

BENJAMIN NGWANDA
and
McCLOUD MAGAMU
and
MOLLET MASOCHA
and
SIMON MANHENGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 29 December 2020 & 15 January 2021

Bail Appeal

I Murambasvina, for the appellants
R Chikosha, for the respondents

CHIKOWERO J: Having been denied bail pending trial by the magistrates court sitting at Chegutu, the appellants appealed against that decision in terms of s 121 (1) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (“the CPEA”) as read with rule 6 (1) of the High Court (Bail) Rules 1971.

THE BACKGROUND

The appellants are artisanal miners employed at Chigumba Mine Gadzema in Chegutu.

On 23 November 2020 they appeared before the magistrates court sitting at Chegutu on initial remand. They are facing a charge of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (“the code”)

The allegations are that on 8 November 2020 and at Chigumba Mining Mill, Gadzema, Chegutu, the appellants hit one Ignatious Tembo on the thigh using a stone and booted feet and fists all over his body intending to cause bodily harm or realising that there was real risk or possibility that bodily harm may occur.

They made a bail application on the date of their initial appearance in Court. It was opposed, and dismissed.

In dismissing the application the court below, after laying out the bail principles, said at p 2 of the judgment:

“In this matter there are compelling reasons to deny bail pending trial. The applicants are artisanal miners as rightfully pointed by the State, they can relocate if given any chance to do so and they will not lose anything. The evidence against the accused is overwhelming. The complainant is still hospitalized and has not yet recovered which is aggravatory on the part of accused persons. The interests of justice will be compromised if the applicants are granted bail. The applicants are not suitable candidates for bail.

In the result the application is dismissed.”

THE GROUNDS OF APPEAL AND THE ARGUMENTS SET OUT IN SUPPORT THEREOF

The appellants contend that the court below misdirected itself as follows:

- “1. First and foremost the decision by the court *a quo* that the interests of justice will be compromised if the applicant are granted bail flies in the face of the factual basis of the appellants’ application for bail that was placed before her. Had the court *a quo* properly applied her mind to that application, and the law on bail, she ought to have realised that from the evidence presented in the court *a quo* the appellants had managed to show on a balance of probabilities that it was in the interest of justice that all the four should be freed on bail. It is also clear that whatever fears the state have could and can be obviated by the imposition of appropriate conditions pertaining to release.
2. The second misdirection which vitiated the court *a quo*’s decision is the fact that artisanal miners can relocate if given the chance to do so and will not lose anything. Such a finding made in the absence of cognizable indications of one being migratory is certainly a misdirection. It is common cause that employment is difficult to find in Zimbabwe and what this means then is that when one is employed, that is a basis for tying that person to a particular place. In *casu*, that appellants are artisanal miners at Chigumba Mine Gadzema actually operates in their favour and not against them.
3. The Court *a quo* again misdirected itself by holding that the evidence against the accused is overwhelming. This finding of fact can only be made after evidence will have been adduced in court during trial and subjected to the usual test through cross-examination. Certainly evidence on paper cannot by any stretch of imagination be said to be overwhelming particularly where accused is not admitting to the offence and gives his own version of what transpired. Accordingly therefore, the decision dismissing the meritorious bail application is vitiated by this misdirection.
4. As if the above misdirections were not enough, the court *a quo* committed a gross misdirection in dismissing bail on grounds that “the complainant is still hospitalized and has not yet recovered which is aggravatory on the part of the accused.” Bail system is not penal in character. The principle behind bail pending trial is to balance the interest of the accused who is still innocent in terms of the law, with those of the administration of justice which require that every accused must stand trial before a competent court of law. The use of words like “aggravatory” is only applicable after conviction and not at bail stage.”

The style adopted by Mr *Murambasvina* in couching the grounds of appeal and argument relative thereto is this. The first sentence in each of the 4 instances is the ground of appeal. What immediately follows is the argument in support of each ground. In this way, he dispensed with the

need to file stand alone heads of arguments. In addition the relevant legal principles were set out and case law germane to an appeal of this nature cited in the appeal filed with registry on 15 December, 2020. So was the complete record of the bail proceedings *a quo* made up of the charge sheet, state outline, the written bail application, the state's written response and the judgment appealed against.

Before me, counsel for the appellants essentially adopted the contention set out in the papers already filed of record, highlighted some key issues and urged me to follow the same reasoning as espoused by the court in *Ismael Sibanda and Another v The State* HMA 47/20. Mr *Murambasvina*, who successfully argued that matter for the appellant said the circumstances of that matter are similar to what is before me.

THE STATE'S RESPONSE TO THE APPEAL

Just as the appellants had done, the respondent referred me to the case law on the legal principles in an appeal of this nature. In a nutshell, if the court below exercised its discretion judiciously and there is no misdirection or irregularity, this court will not interfere with the decision made. See *S v Ruturi* 2003 (1) ZLR 259 (H)

What should be attacked is the decision of the lower court in refusing bail. See *S v Malunjwa* 2003 (1) ZLR 276 (H)

The reasoning of the court below resonated well with the *dicta* in *S v Munsaka* HB 53/10 and *S v Chidziva* 1988 (2) ZLR 19

In supporting the decision to deny bail on the basis that appellants are artisanal miners the respondent submitted that the nature of their work means that they are nomadic by nature, without fixed abodes, hence the magistrates court can not be faulted for concluding that they were likely to abscond if released on bail.

Mr *Chikosha* also submitted that there was no basis for attacking the magistrates' finding that the case for the prosecution was strong. That meant the probability of conviction was high and the possibility of appellants receiving custodial sentences was also high. The appellants' defences appear in the bail application filed *a quo*. The first appellant says that complainant was the aggressor. The first appellant acted in self-defence. Hence the fight between those two. Complainant ran away. The first appellant picked up a stone, threw it, and hit the complainant on the thigh. The complainant fell into a pit and got injured. The rest of the appellants joined in at this

stage, but only to break up the fight. Noone else was involved in the fracas. I understood Mr *Chikosha* to be saying that the defences tendered by all the appellants are very weak. By the time that the first appellant hit the complainant on the thigh (with the stone) the first appellant could not be said to have been acting in self defence because the complainant was running away.

The first appellant was not under any attack. Neither was he under any fear of any imminent attack. By the time that the rest of the appellants are said to have joined in to break up the fight there was no such fight occurring. The only thing they could have joined in was in assaulting the complainant. This they did, hence the serious injuries on the complainant which necessitated that he be detained at Chegutu Hospital and later referred to Parirenyatwa Group of Hospitals in Harare where his fate remained unknown as at the date of the proceedings and judgment *a quo*. The Magistrate could therefore not be criticized for finding that the serious condition of the complainant, at the Parirenyatwa Group of Hospitals, taken together with the strength of the case for the prosecution and the nomadic nature of the appellant's work provided fertile ground for a finding that if released the appellants were likely to abscond.

THE LAW

Both counsel were agreed on the applicable law. This Court will only interfere with the lower court's decision if it committed an irregularity or misdirection or its exercise of discretion was so unreasonable as to vitiate its decision. See *S v Chikumbirike* 1986 (2) ZLR 145 (S). The appeal court must not hear an appeal as if it is the court of first instance. The approach is whether the court *a quo* misdirected itself. It is the findings of the court *a quo* which must be attacked. See *S v Malunjwa* (supra)

THE ANALYSIS

It is with these legal principles in mind that I now examine the grounds of appeal.

But I must at the outset say this. I am not surprised that the judgment in question has been taken on appeal. It is strikingly brief. It is two paged. It only sets out the bail principles and the conclusion of the court without adequately committing to paper the full reasons why that conclusion was reached. But I have the same material that the magistrates court had before it and am fortunate that, despite the above shortcomings there are clear (though brief) indications (which I am prepared to call reasons) why the court below found that there was a likelihood of appellants

absconding if released on bail. I have no doubt that the magistrates court applied its mind to the matter before it. However, the larger part of the analysis remained stored in its head.

ON WHOM DID THE ONUS LIE AND WAS THE ONUS DISCHARGED?

Assault is an offence specified in Part 1 of the Third Schedule. Accordingly, in terms of s 115 C (2) (a) (ii) (A) of the CPEA, the onus lied on the appellants to prove, on a balance of probabilities, that it is in the interests of justice for them to be released on bail.

The magistrates Court misdirected itself on this point of law. It approached the application as if the bail application before it related to a non-Third Schedule Offence in which case, in terms of s 115 C (2) (a) (i) of the CPEA, the onus would be on the respondent to show, on a balance of probabilities, that there are compelling reasons justifying the continued detention of the appellants. This misdirection means that this court is now at large to relook at the application but within the confines of the grounds of appeal. At the end of this exercise I may or may not come to the same conclusion as the magistrates Court. I may or may not interfere with the decision of the magistrates court.

AS ARTISANAL MINERS THE APPELLANTS CAN RELOCATE IF GIVEN THE CHANCE TO DO SO AND WILL NOT LOSE ANYTHING

The real issues are those factors which the lawmaker has put in place to guide the court in assessing the risk of abscondment pending trial. In this regard, the relevant factors are contained in s 117 (3) (b) (i) – (iii) of the CPEA. They are

- “(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 or access to travel documents.”

Paragraph 8 of the bail application filed *a quo* reads, in relevant part as follows:

- “8 None has the means to take themselves outside the jurisdiction of the court and to survive while there. The four are all unsophisticated young men of very limited means. Any fear of abscondment can properly be curtailed by the imposition of bail conditions directing that each reside at their given addresses and report at ZRP Chegutu until conclusion of the matter.”

Paragraphs 2 – 6 of the state outline read as follows:

- “2. Accused 01 is Benjamin Ngwanda, a male adult aged 23 years, residing at Gokwe South and is an artisanal miner.
- 3. Accused 02 is Mccloud Magamu, a male adult aged 20 residing at Magamu village, chief Chirawu, Zhombe and is an artisanal miner in Gadzema.
- 4. Accused 03 is Mollet Masocha, a male adult aged 18, residing at Gokwe and is an artisanal miner

5. Accused 04 is Simon Manhenga, a male adult aged 18 years, residing at Gokwe and is an artisanal miner.
6. The accused persons and the complainant work in the same mining area of Gadzema, Chegutu.”

What is clear to me is that the appellants did not want the police to know their rural homes. They did not want the police to know where they resided. A person can neither reside “at Gokwe South” or “at Gokwe.” That information is completely unhelpful if not totally misleading. It smacks of a design to send the police on a wild goose chase in an endeavor to trace the appellants to their places of residence in the event of them absconding.

I acknowledge that second appellant furnished full information of his residential rural home.

In the application itself, the appellants furnished vague information of their means. It is not assisting a bail court at all for an applicant to say he is an unsophisticated young man of very limited means. It is to draw the court into the world of speculation of what those limited means are and, if they be assets, where they are located.

The threadbare information placed before the court *a quo* was essentially that the appellants were young artisanal miners working and based at Chigumba Mine in Chegutu. Beyond this, they had no ties to Chegutu, it was unknown whether they had any assets and if so, the identity and location of such assets. Their means of travel were unknown. One can travel by either foot, cycle, car or bus. One does not need to be the holder of a passport to travel outside Chegutu.

In my view, the court below did not misdirect itself in finding that these particular artisanal miners had nothing to lose by relocating to avoid trial if released on bail. They had no meaningful ties to the place of trial. They had no known ties to any other place. They deliberately provided unhelpful information to the police and the court *a quo*. The reliance by Mr *Murambasvina* on *Sibanda and Anor v State* (supra) was inapposite. The circumstances of that matter are clearly distinguishable from those obtaining in the present matter.

DID THE COURT A *QUO* MISDIRECT ITSELF IN FINDING THAT THE CASE FOR THE PROSECUTION WAS STRONG?

Counsel for the appellants has taken issue with two things in this regard. First, the language employed by the magistrate. Second, the finding itself that the evidence against the appellants is overwhelming. The argument is effectively that the appellants set out their defences in applying

for bail. Before the matter has proceeded into trial it is not possible for a bail court to conclude that the evidence for the prosecution is overwhelming because all that was available to the court *a quo* were the respondent and the appellants' paper positions. Everything was yet to be tested at trial.

Mr *Chikosha* submitted that what the court did was to express its opinion on the apparent strength of the case for the prosecution, which the CPEA required that court to do.

Section 117 (3) (b) (v) of the CPEA makes it peremptory for a bail court to consider, in assessing the likelihood of abscondment, the following factors:

“(v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee.”

It was necessary for the court below to demonstrate in its judgment how it arrived at its opinion that the case for the prosecution was very strong. I have already noted that the reasoning process was not reduced into writing. But the material used by the learned magistrate is also before me. It is the state outline and the defences set out in the bail statement. There are some facts which are common cause. In setting out the state's response to this appeal I alluded to my understanding of Mr *Chikosha*'s submissions on why he supported the magistrate's opinion that the case for the prosecution was strong. I am not persuaded that the magistrate's view that the prosecution has an apparently strong case against the appellants is misdirected. That finding cannot in my view be said to be so devoid of logic and common sense that no reasonable magistrate properly applying his or her mind to the facts would have reached such a decision.

Mr *Murambasvina* complained of the magistrate's use of the words that “the evidence against the accused is overwhelming” I do not think that was it necessary for him to take issue with the language. It is common cause that the magistrate at Chegutu was not presiding over the trial of the appellants. The court was merely expressing its opinion on the strength of the case for the prosecution. There is superior court authority for resorting to such semantics. In dismissing an appeal against bail refusal in *S v Jongwe* 2002 (2) ZLR 209 CHIDYAUUSIKU CJ said at 218 A – B :

“For the above reasons I am satisfied that the evidence against the appellant is overwhelming and the prospects of conviction for an offence involving the death of the deceased is a virtual certainty. I am also satisfied that the prospects of the appellant receiving a long prison term or even the death sentence, if convicted of murder, are real.

I am equally satisfied that because the prospects of conviction and upon conviction the imposition of a long prison term, indeed, even the death sentence are real, the temptation for the appellant to abscond if granted bail is irresistible. On this basis alone I would dismiss the appeal. The need to consider the other grounds for the refusal to grant bail fall away.”

I am convinced that the magistrates court did not misdirect itself in finding that the prosecution had a strong case against the appellants and, by implication, that the prospects of conviction and imposition of custodial sentences would induce them to flee.

DID THE COURT A QUO MISDIRECT ITSELF IN FINDING THAT THE COMPLAINANT WAS HOSPITALISED AND HAD NOT YET RECOVERED AND THAT THIS WAS AGGRAVATORY ON THE PART OF THE APPELLANTS?

It is a fact that the assault occurred on 8 November 2020.

It also is a fact that the magistrate dismissed the bail application on the day that it was made, 23 November 2020.

The complainant had initially been detained in Chegutu District Hospital where he was struggling to walk and was referred to Parirenyatwa Hospital where his condition remained unknown.

These are facts. The court below took them into consideration. It did not misdirect itself in doing so. Had it not done so, it would actually have misdirected itself.

The use of the word “aggravatory”, however, suggests a misdirection because the court below was not sentencing the appellants. But it is not every misdirection which is gross. It is not every misdirection which is material. My view is that this was a misdirection in the air. It changed nothing. If anything, the court below could very well have had in mind, and properly so in my view, s 117 (3) (b) (iv) of the CPEA. It reads

“iv. The nature and gravity of the offence or the nature and gravity of the likely penalty thereof.”

The maximum sentence for assault is ten years. Where the person assaulted sustains serious injuries a custodial sentence is usually imposed. The courts view assaults perpetrated by a gang in serious light.

It was not a misdirection for the court below to be cognizant of the hospitalization of the complainant as an added factor inducing the appellants to abscond.

CONCLUSION

Despite the misdirection committed *a quo* on the question of onus, I have reached the same decision as the magistrates court after applying the correct legal provisions relating to the facts which were before that court.

The appellants failed to prove, on a balance of probabilities, that it was in the interests of justice for them to be released on bail pending their trial.

ORDER

In the result, the appeal against bail refusal in respect of all the appellants be and is dismissed.

Murambasvina Legal Practice, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners