MATSVIMBO SIMBARASHE CHESTER
versus
THE STATE

HGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 22 June 2021 & 2 July 2021

Bail Appeal

I Mutonhori, for the appellant
A Muziwi, for the respondent

CHIKOWERO J: This is an appeal against refusal of bail.

The appellant is appearing at the Regional Court in Harare (sitting as a Designated Anti-Corruption Court) charged with the crime of extortion as defined in s 134(1)(a) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] "The Code". Also preferred against him is the alternative charge of bribery as defined in s 170 of the Code.

He is jointly charged with one Patrick Badza "Badza".

THE ALLEGATIONS

The allegations against the two are set out in the Request for Remand Form and the annexure to that Form.

These are they. The complainant is the State. it is represented by Kyle Dongchuan Wang. He is a Chinese national residing at a certain address in Borrowdale Brooke, Harare. Wang is the managing director of Live Touch (Pvt) Ltd "Live Touch". This is a cement manufacturing company based in Redcliff.

Badza resides in Harare. The appellant stays in Norton. Both are employed in the President's Department in the capacities of Senior Programmes Manager and Programmes Manager, respectively.

In early 2021 Live Touch ventured into limestone mining. Limestone is a major raw material in cement manufacturing. The expansion necessitated the employment of thirty-three experts from China.

Accordingly, Wang submitted applications for Temporary Employment Permits "TEP" to the Department of Immigration in respect of the experts. The Department of Immigration forwarded the applications to the Committee on Foreign Recruitment for deliberation and processing.

This Committee is made up of five government officials from the Ministries of Public Service, Labour and Social Welfare; Industry and Commerce; Mines and Mining Development; Higher and Tertiary Education and Foreign Affairs and International Trade. The officials are named in the annexure to the Request for Remand Form.

On 21 April 2021 these officials conducted a tour of Live Touch's mine in Kwekwe. The mine's operations officer, one Junior Zigora, led the tour of the mining plant after which he held a brief meeting with the members of the delegation. Thereafter, the Committee members undertook to review the applications on 19 May 2021.

On 14 May 2021 Zigora received a call from Badza. The Econet and Netone mobile numbers used are given. The latter is alleged to have stated that he worked for the President's Office and wanted details of the person handling the TEP applications at Live Touch. Badza is alleged to have solicited for a reward or consideration from Zigora in order to recommend the granting of the applications. Zigora referred Badza to Wang. Badza made the same demand of Wang.

On 17 May 2021 Wang filed a report with the Zimbabwe Anti-Corruption Commission "ZACC" in Harare. The ZACC investigators issued a Trap Authority.

On 18 May 2021 Badza contacted Wang. The parties agreed to meet at the Holiday Inn in Harare. During the meeting Badza is said to have solicited for payment of US$300 in respect of each of the thirty-three applications to take the total to US$9900. He is alleged to have stated that all the thirty-three application forms were in his office pending his approval and recommendations to the Committee on Foreign Recruitment. Wang promised to give Badza US $3 500 as deposit with the balance (US $6 400) payable after the issuance of the Temporary Employment Permits.

On the same day, around 1:00 p.m., Badza again met Wang at a restaurant called Garfunkels in Sam Levy Village, Borrowdale, Harare. While seated on the same table Wang handed over US$3 500, in 35 x US$100 notes, to Badza. This was the deposit agreed to earlier in the day when the parties had met at Holiday Inn.

Six (6) ZACC officials, inside the same restaurant, were observing the incident. At this juncture, it is necessary that I quote paragraphs 11, 12, 13 and 14 of the annexure to the Request for Remand Form:

> "11. …after receiving the bribe money accused (1) (the appellant) took the money and placed it in his front left side pocket of his black jacket. Immediately after receiving the money, accused (1) was arrested by Investigating Officer Mandofa. On realising that accused (1) was arrested, accused (2) started running away and was later arrested some 100 metres from the scene.
>
> 12. After being arrested the accused (1) took the money from his pocket and threw it on the ground and the trap money was picked by another Investigating Officer Mr Nyamandwe.
>
> 13. The trap money comprises of the 35 x USD 100.00 notes as indicated on the schedule marked Annexure "A" attached. The money was booked under ZACC Exhibit book number 12/2021 and can be produced as exhibit.
>
> 14. The accused persons acted unlawfully by soliciting USD 3 500 from the complainant. The money was all recovered."

THE BAIL PROCEEDINGS IN THE MAGISTRATES COURT

Appellant and Badza were denied bail. In opposing the bail application, the respondent had relied on the Request for Remand Form together with the annexure thereto, the oral testimony of the Investigating Officer (Smart Mandofa) as well as the oral submissions made by the Public Prosecutor.

The appellant's erstwhile legal practitioner cross-examined the Investigating Officer. Counsel also orally addressed the Court.

THE REASONS FOR REFUSING BAIL

The learned Regional Magistrate was satisfied that due to the gravity of the offence, the likely penalty to be visited upon the appellant if convicted, the strength of the case for the prosecution and the attempt to evade arrest the appellant is likely to abscond if released on bail.

The Court also found that the appellant is likely to interfere with State witnesses.

THE GROUNDS OF APPEAL

Despite numbering five (5), the grounds of appeal raise only three issues. These are:

1. Whether the Magistrates' Court misdirected itself on the facts in concluding that appellant is likely to abscond and to interfere with State witnesses.
2. Whether the Court's decision that appellant is likely to abscond and to interfere with the State witnesses is so outrageous and irrational when regard is is had to the material that was before that court.

3. Whether the Court ignored the presumption of innocence.

THE LAW

The law in a bail appeal is settled. It is the court hearing a bail application that has the discretion to either grant or refuse bail. An appellate court can only interfere with the lower court's exercise of discretion where it is satisfied that there is an irregularity or gross misdirection in the decision appealed against. See *S* v *Chikumbirike* 1985 (2) ZLR 145 (SC). As to what a misdirection is, GOWORA JA, writing for the Court, said the following in *Chimwaiche* v *State* SC 18/13 at p 4:

> "The record of proceedings must show that an error has been made in the exercise of discretion, either that 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 account relevant matters in the determination of the matters before it."

A misdirection is an error. That error may either be factual or legal, or both. It may be applying the wrong legal principles to the matter before the court, considering irrelevant matters in the decision making process, or deciding the matter on the wrong facts in light of the evidence presented before the Court.

Where the decision appealed against is grossly outrageous and irrational, in light of the material placed before the court of first instance, an appellant court can also substitute its discretion for that of the court below.

It is with this in mind that I proceed to determine the appeal. It is convenient that I commence with the ground relating to the alleged disregard of the presumption of innocence.

DID THE COURT *A QUO* DISREGARD THE PRESUMPTION OF INNOCENCE?

The judgment of the court *a quo* is exhaustive. It is well-reasoned. The court not only dealt with the law relating to the presumption of innocence and its place in an application for bail but also the bail principles *vis-à-vis* likelihood of abscondment and interference with witnesses.

The court accepted that no matter the seriousness of an offence the presumption of innocence weighed in favour of the appellant. However, it cautioned that the presumption does not have to be over-emphasized where there was same "cognizable indication" that the appellant would not abide by the conditions of the bail recognizance. In this regard, it referred to *Attorney-General* v *Phiri* 1987 (2) ZLR 33 (HC). The court applied the presumption of innocence in the context of the likelihood or otherwise of appellant standing trial. It concluded that the respondent had established that appellant is likely to abscond. It gave sound reasons

for its view. I see no misdirection in this regard. An application of the presumption of innocence does not invariably translate to pre-trial liberty of a person accused of a crime. Every case depends on its own circumstances. It follows that the criticism that the magistrates court ignored the presumption of innocence is without merit. This grounds of appeal fails.

ABSCONDMENT

The learned magistrate found that both the main and alternative charges are serious offences. He also found that, if convicted, the appellant is likely to be sentenced to an imprisonment term. I do not accept Mr *Mutonhori*'s submission that merely because the legislature has provided sentences of fines as alternatives to imprisonment for these offences there is no incentive for the appellant to flee. The offences remain serious. The law-maker was aware that these offences are committed in varying circumstances hence the range of sentence running between a level thirteen fine to imprisonment not exceeding fifteen years in respect of extortion and a level fourteen fine to imprisonment not exceeding twenty years in respect of bribery.

I do not consider that the magistrate mistook any facts in formulating an opinion that the prosecution appeared to have a strong case against the appellant. It is true that the annexure to the Request for Remand Form details the role of Badza in the alleged commission of the offence. That documents appears to bring in the appellant only at the stage of receipt of the trap money by Badza in the restaurant at Sam Levy Village. But the allegations do not end there. The same document records that the appellant ran away from the restaurant upon Badza's arrest. The six ZACC officers had to rope in the assistance of members of the public to apprehend the appellant. It was only after a 100 metre chase that the appellant was arrested. In addition, the magistrate, correctly in my view, took into account the investigating officer's evidence that the witness later learnt that the appellant had also been at the Holiday Inn meeting on the day of the arrest, demanding money from Wang.

I agree with Mr Muziwi that there is evidence that the appellant associated himself with Badza in the commission of either the main offence or the alternative thereto. The appellant was admittedly present at or in the immediate vicinity of the scene of the crime. His act of fleeing upon the arrest of Badza implicates him in the alleged commission of the offence. He is said to have been in the company of Badza on the same day at the Holiday Inn whereat the two are alleged not only to have demanded payment of US$3 500 from Wang but also to have

set up an appointment for Garfunkels, Sam Levy village, Borrowdale on the same day for the actual payment to be effected.

Six ZACC officials observed the incident at Garfunkels. The trap money, which Badza threw away immediately before his arrest, was recovered and will be produced at trial. Badza, just like the appellant, also tried to run away. Certified copies of the Trap Authority and the trap money were produced during the bail proceedings *a quo*.

Badza's jacket will also be produced at trial. He had placed the trap money inside the front left side pocket of that black jacket.

I pause to record that, while addressing the court below, the appellant's erstwhile legal practitioner said at page 3 of the record:

> "Running away is never an element of an offence. It was not ordinary running away. All the patrons scuppered (sic) for cover."

Implicit in this submission is an admission that the appellant indeed ran away. What the appellant was saying to the magistrate, through counsel, is that the appellant and all the other patrons ran away from the restaurant because they thought the ZACC officials were robbers. The magistrate did not accept this explanation since those very same members of the public assisted the ZACC officials to apprehend the appellant in the circumstances that I have alluded to earlier. Before me the appellant, represented by a different legal practitioner, was now saying that the magistrate misdirected himself on the facts because he ought to have found that the appellant never ran away. That is not what the appellant told the magistrate. It is not part of the record. The annexure to the request for remand form, the investigating officer's evidence, the submissions by appellant's then counsel all speak to the appellant running away upon the arrest of Badza.

In all the circumstances, therefore, the magistrate had the material before him to conclude that the seriousness of the offence, the likely penalty, the strength of the case for the prosecution and the immediate past conduct of the appellant were such as to establish a likelihood that the appellant would abscond if released on bail.

That conclusion cannot, in my view, be characterised as outrageous and grossly irrational. It is a decision that a reasonable bail court, seized with the same circumstances, would render. There was no improper exercise of judicial discretion by the learned Magistrate. Indeed, he took into account all the factors listed in s 117(3)(b)(i) – (vii) of the Criminal

Procedure and Evidence Act [*Chapter 9:07*] but concluded that the force of factors (iv) and (v) were such that the likelihood of abscondment was established. Factors (iv) and (v) read:

> "(iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor
> (v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee."

The appeal fails on the basis that the learned magistrate properly exercised his discretion in finding that the respondent had established that the appellant, if he were released on bail, will not stand his trial.

DID THE MAGISTRATE MISDIRECT HIMSELF IN FINDING THAT THE APPELLANT IS LIKELY TO INTERFERE WITH THE STATE WITNESSES?

In view of my conclusion on the preceding ground of appeal the need to determine this issue falls away.

DISPOSITION

The appeal against bail refusal be and is dismissed.

Pundu and Company, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners