

ZWELIBANZI MACALA MHLANGA

And

BLESSING MUKARO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4 MAY 2022 & 12 MAY 2022

Appeal against refusal of bail

T. Tashaya for the applicant
K. Guveya for the respondent

DUBE-BANDA J:

1. This is an appeal against the decision of a magistrate court refusing to release appellants on bail pending their trial on a charge of contravening section 136 of the Criminal Law [Codification and Reform] Act Chapter 9:23. It being alleged that in the company of an accomplice they designed a plan to defraud complainant by falsely advising him that there was a residential stand for sale in Matsheumhlope, Bulawayo. Acting on such misrepresentation complainant paid appellants US\$10 000.00, and nothing has been recovered.
2. Appellants launched a bail application before the Magistrates' Court sitting in Bulawayo. Their application was dismissed. They are aggrieved by the dismissal of their bail application and now appeal to this court against the decision of the magistrate not to grant them bail. They pray that the decision of the Magistrate's Court refusing to release them on bail be set aside and that they be released.
3. The court *a quo* refused to release the appellants on bail on the basis that it will not be in the interests of the administration of justice to do so, as they are a flight risk.

4. In their ground of appeal appellants contend that the court of first instance *erred* in concluding that they were on the run when the prosecution adduced no evidence to that effect.
5. 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.
6. 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 the discretion which he has 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.

7. 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.

8. During the hearing before the Magistrates' Court the State adduced evidence from the investigating officer (officer). The officer testified that the appellants are a flight risk, in that they have been on the run since May 2021, until their arrest on the 20 March 2022. There is an outstanding accomplice who is yet to be accounted for, he is still on the run. They might interfere with investigations. There is overwhelming evidence against the appellants. It is said they were positively identified as people who committed this crime.
9. 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 appeal on the basis that they are a flight risk.
10. Evidence was led that this crime was allegedly committed in March 2021, and a police report was made in May 2021 and accused were arrested in March 2022. The period between the filing of the report to their arrest is approximately one year. It is clear from the record that appellant were aware that they were sought by the police and made a decision to evade arrest.
11. I find merit in the submission made in the respondent's papers that the court *a quo* was correct that there were compelling reasons to refuse to release appellants on bail.
12. It is also clear from the ruling that the court *a quo* placed more reliance in reaching its conclusion on the fact that appellants are a flight risk than on any other factor. That is not to say it did not consider other relevant factors. The court *a quo* factored into the equation that if released on bail appellants will interfere with investigations as there is an outstanding accomplice who still has to be accounted for. It also took into account that the State has a strong *prima facie* case against the appellants and in the event of a conviction they were likely to be sentenced to a long term of imprisonment. On the basis of these factors and the fact that the appellants were on the run for a period close to a year the court then found that they are a flight risk.

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. Based on the evidence on record the court *a quo* found that appellants are a flight risk. I agree with the reasoning of the court *a quo*. In *Aitken & Anor v A-G* 1992(1) ZLR 249 (S) it was held that in deciding whether an accused person will abscond if released on bail the following factors constitute a useful guide: the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction; the apparent strength or weakness of the state case; the accused's ability to reach another country and the absence of extradition facilities from that country. The accused's previous behaviour when previously released on bail; and the credibility of the accused's own assurance of his intention and motivation to remain and stand trial. See: *S v Jongwe* 2002 (2) ZLR 209 (S). Appellants were on the run for a close to a year. Appellants are clearly a flight risk. Upon being released on bail they will simple abscond.
14. I have considered the ground of appeal, the authorities referred to and having regard to the submissions of both Mr *Tashaya* and Mr *Guveya*, I am of the view that the appellants have not shown that the court *a quo* committed an error in the exercise of its 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. 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. I am satisfied there was no misdirection in this matter, and the manner in which the court *a quo* exercised its discretion cannot be faulted.

In the result, I make the flowing order:

- i. The appeal against the refusal of the Magistrates' Court to release appellants on bail pending trial be and is hereby dismissed.
- ii. Appellants shall remain in custody.

Sengweni Legal Practitioners applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners