

MTHOKOZISI NDLOVU

And

METHUSELI KHUMALO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 10 & 16 MARCH 2023

Bail Application

Mrs Drau, for the applicants

N. Katurura, for the respondent

MAKONESE J: This is an appeal against the refusal of bail by a Magistrate sitting at Bulawayo on the 23rd of February 2023. The application is opposed by the state. Applicants are facing a charge of unlawful entry into premises in aggravating circumstances as defined in section 131 (2) (e) of the Criminal Law (Codification & Reform) Act (Chapter 9:23). The applicants deny these allegations.

FACTUAL BACKGROUND

The allegations against the applicants as framed in the outline of the state case are that on 9th of December 2022 around midnight, the applicants, in the company of their associates arrived at Cranmore shop, Umguza in a white pick-up truck. A guard at the shop premises observed the truck and sensing danger ran and hid behind the shop. The applicants allegedly broke and entered the shop and stole property worth Z\$3 750.000. Upon their arrest 1st applicant claimed that he had been hired by his co-accused to transport certain goods. First applicant averred that he cannot drive a manual vehicle and hence he requested his co-accused to drive the vehicle. The applicants deny the offence of unlawful entry and indicate that they had carried goods from premises not owned by the complainant. Further, applicants contend that the persons who hired them to ferry the goods are not the ones before the court. Applicants vehemently deny the allegations against them.

In a bail application before the court *a quo*, the state indicated that there were no compelling reasons to deny bail. The state proposed the payment of Z\$70 000 as bail deposit coupled with reporting conditions. In a written ruling, the Magistrate held that the court was not bound by the concession made by the state. The court held that unlawful entry into premises was a serious offence. The offence was committed in aggravating circumstances. The court further held that the applicants committed the offence as a group. The court made further findings that the applicants had threatened the security guard before looting the complainant's property. The learned Magistrate in the court *a quo* concluded that the applicants had been placed at the scene of the crime. The court held that cases committed under the cover of darkness and by gangs of persons are viewed very seriously by the courts.

In conclusion, the court *a quo*, found that it would be injudicious and irresponsible for the court to grant bail under those circumstances.

SUBMISSIONS BY THE APPLICANTS

The applicants submit that the learned Magistrate in the court *a quo* misdirected himself by failing to take into account the presumption of innocence as provided under section 70 (1) (a) of the Constitution of Zimbabwe. Applicants contend that the learned Magistrate erred in concluding that applicants were a flight risk in the absence of any evidence to that effect. Applicants aver that in the light of the concession made by the state that there were no compelling reasons for the denial of bail, the learned Magistrate fell into error by formulating his own compelling reasons not supported by any evidence placed before the court.

Mrs Drau appearing for the applicants argued that the learned Magistrate misdirected himself by concluding that the applicants had been placed at the scene of the crime when no such evidence was placed before the court. The learned Magistrate erred in proceeding with the application for bail as if the applicants had already been convicted.

The learned Magistrate erred in concluding that cases committed under the cover of darkness are viewed seriously, as if, the applicants had already been convicted in a trial.

SUBMISSIONS BY THE RESPONDENT

Mr Katurura, appearing for the respondent, was constrained to concede that the learned Magistrate in the court *a quo* had erred. In written submissions filed by the respondent, it is argued that the applicants are likely to flee if granted bail pending trial.

The respondent contends that a strong *prima facie* case against the applicants had been established on the papers. No evidence was placed before the court to show that applicants were a flight risk. There is nothing in the record to establish a *prima facie* case against the applicants.

APPLICABLE LAW

It is trite that the court *a quo* was not bound by the concession made by the state. Where, however, the state has conceded that there are no compelling reasons to oppose bail, the court may not invent its own grounds for denying bail. Any decision to deny an applicant bail pending his trial must be based on the facts as presented in the Request For Remand, Form 242, the Summary of the State Case and any other evidence placed before the court. In certain instances the state may decide to lead evidence from the Investigating Officer to prove that an applicant is not a suitable candidate for bail. The court may only come to the conclusion that there are compelling reasons to deny bail on the basis of information on record. A judicial officer may not formulate his/her own grounds for opposing bail, and then proceed to deny bail. Such an approach leads to misdirection. The principles governing bail applications have been well established in this jurisdiction. See: *S v Tsvangirai* HH 92-03; *Makone v State* HH 493-07; *S v Zawo* 1998 (1) ZLR 536 (S).

DISPOSITION

The main factors to consider in an appeal against a refusal of bail brought by a person seeking bail pending trial are: Firstly; whether there has been a misdirection on the part of the court *a quo*; Secondly; whether there are any compelling reasons for the denial of bail

pending trial; Thirdly; whether the interests of justice are likely to be compromised if the applicants were granted bail.

Suffice it to say that having read the Magistrate's judgment with some care, I am satisfied that the learned Magistrate erred and misdirected himself by making conclusions not supported by the record. Regrettably, the learned Magistrate proceeded with the matter as if the applicants had already been subjected to a trial and convicted of the offence of unlawful entry and theft.

In the circumstances, and accordingly the following order is made:

1. The order of the court *a quo* dated 23 February 2023 is set aside.
2. Applicants be and are hereby granted bail on the following conditions:
 - (a) 1st applicant resides at his homestead at house 12, Village 2, Springhatch, Umguza, until the matter is finalised.
 - (b) 2nd applicant resides at house 5, Village 2, Springhatch, Umguza, until the matter is finalised.
 - (c) 1st and 2nd applicants each deposits bail in the sum of Z\$100 000 bail with the Registrar High Court, Bulawayo.
 - (d) 1st and 2nd applicants must not interfere with state witnesses.

Messrs Pundu and Company, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners

