FRADERICK MABAMBA
versus
STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 5 March 2021 and 12 March 2021

Bail appeal

S. Chabuka with *A. Munodawafa*, for the appellant
F.I. Nyahunzvi, for the respondent

CHIKOWERO J: Unhappy that the Magistrates Court sitting at Harare denied him bail pending trial, the appellant has come before me on appeal.

THE BACKGROUND

The 60year old appellant was once a Councillor and Deputy Mayor of the Municipality of Chitungwiza.

On 3 February 2021 he appeared before the Regional Court Eastern Division at Harare, sitting as an Anti -Corruption Court, facing 15 counts of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The allegations are that on 15 different occasions between 1999 and 2021 he illegally created and sold 4049 stands, being State land, to members of the public having misrepresented to them that the land in question belonged to him. The purchasers were prejudiced of US$13 724 000 and ZWL$875 040 000 000. The allegations came to light in 2021 when some of the purchasers were rendered homeless after floods had swept away their houses as much of the land sold, and on which some purchasers had constructed houses, was wetland. The relevant Ministry conducted investigations which revealed that it was the appellant who illegally sold the pieces of land in respect of the 15 counts. This land was not reflected on the municipality's data base as part of the land allocated by it to anybody.

Police investigations also established that it is the appellant who had sold the State land in question, and also received the purchase price. Out of around 5000 written agreements of sale the police had managed to recover 33 copies 28 of which the respondent produced through Superintendent Moreblessing Gandiyaru, the investigating officer, in opposing the release of appellant on bail before the court *a quo*.

Bail was opposed on three grounds. The learned magistrate upheld the opposition. Consequently, he refused bail. First, he found that appellant was likely to abscond. Second, he was satisfied that appellant was likely to commit further similar offences. Finally, bail was denied on the basis that appellant was likely to interfere with State witnesses and investigations.

THE GROUNDS OF APPEAL

They are couched as follows:

> "1. The learned Magistrate in the court *a quo* erred in denying the appellant bail pending trial on the ostensible reason that the appellant is facing a serious offence yet it is a well-known precept of our law that the seriousness of an offence is not in itself a reason to refuse bail.
> 2. The learned magistrate in the court *a quo* erred in denying the appellant bail when there were no compelling reasons advanced by the State to deny the appellant bail.
> 3. The learned magistrate in the court *a quo* erred in not taking into account that it is a well-known precept of our law that an accused person is presumed innocent until proven guilty and that pretrial incarceration cuts across the presumption of innocence that is operational in favour of the appellant.
> 4. The learned magistrate in the court *a quo* misdirected himself when it found that there was a risk that the appellant will interfere with evidence and witnesses when there was no evidence adduced to make such an inference.
> 5. The learned magistrate in the court *a quo* misdirected himself in concluding that the existence of pending cases means that the appellant had a propensity to commit further offences."

THE LAW IN AN APPEAL OF THIS NATURE

It is settled law that, because a decision on bail involves the exercise of discretion by the judicial officer seized with that issue at first instance, an appellate court can only interfere with the lower court's decision if the court *a quo* committed an irregularity or exercised its discretion so unreasonably or improperly as to vitiate its decision. See *S* v *Chikumbirike* 1986 (2) ZLR 145 (SC); *Chimwaiche* v *State* SC 18/13.

It is with this principle in mind that I proceed to examine the appellant's grounds of appeal in light of the record of proceedings *a quo*, the papers filed of record and the submissions made before me.

THE SEROUSNESS OF THE OFFENCE AS A REASON TO REFUSE BAIL

This ground is misplaced. It is a misreading of the learned magistrate's well-reasoned judgment. The court *a quo*, under the subheading "likehood of abscondment" accepted that the 15 counts of fraud involving as they did the sale of state land to unsuspecting home seekers were inherently serious offences invariably attracting a lengthy custodial sentence if appellant were convicted. The court *a quo* observed that this was likely to induce appellant to abscond. But it did not refuse bail on the sole basis that the appellant was facing serious offences. The reasoning process of the learned magistrate puts this beyond doubt. He said:

> "…however it is trite that the seriousness of an offence alone cannot be the basis to deny an accused person bail pending trail as the presumption of innocence operates in the accused's favour. It should be considered with other factors if the scale is to tilt against the granting of bail pending trial. See *S* v *Hussey* 1991 (2) ZLR 187 (S).
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> The State has adopted a more robust approach which is rarely employed during initial appearances. They have tendered documentary evidence in support of the contention that the State case is very strong. The accused did not dispute the existence of these agreements of sale. He nonetheless denied the charge stating that he acted procedurally, in such cases where a *prima facie* case is demonstrated, it would not be enough for an applicant to give a bare denial of the charges.
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> He ought to have demonstrated his defense with the conviction that he is innocent. At this stage the State case is strong. In light of the above, the Court is left with the belief that the likelihood of the appellant attempting to escape from a severe sentence of imprisonment cannot be discounted".

What is clear is that a combination of the seriousness of the offences, a strong State case coupled with no cognizable defense disclosed during the bail hearing leading to the real prospect of conviction and the resultant fear of an invariably long custodial sentence persuaded the learned magistrate to find, despite the presumption of innocence, that the appellant was likely to abscond.

Therefore, the first ground of appeal is simply wrong. It attacks a "finding" which was never made. Put differently, in the absence of the alleged finding the ground of appeal has no leg to stand on. It is incapable of raising an issue on appeal. It cannot, and does not, raise an issue. It is dismissed.

THE ALLEGED ABSENCE OF COMPELLING REASONS

Needless to say, a bail appeal is an appeal. My view is that grounds of appeal in a bail appeal also need to be clear and specific. It seems to me that this ground of appeal, as framed, is general. At the same time, however, bail was in this matter refused on three specific grounds. The matter was argued on the basis that the second ground of appeal was properly couched. In other

words the want of specificity of the ground was neither raised nor argued. I therefore proceed to determine the ground on the merits.

As it relates to the finding of likelihood of abscondment I do not agree with Mr *Chabuka* that the ties of the appellant to the place of trial, the existence and location of assets held by the appellant, that appellant was already on bail on similar charges and that he was not a holder of a passport were not considered. Information on these factors, listed in s 117 (3) (b) (i)- (iii) and (vii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the CPEA") was before the Court *a quo*.

I consider that it would have been preferable for the Court *a quo* to have mentioned and discussed these factors against the nature and gravity of the offence or the nature and the gravity of the likely penalty thereof and the strength of the case for the prosecution and the corresponding incentive of the appellant to flee. However, the mere fact that he did not mention the other factors referred to in the CPEA does not, in my view, mean that he did not consider them. In *S* v *Gono* 2000 (2) ZLR 63 (H) the Court said:

> "…that merely because the magistrate had not mentioned community service that did not mean that he had overlooked that option. While it would have been better for him to have specifically dealt with the matter, his reasons for finding one form of punishment as appropriate and another as inappropriate could be deduced from what he said."

By parity of reasoning, the Court *a quo* only had two options in deciding on the likelihood of abscondment: he would have found either that appellant was likely to abscond (which he did) or that the respondent failed to establish that ground (which he did not). It is implicit in its reasons for judgment why it found as it did. The record of proceedings discloses that both parties were represented *a quo* and, after evidence was led, both counsel had gone on to make oral submissions. There was no way that, in preparing judgment, the learned magistrate would have read and considered oral submissions by one counsel. I find that the Court *a quo* considered all relevant material placed before it.

As for the actual reasons why the Court below found that appellant was likely to abscond, those reasons are beyond reproach. It was on the same grounds that the Supreme Court dismissed the bail appeal in *S* v *Jongwe* 2002 (2) ZLR 219 (S)

There are specific grounds of appeal attacking the findings of likelihood to commit further similar offences and the likelihood to interfere with witnesses and investigations. I will deal with those issues under those grounds.

THE PRESUMPTION OF INNOCENCE

I have effectively dismissed this ground in the course of determining the first ground of appeal.

Indeed, without amending this ground of appeal Mr *Chabuka* conceded at the hearing that the learned magistrate considered the presumption of innocence.

Instead, he sought to argue that the misdirection lay in paying lip service to the presumption of innocence. Counsel did not explain what he meant. I disagree with him if the submission is that paying due regard to the presumption of innocence means that the appellant ought to have been released on bail. There were other grounds militating against appellant's pre-trial liberty, despite the presumption of innocence. In any event the argument sought to be advanced could not competently be made without amending the ground of appeal.

In the event, with the concession having been made, and properly so (that the presumption of innocence was considered) the ground of appeal is likewise dismissed for lack of merit.

INTERFERENCE WITH EVIDENCE AND WITNESSES

In finding that the appellant was likely to interfere with evidence and state witnesses, the learned magistrate reasoned as follows:

> "The police are yet to complete investigations. More agreements of sale are yet to be recovered from the accused as well as other witness. This is a reasonable expectation considering the number of houses affected. The accused knows the complainants since they were his clients. As a former deputy Mayor and counsellor, as well as being a philanthropist in the area, his influence can never be under estimated."

Mr *Chabuka* was unable to fault this reasoning process. He abandoned his earlier argument that the record discloses that appellant cooperated with the police in their investigation of this matter. Instead, he submitted that I must order the appellant to surrender all required documentation to the police. Counsel, to his credit, conceded that I was not sitting to direct police investigations but to determine the appeal. In a nutshell, the concession made, with which I agree, means that the court *a quo* did not misdirect itself in finding that there was a likelihood that appellant will interfere with evidence and witnesses.

THE PROPENSITY TO COMMIT FURTHER OFFENCES

It was common cause, both a quo and on appeal, that appellant had three other cases under investigation involving the sale of state land.

It is also common cause that he was already on bail on two other records involving the sale of State land.

It was not disputed *a quo* that appellant sold the stands which form the subject of the 15 counts of fraud.

Indeed, the witness testified that appellant was still selling State land in 2021.

Appellant did not deny selling the land captured in the 15 counts of fraud. No defence at all was put to the investigating officer to elicit his comment. The following occurred when the witness was being cross-examined (record p 48):

"Q Accused is willing to clear his name in a trial.

A This is not a trial. It is a bail application."

This is not a defence. It is simply a statement.

It was only in oral submissions *a quo* that counsel for the appellant argued, without elaborating, that all which appellant did was procedural. But there was no denial of the allegation that appellant sold the State land on all 15 occasions.

The learned magistrate considered that appellant was already on bail on two records involving sale of State land, was under investigation for three separate similar matters, was back in court on 15 similar charges for which no defence was proferred and there was the prospect of further similar charges being preferred against him. He thus found that if released pending the trial there was a likelihood of appellant committing further offences of a similar nature. It is true that the presumption of innocence operates in appellant's favour, but there was no misdirection in the learned magistrate's approach in taking into account the multiplicity of similar charges spanning the period 1999 to 2021, backed by credible evidence against the appellant, as sufficient evidence to discharge the onus which lay on the respondent to prove, on a balance of probabilities, that if granted bail appellant was likely to re-offend. On the significance of the number of similar counts in this respect the court a quo properly referred to *Marembo* v *S* HH 133/15. See also *S* v *Biti* 2002 (1) ZLR 115 (H).

Finally, I do not consider that *Attorney-General* v *Phiri* 1987 (2) ZLR 33 (HC) expresses the view that a finding that there is a likelihood of commission of further offences can only be made where the applicant for bail has relevant previous convictions. Each case depends on its own circumstances. I find no merit in the last ground of appeal.

DISPOSITION

In the result, the appeal against the decision of the Regional Court Eastern Division sitting at Harare in case number ACC 08/21 refusing bail be and is dismissed.

Nyikadzino, Simango & Associates, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners