

DOUGLAS TAPFUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 15 & 23 August, 2019

Appeal against refusal of bail.

S Mahuni, for the appellant
E Mavhuto with *A Kumire* for the respondent

MUZOFJA J: This is an appeal against refusal of bail pending trial by the Magistrates Court.

The applicant is facing three counts of criminal abuse of duty as a public officer in contravention of s 174 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

The applicant was the principal director, State Residence, Office of the President and Cabinet. In the first count, it is alleged that on 10 April 2018 the applicant purchased two personal Toyota Hiace mini buses from South Africa. He assigned one Bonane Ganyane to facilitate clearance of the vehicles on behalf of the department of the State residence. On 20 April 2018 the applicant applied for duty free certificates in the name of the President's department and they were granted. Thereafter he registered the vehicles at Central vehicle registry in the name of the President's department. The duty payable and evaded was \$3 180.

On the second count, it is alleged that on 5 June 2018 the applicant purchased three personal vehicles a Toyota Altezza, Honda Accord and a Nisan Tiida from South Africa. He assigned Cousin Gwanyanya to clear the vehicles in name of the President's department. Using the same *modus operandi* as in the first count the applicant obtained duty free certificates and registered the vehicles under the name of the President's department. The duty payable and evaded was \$4 340.

In respect of the third count, the applicant purchased two personal Honda Fits. He sent Cousin Gwanyanya. Using the same *modus operandi*, the motor vehicles were cleared by Zimbabwe Revenue Authority and subsequently registered. By doing so the applicant evaded paying duty for vehicles in the sum of \$4 416.

In all the three counts the applicant was aware that the vehicles did not belong to the department of State Residences or the President's Department. He assigned the officials from the department who claimed travel and subsistence allowances to further his personal business.

In the affidavit attached to the Form 242 the investigating officer opposed bail on the grounds that,

- a. There is overwhelming evidence against the accused which may influence him to abscond trial.
- b. The accused is facing a serious offence which he committed using his influential position as a senior government employee and is likely to interfere with witnesses.
- c. The accused is also under investigation where he facilitated the illegal importation of over 100 vehicles - ZACC RR 12/01/19.

In his ruling the Magistrate took into account the seriousness of the offence, the overwhelming evidence against the appellant which could induce him to abscond and the likelihood to interfere with state witnesses. On those factors the Magistrate found that the appellant was not an appropriate candidate for admission to bail.

Two grounds of appeal were set out to impugn the decision, that the state failed to prove that there were compelling reasons for the appellant to be denied bail and that the court erred in finding that the appellant is a flight risk.

Although the magistrate did not specifically traverse the circumstances of the basis for the likelihood to abscond, he referred briefly to the factors. The factors to be taken into consideration in assessing the risk were spelt out in *Aiten and Another*¹ at 254 that:

“In judging this risk, the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted, the strength of the State case, the ability to flee to a foreign country and the absence of extradition facilities..”

With regards to seriousness of the offence counsel for the appellant argued that, that on its own should not lead to denial of bail. This is the correct position of the law. The weighting of the offence should be taken in light of the available evidence and the possible penalty. I do not agree with counsel for the appellant's submission that for the total prejudice of \$11 936 the offence is likely to attract a fine in the event of conviction. Clearly counsel failed to appreciate the gist of the offence. The appellant was not charged with the offence of smuggling as correctly stated by the

¹ 1992 (1) ZLR 249 (S)

magistrate. It is the abuse of his official position to import vehicles in the name of the State and use state resources to his personal benefit. This is the conduct that, if proved is taken into account, the total prejudice an additional consideration but not the determinant factor in sentencing upon conviction. It is the use of the state machinery to his benefit that is punishable. Apparently, what the State alleged was not denied. Counsel insisted that the process was above board, it was approved by the Chief Secretary. That would not absolve him if the vehicles were for his personal use. The penalty provision provides for a fine not exceeding level thirteen or imprisonment up to fifteen years. It seems the state has a solid case so far .Clearly this is a serious matter which is likely to attract imprisonment. This is where the ordinary human inclinations come into play. The higher the probabilities of a conviction, the greater the incentive to abscond.

The court's attention was drawn to the events before the appellant was arrested. That investigations commenced in December 2018 he was cooperating with the investigating officers. He had the opportunity to abscond but he did not. It was submitted that the State did not point to any instance where a likelihood to abscond can be inferred from. The Court is alive to case law that such should exist before a finding can be made. However each case depends on its circumstances taken in totality with other factors. It is my considered view that at the time of the investigations the circumstances were different. There was no real incentive to abscond. It was an investigation. The appellant has since been arrested, he is now aware of the evidence and the likely penalty, this creates a different outlook of the circumstances. There is no reason to interfere with the magistrate's decision on this aspect.

This takes the Court to the next point on the interference of witnesses. The magistrate found that the appellant, a senior government employee is likely to interfere with witnesses. It was argued for the appellant that the State did not show any attempt by the appellant to interfere with witnesses on the authority of *R v Maharaj* 1976 (3) SA 205.

It must be borne in mind that the circumstances of the commission of the offence and the proximity of the accused to the witnesses both geographically and relationally should of necessity be taken into account too. It is not an absolute rule that where there is no prior attempt to interfere with witnesses therefore the accused may not do so. In this case, according to the investigating officer, most of the witnesses were the appellant's juniors. At the time of arrest, the appellant was still employed in the office. As investigations come to finality he is now aware of the witnesses who were his subordinates. The court cannot ignore the fact this is a senior government employee

who to some extent has influence. I did not hear any indication that he had been relieved of his duties but there was some submission before the magistrate that he had been moved to head another department. He remained influential and an inference that if released on bail he could still wield his power and reach out to witnesses cannot be farfetched. I cannot fault the magistrate on the finding that he is likely to interfere with witnesses.

I note that the investigating officer indicated that bail was also opposed on the basis that the appellant was under investigation ZACC RR 12/01/19. The magistrate did not consider that as relevant. The court cannot close its eyes to such a submission. What it means is that the appellant has an additional incentive to abscond. The very fact that it is before the court cannot be ignored although the weighting should be taken together with other factors.

As properly submitted for the appellant, the law is very clear on the right to bail pending trial as set out in s 50 (1) (d) of the Constitution. This is because at this stage, the presumption of innocence is in his favour. However, that right is not absolute. It can be interfered with where there are compelling reasons justifying continued detention. The court has to be careful to strike a balance between the proper administration of justice, the interests of the public and the interest of the appellant's freedom. In this case it is tilted more in favour of the proper administration of justice, particularly to secure the appellant's attendance for trial and non interference with the witnesses. There are compelling reasons to interfere with appellant's liberty. A reading of the state papers suggests the matter is ripe for prosecution. The appellant should be tried and know his fate so that justice is seen to be done, the public should trust the justice delivery system to do what is right.

I find no basis to overturn the decision of the magistrate.

Accordingly, the appeal against refusal of bail is dismissed.