngoro of Ziumbe and Partners to do a deed search and draft an agreement of sale. The appellant allegedly later met the complainant at Banc ABC Belgravia Harare and made a part payment of US\$35 000 cash after which the agreement of sale was

allegedly signed by the complainant and the appellant. It is alleged that on 04 July 2015 the complainant made a transfer of US\$54 600 into the appellant's legal practitioner one James Mutsauki of James Mutsauki Attorneys Bulawayo ZB Bank Account No 4302715968201 from the complainant's Banc ABC Account No. 10235903802019. It is further alleged that on 7 July 2015 the appellant went to Bulawayo where he was handed over \$53 000 by his legal practitioner Mr James Mutasuki inside ZB Bank Fife Street Branch in Bulawayo.

The state alleges that on 13 July 2015 the complainant met one Peter Tsuru who had a document authorising him to receive the outstanding amount on behalf of the appellant but the complainant became suspicious when he noted that the signature on that document was different from the agreement of sale allegedly signed by the appellant. The complainant insisted that he would hand over the US\$10 000 in the presence of his legal practitioner Mr Tendai Ngoro at his offices at Ziumbe and Partners in Mt Pleasant Harare. The complainant's legal practitioner managed to contact the owner of the stand who is based in Botswana who revealed that the property in issue was not for sale. The complainant realised that he had been duped and made a report to Police on 13 July 2015. It is alleged the appellant was arrested at House No. 30 Cass Road Hillside Harare on 29 July 2015 after a tip off. The appellant is alleged to have tried to avoid to be arrested by hiding in the toilet at that house. It is the state case that both Mr Tendai Ngoro and the complainant managed to identify the appellant as the culprit. The appellant's alleged legal practitioner Mr James Mutsauki is alleged to also have positively identified the appellant as his client whom he paid US\$53 000 at ZB Bank in Bulawayo. The state also relies on a video footage from Banc ABC Belgravia Harare which allegedly shows the appellant receiving money from the complainant and video footage at ZB Bank Bulawayo showing the appellant receiving money from Mr James Mutsauki. The total prejudice is said to be US\$90 000 of which nothing was recovered.

The appellant has raised basically two grounds of appeal which are as follows;

- a) that the learned provincial magistrate erred when he concluded that the appellant has the propensity to commit offences when in fact the appellant has a single pending case of fraud and does not have previous convictions.
- b) that the learned provincial magistrate erred and misdirected himself when he held that there was overwhelming evidence against the appellant when no such evidence was alleged or produced by the State.

In terms of s 50 (1) (d) of the Constitution of Zimbabwe, an accused person who is yet to be tried must be released on bail and can only be denied bail if it is shown that there are

compelling reasons justifying the refusal to admit such an accused person to bail. The onus, in my view falls squarely on the shoulders of the State to prove or to show the existence of such compelling reasons justifying the refusal to grant the accused person bail pending trial. In deciding whether there are such compelling reasons justifying the denial of bail pending trial guidance should be sought from the provisions of s 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

In an appeal of this nature the appellant should attack the decision of the court *a quo* in denying him bail pending trial. See *S v Malunjwa* 2003 (1) ZLR 275 (H). The appellant would be successful and admitted to bail pending trial if it is shown that the court *a quo* committed an irregularity or misdirected itself or exercised its discretion in an unreasonable or improper manner to such an extent that its decision cannot be upheld by this court. See *S v Ruturi* 2003 (1) ZLR 259 (H).

I am not satisfied that the court *a quo* erred in any manner in dismissing the appellant's application for bail pending trial. The reasons given by the court *a quo* are very lucid and shows that the learned provincial magistrate properly applied his mind to the facts of this case.

The court *a quo* in my view properly made a finding that the appellant is a flight risk. It is common cause that evidence was placed before the court *a quo* showing that the appellant defaulted court on 12 November 2009 and has been on a warrant of arrest for 6 years until his arrest in the present case. It would be fool - hardy for any reasonable court to believe that the appellant would avail himself for trial if he is admitted to bail.

The finding by the court *a quo* that the appellant is a flight risk if further buttressed by the manner of the appellant's arrest. The appellant was arrested only after a tip off and he had the temerity to hide in the toilet to avoid being arrested. The police had to break the toilet door in order to arrest the appellant. Such conduct by the appellant is clearly consistent with a person who is determined to avoid the long arm of the law at all costs even if it means to hide in a toilet of all places!!

It is clear that the appellant is facing a very serious offence of Fraud involving alleged actual prejudice of US\$90 000. However as was stated in the case of *S v Hussey* 1991 (2) ZLR 187 (S) the seriousness of the offence should be considered with other factors. I have no doubt in my mind that that state has a very strong case against the appellant. The appellant is implicated in this elaborate scam not only by the complaint but by two respected legal practitioners Mr Tendai Ngoro of Harare and Mr James Mutsauki of Bulawayo who is also

said to be appellant's legal practitioner. In addition to that the state relies on video footage obtained from two different banks, Banc ABC in Belgravia Harare and ZB Bank in Fife Street Bulawayo. In light of such evidence against the appellant a conviction is very likely and appellant may find himself enjoying the discomfort of prison for a very long time. I am not surprised that the appellant in his bail statement has not proffered any discernable defence. See *S v Ndlovu* 2001 (2) ZLR 261 (H). It is clearly a herculean task to do so.

The appellant's woes are further complicated by the fact that he is facing a similar charge of fraud as he was arrested while he had defaulted court in 2009. The court *a quo* was in my view correct to make a finding that the appellant is likely to commit similar offences if released on bail. The court has a duty to protect innocent citizens who may fall prey to the type of scams like the one alleged against the appellant.

I find no misdirection at all in the decision of the court *a quo* to deny the appellant bail. I have no doubt that it would be prejudicial to the proper administration of justice if the appellant is admitted to bail pending trial.

In the result the appeal is dismissed for lack of merit.

Zimudzi & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners