

TRYMORE YEMURAI  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 5 February 2021 and 16 February 2021

**Appeal against refusal to grant bail by the magistrate**

*J Gusha*, for the appellant  
*R Chikosha*, for the respondent

CHITAPI J: The appellant as accused No. 5 appeared before the provincial magistrate with four alleged accomplices on 30 October, 2020 facing a charge of robbery as defined in s 126 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. The quintet was placed on remand following which they applied for bail pending trial which was denied by the said provincial magistrate. The appellant filed an appeal against the provincial magistrate's decision to deny him bail on 13 January 2021. On 15 January 2021, the appeal was set down before FOROMA J whom postponed the matter to 19 January 2020 at the request of State counsel who required time to prepare and file the respondent's response. On 19 January 2021, the hearing was further postponed to 22 January 2021 as the respondent's response was still not filed. The hearing was further postponed to 28 January 2021 and then to 4 February 2021. The respondent's response by Mr *Chikosha* was finally filed on 21 January 2021. He was however only available to argue the matter on 4 February 2021 due to COVID-19 challenges as the National Prosecuting Authority placed its officers in groups for purpose of providing limited service to ensure a non-shutdown of the office.

In the response Mr *Chikosha* opposed the appeal. I should record that on 18 January 2021, the respondent filed a response prepared by Miss *Kunaka* in which she conceded the merits of the appeal and had consented to bail being granted. The response aforesaid was on 19 January 2021

withdrawn by Mr *Chikosha* who proceeded to then file his response in place thereof on 21 January 2021.

The background facts to this matter were that the appellant and his accomplices were charged for robbery on allegations that the five of them went to Equity House at Corner Jason Moyo and Rezende Street where they proceeded to the complainant's office. They pretended to be genuine customers who intended to sell gold to the complainant. It was not stated whether or not the complainant was legally entitled to deal in gold. That consideration aside, the charge alleged that the appellant and his accomplices then threatened the complainant with violence whilst armed with an electric shocker which they used to induce fear and submission of the complainant to relinquish his property. The quintet allegedly manhandled the complainant, tied his hands and legs and zipped his mouth with a cello tape. I must remark that on these allegations the robbery was committed in movie style. The quintet then forcibly took the safe keys from the complainant and opened the safe. They stole from the safe US\$2 215.00. Besides the cash, they stole the complainant's oppo cell phone and another cell phone belonging to one Freddy Karimupfumbi who had left it on charge in the complainant's office.

The further allegations were that the complainant managed to quickly set himself free and shouted for help. The complainant gave chase of the quintet and managed to apprehend one David Farai Hausi within the building. David Farai Hausi appeared before the magistrate as accused 1. Accused 2 and 3, namely Tawanda Nyemba and Richard Aloishes Miller were apprehended by members of the public outside Equity House. One accused George Moyo was alleged to have escaped. The inclusion of George Moyo would mean that contrary to the allegations in the charge sheet which refers to the robbery as having been committed by a quintet, the robbery was committed by sextet. It was alleged that upon their arrest, the three apprehended accused 1, 2 and 3 who then implicated the 4<sup>th</sup> accused and 5<sup>th</sup> accused being Michael Kamusoko and the appellant. The same three accused persons were alleged to have further implicated George Moyo and one, Gunners (no further particulars) and Maphosa (no further particulars). It alleged that property worth US\$1800.00 was recovered out of stolen property worth US\$2395.00. Other than the oppo cell phone recovered from accused 2, Tawanda Nyemba, no detail was stated as to what further property was recovered and from him. It was also stated in the allegations that the appellant was arrested at his house No. 7685 Kuwadzana 3 without resistance.

The provincial magistrate denied the appellant bail as well as the other four accused persons. In her ruling the provincial magistrate was not explicit on the ground which she relied upon to make a finding that it was not in the interests of justice to deny the appellant bail. She simply stated that the appellant and his accomplices had not outlined their defences to assist the court to gauge the strength of the State case. She accepted that the evidence against the appellant and Michael Kamusoko was in the nature of implication by accused 1, 2 and 3. The provincial magistrate then stated that the 4<sup>th</sup> accused and the appellant “initially managed to escape from the scene.” She accepted that there had been no identification parade carried out to implicate accused 4 and the appellant. The provincial magistrate stated as follows in regard to the 4<sup>th</sup> accused and the appellant in her judgment:

“The counsel for 4<sup>th</sup> and 5<sup>th</sup> spoke of the I.D. parade but the 3’s defences are not expressly mentioned save to say they have nothing to do with the alleged offence.”

The provincial magistrate then concluded her judgment as follows:

“The State has succeeded in proving compelling reasons such as the danger that the accused persons may pursue members of the public if released. Also, search have not yet been made in full. The court is of the view that the 5 are not suitable candidates for bail.”

In this appeal, the appellant listed the following grounds of appeal

- a) The court *a quo* erred at law in refusing the appellant bail on the basis that there were compelling reasons when in fact there was no such reason.
- b) The court *a quo* erred at law in refusing bail to the appellant on the basis that he posed a danger to member of the public whom he may pursue if released on bail.
- c) The magistrate erred by not considering the defence or explanation raised by the appellant. There is not nexus whatsoever between the appellant and the offence in question.

In the respondent’s response, Mr *Chikosha* correctly submitted that on appeal, the decision of the magistrate can only be interfered with where it is shown that the magistrate committed an irregularity or a misdirection in reaching the decision appealed against. Counsel submitted that in case No B 2060/20 the 4<sup>th</sup> accused was denied bail by CHIRAWU-MUGOMBA J and that the circumstances of the 4<sup>th</sup> accused and the appellant were similar. The 4<sup>th</sup> accused indeed had the appeal dismissed on 5 January 2021. The only endorsement on the result slip reads as follows:

“Compelling reasons to deny bail existed so no misdirection. Appellant implicated – evidence not seriously challenged.”

The learned judge did not prepared a fully clothed judgment. It is not possible for me to appreciate the nature and detail of the compelling reasons referred to by the learned judge. The evidence of implication referred to was not outlined. I am therefore not in a position to rubber stamp Mr *Chikosha*'s submission that the circumstances of the 4<sup>th</sup> accused as prescribed in his appeal in case No. B 2060/20 were the same as for the appellant herein. For those reasons of paucity of information on the reasons for judgment, I cannot be persuaded to be guided by the decision in case no. B2060/20. The decision is therefore to be taken as having been informed by the peculiar considerations which the learned Judge considered.

Other than the above, Mr *Chikosha* did not make any other meaningful submissions to support the provincial magistrates' decision. He submitted that the appellant did not outline the nature of his defence. However, he did because he stated that he knew nothing about the commission of the offence. Such a statement amounts to challenging the state to prove both the *actus reus* by the appellant accompanied by the necessary *mens rea*. The critical issue was for the provincial magistrate to consider the veracity of the allegations made against the appellant first before considering the applicant's defence where he or she has proffered one. The accused may not even plead a defence where there is no evidence to link him to the commission of the offence. The provincial magistrate relied on the case of *S v Ruturi* HH 26/2003, a decision by MAKARAU J (as she then was) in an appeal against the refusal by the magistrate to grant appellant bail in a fraud case. The learned Judge commented that the appellants' failure to plead his defence at the time of arrest and at his remand hearing made the state case appear strong. The provincial magistrate also relied on this decision to make an adverse finding that the appellant was not a suitable candidate for the grant of bail.

It is my considered view that the both Mr *Chikosha* and the learned provincial magistrate misapplied the dicta in the *Ruture* case. In that case there was cogent evidence against the appellant which without being answered became strongly suggestive of the appellants' guilty. Therefore the *dicta* in the *Ruturi* case that the accused is expected to give an outline of his defence must apply where there is cogent evidence alleged by the State as require to be answered. *In casu*, there was no cogent evidence against the appellant which was alleged by the State. I say so because other than being implicated by the co-accused, there was no cogent and admissible evidence alleged by

the state to link the appellant to the offence. In the course of argument, Mr *Chikosha* persisted in his submission that there was cogent evidence against the appellant in the form of implication by the appellant's co-accused. I paused the question how such evidence would be adduced at trial since the accomplices would be accused persons in the dock and there would be no evidence against the appellant at the close of the State case. Mr *Chikosha* had no answer to the question posed and rather than simply acknowledge and concede that there was no cogent evidence against the appellant he submitted that he could not concede to the appeal. It is not expected of counsel to cling to a unsupportable position because justice is all about impartiality and in this regard, the prosecution is constitutionally mandated to act without fear, favour or bias in the discharge of prosecuting functions.

I also consider it necessary to make further comment on the judgment in *Ruturi*'s case. It must be appreciated that the well written judgment is a 2003 judgment. There have however been developments in our jurisprudence. There is presently a new constitution passed in 2013 which provides for the right of arrested and detained persons to remain silent. Section 50 (4) (a) of the constitution provides for this right and it is extended to "any person who is arrested or detained for an alleged offence". Section 70 (1) (i) of the constitution provides that "any person accused of an offence has the following rights – (1) to remain silent and not to testify or be compelled to give self-incriminating evidence." The dicta in the *Ruturi* case on the need for the accused to give an outline of his defence failing which an inference of a strong case against the accused may be assumed is arguably unconstitutional because the accused is compelled to trade in his right to remain silent for a favourable finding on the accused's suitability to be granted bail. *In casu* the provincial magistrate misdirected herself in law by basing her refusal to grant bail on the apparent failure by the appellant to outline his defence.

A startling finding by the provincial magistrate was the finding attached by the appellant in the second ground of appeal that the appellant would if release on bail pursue members of the public. It was a finding which came from the blue as it was not an issue in the hearing before the magistrate. The judgment of MAKARAU J (as she then was) in *Taruwona & anor v State* HH 6/05 which was quoted by the appellants' counsel comes to the fore where the learned Judge stated,

"It is trite in my view that when a judicial officer decides on an application, he or she must at least refer to that legal principle upon which the decision is based in addition to the facts upon which the legal principle is applied. In the above ruling by the trial magistrate no legal principle is referred to

and the evidence that he claims to have looked at thoroughly is not referred to. It is the lack of these basic features in the ruling by the magistrate that in my view constitute the misdirection on his part...”

The above dicta applies with equal force in this appeal. The provincial magistrates’ judgement shows that she directed herself to the promiscuous of s 117 (2) of the Criminal Procedure & Evidence Act which list the four grounds which if established will justify the denial of bail in the interests of justice. The provincial magistrate only paid up service to the factors aforesaid. Had she been properly directed, she would have realized that the factors which must be taken into account in establishing each of those grounds are set out in s 117 (3). The finding that the appellant would pursue members of the public was not based on any facts or evidence place before the provincial magistrate.

In consequence of the gross misdirections committed by the provincial magistrate, I am at large to exercise a fresh discretion on the matter. Having considered the facts and circumstances of the case, the lack of cogent evidence of the link between the appellant and the commission of the offence, and inter-alia that he has a fixed abode and did not evince any intention to abscond, there are no compelling reasons to deny the appellant bail.

Accordingly the following order is made:

The decision of the magistrate to deny the appellant bail in case no. CRB HREP 9930/20 made on 30 October, 2020 is hereby set aside and substituted with the following order:

- (i) The accused is admitted to bail pending trial in case no. HRE P 9930/20.
- (ii) The accused shall deposit \$5000.00 with the Clerk of Harare Magistrates Court.
- (iii) The accused shall reside at House no. 7685 Kuwadzana 3, Harare until the matter is finalized.
- (iv) The accused shall report at Kuwadzana Police Station every Fridays between 0600-1800 hours.
- (v) The accused shall not interfere with witnesses and investigations.