

DORCAS DOROTHY DERI
And
ELIZABETH NYASHA DERI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 3 September 2021 & 20 September 2021

Urgent chamber application

MUCHAWA J: On the 25th of August 2021, I dismissed the appeals lodged by the appellants in this case against refusal of bail. My finding was that there was no misdirection on the part of the court *a quo*. The appellants have requested reasons for the dismissal of their appeal.

Background Facts

The appellants were arraigned before Mbare magistrates court facing a charge of unlawful entry into premises in aggravating circumstances as defined in s 131 (a) the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as read with s 131 (2) (e) of the said Act.

It was alleged that on 26 July 2021 and at house number 9025 Budiriro 5B, the two accused, one or both of them, unlawfully, intentionally and without permission or authority from Jacqueline Divura, the lawful occupier of the said premise, forced open the main back door using an iron bar to gain entry and stole a 65 inch telefunken television, 43 inch LG television, OVD decoder, red carpet, bucket of loose biscuits, 3 remotes and cash amounting to US \$550.00. Their actions were alleged to have been unlawful as they knew Jacqueline Divura was entitled to own same and they intended to deprive her permanently of her ownership, possession or control of the listed property.

An application for bail pending trial was dismissed. The appellants initially pleaded guilty to the offence. However they proceeded to qualify their plea of guilty by stating they did not take the decoder and cash. The plea was altered to not guilty.

The state was opposed to the granting of bail on the basis that the two were facing a very serious offence which attracts a custodial sentence which would induce abscondment. It was also pointed out that some recoveries had been made at accused two's house and there were eyewitnesses.

In her ruling, the magistrate reasoned that since the accused persons had entered a partial plea of guilty, they were likely to get a custodial sentence and this would motivate them to abscond. Bail was therefore denied.

In their appeal, the appellants averred that they were innocent as they got custody of the complainant's property as a result of complainant handing over same in as security of a debt owed to 2nd accused in the amount of \$600 USD. Such debt was alleged to have remained unsettled for a long time despite demand. Further, it is alleged that the goods were to be held as security for a month. Appellants express that they were shocked to be summoned by the police to answer to the charges preferred, in such circumstances. The court *a quo* is alleged to have failed to consider the existence of such agreement between the complainant and the appellants.

In an appeal against refusal of bail, the approach taken is set out in *S v Malunjwa* 2003 (1) ZLR 27 5(H). It is to determine whether the court misdirected itself when bail was refused. The appeal should be directed at the judgment of the court *a quo* and that is what should be attacked.

In casu, the appellants did not attack the judgment of the court *a quo* and point out any misdirections. In fact, the defence given before me is not on record. The record shows the appellants changing their plea of guilty to one of not guilty on account of not having taken all the property listed.

As an appeal court I am restricted by the record and cannot substitute my own discretion for that of the lower court.

Given what was placed before the lower court and its ruling, it was my finding that there was no misdirection and I proceeded to dismiss the appeal.