FRADERICK CHIMAIWACHE v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, JANUARY 30 & MARCH 18, 2013

K Maeresera, for the appellant
E Nyazamaba, for the respondent

Before**: GOWORA JA**, in Chambers in terms of s 121(2)(a) of the Criminal Procedure and Evidence Act [*Cap. 9.07*].

This is an appeal against a judgment of the High Court which was issued on 5 June 2012 refusing bail pending appeal in respect of the appellant. The appellant prays that the judgment of the court *a quo* be set aside and be substituted with an order admitting him to bail.

The facts of this case are these. The appellant was arraigned before the Regional Magistrate on one count of contravening s 113 of the Criminal Law (Codification and Reform) Act, [*Cap. 9:23*]. The allegations against him were that he had stolen a motor vehicle belonging to the Attorney General's Office and which had been assigned to one of the officers within the department. The appellant was convicted after a lengthy trial and sentenced to 10 years imprisonment with 2 years of the sentence suspended on condition he paid restitution to the complainant in the sum of USD42 000. The appellant was aggrieved by the conviction and has appealed to the High Court against his conviction. The appeal is still

to be determined. Subsequent to noting the appeal he then launched an application for bail which is the subject of this appeal.

The grounds of appeal are as follows:

1. The learned judge in the court *a quo* seriously misdirected herself by holding that there was only one valid ground of appeal to the High Court yet the grounds are clear and specific as to what exactly is being attacked in the learned magistrate's judgment and/or findings in conformity with the direction given in the case of *S v Ncube* 1990 (2) ZLR 303 (S).

AD PROSPECTS OF SUCCESS

2. The learned judge erred in holding that the trial magistrate had decided the matter on circumstantial evidence and the credibility of witnesses. This was a matter which was decided purely on circumstantial evidence as was indicated by the trial magistrate in his judgment.
3. The learned judge seriously misdirected herself in holding that the trial magistrate had properly found that the only reasonable inference to be derived from the circumstantial evidence was that it was the appellant who stole the motor vehicle in question. The learned judge overlooked and/or omitted to consider the real possibilities which could reasonably be drawn from the circumstantial evidence thereby misdirecting herself in finding that there were no prospects of success on appeal against conviction.
4. The learned judge erred in failing to address the obvious inconsistencies, contradictions and confusion in the evidence of the State witnesses especially Rejoice Muroyi more particularly in so far as the issue of keys to the safe was concerned.

5. The learned judge misdirected herself by failing to properly analyse and commenting on the evidence led before the learned magistrate and giving meaningful reasons as to why she made a finding that the trial magistrate's findings and the subsequent conviction were proper hence there were no prospects of success.
6. The learned judge erred in holding that the appellant contended that the trial magistrate had erred in convicting him on circumstantial evidence yet the first ground of appeal is specific that the appellant contends that the trial magistrate seriously misdirected itself in convicting the appellant yet the circumstantial evidence adduced on behalf of the state did not lead to one conclusion that the appellant committed the offence but to different possibilities. The finding therefore does not have any basis.
7. The learned judge seriously misdirected herself by erroneously assuming that the appellant's contention was that it was an irregularity to convict someone on the basis of circumstantial evidence hence basing on that erroneous belief she held the conviction was proper. This was never raised either in the grounds of appeal or the application for bail pending appeal itself. The learned judge ultimately erred in dismissing the appellant's application for bail as a result of that erroneous belief.
8. The learned judge in the court *a quo* erred by concluding that the appellant's guilt had been proved beyond reasonable doubt and thereby erroneously and without justification coming to the conclusion that there are no prospects of success on appeal against conviction thereby wrongly denying the appellant bail pending the determination of his appeal.

GENERAL

9. The learned judge in the court *a quo* erred by denying the Appellant bail pending appeal in circumstances where he had established on a balance of probabilities that

the interests of justice would not be prejudiced by his admission to bail pending appeal.

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 has been made 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 consideration relevant matters in the determination of the question before it. In *Ncube v The State* SC 126/01 SANDURA JA enunciated the principles mentioned above thus:

> "Having said that, I hasten to add that the power of this Court to interfere with the decision of the High Court is rather limited. This point was made in the *State v Chikumbirike* 1986 (2) ZLR 145 at 146E-F where this Court said:
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> > "The next matter to be decided is whether this Court in hearing the appeal should treat it as an appeal in the wide sense, that is to say, that it is to be decided as if it were a hearing de novo. Once again that matter has been decided in the case of *The State v Mahommed* 1977 (2) SA 531 (AD) at 541 B-C where TROLLIP JA said that in an appeal of this nature the Court of appeal will only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its discretion."
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> The same point was subsequently made by this Court in *Aitken's* case (*supra*) at 252E-F as follows:
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> "While the Judge President, in considering the appeal was at liberty to substitute his discretion for that of the magistrate on the facts placed before the latter, the present appeal is one in the narrow sense. The powers of this Court are, therefore, largely limited. In the absence of an irregularity or misdirection this Court has to be persuaded that the manner in which the Judge President exercised his discretion was so unreasonable as to vitiate the decision reached". See *State v Barber* 1979 (4) SA 218 (D) at 220E-G; *State v Chikumbirike* 1986 (2) ZLR 145 (S) 146F-G'.

> The principle is therefore well established. It follows that in the present appeal, for the decision of the learned judge to be reversed, it must be shown that the learned judge committed an irregularity or misdirection, or that the manner in which he exercised his discretion was so unreasonable as to vitiate the decision made."

Before the High Court and this Court it was contended on behalf of the state that the grounds of appeal against conviction were, apart from the first ground, general and therefore were mere amplifications of the first ground. The learned judge in the court *a quo* was persuaded by the argument proffered on behalf of the state and consequently only had recourse to the first ground in determining the application before her.

This Court is enjoined to decide whether or not the court *a quo* misdirected itself, or whether it exercised its discretion unreasonably in denying the appellant bail pending appeal. The learned judge in the court *a quo* found that the appellant had only filed one ground of appeal and that grounds 7 to 8 were mere amplification of the first ground of appeal. The nub of the appellant's complaint is focused on this finding by the learned judge.

The procedure for the noting of an appeal against conviction and sentence in the Magistrates Court is provided for in the Appellate Division (Magistrates Court)(Criminal Appeals) Rules, S.I. 504 of 1979, specifically r 22 (1), which provides in relevant part:

> "The appellant shall, within ten days of the passing of sentence, or, where a request has been made in terms of subrule (1) of rule 3 of Order IV of the Magistrates Courts (Criminal) Rules, 1966, within five days of receipt of the judgment or statement referred to in that rule, whichever is the later, note his appeal by lodging with the clerk of court a notice in duplicate setting out clearly and specifically the grounds of the appeal and giving for the purpose of any service the address of his legal representative or, if a legal practitioner is yet to be appointed, the address of the appellant."

The rule has been interpreted in several judgments emanating from this Court. In *S v Jack* 1990 (2) ZLR 167 MCNALLY JA spelt out succinctly the requirements of the rule in a notice of appeal thus:[1]

> "The appellant was unrepresented at his trial, but on 30 August 1988 a 'notice of appeal' was lodged by his legal practitioner, Mr Mhlanga. The notice of appeal in regard to conviction was fatally defective. As against conviction on each count it contained the following single ground of appeal:
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> > "The magistrate erred in finding the accused guilty despite the fact that the charge was not substantiated".
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> This amounts to saying he was not guilty because he was not guilty. It is meaningless. A magistrate who receives such a notice of appeal cannot know what to say in response to it. The notice is not a notice of appeal (at any rate in regard to conviction) because it does not comply with the Rules. Rule 22, contained in SI 504 of 1979, requires a notice "setting out clearly and specifically the grounds of the appeal."

It is necessary to draw legal practitioners' attention again to the provisions of this Rule and to the judgment of BEADLE J (as he then was), in *R v Emerson & Ors* 1957 R & N 743; 1958 (1) SA 442 (SR). See also *S v McNAB* S-159-86 and *S v Marenga* S-32-88.

> "It seems to be widely believed that when a client who has been convicted and sentenced belatedly instructs a legal practitioner, all that is necessary is that a notice of appeal be lodged setting out the most cursory and meaningless grounds with (sometimes) the promise that proper grounds will be substituted when the record is available. This is not so. A notice of appeal without meaningful grounds is not a notice of appeal. Since it is a nullity, it cannot later be amended."

The learned judge of appeal had occasion again to discuss the requirements of rule 22 in *S v Ncube* 1990 (2) ZLR 303, where at p 304C-E he stated:

> "The first of these grounds is the only appeal against conviction. I need only quote one passage from *R v Emerson*, *supra*, at 748D-E to show that such a ground is unacceptable. BEADLE J with the concurrence of the Full Bench of the High Court of Southern Rhodesia, said this:
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> > 'I do not consider that such general grounds of appeal as "the conviction is against the weight of evidence" or "the evidence does not support the conviction" or "the conviction is wrong in law" are a compliance with the rule. It follows that where the only ground of appeal given in the notice is a vague

[1] At p167C-G

> one of this description the notice of appeal must be considered to be bad. The effect would be the same as if no notice of appeal had been given at all, and the Magistrate concerned would be perfectly within his rights in refusing to give his reasons for judgment on receipt of such a vague notice'.

The notice of appeal against conviction was therefore a nullity."

It seems that the rider contained in those authorities is still not being heeded by those who practice law in this jurisdiction. A notice of appeal must contain grounds that are clear and specific. If a ground of appeal is general then it cannot be a valid ground of appeal. The learned judge in the court *a quo* did not state that grounds two to eight were invalid, instead she held that they were amplifications of the first ground. I agree. An examination of each of the grounds illustrates the failure on the part of the appellant's legal practitioner to comply with the rule.

The grounds of appeal filed in the High Court and which the learned judge had to consider in the application for bail were the following:

1. The court *a quo* seriously misdirected itself in convicting the appellant yet the circumstantial evidence adduced on behalf of the state did not lead to one conclusion that the appellant committed the offence but to different possibilities.
2. The learned magistrate erred in simply ruling out real possibilities as fanciful and far-fetched and making too many assumptions which were not supported by the evidence in any way.
3. The learned magistrate seriously misdirected himself in simply dismissing as irrelevant vital evidence that when the motor vehicle was stolen the appellant was within the premises hence he could not have stolen the motor vehicle in question and further that at one of the meetings it had been discussed that the motor vehicle in question had been seen somewhere.

4. The court *a quo* clearly failed to analyse the evidence before it but simply relied on unsubstantiated assumptions which were not supported by the facts in any way.
5. The learned magistrate erred in placing too much reliance on the fact that the appellant was the one in charge of the keys to the motor vehicles and hence he ought to be held responsible for the stolen motor vehicle yet the evidence did not prove the guilty (*sic*) of the appellant as required by law.
6. The court *a quo* erred in simply accepting the evidence of the state witnesses and just dismissing the appellant's testimony.
7. The court *a quo* erred in law and in fact by failing to properly apply its mind to the requirements that have to be met when relying on circumstantial evidence. If it had done so it ought to have acquitted the appellant.
8. The court *a quo* clearly misdirected itself by dismissing legitimate evidence and giving undue importance on circumstances which were not irreconcilable with innocence.

I find merit in the submission made by Mr *Nyazema* that the fact that an appellant has raised numerous grounds of appeal does not entail that the appellant has prospects of success on appeal. What is trite is that a ground of appeal must be clear and specific. It should not be vague.

The crisp issue, notwithstanding the number of grounds of appeal, is whether the learned judge in the court *a quo* applied the correct legal principle applicable to applications for bail pending appeal. When one has regard to the judgment of the learned magistrate it is clear that the basis for convicting the appellant was circumstantial evidence. The first ground of appeal to the High Court attacks the reasoning of the magistrate in

arriving at his decision based on the circumstantial evidence. It also raises the possibility that the circumstantial evidence did not conclusively point to the guilt of the appellant but to different possibilities. The second ground of appeal, in raising as it does, the alleged error on the part of the magistrate in discounting real possibilities as being fanciful and far-fetched is clearly an amplification of the first ground.

The third and fourth grounds are linked with the first and second grounds and relate to the nature of the evidence presented to the trial and the alleged failure on the part of the magistrate to analyse the evidence and his reliance on alleged wrong assumptions. The two grounds do not mention the specific evidence that the magistrate failed to analyse, but make reference in general terms to evidence and unsubstantiated assumptions, the latter of which is not specified. The sixth to eighth grounds again deal with issues relating to the circumstantial evidence and the acceptance of such evidence by the trial court and his dismissal of the appellant's evidence out of hand.

It seems to me that the learned judge erred in treating the fifth ground as an amplification of the first ground in that it raised a specific and clear ground of appeal. It seems however, that despite its finding that there was only one ground the learned judge did not strike out the other grounds but found instead that they were an amplification of the first ground. She said that the first ground could be substantiated.

The court then dealt with the application on the basis of the first ground of appeal. The court was alive to the fact that the trial court had convicted the appellant based on circumstantial evidence. It is trite that where a judicial officer convicts an offender on the basis of circumstantial evidence there must be no other existing circumstances which would

weaken or destroy the inference sought to be drawn. The inference drawn must be the only reasonable inference that can be drawn from the circumstances. This principle was enunciated in *R v Bloom* 1939 AD 188 by WATERMEYER JA in the following terms:[2]

> "In reasoning by inferences there are two cardinal rules of logic which cannot be ignored:
> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

I must examine what the learned judge said in her judgment in order to determine whether she committed any irregularity or misdirection, or exercised her discretion in a manner vitiating her decision. In her judgment, the learned judge stated:

> "The trial court had the benefit of seeing, hearing and assessing the witnesses credibility and made a finding that those state witnesses were worthy believing thus credible. A perusal of the record shows the analysis of evidence by the court and one cannot help but agree with the court's assertion. It is not an illegality to convict on circumstantial evidence. What is important is that from the given evidence the only reasonable inference to be drawn is that which the court *a quo* came up with. In the present case the court *a quo* made a finding that the only reasonable inference was that it was the applicant who stole the motor vehicle in question. The inference drawn must or ought to be the only reasonable inference that can be drawn from the circumstances. The judgment by the court *a quo* spells out how the trial court basing on credibility of witnesses came up with the conclusion that given the evidence on hand the only reasonable inference to be drawn was that the applicant stole the motor vehicle in question."

It is clear that the learned judge was alive to the principles applicable to a court which convicts an accused based on circumstantial evidence. Even though the fifth ground was held to an amplification of the first ground, I find that in the application of the principles relating to circumstantial evidence, the learned judge would have had regard to all the evidence that was before the magistrate in her assessment as to the sufficiency of such

[2] At 202 - 203

evidence and the inferences to be drawn. There is no suggestion that the judge applied the principle incorrectly. There is also no suggestion that there was an irregularity or that the judge exercised her discretion in a manner that vitiated her decision.

It seems to me that the appellant has filed grounds of appeal before this Court that are more precise and clearer in format than those prepared against the conviction in the Magistrate's court. I find no misdirection on the part of the learned judge who dismissed the application for bail pending appeal.

The appeal is devoid of merit and it is dismissed.

Maeresa & Partners, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners