MENG DONG
and
LEGWAN MAVHUNGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 3 & 17 June 2021

Bail Application

Mr *J Sikhala* with Mr *N Masarirevhu*, for the applicant
Mr *T Mapfuwa*, for the respondent

CHAREWA J: The appellants are facing a charge of bribery in contravention of s 170 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*], in that on 12 May 2021, second appellant, called the investigating officer in a case of fraud or alternatively, defeating/obstructing the course of justice in CRB 3996/21 involving first appellant requesting a meeting over the case.

On 13 May 2021, second appellant visited the investigating officer at his work place and communicated that he had been sent to offer the investigating officer money to destroy evidence in the case and ensure first appellant's removal from remand. The investigating officer telephonically confirmed this with first appellant and immediately informed his superiors who made the decision to trap appellants. The appellants fell into the trap on 16 May 2021 when they handed over USD1480 to the investigation officer and were immediately arrested.

On 19 May 2021, the magistrate's court denied them bail on the basis that the appellants have a case to answer as there was an exchange of money between them and the investigating officer. Further, appellants are on bail in other matters: therefore, their conduct shows that they can commit further First Schedule offences. In addition, the state case against them is strong such that they are not good candidates for bail. The magistrate recorded that he conducted no

inquiry as whether appellants are likely to interfere with investigations or witnesses, but concluded that the appellant's conduct "speaks volumes". He therefore denied them bail.

In this appeal, the appellants submit that the magistrate misdirected himself in several respects. Firstly, that an accused person has a case to answer is not a ground for denying bail. In any event, since at a bail hearing the accused person is not obliged to give a defence outline, the conclusion that the appellants have a case to answer is a misdirection as it is predicated on one side of the case. Secondly, the magistrate did not give sufficient weight to the presumption of innocence operating in favour of an unconvicted person, particularly since no previous convictions were tendered. Thirdly the court misdirected itself in granting bail to a co-accused whose situation was exactly the same as second appellant in that there was no allegation of interference with previous bail conditions for similar offences. Fourthly, the court misdirected itself in concluding that there is a strong case against appellants when the investigation officer lured them to commit the crime. Fifthly, having conducted no inquiry as to the likelihood of interference with investigations or witnesses it was irregular for the court to conclude otherwise. Finally, pending cases are not sufficient ground to deny bail particularly since those cases are not relevant to the current charge. In any event, second applicant has no pending relevant First Schedule offence for the court to have concluded that appellants are likely to commit further First Schedule offences if granted bail.

In opposing bail, the respondent conceded that s 117(2) relates only to First Schedule offences of which there is no proof that appellants have committed such and are likely to commit more if granted bail. However, it still persisted in opposing the application on the basis that appellants do not deny the recovery of the bribe money they paid. It further submits that appellants were not lured to commit the crime, but were only lured as to the place to conclude the exchange of the bribe, Further, while an inquiry was not held with respect to the likelihood of interference with investigations or witnesses, the current offence was committed in an attempt to so interfere, thus likelihood of committing further offences is real. It also submits that the court a quo committed no irregularity as the prosecution case is indeed strong since appellants were arrested and bribe money recovered during the commission of the offence. Therefore, the chances of conviction are high leading to a custodial sentence which may be an incentive to abscond. Further, the trial court properly distinguished the third accused who was

merely a driver and did not participate in the communications to subvert the investigating officer.

The law with regard to bail pending appeal is trite. So is the law regarding appeals against refusal of bail. The court must safeguard the liberty of a person while at the same time protecting the interest of justice.[1] An appeal against refusal of bail can only succeed where the court a quo committed an irregularity or misdirection or it exercised its discretion so unreasonably as to vitiate its decision. This must be so as the superior court cannot act as a court of first instance.[2]

In casu, the court *a quo* did misdirect itself. As conceded by respondent, without holding an inquiry as to whether or not the appellants would interfere with investigations or witnesses, it nevertheless reached that conclusion on the basis that the appellants' conduct "speaks volumes". There can be no worse irregularity than that. Further, as also conceded by the respondent, the court a quo denied the appellants bail on the grounds that they are likely to commit further First Schedule offences when there is no evidence in that respect. In fact, the pending cases against appellants are irrelevant to the matter for which they seek bail. To make matters even worse, the court a quo refused to grant bail on the basis that appellants have a case to answer as there was an exchange of money. This was a clear misdirection as whether or not an accused person has a case to answer is not a basis for denying or granting bail. The factors to consider in granting or denying bail are concisely prescribed in s 117 and s 117A of the Criminal Procedure and Evidence Act, [*Chapter 9:07*].

While it is true that the alleged offence and conduct of appellants were committed while they were already on bail for other offences and amounts to an attempt to interfere with witnesses, nothing suggests that if released on bail they are likely to interfere given that the state witnesses are already on alert to guard against any further such transgressions. Page 1 of the ruling is instructive. The respondent opposed bail before the court a quo on two grounds: that fist appellant is on remand on allegations of fraud which are still pending in CRB 1996/21 and that second appellant is facing allegations of obstruction or endangering free movement of people in CRB3389/21 and consequently they have a propensity to commit further crimes if

[1] Attorney General v Phiri 1987(2) ZLR 33 @35. See also S v Mudzengerere 2018 (1) ZLR 646
[2] S v Chikumbirike 1986 (2) ZLR 145 (S). See also S v Malunjiwa 2003 (1) ZLR 276 (H)

released on bail. These were the compelling reasons raised by the respondent to deny appellants bail.

It seems to me that that the court a quo committed an irregularity in agreeing that these are compelling reasons to deny bail in the interests of the proper administration of criminal justice given its correct statement of the law that any person arrested must be released unconditionally or on reasonable conditions unless there are compelling reasons which are prescribed in s 117.

I note that the respondents are raising the issue of apprehension of abscondment which was never raised or dealt with by the court a quo. This being an appeal, the decision of this court must fall squarely within the issues raised and the findings made by the court a quo.

Consequently, the decision of the court a quo must be set aside. The following order is therefore made:

"IT BE AND IS HEREBY ORDERED THAT

1. The decision of the magistrate is set aside and substituted with the following:
2. The appellants be and are hereby admitted to bail pending trial on the following conditions:
    a. The appellants shall deposit RTGS$5000 with the Clerk of Court, Harare.
    b. The first appellant shall continue to reside at 408 Borrowdale Brooke, Harare until the finalisation of this matter.
    c. The second appellant shall continue to reside at 14513 Unit O Seke, Chitungwiza until the finalisation of this matter
    d. The first appellant shall report once a week every Friday at Borrowdale Police Station between the hours of 6.00 am and 6.00 pm.
    e. The second appellant shall report once a week every Friday at St Mary's Police Station between the hours of 6.00 am and 6.00 pm.
    f. The appellants shall not interfere with state witnesses and investigations.

Tendai Biti Law, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners