

DISTRIBUTABLE (103)

GAILLAH MUROYI
v
THE STATE

SUPREME COURT OF ZIMBABWE
HARARE: JUNE 5 & AUGUST 7 2020.

Appellant in person

R. Chikosha, for the respondent

IN CHAMBERS

UCHENA JA: This is an appeal in terms of Rule 67 (1) of the Supreme Court Rules 2018 against the dismissal of the appellant’s bail application by the High Court.

FACTUAL BACKGROUND

The appellant was arraigned before the magistrate’s court charged with one count of robbery in contravention of s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was alleged that on 7 October 2017 she acting in common purpose with her co accused robbed Wongani Mawola Banda (“the complainant”) of his bank cards and other valuables after their lead team had abducted him from O.K. Fife Avenue, Harare. After committing the offence, some of the accused persons, including the appellant, fled to South Africa while others remained behind and were arrested. The arrested co-accused implicated the appellant.

The appellant was arrested when she returned to Zimbabwe in February 2018. She pleaded not guilty to the charge levelled against her. In her defence, she told the trial court that at the time the offence was committed she was in South Africa as she had left Zimbabwe on 5 October 2017. The appellant testified that she returned to Zimbabwe on 3 February 2018. She was given several opportunities over a long time to produce her passport to prove her *alibi* but she failed to do so. However, photo copies of the relevant pages of her passport were eventually produced by the state. They proved that the appellant crossed the Zimbabwean Boarder going to South Africa on 9 October 2017. On being cross examined on why she testified that she had left the country on 5 October 2017, she pretended that she was not sure of the exact date of her departure.

The respondent's witnesses, particularly, the complainant and one Daniel Bare positively identified the appellant as one of the people involved in the commission of the crime. The complainant identified the appellant because he was with her for several hours during the commission of the offence as she was one of the ladies who remained guarding him whilst their co-accused were going around Harare shopping using his bank cards. Daniel Bare identified the appellant as one of the ladies who sold beer allegedly bought with the complaint's money to his bottle store.

The magistrate's court held that the appellant's unsatisfactory excuses concerning the production of her passport as evidence indicated that she did not want to produce it as an exhibit. It also held that the appellant's attempt to belatedly pretend that she was not sure of her exact date of departure was insincere and affected her credibility as a witness. The Magistrate's Court further held that the appellant's *alibi* was not believable as relevant pages of her passport produced by the state proved that she was in Zimbabwe when

the offence was committed. It also held that the appellant was positively identified by the complainant as he was with her for several hours during the robbery. It also found that the testimony of Daniel Bare was credible because it was consistent with the facts and that he had no reason to falsely implicate the appellant.

The court further held that the appellant was guilty because she had common purpose with her co-accused in the commission of the offence. It held that the appellant was an active participant in the robbery. Consequently, the appellant was found guilty and convicted. She was sentenced to 10 years imprisonment of which 3 years were suspended for 5 years on condition that, during that period, she does not commit any offence involving dishonesty or violence. Aggrieved by the conviction and sentence imposed on her, the appellant noted an appeal to the High Court. The appeal is still pending.

After noting the appeal, the appellant applied to the High Court for bail pending appeal. Her application was dismissed. She appealed against that decision to this Court. Her main arguments were that the magistrate's court erred when it held that she was positively identified whilst there was conflicting evidence in that regard. She contended that the magistrate's court had failed to properly assess her *alibi*. The appellant further argued that in sentencing her the magistrate did not take into consideration the fact that she had not benefitted from the commission of the offence. In response the respondent submitted that the appellant was a flight risk and that the magistrate's decision on the appellant's conviction and sentence was unassailable. It further submitted that the court *a quo* correctly refused to grant the appellant bail pending appeal.

The court *a quo* held that the findings of the magistrate's court on the appellant's identification were satisfactory and justified its refusal to release her on bail pending appeal. It also held that from the evidence on record, there was a possibility that the appellant will abscond if granted bail, and that she had failed to prove that she was a proper candidate for bail. The court *a quo* held that there were no prospects of success against both conviction and sentence. Accordingly, the appellant's application for bail pending appeal was dismissed. Aggrieved by the dismissal of her application, the appellant noted an appeal to this Court.

In her grounds of appeal the appellant alleged that the dismissal of her application for bail pending appeal by the court *a quo* should not be allowed to stand because her main appeal has prospects of success. She alleged that the court *a quo* did not take into consideration her limited knowledge of the law and court procedures. The appellant further alleged that the court *a quo* failed to critically analyse the evidence placed before it in that it did not comment on the contradictory evidence concerning her identification. She further submitted that the court *a quo* did not give adequate consideration to her defence of an *alibi* and that the trial court's reasons for accepting the evidence of one Daniel Bare and the complainant placing her on the scene of crime was unsatisfactory.

The appeal raises two issues for determination

1. Whether or not the appellant has good prospects of success on appeal against both conviction and sentence?
2. Whether or not the appellant is likely to abscond in light of the gravity of the offence and the sentence imposed?

SUBMISSIONS MADE BY THE PARTIES.

The appellant submitted that the court *a quo* erred in refusing to grant her application for bail pending the determination of her appeal. She submitted that her appeal has good prospects of success and that she was a good candidate for bail. She argued that the court *a quo* erred by denying her bail pending appeal. She submitted that the evidence relating to her identification was contradictory and unsatisfactory. The appellant submitted that her defence of an *alibi* was not properly taken into consideration and scrutinised. She averred that if all this was properly considered, it can be established that she is not guilty, therefore her appeal enjoys high prospects of success. She undertook to abide by any bail conditions which the court may impose on granting her bail.

The respondent submitted that the appellant's application was devoid of merit. It submitted that the court *a quo* correctly refused to grant the appellant's application for bail pending appeal. The respondent argued that the identification of the appellant was supported by evidence on record from its witnesses who positively identified her. It submitted that the appellant's defence of an *alibi* cannot stand as it was contradicted by photocopies of the relevant pages of her passport which proved that she was in Zimbabwe when the offence was committed and that evidence from the complainant and Daniel Bare proved that she participated in the commission of the offence. The respondent argued that the appellant was a flight risk as the record proved that she left the country two days after committing the offence. In light of this, the respondent submitted that the appellant's appeal against the refusal of bail by the court *a quo* was devoid of merit and should be dismissed.

THE LAW

The granting of bail involves an exercise of discretion by the court of first instance. It is trite that an appellate court will not interfere with the exercise of discretion by a lower court unless there is a misdirection. It is not enough that the appellate court thinks that it would have taken a different course from the trial court. It must appear from the record of proceedings that there has been an error made in the exercise of discretion by the trial court. It must be proved that it acted on a wrong principle; allowed extraneous or irrelevant considerations to affect its decision or made mistakes of fact or failed to take into considerations relevant matters in the determination of the question before it. See *Barros & Anor v Chimponda* 1991 (1) ZLR 58 (S); *Aitken & Anor v Attorney General* 1992 (1) ZLR 249 (S).

The purpose of the exercise of discretionary power vested in the court under s 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (“the Act”) is to secure the interest of the public in the administration of justice by ensuring that a person already convicted of a criminal offence will appear on the appointed day for the hearing of his/her appeal. It is for that reason that the Act provides that upon sufficient evidence being availed to justify, a finding that a convicted person is likely not to appear for his/her appeal if released on bail is a relevant and sufficient ground for ordering his/her continued detention pending appeal. See *Madzokere & Others v The State* SC 08/12.

The main factors to consider in an appeal against a refusal of bail brought by a person convicted of an offence are twofold. The first is the likelihood of the appellant absconding. See *Aitken*, (*supra*). The second is the appellant’s prospects of success on appeal in respect of both conviction and sentence. See *S v Williams* 1980 ZLR 466 (A) at 468 G-H; *S*

v Mutasa 1988 (2) ZLR 4 (S) at 8D; *S v Woods* SC 60/93 at 3-4; *S v McGowan* 1995 (2) ZLR 81 (S) at 83 E-H and 85 C-E. Other factors to be taken into consideration are the right of the individual to liberty and the possibility of a lengthy delay before the appeal can be heard. See *Mungwira v S* HH 216/10.

WHETHER OR NOT THE APPELLANT HAS GOOD PROSPECTS OF SUCCESS ON APPEAL AGAINST BOTH CONVICTION AND SENTENCE?

The appellant's contention against conviction and sentence is based on factual findings and evidential issues. The appellant argues that her identification was improperly established as it was premised on contradictory evidence. She also avers that the reasons given for the acceptance of the complainant and Daniel Bare's evidence are not satisfactory.

The court *a quo* refused to grant the appellant bail pending appeal. The magistrate's court found that the appellant participated in robbing the complainant, as she was positively identified by the complainant and Daniel Bare. A perusal of the record of proceedings, establishes that these factual findings are insurmountable. The evidence concerning her identification was coherent and corroborated. The complainant was with the appellant for several hours during the commission of the offence, therefore, his positive identification of her cannot be faulted. Further, Daniel Bare also positively identified her and had no motive to falsely implicate her. It is trite that appellate courts are slow to interfere with trial courts on the findings on the credibility of witnesses. This was clearly explained in the case of *Beckford v Beckford* 2009 (1) ZLR 271 (S), where it was held that:

“It is quite clear that the learned Judge made specific findings of fact with regard to the credibility of the parties and their witnesses. As has been stated in a number of cases, an appellate court would not readily interfere with such findings. That is so because the advantage enjoyed by a trial court of observing the manner and demeanour of witnesses is very great. See *Arter v Burt* 1922 AD 303 at 306; *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199; and *Germani v Herf and Anor* 1975 (4) SA 887 (AD) at 903 A-D.”

In *Gumbura v The State* SC 78-14, this Court said:

“As regards the credibility of witnesses, the general rule is that an appellate court should ordinarily be loath to disturb findings which depend on credibility. However, as was observed in *Santam BPK v Biddulph* (2004) 2 All SA 23 (SCA), a court of appeal will interfere where such findings are plainly wrong. Thus, the advantages which a trial court enjoys should not be overemphasised. Moreover, findings of credibility must be considered in the light of proven facts and probabilities.”

The circumstances under which an appellate court will interfere with the findings of a trial court on the credibility of a witness were articulated in the case of *S v Robinson & Others* 1968 (1) SA 666 (AD) at 675 G-H where HOLMES JA said:

“A Court of Appeal, not having had the advantage of seeing and hearing the witnesses, is of necessity largely influenced by the trial court’s impressions of them. Having regard to the re-hearing aspects of an appeal, this Court can interfere with a trial judge’s appraisal of oral testimony, but only in exceptional cases, as aptly summarised in a Privy Council decision quoted in *Parkes v Parkes* 1921 AD 69 at p 77:

‘Of course, it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony.’”

In light of the above and the strength of the respondent’s opposition to the granting of bail pending appeal, I am satisfied that the appellant has failed to establish a basis for interference with the decision of the court *a quo*.

The appellant’s defence of an *alibi* is unbelievable and cannot withstand the evidence led to rebut it. She argued that when the offence was committed on 7 October 2017, she was in South Africa as she had gone there on 5 October 2017 and only returned to Zimbabwe on 3 February 2018. This was rebutted by the production of photocopies of the relevant pages of her passport which proved that she passed through the Beitbridge Border Post

on 9 October 2017, two days after the commission of the offence. She was positively identified by the complainant who saw her participating in the commission of the robbery. This justifies the court *a quo*'s decision to refuse to grant her bail pending appeal.

It is trite that an appellate court will only interfere with factual findings of a subordinate court where it is alleged and proved that the findings were arrived at irrationally. See *Hama v NRZ* 1996 (1) ZLR 664 at 670. The appellant did not demonstrate that in refusing her bail pending appeal, the court *a quo* grossly misdirected itself in its exercise of discretion. In my view, there is no basis to interfere with the court *a quo*'s exercise of discretion. The appellant has not shown good cause for such interference. In *The Attorney General v Siwela* SC 20/17, it was stated that:

“The power of this Court to interfere with the decision of the court *a quo* in an application for bail is limited to instances where the manner in which the court *a quo* exercised its discretion is so unreasonable as to vitiate the decision made. See *S v Ncube* 2001 (2) ZLR 556 (S). Another ground for interference with a decision of a court *a quo* is the existence of ‘a misdirection occasioning a substantial miscarriage of justice’ by the court *a quo* – *S v Makombe* SC 30/04.”

In this case it is difficult to impugn the decision of the court *a quo*, in finding that there were no prospects of success. The magistrate's court took into account all factors surrounding the offence before convicting the appellant. There are, therefore, no prospects of success on appeal against both conviction and sentence. The court *a quo*, therefore, correctly dismissed the appellant's application for bail pending appeal.

WHETHER OR NOT THE APPELLANT IS LIKELY TO ABSCOND IN LIGHT OF THE GRAVITY OF THE OFFENCE AND THE SENTENCE IMPOSED?

The appellant undertook to abide by bail conditions to be imposed by the court. She submitted that she is not a flight risk. Based on the evidence on record the court *a quo*

found that she was a flight risk. I agree with the reasoning of the court *a quo*. In *Aitken, supra*, it was held that in deciding whether an accused person will abscond if released on bail the following factors constitute a useful guide:

- “-the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction.
- the apparent strength or weakness of the state case.
- the accused’s ability to reach another country and
- the absence of extradition facilities from that country.
- The accused’s previous behaviour when previously released on bail; and
- the credibility of the accused’s own assurance of his intention and motivation to remain and stand trial. See also *S v Jongwe* 2002 (2) ZLR 209 (S).”

A reading of the record proves that the appellant fled to South Africa on 9 October 2017 two days after committing the offence. The appellant came back on 3 February 2018 believing that the heat had cooled off but was arrested. During the trial, the magistrate gave the appellant several opportunities to produce her passport to prove her *alibi* but she did not do so, even though her mother and sister who were attending her trial could have assisted her in that regard. Her conduct proved that she did not want to produce it. This affects the reliability of her promise that she will not abscond if granted bail pending the hearing of her appeal.

There are on record photocopies of relevant pages of the appellant’s passport which prove that she is a frequent traveller who on occasions spends long periods of time out of the country. This proves that she has means or relatives who are able to sustain her if she on being granted bail, absconds and flee the country. There is, therefore, a possibility that she may abscond if she is granted bail pending appeal. The fact that she has been convicted and has already experienced incarceration, and is fully aware of the sentence imposed are most likely to cause her to abscond. There is, therefore, a high probability that she will abscond if she is

released on bail pending appeal. In light of this, the appellant fails the second test as she is a flight risk.

The appellant's appeal against refusal of bail by the court *a quo* has no merit. It is accordingly dismissed.

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