JIM KUNAKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 26 January 20121 and 12 February 2021

Bail against referred to grant bail by magistrate

CHITAPI J: The appellant was on 30 December 2020 denied bail pending trial by the provincial magistrate sitting at Harare. The appellant had appeared before the magistrate on a charge of incitement to participate in a gathering with intent to promote public violence, breach of peace or bigotry as defined in s 187 (1) (a) as read with s 37 (1) (a) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. In the atternative, the appellant was charged "with incitement of gathering of more than fifty people without permission as defined in s 187 (1) (a) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*] as read with s 4 of the Public Health (COVID-19) Prevention, Containment and Treatment) (National Lockdown) Order, 2020 S.I 110 of 2020."

A consideration of the request for remand Form 242 shows that in relation to details of the commission of the offence or evidence it is noted:

> "1. There is a video clip that was recorded while accused was inciting people to participate in a gathering to promote public violence on 31 July 2020."

On the section relating to whether the applicant has pending cases at court, the following was endorsed

> "(i) Public violence. Harare Central CR 1-7/08/18
> (ii) Subverting Constitutional Government, HRE P CRB 762/19."

There is no indication that the listed Harare Central cr-1-7/08/18 is a pending court case as there is no CRB endorsed therein.

In regard to whether the accused is likely to abscond, it was indicated as follows:

> "The accused is likely to abscond trial. On 7 August 2020, accused was due to appear in court on routine remand for a charge of subverting Constitutional Government as defined in s 22 (a) (ii) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] on Harare Magistrates Court CRB 762/19 but he defaulted and was issued with a warrant of arrest. Since then he never bothered to attend court for default enquiry thereby demonstrating his propensity to abscondment."

In regard to whether the accused is likely to commit other offences, the following was stated:

> "Whilst accused was aware that he was on remand on the above stated cases, he committed this offence, thereby also exhibiting his propensity of continuing to commit other offences."

In regard to any other reason to deny bail, the following was stated:

> "It is in the interest of justice that accused be denied bail as he has demonstrated that he does not abide by court orders."

In denying the appellant bail the magistrate stated as follows:

> "Accused had managed to evade law authorities for a while and that shows that the courts cannot trust him again with bail. That will be abuse of the bail system. He is not a good candidate for bail since he has a propensity to commit more offences and will not appear in court for trial purposes. The fact that no trial date had been set was not to be cured by defaulting but applying for refusal of remand."

It is against the decision of the magistrate as aforesaid that the appellant noted this appeal.

The grounds of appeal can be summarized as follows

a) that the magistrate erred at law to find that there were compelling reasons to deny appellant bail.

b) that the magistrate erred at law in failing to determine the reasonableness of the appellant's explanation for the default relating to case No. CRB 762/19 more so as the State did not controvert the explanation.

c) that the magistrate was misdirected to conclude that the appellant was a flight risk.

d) that the magistrate erred in finding that the accused was facing serious charges in circumstances where the respondent conceded that its case was weak.

The respondent has opposed the appeal. It was submitted in the respondent's written response on points of law that the magistrate's decision could only be interfered with on appeal if

there is no irregularity or misdirection committed by the magistrate in coming up with his or her decision. It was also submitted that the appeal should be aimed at attacking the decision reached. Counsel referred to the cases of *S* v *Ruturi* 2003 (1) ZLR 59 and *S* v *Malunjwa* 2003 (1) ZLR 276. I am grateful to counsel for the submissions and cases cited. I agree that what counsel stated is the correct position in law.

On the merits, the respondents counsel submitted that the appellant had not denied the allegations against him and that the offence charged was serious in nature. Counsel also submitted that the appellant had incited the holding of gatherings of more than fifty contrary to COVID-19 regulations set out in S.I 110/20. Counsel further submitted that the appellant had committed the current offence whilst on bail and that the appellant had been on a warrant of arrest which although it was cancelled, the appeal court should find that the period of five months that the appellant claimed to have been indisposed was too long. Further counsel submitted that the appellant was likely to commit further offences. Counsel therefore argued that the magistrate's decision should be allowed to stand.

Having gone through the record of proceedings and analysed the evidence of the investigating officer, he did not dispute that Police had never looked for the appellant at the address where he was ordered by the court to reside in case no. CRB 162/19 upon the grant of bail, and failed locate him. It was accepted by respondent's counsel that the issue of the appellants default in case no. CRB 769/19 was dealt with by the court which had issued the warrant of arrest. It is a fact that the appellant's bail was left to stand. The issue of the appellants default in case no. 769/29 having been dealt with by the default enquiring court and the warrant having been confirmed and a fine imposed the decision thereon made the court *functus officio* on the point. It was therefore a misdirection for the magistrate to revisit or review the decision on the default enquiry and to hold that the fact that the appellant had wilfully defaulted and that had he considered that since a trial date had taken long to be provided, the appellant should have applied for refusal of further remand as opposed to defaulting court. This finding should have been made in the proceedings on the default enquiry in case no. 762/19 and not in this bail application as it was not an issue for determination. The ground of appeal that the magistrate was misdirected to impart the default

enquiry proceedings in 762/19 into this application has substance moreso as the court's decision to deny bail appeared to be anchored on the default enquiry.

The magistrate made a finding that the appellant had a propensity to "commit more offences and will not appear in court for trial purposes". The provisions of s 117 (2) (a) (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] are clear that it will not be in the interests of justice to admit an accused to bail where it is shown that the accused "will commit an offence referred to in the first schedule." It is therefore necessary for the court to make a finding on the nature of the offence which the accused will likely commit. The offence must be specified. Further the offence must be such that it fits within the band of offences which are listed in the first schedule. It was therefore a misdirection for the magistrate to make a generalized finding that the accused has a "propensity to commit more offences…"

Apart from the provisions of s 117 (2) (a) (1) as aforesaid in the case of *Attorney general* v *Siwela* SC 20/16 the learned Chief Justice, CHIDYAUSIKU discussed the subject of propensity to commit similar offences as a ground for denying an accused bail. The case refers to "a propensity to commit similar offences" and not to commit any offences. Thus, even if reliance were to be placed on appellant's propensity to commit offences, such offences would either have to be First schedule offences or similar offences. The failure to appreciate how the challenge to bail based on propensity of the appellant to offend is dealt with, meant that the magistrate was misdirected and did not apply her mind to the relevant considerations.

There is no law which provides that an accused who is on bail and is brought to court on another charge cannot be granted bail. Bail will be granted nonetheless to such person if it is in the interests of justice to grant bail. *In casu*, the appellant remained on bail after the default enquiry. He can only have remained on bail because the magistrate who dealt with the default, who incidentally is the same magistrate who dealt with the bail application must have considered that the appellant despite the previous default was a good candidate for bail. With the default enquiry and the bail application having been dealt with simultaneously, it was illogical to find that the appellant remained a good candidate for bail in relation to case no. 762/19 after the default enquiry and not bailable in regard to the current charges.

In the light of the misdirections committed by the magistrate, Mr *Chikosha* unbelievably submitted that whilst he accepted them, the position of the National Prosecuting Authority was not to concede anything. Such an attitude is not expected of the office of the Prosecutor General. In terms of s 260 (1) (b) of the Constitution, the Prosecutor General is required to "exercise his functions impartially and without fear, favour; prejudice or bias". Unfortunately one could easily read fear in Mr *Chikosha*'s eyes as he stammered to advance his point yet he refused to make a concession albeit he had no ammunition to support the opposition to the appeal.

I should note that there was no suggestion in the court's judgment or in arguments that the appellant was a flight risk. The cornerstone of bail is to ensure the smooth administration of justice by ensuring the attendance of the accused at his trial. There was no argument that the appellant was not of fixed abode. The argument was that the appellant would commit further offences and defaulted court whilst on bail. However, bail was not cancelled. There is nothing to persuade me that the applicant will abscond in this case. He was adjudged to be good for bail upon the default enquiry and I find no compelling reason which the provincial magistrate relied on to deny the appellant bail. The following order is thus issued:

1. The decision of the magistrate made on 30 December, 2020 to deny the appellant bail in case No. CRB 12218/20 is set aside ad substituted with the following order:
   (a) The accused shall deposit $15 000 with the Clerk of Court of Harare Magistrate Court.
   (b) The accused shall reside at 1468 Mainway Meadows Waterfalls, Harare.
   (c) The accused shall not interfere with State witnesses or investigations.
   (d) The accused shall report at Waterfall Police Station every Fridays between 6:00 a.m. - 6:00 p.m.

Mutuso, Taruvinga & Mhiribidi, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners