HOPEWELL CHIN'ONO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 July 2020 & 6 August 2020

Appeal Against Refusal to grant bail

B Mtetwa with *Messrs Mtisi & Coltart*, for the appellant
E Makoto with *W Mabhandi*, for the respondent

CHITAPI J: This matter is before me on appeal against the judgment of the learned regional magistrate N Nduna Esquire sitting at Harare, made on 24 July 2020 wherein he dismissed the appellant's application to be admitted to bail. This appeal is made in terms of s 121 (1) of the Criminal Procedure & Evidence Act [*Chapter 9:23*] as read with r 6 (1) of the High Court of Zimbabwe Bail Rules, 1971. In terms of s 121 (1) of the Criminal Procedure & Evidence Act, a person whose bail plea or application made to a magistrate has been denied, may at any time after such denial or refusal appeal against such decision to a judge of the High Court. The provisions of the section also provide for an appeal to be similarly noted in circumstances where bail has been granted but the person is not satisfied with the bail conditions imposed.

The background of this appeal is outlined hereunder. The appellant was brought before the learned regional magistrate for an initial remand hearing on 22 July 2020 on one main charge and two alternative charges of committing the offences of incitement to commit three offences. In the main charge, it was alleged that the appellant committed the offence of incitement to commit public violence as defined in s 187 (1) (a) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*] as read with s 36 of the same act. Section 36 defines and criminalizes public violence whilst s 187 (1) (a) criminalizes incitement to commit any offence. In the first alternative charge, the appellant was charged with incitement to commit

public violence as defined in s 187 (1) (b) as reads with s 36. The difference between ss 187 (1) (a) and 187 (1) (b) of the Criminal Law (Codification & Reform) Act, is that in regard to s 187 (1) (a) the person charged will allegedly have intended by communication to persuade or induce other persons to commit a crime in terms of the Criminal Law (Codification & Reform) Act or any other enactment whilst in regard to s 187 (1) (b) the person charged will have made the communication in circumstances of a relationship of a real risk or possibility that other persons could be persuaded or induced by such communication to commit the offence. In the second alternative, it was alleged that the appellant committed the offence of incitement to participate in a gathering with intent to promote public violence, breach of peace or bigotry as defined in s 37 (1) (a) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*].

Following the usual motions of remand procedures wherein the State prosecutor applies to the court to place the accused person on remand pending trial, the appellant was placed on remand. In the course of the application for remand, the appellant's counsel raised complaints against police treatment including the fact that he was exposed to other persons in the investigations who were not members of the police. The complaints were noted on the court record. It is not necessary for purposes of this appeal to deal with details of the complaints raised because the issue does not arise in this appeal.

It is important to note that the appellant was placed on remand on the allegations preferred against him by the police as set out on the remand form 242 which was produced in court. I wish to underline the observation that the allegations on which the remand of the appellant was sought were not challenged. In other words, the learned magistrate was not called to determine whether or not the allegations made disclosed the offences charged. There was no challenge as well on whether or not the appellant was linked to the alleged offences. Therefore, the remand placement not having been unchallenged, the next step was for the learned magistrate to determine whether or not the appellant should be detained in custody pending his trial or be granted bail pending trial. Inasmuch the issue of the appellant's remand was not contested before the learned magistrate, the same cannot become issue on appeal. Arguments relative to the issue as were raised in the application documents and in argument were misplaced. Any challenge to the remand must therefore be directed to the remanding court. The only way such issue can be escalated to this court would be by way of appeal or review of the magistrate's decision made upon an application to challenge the continued remand of the appellant.

I next address the law on the approach of the judge to determining an appeal against the refusal by the magistrate to admit the accused person whose plea for bail has been refused. When simply expressed in layman's terms, an appeal functions as a process to correct an error(s) made by the court or tribunal whose decision has been appealed. The question which arises on a bail appeal is whether the learned magistrate was properly directed in the application of the law and assessment of the facts or allegations made which were placed before him. The appeal judge will only have jurisdiction to disturb or set aside the order appealed against if the appellant establishes a misdirection of law, fact or both committed by the magistrate. If such misdirection is established, the judge will then be at large to interfere with the order of the magistrate. Specifically, the judge's powers on appeal are provided for in subsection (5) of s 121 of the Criminal Procedure & Evidence Act, which reads as follows—

> "(5) A judge who hears an appeal in terms of this section may make such order relating to bail or any condition in connection therewith as he considers should have been made by the judge or magistrate whose decision is the subject of the appeal."

Again to simply the procedure, the starting point is that the appellant should establish a misdirection as already discussed committed by the magistrate. If no misdirection is established by the appellant, the matter ends there and the decision of the magistrate remains undisturbed. Such decision will not be disturbed on appeal notwithstanding that the appeal judge is of the view on the facts and circumstances of the case that had he or she been the magistrate who heard the bail application, he or she would have granted it. If, however the appellant establishes a misdirection committed by the magistrate in the determination of the bail application, the appeal judge may grant bail or still refuse to grant bail depending on whether in the judge's assessment of the whole proceeding before the magistrate, it is in the interests of justice to grant bail. In this regard, denial of bail would be in the interests of justice if the State has, from what it submitted at the bail hearing before the magistrate, established compelling reasons to persuade the judge that bail be denied.

In regard to the appeal judge's approach to determining a bail appeal, the judgment of HEFER J in *S* v *Barber* 1979 (4) SA 218 D at 220 E sets out the correct legal position in relation to bail appeals. The learned judge stated:

> "It is well known that the powers of this court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. The court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this court may have a different view, it should not substitute its own view for that of the magistrate because

> that would be an unfair interference with the magistrates exercise of his discretion. I think it should be stressed that no matter what this court's views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly."

In the case of *Fradreck Chimaiwache* v *S* SC 18/2013 GOWORA JA (as she then was) stated as follows on p 4 of the cyclostyled judgment when dealing with an appeal against the refusal by a judge of the High Court to grant bail to the applicant—

> "The granting of bail involves an exercise of discretion by the court of first instance. It is trite that this court would only interfere with the decision of the learned judge in the court *a quo* if she committed an irregularity or exercised her discretion so unreasonably or improperly as to vitiate her decision. The record of proceedings must show that an error was has been made in in the exercise of discretion, either; that the court acted on a wrong principle, allowed extraneous or irrelevant considerations to affect its decision or made mistakes of fact, or failed to take into account relevant matters in the determination of the question before it."

The learned judge of appeal also referred to the judgment in *Ncube* v *State* SC 126/01; *S* v *Chikumbirike* 1986 (2) ZLR 145 and *S* v *Barber* (*supra*). It follows therefore that the appeal against a bail decision is an appeal in a wide sense. (See *Samuel Mtizwa* v *S* SC 13/20). The appeal is limited to the record of proceedings in the bail application. Any new matters arising after the decision appealed against was made and have a bearing on whether or not bail may properly be granted, should be referred to the magistrate who determined the first application or in his or her absence to any other available magistrate for a decision to be made whether the new circumstances or issue is compelling enough to justify the grant of bail previously denied.

Thus, then, the powers of the judge on appeal and the approach to the determination of bail appeals having been ventilated, I will be guided accordingly.

Before I consider the reasons or basis which the learned magistrate gave for denial of the appellant's bail application, I consider it appropriate to briefly relate to relevant provisions of the law on bail in this jurisdiction which arise in this appeal. The interrogation of the law will inform whether when related to the learned magistrate's decision, a misdirection on the law will be revealed.

The first point to note is that the release of an arrested person relates to a fundamental right in terms of s 50 (1) (a) of the constitution. The right is qualified as opposed to absolute because the grant of bail is subject to the absence of the existence of compelling reasons to justify the continued detention of the arrested person. In the final analysis, however, the grant or refusal of bail is in the discretion of the judicial officer before whom the application is made. This so because the decision as to whether or not compelling reasons exist to deny bail in any

particular case is left to the judge to decide. What constitutes compelling reasons are grounds listed in s 117 (2) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. The same grounds if shown to exist or where they have been established will justify a finding that it is not in the interests of justice to grant the arrested person bail.

The provisions of s 117 (2) aforesaid read as follows—

> "117 (2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—
> (a) Where there is a likelihood that the accused, if he or she were released on bail, will—
> (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
> (ii) not stand his or her trial or appear to received sentence
> (iii) attempt to influence or intimate witnesses or to conceal or destroy evidence; or
> (iv) undermine or jeopardize the objectives or proper functioning of the criminal justice system including the bail system; or
> (b) where in exceptional circumstances, there is the likelihood that the release of the accused will disturb the public order or undermine public peace and security."

Relating now to the question of onus of proof in bail applications, s 115 C of the Criminal Procedure & Evidence Act is instructive. In regard to a First Schedule offence as with offences with which the applicant was charged, the prosecution bears the burden of showing on a balance of probabilities that there are compelling reasons which justify the applicant's continued detention.

Thus, if the appeal of the applicant is to succeed on the basis of a misdirection as to the application of the substantive law procedure by the learned magistrate, the applicant bears the ouns on a balance of probabilities to establish the misdirection before I can intervene on the basis of the alleged misdirection. The same will apply in this appeal in regard to an alleged misdirection on the facts. The appellant bears the onus to prove on a balance of probabilities that the learned magistrate based the decision reached on facts which could not be reasonably entertained or upon a wrong appreciation of the facts or allegations or that the learned magistrate was misdirected in any of the other ways as are referred to by GOWORA JA in the *Chimaiwache* case (*supra*)

Turning to the record of proceedings and the learned magistrate's judgment, the learned magistrate determined correctly that the State had the onus to show compelling reasons why the applicant should not be admitted to bail. The State put forward four grounds of opposition to the release of the appellant and submitted that the grounds amounted to compelling reasons to deny bail. These were listed on page 4 of the transcribed judgment of the learned magistrate as:

"(1) That accused is facing a charge, if proved is likely to call for a custodial sentence
(2) Accused has not yet accomplished his mission as the protests are penciled for 31 July, 2020 which is a date to materialize. So his release may enable him to continue with his campaign
(3) That the State has a strong case
(4) That the accused is likely to interfere with evidence

The learned magistrate on p 5 of his transcribed judgment dismissed the grounds1, 3 and 4 as not holding any water for reasons which he articulated. There is therefore no need for me to address them in this appeal and to the extent that the grounds of appeal submitted by the appellant may relate to the grounds aforesaid such appeal grounds are surplusage. The learned magistrate therefore denied the appellant's bail on the basis of ground number 2 as recorded above. The appeal therefore should address on whether the learned magistrate was misdirected in fact or law to deny the appellant bail on the basis that the appellant's undisputed or admitted tweet messages did not enjoy constitutional protection as what the appellant advocated for, fell outside the purview s 59 of the constitution. The learned magistrate determined that the tweet messages had to be read together rather than individually because the net message was that which the listener would give to the messages read together. He further determined that the appellant was "determined to ensure the success of the protests he is advocating for." I shall deal with the nature and content of the tweets as well the learned magistrate's conclusions thereon later after considering the grounds of appeal.

The applicant proffered several grounds of appeal. Some of the grounds are convoluted and difficult to follow. The appeal in this matter would ordinarily address a simple enquiry which is "on what basis?" or for what reason was bail denied? How is alleged that the learned magistrate misdirected himself in denying bail on that basis. The applicant's counsel addressed the reason for bail denial as follows in the bail statement:

> "The dismissal was on the basis that he is a danger to the public as he has not yet accomplished his mission as the protests are penciled for 31 July 2020. Therefore, the magistrate stated that his release was enable him to continue with his campaign and there is no condition discernible capable of restraining him if he is out on bail…"

The grounds of appeal ought to have been directed at the wrongfulness of the learned magistrate finding as set out above.

A reading of the grounds of appeal shows that some of them are directed at matters irrelevant to the admission of the appellant to bail. They are directed at the justifiability of the placement of the appellant on remand. For example, in the first ground number 3.1 the applicant alleged that

"3.1 The learned Magistrate *a quo* erred and misdirected himself in a number of respects in that:

(a) He wholly ignored the fact that the appellant is a journalist who was reporting on an issue which was topical and newsworthy and therefore protected by the provisions of s 61 of the Constitution of Zimbabwe.

(b) That in terms of s 59 of the Constitution of Zimbabwe, citizens are entitled to peacefully demonstrate and petition and that the tweets relied upon by the state were wholly in line with provisions of s 59 of the Constitution

(c) That sections 97 and 109 of the Constitution of Zimbabwe provide for the constitutional removal of a president and a government before the expiry of their terms of and that there is nothing unlawful for citizens to demonstrate for such an occurrence

(d) The magistrate further erred and misdirected himself in his failure to comprehend that both the senate and the house of Assembly are constituted by representatives of the very people who are entitled to demonstrate and to present petitions."

The quoted grounds of appeal clearly attack the finding by the learned magistrate that there were grounds to order the remand of the appellant. The grounds are directed at establishing that the appellant was not guilty of any wrong doing since he enjoyed constitutional protection as a reporter and that he was reporting on newsworthy topical issues. The grounds of appeal are misplaced. If the challenge is that there were no reasonable grounds for the learned magistrate to place the appellant on remand, the appellant had every right to challenge the decision of the learned magistrate to place the appellant on remand, by way of an appeal or review. Indeed, during argument, I asked Mrs *Mtetwa* as to whether she was challenging the remand of the appellant in this bail appeal. Mrs *Mtetwa* responded that she would be making the challenge before the remand court. As I have already observed, an appeal to a judge of this court made in terms of s 121 (1) of the Criminal Procedure and Evidence can only be made

"... against the admission to or refusal to grant bail or the amount fixed as bail or any conditions imposed in connection with bail."

The appeal envisaged cannot address other matters like the justification for the remand or any challenges to such remand. Whilst such challenges can be mounted, this cannot be done through the medium of the provisions of s 121 (1) aforesaid. I therefore refuse to be drawn into interrogating the basis for the remand or whether the applicant is excused from liability on the charge because of his professional status and constitutional protections accorded by the constitution. It was improper for the appellant to introduce by way of appeal under s 121 (1) aforesaid, matters which are not proper to be dealt with in this bail appeal. The ground of appeal 3.1 and its subgrounds are accordingly invalid for purposes of this appeal.

Ground of appeal number 3.2 and its subgrounds was couched as follows:

"3.2 the learned magistrate a *quo* further erred and misdirected himself when he wholly ignored the investigating officer's evidence that:

(a) he was unaware that a government can be removed before the expiry of its term without elections, and that the basis of arrest was therefore premised on an incorrect understanding of the law.

(b) that the investigating officer conceded many weaknesses in the State case including a failure to point out in any of the tweets relied upon words which connote incitement to commit public violence or to participate in a gathering with intent to promote public violence, a breach of the peach or bigotry.

(c) that the investigating officer conceded that any fear he had of abscondment or interference could be alleged by appropriate bail conditions

(d) the magistrate a *quo* generally erred and misdirected himself when he totally ignored the evidence led by the State which did not demonstrate the existence of compelling reasons for denying appellant bail. This is particularly so given the fact that he gave no reasons for rejecting the State evidence which he simply ignored.

In regard to the above grounds, I make the same criticism on the propriety of matters raised therein being brought up in this appeal. For example, subground 3.2 (a) speaks to the alleged magistrate's misdirection in ignoring the investigating officers evidence that the appellants' arrest was premised on an incorrect understanding of the law and therefore invalid. As I have already noted, I cannot in an appeal brought against refusal to great bail determine the disputed issue of the legality or justification for the appellant's arrest. As I understand the said ground of appeal, its resolution entails my having to make a finding that the appellants' arrest was unlawful. I cannot do that and the appellant as I have indicated is advised to either appeal or seek a review of that finding using the appropriate procedure. The same applies to ground 3.2 (b). The two grounds are invalid for purposes of this appeal

Ground 3 (2) (c) and (d) must be considered against the procedural position of law that the magistrate is not bound to accept concessions made by the prosecutor or the investigating officer. The process of determining a bail application by the judicial officer is not a simple task of endorsing what the prosecutor or a witness be it a State or defence has said. Whatever submissions and evidence led are weighed together within the context of the circumstances of the whole case and probabilities. A reasoned decision is then reached. I do accept that the learned magistrate did not specifically isolate and deal with the evidence of the investigating officer as stand-alone evidence. However, a careful reading of the evidence of the investigating and the judgment clearly shows that the leaned magistrate's decision to deny the appellant bail was partly informed by what the investigating officer stated in his evidence, notably that the appellant had incited people to participate in gatherings which would breach the peace and that

the gatherings were intended for 31 July, 2020. The investigating officer was asked the following questions to which he answered as set out hereunder

> "Q So on the issue of 31st July, what is wrong, the constitution provides for right to petition to demonstrate, what is it in relation to 31st
> A Peaceful demos are not a problem. What I am saying is accused is mobilizing demonstrations that actually intend to remove the constitutionally elected government."

A careful reading of the learned magistrate's judgment shows that he adopted this piece of evidence. It is also important to keep in mind that bail applications are in the nature of enquiries in which the strict rules of evidence are not observed. Any relevant information placed before the magistrate falls for consideration in deciding whether to grant or refuse bail. Section 117 (4) (b) of the Criminal Procedure and Evidence provides for the flexibility given to the presiding officer determining a bail application not to be strictly bound by the rules of evidence as apply generally to admission of evidence in bail applications.

In grounds of appeal numbers 3.3 – 3.12 the appellant stated as follows

> "3.3 The magistrate further erred and misdirected himself when he asked the wrong question on whether or not to refuse bail when the question ought to have been whether or not the state had demonstrated compelling reasons justifying appellants' continued detention
> 3.4 The magistrate further erred and misdirected himself when he falsely stated that he had not been referred to any authority on the standard of proof required in demonstrating compelling reasons when such authority in the form of *NGUWAYA* v *STATE* HH 443/2020 had not only been drawn to his attention, but a copy of the judgment had in fact been handed to him in open court.
> 3.5 The learned magistrate further erred and misdirected himself when he ignored the fact that the Appellant is a duly accredited journalist who enjoys the rights allowed by Sections 60 and 61 of the Constitution of Zimbabwe.
> 3.6 The magistrate a *quo* further erred and misdirected himself when he found that the dissemination of the information complained of to the tweeting public was the basis of the charges. Such a finding not only criminalists journalism but it is in violation of the provisions of Sections 60 and 61 of the Constitution.
> 3.7 The magistrate's reliance on the definition of incitement which clearly did not and could not apply to the tweets complained of, which did not I any way seek to provoke the public to commit offences constitute a gross misdirection.
> 3.8 The magistrate further erred and misdirected himself in considering the issue of bail using the old standard as opposed to whether the evidence led by the State demonstrated compelling reasons justifying the Appellant's continued detention.
> 3.9 The magistrate further erred and misdirected himself when he based his decision on his own subjective interpretation of the tweets when the investigating officer had conceded that none of the tweets made reference to violence and a breach of the peace or bigotry.
> 3.10 The magistrate a *quo* further erred and misdirected himself when he concluded that discounting elections equated to advocating for violent change and a breach of the peace when the investigating officer conceded the parallels between the November 2017 demonstration which led to a peaceful and non-violent power exchange, which the High Court and the Constitutional Court have since declared lawful.

3.11 The magistrate a *quo* further erred and misdirected himself when he failed to consider and take into account that the only ground he relied upon in refusing to admit Appellant to bail could easily have been taken care of by imposing appropriate bail conditions
3.12 Having found that grounds 1. 3 and 4 relied upon by the State did not hold water, the magistrate erred and misdirected himself when he overemphasized the surmise and conjecture on which ground 2 was premised, more particularly taking into account that
(a) The applicant has strong ties to Zimbabwe;
(b) He is a Zimbabwean citizen with a permanent home in Zimbabwe.
(c) That appropriate conditions would, as conceded by the investigating officer, take care of whatever fears the court entertained underground 2."

In regard to ground number 3.3 I did not find the misdirection complained of upon perusal of the record. In argument, appellant's counsel did not refer me to the alleged misdirection of law. On the contrary, the following appears from page 10 of the transcribed judgment:

"Although it is perfectly true that the community must be protected against dangerous offenders, one must not lose sight of the circumstances first, that when bail is being considered, one is confronted with an alleged crime and an unconvicted accused person, and second, that the liberty of the subject is one of the most fundamental and treasured concepts in our society. Again the same constitution which provides deeply rooted right to liberty also provides for situations where it can be curtailed; existence of compelling reasons justifying its removal. The constitution provides so in section 50."

Further on p 9 of the transcribed judgment, the learned magistrate stated as follows:

".....The right to liberty and the presumption of innocence are fundamental tenets of our criminal justice system. In the pre-trial context, release-at the earliest opportunity and in the least onerous manner – is the default presumption in our criminal law. Pre-trial detention is the exception not the rule; all that is in proper and befitting circumstances prescribes."

The quoted excerpts show that the learned magistrate was not misdirected as to the question which he had to address. He properly referred to the constitution as curtailing the right to bail where compelling reasons are established. He also properly noted that the default position was that bail should be granted in befitting circumstances and that to deny bail was to be considered as the exception. This ground of appeal had no substance and is dismissed. I must also note that ground number 3-8 is answered as it is a repetition n of ground 3-3.

Ground 3-4 is not a valid ground of appeal. It is vague and embarrassing. To plead in a ground of appeal that the learned magistrate told a falsity that he had not been referred to a case authority yet he had been given a copy of the judgment does not take the appeal further. It is not alleged what the alleged falsity resulted in. It is needless to state the obvious that an appeal is aimed at the order granted by the lower court. The proposed ground of appeal must relate to

the order which the appellant wants to be set aside. The appellant left the ground of appeal as an open statement or comment. There is nothing to determine in regard to the alleged ground.

Grounds 3.5, 3.6, 3.7, 3.9 and 3.10 again attack the basis for the remand as opposed to attacking the reasons for and the order to deny the appellant bail. I repeat the same comments I have made in relation to the invalidity of ground 3.1 and its subgrounds and dismiss the grounds. It must always be remembered by counsel that the remand and bail procedures are related but distinct processes. They are related in that the remand of the arrested person must precede the bail application. If for example a remand sought by the State is refused, the need to apply for bail falls away and vice versa. There is no specific provision in the Criminal Procedure and Evidence which provides for the making of an appeal against the decision of the magistrate to grant the State application to place the arrested person on remand. Such appeal would have to be made in the ordinary course of how criminal appeals are noted from the magistrate court. There is of course the review route which can be followed. Bail appeals are special appeals as provided for in s 121 (1) as read with subsections (5), (6) and (7) of the Criminal Procedure and Evidence Act.

It has become the practice of legal practitioners to agree to a remand request before the magistrate for expediency when in fact there are grounds to challenge the placement of the accused person on remand. The accused's legal practitioner then requests the magistrate to note that there will be an application made on the next remand date for refusal of remand. The reasons for agreeing to a remand of convenience is that the legal practitioner would be anxious to deal with bail which can only be determined after a remand has been granted. If bail has been granted, applications are then made to challenge the grounds for remand. This practice is wrong. If an accused agrees to be placed on remand without challenge, he or she must be taken as agreeing to allegations made against him or her that they ground the charge preferred. Any subsequent challenge should therefore be based on new facts which impact on the previously admitted facts. It is unprocedural for the legal practitioner to allow the court to place the accused on remand on facts as alleged and reserve the right to challenge the remand on the next day because the accused wants to apply for bail. If there are no grounds for remand on the initial appearance, the challenge should be done at that sitting.

In *casu*, the appellants' legal practitioner challenged the grounds for remand and made a bail application simultaneously. The learned magistrate allowed that. This is wrong. On initial remand, the magistrate should deal with the issue of the remand. If challenged, then the

challenge should be determined. The process of remand is a precursor to the making of a bail application. An order granting the remand sought by the State should be separately granted before proceeding to deal with a bail application which is step 2. In this case, the two processes were conflated. In this appeal the appellants' counsel has conflated the challenge or appeal on matters to do with the challenge to placement of the appellant on remand and the denial of bail. This is as already determined, improper.

Ground 3.11 is one of the few grounds if not the only one directly in point. The appellant alleges that the learned magistrate misdirected himself in failing to consider that the fears which he expressed in granting bail could have been cured by the imposition of appropriate conditions. It is noted that the appellant did not himself suggest any other conditions to counter the States fears that if released on bail, he would continue his threat to incite that the demonstrations in his tweet would continue albeit the State having declared them illegal. The appellant did not offer to desist and stop the tweets. His position was that there was nothing illegal about the tweets and the threatened demonstrations. The easiest way to deal with the impasse on the appellant's part would have been to approach the court for a declaratur on the legality of the planned demonstrations. The point made therefore is that the learned magistrate would not have been reasonably expected to impose conditions not suggested to him let alone given the circumstances of the case wherein the appellant's position was to defy authority on the basis that there was nothing wrong with his tweets and that he was within his rights to broadcast them. The attitude of the appellant was therefore one of defiance of State authority on the basis of a claim of right. In such circumstances the learned magistrate cannot be faulted in his reasoning when he stated on p 9 of the transcribed judgment -

> "... The conduct enumerated clearly shows that accused is determined to ensure the success of protests he is advocating for.., There is no condition which is discernibly capable of restraining him from resuming his campaigns if bailed out."

The learned magistrate made a finding not denied by the appellant that the appellant had broadcast to the public via his tweeter account 4 messages whose contents were as follows:

> "1. Hopewell Chin"ono @da..30 Jul
>
> Zimbabweans have been complaining about the LOOTING of public funds. They have been blaming progressive leaders of doing nothing about it.
>
> @jngarivhume & many others to come have put their hands up & said they will lead anti-looting demo on 31 July.
>
> Spread the word. RETWEET

2. The organiser of the #July31 protest says after meeting with and consulting many people, the consensus is that #ZanupfMustGo

   That is the power of engaging with others! So from now on he says it will be the #July31 #ZanupfMustGo protest.

3. Zimbabwe will NEVER be freed from these LOOTERS through elections, it is a waste of time.

   They will rig the elections, and if you go to court, their judiciary LOOTING partners will be waiting for you.

4. Daily citizen are dying quietly in their homes without healthcare or clean drinking water, due to LOOTING & corruption.

5. Reforms will transform their quality of life & stop the LOOTING.

   Yet Mnangagwa refuses.

   Change will come by any means."

The learned magistrate determined that the tweets had to be read together and not individually. He was correct because they were speaking to the same subject matter. The learned magistrate reasoned that the mood and intention of the appellant in composing and broadcasting the tweets was to incite protests which were not peaceful. He reasoned that this was so because the tweets were not intended to promote a constitutional change of government. It was the magistrates finding that the appellant in his tweets advocated for change through violence as a weapon because he discounted the elections route on the basis that the elections would be rigged and that the judiciary was comprised of co-looters who would endorse rigged elections. The appellant also tweed that change would come by any means and that the consensus was that "ZANU PF Must go." The learned magistrate cannot be said to have been misdirected to reason that the tweets advocated for confrontation as opposed to peaceful protest. It is also apparent from the tweets that none of them speak to peaceful protest but to doing away with the ruling party ZANU (PF). It would not have been unreasonable to hold as the learned magistrate did that the tweets amounted to inciting violence. The potential and probability for violence was there because it would have been foolhardly to expect that ZANU PF members would hold their hands and simply "go way" on account of protests. In the circumstances, notwithstanding differing views on the interpretation of the tweets, the real issue is whether or not the learned magistrate's findings and conclusion were based upon a

wrong appreciation of facts placed before him and whether the decision he reached to deny bail, being the need to protect the public from engaging in unsanctioned and non-peaceful demonstrations which had a potential to turn violent was so devoid of logic and common sense that no reasonable magistrate properly applying his mind to the facts would have reached such decision.

In my view there was nothing irrational in the magistrate's decision. Before I concluded this judgment, I need to comment on two issues, one concerns the apparent attack on the learned magistrate and the criminal justice system by the appellant's legal practitioners. The second one is procedural on whether I should consider the fact that the 31st July, 2020 which was the focus of the bail application had come and gone, in this appeal.

On 27 July, 2020 the appellant's legal practitioners addressed a letter to the clerk of court in the following terms:

> "Re: S v HOPEWELL CHIN'ONO CRB 6801/2020: PP REF F683/2020
>
> We refer to the above-mentioned matter in which we represent MR CHIN'ONO.
>
> The initial remand haring was, as has become he practice in so called high profile or politically motivated cases, heard by Regional Magistrate MR NDUNA who rendered his decision on the 24th May, 2020 in terms of which he expectedly denied our client bail.
>
> As he is entitled to do, our client has since noted an appeal in terms of Section 121 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. We therefore request that you immediately prepare and forward to the Criminal Registrar of the High Court such record taking into account the provisions of Section 117A (3) which require that applications of this nature be disposed of without undue delay. We therefore hereby render all costs for the preparation of this record and thank you in advance for your early and urgent preparation of same.
>
> We have copied this letter to the Prosecutor General's Office who now routinely expect bail appeals to be postponed for their convenience with no regard to the sacrosanct right to liberty. We therefore request that the Prosecutor General's representatives familiarise themselves with the record and liaise with their colleagues who dealt with the bail application at the initial remand stage. Any attempts to delay the hearing of the appeal as has become the normal tactic will be opposed.
>
> We therefore thank you in advance for your cooperation.
>
> Yours faithfully
>
> B. MTETWA
> MTETWA & NYAMBIRA"

A copy of the letter was filed of record in this appeal record. This is how it came to my attention. When I read it, it became necessary to pass comment on the letter in regard to a statement which is inflammatory and demeaning if not a direct attack on the learned magistrate. It is alleged in the letter in paragraph 2 "…. It has become the practice in so called high profile or politically motivate cases heard by Regional Magistrate Mr Nduna who rendered his decision on the 24th May, 2020 in terms of which he expectedly denied our client bail" (own underlining). I am not sure as to the decision of 24 May, 2020 referred to since the appeal before me relates to proceedings on 22 and 24 July, 2020. Whatever the legal practitioners intended to convey by the attack on the learned magistrate, it is unprofessional for a legal practitioner to mount a personal attack on the judicial officer. The legal system allows for appeal and review process by higher courts to correct any decisions which a party may be unhappy with by way of appeal or review. Legal practitioners are officers of the court and should not be complicit in demonising and attacking the integrity of the judicial system. Judicial officers are acutely aware that they are subject of attack and criticism of their judgments. This is what they must live with because losers and interested parties not happy with decisions of the judicial officers will unsurprisingly vilify the concerned judicial officer. Such attacks become cause for extreme concern when engaged in by a legal practitioner who practices law under registration to do so by this court. The writer of the letter is therefore reminded of the responsibilities of a legal practitioner to the court and the need to avoid becoming one with one's client as in this case in attacking the judiciary.

The second matter concerns the submissions made on appeal by the appellant's counsel that the siltation had changed because the demonstrations which constituted the focus of the tweets having been planned for 31 July, 2020 did not take place. I indicated then that this was a matter outside the appeal record which I could not take account of. An appeal is determined on the basis of the record of proceedings taken on appeal. In other words, this appeal determines whether the decision of the learned magistrate as given on 24 July, 2020 based on what was said and produced before him is supportable. Anything which occurred after the hearing and judgment cannot be considered on appeal. Thus, whether or not it is still in the interests of justice to continue the detention of the appellant without bail is a matter which should be determined by the court which initially denied him bail. New facts which arise after the determination of a denied bail application cannot be considered on appeal. It was for these

reasons that I refused to take account of events after the termination of the bail proceedings before the learned magistrate.

In disposing of the matter, I determine that the appellant has failed to demonstrate any misdirections of fact, law or both made by the learned magistrate in the court *a quo* as would justify interference with his judgment. In consequence therefore, the order I make is as follows:

"The appeal be and it is hereby dismissed."

pp

Mtetwa and Nyambirai, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners