

CRYNEDGE MUPAMHURA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 29 JANUARY & 6 FEBRUARY 2020

Bail pending appeal

J Bamu, for appellant
A Muziwi, for respondent

TSANGA J: This was an appeal against the magistrate's refusal of bail. I dismissed the appeal on the grounds that there was no evidence on record to support the claim that the magistrate erred. The background facts upon which the magistrate denied the appellant bail were as follows: The applicant was arrested on the 5th of January in Mount Darwin on a charge of contravening s 89 of the Postal and Telecommunications Act [*Chapter 12:05*] as well as a theft charge. The records were treated as one for the purposes of the bail application. He was granted bail in those matters and is appearing in Mt Darwin magistrate's court.

Upon his release on bail on the 9th of January 2020, he was immediately arrested and taken to Bindura to face one allegation of robbery and another also relating to the Postal and Telecommunications Act. On the latter charge he was granted bail and required to report twice a week. He was, however, denied bail on the robbery charge.

From the request from remand form, the brief facts of the robbery allegation for which he was denied bail were that during the period extending from 19 September 2019 to December 2019, the appellant in the company of others who are still at large, had proceeded

to network boosters in Bindura, Glendale, Mazowe and Shamva using an unregistered white Toyota Wish and a red Honda fit. They were armed with machetes and iron bars. Upon arrival at different network boosters they held the security guards, threatened and assaulted them with machetes and iron bars, and tied their hands together before breaking open the booster battery rooms and stealing the booster batteries. He was said to have been positively identified at the scene and had led police to the recovery of some the stolen property.

The court *a quo* was said to have misdirected itself by not appreciating that the state had failed to establish compelling reasons justifying the appellant's continued detention. There was also said to be misdirection in holding that the appellant would interfere with witnesses and furthermore in denying bail on the basis of the prevalence of the offence in Mazowe. In addition, the court *a quo* was said to have misdirected itself in holding that the appellant would not stand trial when there was said to be no indication that he would abscond. Lastly, the court *a quo* was said to have misdirected itself in failing to consider the imposition of stringent conditions and in not taking into account that he would stand trial.

Under the headline “**Ruling (Bail)**” the magistrate highlighted that the state was opposed to bail on the grounds that the accused faced a serious charge and that the state had a strong *prima facie* against him such that he will not stand trial. Also highlighted by the court as the state's reason for opposing bail was that the accused had been on the run since the offence was committed. Notably from the record the IO had indeed spoken to how the accused had been on the run in the robbery case. Equally highlighted by the court *a quo* was that the state had called the IO who also opposed bail on the grounds that the accused is likely to interfere with accomplices.

The magistrate had then dealt with the defence counsel's submission that the state had failed to give compelling reasons to deny bail. Bail was highlighted as a constitutional right with compelling reasons for denial being those that are forceful and convincing. The court outlined some of the factors considered as compelling reasons in our courts, namely the likelihood of absconding and the likelihood of interference with investigations and witnesses, these being the issues emphasised by the state in its objections to bail.

On the likelihood of absconding, the magistrate highlighted that the state gave the reason that the accused is likely to abscond since there is a strong case against him. The

defence counsel's reasoning that seriousness on its own was not a compelling reason was touched on with the court noting that with the likely (stiff) sentence to be given if convicted, the relative strength of the state case thus becomes a compelling reason for bail denial. The court below then stated that robbery is a serious offence and if convicted it attracts a custodial sentence and that that alone can induce the accused to flee.

It was thereafter that the court took judicial notice of the increased robbery cases in Mazowe. Indeed for the avoidance of doubt that sentiment was expressed as follows:

“The court **further** takes judicial notice of the fact that there is a series of robbery cases in Mazowe involving machetes and iron bars. Further the IO stated that the accomplices have not yet been apprehended. With the rate of robberies in the area the accused is definitely likely to interfere with witnesses / investigations or even abscond since the likely sentence if convicted is imprisonment”.

The word “further” denotes in the above paragraph that the court had already considered the reasons for denying bail as it indeed had as I have illustrated. These remarks were over and above that it was taking judicial notice of. I pointed this out to the lawyer when I gave my *ex tempore* judgment. It has been held that an appeal against the magistrate's refusal of bail is an appeal in the narrow sense and that the decision will not be interfered with unless the magistrate committed an irregularity or misdirection or exercised his or her reasoning unreasonably or improperly as to vitiate the decision. *S v Ruturi (2) 2003 (1) ZLR 537(H)*.

Now looking at the magistrate's ruling, the decision not to grant bail was not by any stretch of the imagination based solely on the increased robberies in Mazowe. It was informed by what the state had put before the court as its reasons for opposing bail, foremost that the accused would not stand trial because he had been on the run and also because the sentence was most likely going to be stiff. It was a misleading argument by appellant's counsel upon the reading the record that the decision was based on the prevalence of crime in Mazowe. The submissions by either side are central in how the court reaches its decision and these are clearly captured and summarised in how the court arrived at a decision to deny bail. It could not be said that the submission that the accused had been on the run were merely factual statements. The magistrate found them to be compelling reasons for not granting bail hence the emphasis on the likelihood of absconding as a compelling reason for bail denial.

There was no misdirection on the part of the magistrate and no basis for interfering with his decision. It was for the above reasons that I accordingly dismissed the appeal against the magistrate's refusal of bail as lacking merit.

Mbidzo Muchadehama and Makoni: Appellant's Legal Practitioners
National Prosecuting Authority: State's Legal Practitioners