KARL JODACK HERBST

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 5 MAY 2022

A**appeal against refusal of bail pending trial**

Ex tempore

N. Sibanda for the applicant
K. Nyoni for the respondent

DUBE-BANDA J:

1. At the hearing of this matter I dismissed this application and gave my reasons *ex tempore.* Counsel for the applicant subsequently requested for the reasons. These are the reasons.

2. This is an appeal against the decision Magistrates' Court sitting in Bulawayo given on the 7 April 2022. Appellant is charged with the crime of contravening section 125 of the Criminal Law (Codification & Reform) Act [Chapter 9:23]. It being alleged that on the 16 March 2022, and at Shonga Lodge, Bulawayo, he was found in possession of a white Toyota Prado registration number JS35DZGP (vehicle) in circumstances which gave rise to a reasonable suspicion that it was stolen. It is contended that a physical examination of the vehicle showed that the chassis and engine numbers were tampered with.

3. Appellant applied for bail pending trial and his application was dismissed. Aggrieved by the dismissal of his bail application, he now appeals to this court against the decision of the Magistrates' Court. He prays that the decision of the court *a quo* refusing to release him on bail be set aside and he be released pending trial.

4. The court *a quo* dismissed his application on the basis that it was not in the interests of justice to release him on bail pending trial as he was a flight risk.

5. The grounds of appeal are as follows:

   i. The court *a quo* misdirected itself by finding that the respondent had proved compelling reasons as required by section 50(1) (d) of the Constitution of Zimbabwe, to deny applicant bail.

   ii. The court *a quo* grossly misdirected itself by making a finding that appellant had no interests in Zimbabwe in the form of property hence appellant was a flight risk.

   iii. The court a quo grossly misdirected itself by ignoring the evidence of the investigating officer which evidence quelled any fears of the appellant being a flight risk.

   iv. A *fortiori* the court grossly misdirected itself on the proper construction of an accused being a flight risk.

6. The appeal to this court is in terms of section 121 of the Criminal Procedure and Evidence Act [Chapter 9:07]. It is a settled principle that a court hearing a bail appeal is not entitled to set aside the decision against which the appeal is brought unless it is satisfied that the decision is wrong. In *Chimaiwache v The State* SC 18/13 the court held that the granting of bail involves an exercise of discretion by the court of first instance. The appeal court would only interfere with the decision of the lower court if it committed an irregularity or exercised its discretion so unreasonably or improperly as to vitiate the decision. The record of proceedings must show that an error had been made in the exercise of discretion: either that the 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 consideration relevant matters in the determination of the question before it.

7. The following pronouncement in *S v Barber 1979 (4) SA 218 (D) at 220 E-G* is apposite:

> It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised his discretion wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.

8. This approach has been underscored in a number of decisions. See: *S v Madamombe* SC 117/21; *S* v *Malunjwa* 2003(1) ZLR 275(H); *S* v *Ruturi* HH 23-03. In order to interfere on appeal it is necessary for this court to find that the lower court misdirected itself in some material way in relation to fact or law. If such misdirection is established, the appeal court is at large to consider whether bail ought, in the particular circumstances to have been granted or refused. In the absence of a finding that the lower court misdirected itself the appeal must fail.

9. During the hearing before the court Magistrates' Court the State adduced evidence from the investigating officer (officer). The investigating officer testified that if released on bail appellant was likely to abscond. He is facing a serious offence and if convicted he is likely to face a lengthy prison term. He is a South African national with no known Zimbabwean address. He was arrested at Shonga Lodge where he was booked. Physical examination of the vehicle showed that the chassis and the engine numbers were tampered with.

10. The officer testified that if released on bail appellant was likely to tamper with an accomplice, one Patrick who has not been accounted for. On the basis of the investigations the officer was of the opinion that appellant is part of a gang that smuggles cars stolen from South Africa into Zimbabwe.

11. This court is enjoined to decide whether or not the court *a quo* misdirected itself, or whether it exercised its discretion unreasonably in denying the appellants bail pending trial.

12. In its ruling the court *a quo* made a factual finding that appellant has no physical assets in Zimbabwe, save for the motor vehicle in question which is in the custody of the police. It found that he had no family or business ties in the country. He is a South African national and citizen. He is a South African passport holder. The court *a quo* noted that Zimbabwe and South Africa do not have an extradition treaty and if he escapes from the jurisdiction it will be difficulty to re-arrest him and bring him to justice. The court reasoned that bail conditions will be difficult to enforce, in that appellant will just return to his home country. Further, the court *a quo* noted that he is of no fixed abode in Zimbabwe. He was arrested at a lodge where he was booked.

13. In deciding whether flight is likely and in the absence of concrete evidence of a predisposition to abscond, account must be taken of a number of factors which common experience have shown might influence a person either to stand trial or abscond. See: Prof. Feltoe *Magistrates' Handbook* (Revised 2021) 77. When assessing the risk of an accused for bail absconding before trial, the court will be guided by the following: the gravity of the charges and the severity of penalties which would be likely to be imposed if convicted; the apparent strength or weakness of the State case; accused's ability to flee to a foreign country, whether he has contacts in the foreign country who will offer him sanctuary and the absence of extradition facilities in that country; whether he has substantial property holdings in Zimbabwe and his status in Zimbabwe, that might mean he would lose so much if he absconded that flight is unlikely; whether he has substantial assets abroad; if he was previously released on bail, whether he breached the bail conditions; and the assurance given that he intends to stand trial. See: *S v Jongwe* 2002(2) ZLR 209(S), *S v Chiadwa* 1988(2) ZLR 19 (S), *Aitken & Anor v A-G* 1992(1) ZLR 249 (S).

14. A decision to refuse bail must not be taken lightly. The main purpose of pre-trial detention is to secure the presence of the accused in order that he may be tried.

15. Mr *Nyoni* counsel for the respondent in a veiled concession contends appellant is not facing a serious charge. I do not agree. The penalty provision provides for a fine not

exceeding level ten or not exceeding twice the value of the property which forms the subject of the charge, whichever is the greater; or imprisonment for a period not exceeding five years. To me this is a serious charge, and in appropriate circumstances an accused may face a five year prison term.

16. Mr *Nyoni* further contends that there is no law which says foreigners should not be released on bail pending trial. I agree. However, each case must be considered on its merits. Appellant is a South African national. He holds a South African passport. He is obviously in Zimbabwe on a visitor's visa. A visitor's visa has an expiry date. He has the ability to flee to his home country South Africa. His contacts are in South Africa who will offer him sanctuary. South Africa has no extradition treaty with this country. He has no property in Zimbabwe. He has nothing to lose by fleeing Zimbabwe to his home country.

17. The court of first instance made a factual finding that he is of no fixed abode in Zimbabwe. The affidavit attached to this appeal deposed to by one Nomathamsanqa Ndlovu saying she is a long-time girlfriend of appellant and she will accommodate him pending the finalisation of his trial has absolutely no weight, for the simple and elementary reason that this is an appeal and this affidavit was not part of the evidential material placed before the court *a quo*. This court cannot say the court *a quo* misdirected itself by finding that appellant is of no fixed abode, based on evidence that was not before it.

18. Appellant is of no fixed abode. This explains why he had booked himself at a lodge where he was arrested from. The temptation for the appellant to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002. In this case if released on bail appellant will not stand his trial. He will just abscond and return to his home country. The facts and the evidence on record supports this finding: just to recap, he is a South African national, no property in Zimbabwe save for the vehicle subject this charge, his people are in South Africa, he holds a South African passport, he is obviously in this country on a visitor's visa, if it expires he will have to leave the country, he had booked himself at a

lodge, and in the event of a conviction he could possible face a five year prison term. The court *a quo* concluded with these words:

> I am of the conclusion that, in light of the above it will be irresponsible and mischievous for me to grant the accused bail. The State managed to prove compelling reasons, and accordingly accused be and is hereby denied bail.

19. I agree with this conclusion.

20. The first ground of appeal that the court *a quo* misdirected itself by finding that the respondent had proved compelling reasons as required by section 50(1) (d) of the Constitution of Zimbabwe, to deny applicant bail is bad at law. It is so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court *a quo.* See *Matanhire* v *BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S).

21. The second ground of appeal that the court *a quo* grossly misdirected itself by making a finding that appellant had no interests in Zimbabwe in the form of property hence appellant was a flight risk has no merit. The court correctly found that he has no property in Zimbabwe, except his vehicle that is subject of the charge and which is held by the police.

22. Further the third ground of appeal that the court *a quo* grossly misdirected itself by ignoring the evidence of the investigating officer which evidence is said to have quelled any fears of the appellant being a flight risk has no merit. The court *a quo* correctly found that appellant is a flight risk. On the facts and the evidence on record these findings cannot be faulted.

23. The fourth ground of appeal that the court *a quo* grossly misdirected itself on the proper construction of an accused being a flight risk is bad at law. It is too general.

24. The granting of bail involves an exercise of discretion by the court of first instance. It is not for this court sitting as an appeal court merely to set aside the decision of the court *a quo* because it does not agree with it. There must be a misdirection. I am

satisfied there is no misdirection in this matter, and the manner in which the court *a quo* exercised its discretion cannot be faulted. The court applied the law and the correct legal principles.

25. On a consideration of all the factors, I find no fault in how the court *a quo* considered the appellant's bail application. In particular, I am not persuaded that the court *a quo's* reasoning and conclusions are wrong. On the contrary, I am of the view that the learned magistrate carefully considered all the factors relevant to the appellant's bail application. The appeal should therefore fail.

In the result, I make the following order:

i. The appeal against the refusal of the Magistrates' Court to release appellant on bail pending trial be and is hereby dismissed.

ii. Appellant shall remain in custody.

Tanaka Law Chambers appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners