HB 126/20
HCB 182/20

THANDO CHINARA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 15 and 25 JUNE 2020

Bail application

A. Ndlovu for the applicant
K. Jaravaza for the respondent

KABASA J: This is an appeal against the refusal of bail by the court *a quo*.

The appellant appeared before the Magistrates Court facing one count of robbery as defined in s126 of the Criminal Law (Codification and Reform) Act, Chapter 9:23 and one count of attempted murder.

The allegations are that on 29th May 2020 between 10th and 11th Avenue, Bulawayo at around 1600 hours the complainant was accosted by 6 males as she was opening her motor vehicle. The appellant was one of the six and they were using a Honda Fit as their mode of transport. One of these assailants grabbed the complainant's bag and stabbed her on the left hip with a knife. The appellant and the other suspects proceeded to open the passenger door of the complainant's motor vehicle and took property valued at USD2 670. The complainant screamed for help alerting members of the public who responded. Five of the suspects managed to run back into their getaway vehicle but the appellant was apprehended and severely assaulted by members of the public.

In their bid to flee the other suspects endangered the life of the complainant who had tried to block their escape and this gave rise to the attempted murder charge.

The appellant was arrested, brought before the magistrate and applied for bail without success. He is therefore appealing against the magistrate's decision in denying him bail pending trial.

In coming up with his decision the learned magistrate observed that s50 (1) (d) of the Constitution of Zimbabwe, 2013, provides that a person who is arrested must be released either unconditionally or on reasonable conditions pending trial unless there are compelling reasons justifying their continued detention.

The court *a quo* proceeded to consider the circumstances surrounding the commission of the offences, the seriousness of the offences and the fact that the applicant's defence was a bare denial before concluding that the appellant was not a good candidate to be admitted to bail.

The appellant's defence is briefly that he had been offered a lift in the Honda Fit by a neighbour and was seated in the boot when the other occupants left on the pretext that they were going to buy cigarettes. On their return and as they were about to drive off a certain lady jumped in front of the motor vehicle and he was surprised to see his colleagues fleeing. The appellant disembarked from the motor vehicle but was apprehended by members of the public who ignored his attempt to explain his innocence.

In attacking the magistrate's decision to deny him bail, the appellant argued that the serious nature of the offence is no impediment to the granting of bail. The magistrate therefore erred in citing that reason as the basis for the denial of bail.

The court *a quo* equally erred in holding that the strength of the state's case and the likely penalty upon conviction would induce the appellant to abscond. There was no identification parade held and cases abound where a complainant at trial stage fails to positively identify the perpetrator.

Further, the magistrate's decision was also attacked on the basis that the appellant has a story to tell and his defence is therefore not a bare denial. He therefore deserves to have his day

in court to tell that story and would therefore want to stand trial. His mere presence at the crime scene is no reason to hold that the state's case is strong as the appellant has a reason explaining his presence at the crime scene, so argued counsel for the appellant.

The question to be asked here is whether the magistrate failed to exercise his discretion properly and so the exercise of that discretion is afflicted by misdirection vitiating the decision arrived at.

Mr Jaravaza for the state referred to the decision in *S* v *Ruturi* 2003 (1) ZLR 537 (H) where CHINHENGO J at page 19 thereof succintly put it thus;

> "I think that the 1997 amendment (of the Criminal Procedure and Evidence Act, Chapter 9:07) had the effect of placing the High Court in exactly the same position which the Supreme Court was in relation to an appeal against the decision of the High Court. This means that where the Supreme Court could not substitute its own discretion for that of a judge of the High Court as in Chikumbirike's case (*supra*) and *Aitken's* case (*supra),* the High Court cannot now substitute its own discretion, in the absence of a misdirection or irregularity, in an appeal against a magistrate's decision. The appeal to the High Court, has, in my view, become an appeal in "the narrow sense' as the words are used in *Aitken supra* at 252F. The statement by EBRAHIM J in *Chikumbirike's* case, *supra* at 146F now applies to the High Court with the result that a "Court of Appeal will only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its own decision."

With this in mind, was the magistrate wrong in making reference to the seriousness of the offences as one of the reasons for denying the appellant bail?

In *S* v *Tsvangirai and Others* HH-92-03 GARWE J (as he then was) held, inter alia, that the grant of bail is a consequence of the arrest and remand of an accused person on a specific charge. The nature of the offence charged and other relevant considerations are factors to be taken into account in determining the grant or refusal of bail.

It is important to note that the court *a quo* looked at the circumstances surrounding the commission of the offence and the seriousness of the offence. What are these circumstances?

The circumstances appear to reveal a brazen execution of a robbery and a determination to escape.

The appellant does not deny he was in the company of the 5 others who managed to make good their escape. He equally does not deny that the complainant stood in front of the "getaway" vehicle giving rise to the attempted murder charge. Further he accepts being apprehended by members of the public who meted out instant justice.

Granted he has an explanation as to his presence at the scene of crime and the presumption of innocence operates in his favour but the issue is whether the magistrate erred in considering these facts whilst seeking to strike a balance between the appellant's liberty and the need to ensure the proper administration of justice.

> "In an appeal to a judge against a magistrate's refusal of bail, the approach to be adopted by the judge is whether the magistrate misdirected himself when refusing bail. The appeal should be directed at the magistrate's judgment and the magistrate's findings." (per NDOU J in *S* v *Malunjwa* HB-34-03)

In light of the circumstances surrounding the commission of the offence the magistrate cannot be faulted for considering the seriousness of the offence in denying the appellant bail. He did not consider the seriousness of the offence in isolation.

The following excerpt from the magistrate's judgment is worth repeating:

> "To begin with the offences faced are of a serious nature. Further to that, it is my view that the state case stands very strong as against the accused. This is an accused who was arrested on the crime scene. We have a state case which details how the accused and co-accused at large parked their car, then sought to flee from the scene afterwards leading to the attempted murder charge. If one looks at the defence it is silent on all these averments by the state."

The seriousness of the offence was considered in conjunction with the attempts to flee. The magistrate went on to observe that recovery of the stolen property was made at the scene further strengthening the state case. He therefore concluded that there was likelihood that the appellant may not stand trial if granted bail.

I find no fault with such findings and the conclusion arrived at which shows an articulation of what was necessary to look at in the quest to balance the interests of the liberty of the appellant and the interests of the proper administration of justice.

In *S* v *Khan* 2003 (1) SACR 636 the seriousness of the offence and the likelihood of a severe sentence were considered as relevant facts in determining whether an accused is likely to be induced to abscond and therefore not stand trial.

Whilst it is accepted that the seriousness of the offence on its own is no reason to deny an accused bail, the magistrate in casu did not base the decision solely on this factor.

In *S* v *Ashton Mlilo* HB-49-18 MATHONSI J (as he then was) had this to say;

> "… that the applicant is facing a serious charge, cannot, on its own, be sufficient ground for denial of bail. The courts have granted bail to accused persons facing even more serious charges. (my emphasis)

The magistrate *in casu* looked at more than just the seriousness of the offences and his reasoning cannot be faulted.

Mr Ndlovu also took issue with the fact that the court a quo looked at the strength of the case against the appellant in light of the fact that he was identified by the complainant. Counsel argued that there was no identification parade held and so the state could not rely on that averment and equally so the magistrate could also not base his decision on this factor.

In casu, the identification of the appellant was made at the scene. This is not a case where the perpetrators made good their escape only to be arrested later. In such a scenario the argument that no identification parade was held and so it could happen that come trial the complainant would not be able to identify the accused, would hold water. However, in casu such an argument does not make much sense.

The criticism of the court *a quo's* reasoning is therefore unwarranted as it is not based on the correct factual basis upon which the finding was arrived at.

As regards the appellant's defence, the court *a quo* cited the case of *S* v *Sibangani Dube* HB-206-18, where the learned judge had this to say;

> "It is clear that the appellant has not raised any recognizable defence at law. He has made a bare denial of the allegations. ----------
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> While it is the right of any accused person to be admitted to bail pending trial, such right does not operate in a vacuum. The applicant in an application for bail must demonstrate that the granting of bail will not compromise the due administration of justice. The accused bears no onus to prove innocence, but must put forward a defence which is reasonably possibly true."

The appellant's defence amounts to a bare denial when looked at in light of the allegations against him. The circumstances surrounding the commission of the offence, the attempt to flee and the subsequent apprehension by members of the public juxtaposed with the claim of having been an innocent passenger in that Honda Fit explains why the court *a quo* found this to be tantamount to a bare denial.

The court *a quo* did not misinterpret the law or legal principles. Section 50 (1) (d) of the Constitution espouse the right to be released either unconditionally or on reasonable conditions thereby underscoring the right to liberty which is the bedrock of the presumption of innocence.

However, that right is not an absolute right and that is why the Constitution qualifies it by the inclusion of:

"… unless there are compelling reasons justifying their continued detention."

A threat to the proper and orderly administration of justice qualifies as one such compelling reason and this is what the court *a quo* addressed in arriving at the decision to deny bail.

This court cannot and ought not to interfere with that exercise of discretion just because it can but should do so only when it must in order to address a misdirection. When an appeal court

interferes with the exercise of discretion only because it can, all that such appeal court is doing is substitute its own discretion for the court *a quo's*. That is not how it should be.

However, where there is a misdirection in the exercise of discretion by the court *a quo* the interference by the Appeal Court graduates from being a mere substitution of discretion to a MUST in order to correct an irregularity.

Having found no misdirection to vitiate the court *a quo's* decision, this court has no basis to interfere with that decision.

In the result the appeal against the court *a quo's* decision to deny the appellant bail be and is hereby dismissed.

Dube & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners