INNOCENT COLLINS GOBVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & CHIKOWERO JJ
HARARE, 7 December 2021

Bail Appeal

H S Tsara, for the appellant
F Kachidza, for the respondent

CHIKOWERO

J: This is an appeal against bail refusal.

The appellant is appearing before the magistrates court at Harare facing a charge of money laundering as defined in s 8(2) of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*].

The allegations are these. On 8 October 2021 the appellant, acting in connivance with one Paminus Mutengo (Mutengo) opened two visa card accounts at separate branches of Banc ABC in Harare. He opened the accounts in his own name whereupon he furnished the account details, the personal identification numbers as well as handed over the visa cards to Mutengo.

On 23 October 2021 the two accounts were credited with a total of US$120 000. Between 23 and 24 October 2021 withdrawals totaling US $2784.44 were effected from the two accounts through different Automated Teller Machines in Ivory Coast.

The appellant failed to explain the source or origin of the sum of US$120 000 deposited into his accounts. Hence his placement on remand on allegations that he had concealed or disguised the illicit origin of the money or had assisted the person involved in the commission of a serious offence to evade the legal consequences of his act or omission by opening the two bank accounts

for the purpose of receiving deposits of the allegedly dirty money and, by so doing, concealed its illicit origin.

Mutengo is on the run.

The magistrates court refused bail on the basis that the appellant will not stand trial or appear to receive sentence. It found that the case for the prosecution is strong as the appellant had insufficiently disclosed his defence. Although he had implicated Mutengo, the evidence against the appellant still appeared to be strong. At the very least the appellant would be an accomplice or accessory after the fact. The appellant's conduct was deliberate. He opened two visa card accounts, one each at two different branches of the same bank. This pointed to him dodging the control systems at the first branch which translated to circumventing the control systems of the bank itself. In the court's opinion, this demonstrated that the appellant was a willing participant in the commission of the alleged offence. The court had regard to the further facts that withdrawals were effected at different automated teller machines, and that in Ivory Coast. The sophisticated nature of the circumstances of the commission of the offence is what informed the court's decision that the interests of justice would be harmed by admitting the appellant to bail. In other words, the court's opinion was that the appellant's defence that he was an innocent victim of the criminal machinations of Mutengo was very weak. The appellant, through counsel, told the court below that Mutengo was a former school mate of his. Mutengo told the appellant that he was expecting to receive some money from his United Kingdom based business partner. Mutengo had allegedly lost his national identity card. In the circumstances, Mutengo requested for the appellant's visa account details. The latter had none. This culminated in the appellant opening two visa accounts in view of the daily cash withdrawal limits on one account. The appellant thereafter observed that US $10 000 was deposited into the one account with US $110 000 being deposited into the other a few days later. He had been promised US $200 as reward for the use of the two accounts. When the appellant eventually tried to call Mutengo, the latter had switched off his phone. The appellant, a potential witness, is a victim of circumstances.

In assessing whether the respondent had established, on a balance of probabilities, that the appellant will not stand trial or appear to receive sentence the court considered the following factors:

- The seriousness of the offence.

- The enormity of the amounts of foreign currency involved.
- The strength of the case for the prosecution and the likely sentence in the event that the appellants were convicted.
- The appellant's links to persons outside this country.

In the appellant's favour the court considered the presumption of innocence It also took into account his assurances that he will stand trial

Having balanced the competing factors, the court concluded that the appellant will not stand trial or appear to receive sentence.

The appellant relies on two grounds of appeal. I cite these verbatim:

> "1. The court *a quo* erred and misdirected itself by treating the appellant differently from his co-accused, Tendai Njowa despite the fact that the two were facing similar charges arising from similar facts and involving the same complainant.
>
> 2. the court *a quo* erred and misdirected itself by making a finding that the appellant was a flight risk and may abscond to avoid trial if he is released on bail. The learned magistrate should have considered the imposition of stringent conditions to counteract the risk of abscond." (underlining is mine)

The respondent, in its written response, conceded to the appeal. It criticized the court's reasoning that the appellant had not been "upfront on the nature of his defence", when the appellant had proffered a defence. It criticized the court for reasoning that the appellant had insufficiently implicated Mutengo because imbedded in that line of reasoning was a finding that the appellant had tendered a defence. Counsel for the respondent then proceeded to restate the defence. I have already set it out. These constitute the reasons for the concession. In that light, counsel took the view that the court misdirected itself in failing to treat the appellant equally with his "co accused."

Ms Kachidza did not support the court's finding that the appellant is a flight risk. In this vein para 8 of the state's response reads as follows:

> "… even if the appellant is convicted, the penalty provision provides for a fine or imprisonment. The potential prejudice is US$120 000 of which US $117 215.56 was recovered. The actual prejudice is US2 784.44 which is not enormous and is highly mitigatory for accused to be sentenced to a fine. That would surely not induce appellant into abscondment"

In the result, respondent suggested that the appeal be allowed with the appellant being ordered to deposit ZWL$ 10 000 as bail money, to reside at the given address, not to interfere with state witnesses and to report to the police every Monday, Wednesday and Friday. The appellant had offered to report on Mondays and Fridays only.

I did not accept this concession.

To begin with, the first ground of appeal, its contradictions aside, does not arise at all. Tendai Njowa is not the appellant's co- accused. There is no basis for the appellant to seek equal treatment with Njowa. The two were arrested on the same day. They were brought to court for initial remand on the same day. The investigating officer is the same. Both were charged for contravening the same provision of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*].

However, they were not charged on the same set of facts. They were not co- accused. Purely on the basis of expedience, the Public Prosecutor decided to deal with the two different matters at once for purposes of the bail applications. The legal practitioners of the appellant and Njowa (who hailed from different law firms) did not object to that manner of proceeding. The investigating officer testified and was cross-examined. Counsel made oral submissions whereupon the court rendered a composite judgment disposing of the two different matters. Njowa was admitted to bail. The appellant was not. The court opened the judgment by acknowledging that it was disposing of two different matters, but got confused by proceeding on the premise that the two were facing the same charge. They were not. This led the court to "distinguish" the circumstances of the two as if they were co-accused.

I will not set out the allegations forming the subject of the charge against Njowu. Neither will I advert to the reasons for his admission to bail, the basis of the "unequal treatment" of the appellant, the arguments tendered in support of the first ground of appeal and the basis of the concession as it relates to that ground. These were different matters. Accordingly, the applicant's bail application had to stand or fall on its own merits. That the court *a quo* proceeded to "distinguish" the circumstances of the one from that of the other was not necessary in the first place. The appellant cannot rely on it on appeal. In the circumstances, I strike out the first ground of appeal on the basis that it is incompetent.

In assessing whether the appellant will not stand trial or appear to receive sentence the court weighed the factors set out in s 117(3) (b) (i) – (vii). The court was cognizant of the fact that the factors, when applied to the facts of the matter before it, pulled in opposite directions. The presumption of innocence, the appellant's confirmed residence, that he is a family man, is formally employed and that he offered to report to the police, among other conditions, suggested that he could be admitted to bail. But the task of the magistrates' court was not as simple as that. It had to weigh these favourable factors against those militating against the appellant's liberty before the trial. These were the nature and gravity of the offence, or the nature and gravity of the likely penalty therefore, the strength of the case for the prosecution and the corresponding incentive of the appellant to flee and the efficacy of the amount and nature of the bail and the enforceability of any bail conditions.

In the exercise of his discretion, the magistrate formed the opinion that the factors adverse to the admission of the appellant on bail outweighed those in favour of his release.

I am unable to find any irregularity, misdirection or unreasonableness in the decision to refuse bail. The court took into account all relevant factors. It did not consider extraneous circumstances. Its findings and decision are not removed from the material that was placed before it. I agree that the case for the prosecution appears to be strong. The circumstances reveal a serious and sophisticated offence of money laundering. The appellant opened two visa card accounts at different branches of the same bank. Huge deposits of foreign currency were deposited into those accounts. Almost immediately, withdrawals were effected from those accounts at different automated teller machines not in Zimbabwe but in Ivory Coast. An accomplice is on the run. The account holder (the appellant) failed to disclose the source of the huge sums of foreign currency deposited into his accounts. Those accounts are his. They are not Mutengo's. Amidst all this, the appellant tendered a defence portraying himself as an innocent victim of Mutengo's shenanigans. The magistrate's opinion of the strength of that defence was dim. That is an opinion. I am unable to find any fault in the court's view of the strength of the case for prosecution and the corresponding incentive of the appellant to flee.

The prospect of conviction is real. The respondent downplayed the likely sentence. The facts reveal deposits of large sums of foreign currency into the appellant's accounts part of which was immediately withdrawn in West Africa. This is a crime which does not depend for its

commission on the availability of either a passport or a visa. It renders the existence of immigration facilities of no consequence. It is extra-territorial in nature and effect. These are factors which a sentencing court cannot ignore. A stiff custodial sentence, in the event of a conviction, is likely to be imposed. I share the magistrate's opinion that there is a great incentive for the appellant, in fear of imposition of such a sentence, not to stand trial.

The appellant appeared at the police station without knowing the purpose of the interview that the police intended to carry out. At the time of the bail application *a quo*, he knew the nature and gravity of the charge, the rudimentary nature of the evidence of the prosecution and the likely penalty in the event of a conviction. The magistrate was not unreasonable in proceeding on the basis that the appellant's conduct before the arrest was not a reliable barometer to measure the risk of the appellant not standing trial. The court did not mention this in the judgment but three can be no doubting that is how the magistrate resolved the conflict between the import of the pre-arrest conduct and the effect of the charges on the appellant's chances of standing trial if released on bail.

I am satisfied that the court considered the imposition of stringent bail conditions and decided that this was not a suitable case for taking that course. The court referred to the assurances made by the appellant that he would stand trial. In making these assurances the appellant had tendered bail conditions which the court considered and went on to refuse bail. I am fortified in this regard by the fact that the court admitted Njowa to bail on substantially the same conditions tendered by the appellant. Resultantly, it matters not that the court did not say:

> "I have considered granting bail on stringent conditions but I have refused to admit you to bail on stringent conditions because of a, b, c…."

Having found no irregularity or misdirection by the magistrate and being satisfied that he exercised his discretion reasonably and properly, it follows that this appeal cannot succeed. See *S* v *Malungwa* 2003(1) ZLR 275(H); *S* v *Ruturi* 2003(1) ZLR 59(H).

These, then, are the reasons why I dismissed the application at the conclusion of argument on 7 December 2022.

Tsara and Associates, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners