

FARAI CHINGOMBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 1 & 4 NOVEMBER 2021

Bail appeal

Ms. M. Nyika, for the applicant
T. M. Nyathi, for the respondent

DUBE-BANDA J: This is a bail appeal. It is an appeal against a judgment of Magistrates Court, sitting in Hwange which was issued on 19 October 2021, refusing to release appellant on bail pending trial. The appellant prays that the judgment of the court *a quo* be set aside and be substituted with an order admitting him to bail.

Appellant is charged with 15 counts of contravening section 136(a)(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Fraud). It being alleged that between July and August 2021, he advertised to the complainants for them to invest in an online company called Crypto Shares, under the misrepresentation that each complainant would get a return on his or her investment on the maturity date. The maturity dates were in the main one month from the date of each investment. He made a misrepresentation that the scheme had a lifespan of three years. Count 1 amount paid USD1500; count 2 amount paid USD1500.00; count 3 amount paid USD1000.00; count 4 amount paid USD2000.00; count 5 amount USD1150.00; count 6 paid amount USD1000.00; count 7 amount paid USD1000; 8 count amount paid USD300.00; count 9 amount paid USD1000.00; count 10 amount USD500.00; count 11 amount USD1600.00; count 12 amount USD1600.00; count 13 amount USD1700.00; count 14 amount USD400.00; and count 15 USD2400.00. All these amounts were not repaid on their respective maturity dates. Total prejudice USD\$18.650.00, and nothing was recovered.

The appellant was arrested and appeared before the court *a quo* on the 11th October 2021. After a contested bail hearing, the court *a quo* refused to release the appellant to bail pending trial. The court *a quo*'s decision was anchored on the fact that the appellant was a flight risk. Further the court *a quo* held that if released on bail, applicant will interfere and or

destroy the evidence against him. Aggrieved by the refusal to admit him to bail, the appellant noted an appeal to this court. The appeal to this court is anchored on six grounds, which can be summarised as follows: that the court *a quo* misdirected itself in concluding that the appellant was a flight risk when there was no evidence that was led to that effect; and that the court *a quo* misdirected itself in finding that he will interfere with evidence against him when there was no such evidence before court.

It is trite that a court or a judge hearing an appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court shall give the decision which in its opinion the lower court should have given. What is of importance is that the grant or refusal of bail involves an exercise of discretion by the court of first instance. In *Chimwaiche v The State* SC 18/13 The Supreme Court held thus:

The granting of bail involves an exercise of discretion by the court of first instance. It is trite that this court would only interfere with the decision of the learned Judge in the court *a quo* if she committed an irregularity or exercised her discretion so unreasonably or improperly as to vitiate her decision. The record of proceedings must show that an error has 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.

Although this court may have a different view, it should not substitute its own view for that of the magistrate because it would be an unfair interference with the magistrate's exercise of his discretion. In *State v Barber* 1979 (4) SA 218 (0) at 220 E-H the court said:

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 it 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.

The issue now before this court is whether the magistrate misdirected himself in refusing to release the appellant to bail. Put differently, the question that falls for decision in this court is whether, on the facts before it, the court *a quo* erred or misdirected itself in refusing to release the appellant on bail. The court *a quo* found that it is not in dispute that appellant received money from the complainants, although defence counsel indicated that he received from some and not all the complainants. He was positively identified by the complainants. In fact it is the complainants who handed him over to the police. The court found that the state has a strong case against the appellant. Further the court noted that if convicted appellant will face a long prison term, and this might induce him to abscond and not stand his trial. Further the court *a quo* said that from the state papers it is alleged that the Crypto Shares is an online company. It then noted that this means most of the evidence of whether or not appellant received the money and whether or not he sent it to his principal or he used it is online. The court then found that appellant will be induced to temper, conceal or destroy the evidence before the matter goes to trial, thus undermining the proper functioning of the justice system. The court *a quo* then ruled that the appellant was not a proper candidate for bail and it was not in the interests of justice that he be released on bail pending trial. I perceive no misdirection in the findings of the court *a quo*. The submission made by Ms. Nyika, counsel for the appellant that appellant may be prevented from interfering, concealing or destroying by blocking his access to the online company is a non-issue in this court. This is an appellate court, it cannot start considering bail conditions that were not placed before the court *a quo*.

The concession by Mr Nyathi, counsel for the respondent is based on a misunderstanding of the case and misreading of the judgment of the court *a quo*. The allegations are not that the crypto shares will mature and a payment be made to the complainants in the next three year. It is the investment scheme that was said to have a lifespan of three years, however each investment had a maturity date of approximately a month from the date of such investment. The argument peddled by appellants counsel and respondent in its papers that payment to the complainants had to be made after three years is factually incorrect. Regarding the judgment, the court *a quo* found that the state had a strong case against the appellant, and if convicted he will face a long prison term. The issue of appellant being a person of means was mentioned, but is not the basis of a finding that he is a flight risk. Further the court a court found that Crypto Shares is an online company and the evidence in respect of

this case must be online. This factual finding is not speculation and cannot be faulted. The concession by the respondent was not properly taken.

Even if this court may have a different view, it cannot substitute its own view for that of the magistrate because it would be an unfair interference with the magistrate's exercise of his discretion. The real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly. See: *S v Madamombe* SC 117 / 2021. I am not satisfied that the court *a quo* misdirected itself. On a conspectus of this case, it cannot be said that the magistrate misdirected himself in finding that if released on bail appellant will abscond and that he will be induced to temper, conceal or destroy the evidence before the matter goes to trial.

Disposition

In the absence of any misdirection by the court *a quo*, this appeal cannot succeed. In the result, it is ordered that:

The appeal is devoid of merit and it is dismissed.

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