

NGONIDZASHE MUNHUURIPI
and
SIMBARASHE MACHEKERA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 2 and 10 November 2021

Bail appeal

F. Mangezi, for the appellants
F.I. Nyahunzvi, for the respondent

CHIKOWERO J: This is an appeal against the judgment of the Magistrates Court refusing to admit the appellants to bail pending their trial.

The appellants are employed as prison and correctional officers and are stationed at Harare Remand Prison.

On 8 October 2021 they appeared before the Magistrates Court sitting at Harare jointly charged with the crime of criminal abuse of duty as public officers as defined in s 174 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The alternative charge is the crime of securing or aiding a prisoner to escape from lawful custody as defined in s 185 (2) (b) of the same Act.

The allegations grounding the charges are as follows. On 1 October 2021 the appellants were on duty at Harare Remand Prison when they approached one Sam Muropa, a prisoner who was in a given cell in the D class section of the prison. The first appellant told Muropa that he had come to assist him to escape from the prison because it was going to be very difficult for the latter to be admitted to bail. During the prison lock-up period the appellants hid Muropa in the bathroom situated in the prison yard. They later took him to the reception where they sourced for his clothes on the pretext that he had been granted bail. They briefed Muropa on the security set-up of the premises. They advised him of the route which he was to take in order to avoid being seen by other

prison and correctional officers who were providing security at the prison. The first appellant assisted Muropa to lay concrete pillars against the precast wall. Leveraging on these concrete pillars Muropa escaped from the prison premises. The second appellant made arrangements for a taxi which collected Muropa along Enterprise Road. On 5 October 2021 Muropa was re-arrested by police details from the Criminal Investigations Department Homicide section Harare whereupon he narrated how he had escaped from prison. He implicated the appellants as having aided him in effecting the escape.

The magistrate refused bail on two grounds. Firstly, he found that the appellants will not stand trial or appear to receive sentence if they were to be released on bail. Secondly, he found that the appellants will interfere with Muropa if they are admitted to bail.

The appellants contend that the court misdirected itself in finding that they will not stand trial and that they will interfere with Muropa.

In finding that the appellants will abscond, the court said the following at pp 4-5 of the judgment:

“The offence is a serious one and they were identified by witness at an informal parade. The likely sentence is going to motivate them to abscond, the matter has attracted much public attention and indignation.”

As for interference, the Court’s finding, on p 4, is in these words:

“On interference there is no evidence that accused interfered but since the accused is now convicted and serving there is a high likelihood of interference. Accused are prison officers.”

The accused person referred to as having been convicted and serving a custodial sentence is Muropa.

WHETHER THE COURT MISDIRECTED ITSELF IN FINDING THAT THE APPELLANTS WILL NOT STAND TRIAL OR APPEAR TO RECEIVE SENTENCE

The court was aware that both appellants are employed as prison and correctional officers and are stationed at Harare Remand Prison. Both are married and have family responsibilities. Although the immovable properties where they stay do not belong to them, the first and second appellants reside, respectively, at named addresses in Mufakose and Chitungwiza. Neither is a holder of a passport. The court took these factors into account. They are listed in its judgment. The Court was also aware that both appellants neither had savings, property of value nor had they ever

travelled out of this country. In the circumstances, I am satisfied that the Court considered the factors listed in s 117 (3) (b) (i)-(iii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

It was common cause at the hearing of the appeal that the Court took into account the nature and gravity of the offences of criminal abuse of duty as a public officer and securing or aiding a prisoner to escape from lawful custody and the likely penalties therefor. In any event, the relevant portion of the judgment, quoted above, is clear in that respect.

A person convicted of criminal abuse of duty as a public officer is liable to a fine not exceeding level thirteen or imprisonment for a period not exceeding fifteen years or both.

As for securing or aiding the escape from custody of a person lodged in prison, there is no provision of a fine. Where a weapon or violence was used by the person in escaping from lawful custody, the sentence is imprisonment for a period not exceeding ten years. In any other case, the sentence is imprisonment for a period not exceeding seven years.

It was common cause at the hearing of the appeal that the magistrates court could not be faulted for finding that the offences are serious and that, if convictions ensued, the appellants were likely to be visited with lengthy prison terms.

What was contested was whether the court misdirected itself, on the material placed before it, in formulating an opinion that the case for the prosecution was strong, that both appellants were thus likely to be convicted and that there was in the circumstances a corresponding incentive for them to flee.

Mr *Mangezi* argued that the case for the prosecution was not strong, convictions were unlikely and hence there was no incentive for either appellant to flee. He submitted that the prosecution's key witness, Muropa, was an accomplice. The trial court will treat the evidence of Muropa with caution. That this convicted escapee informally identified the appellants demonstrates the weakness of the case for the prosecution because an informal identification parade is not an identification parade. Counsel also drew my attention to the appellants' defences. These were placed before the court below. Both denied committing the offences. In addition, the first appellant stated that he neither was known to Muropa nor did he know the latter until the day that the first appellant was charged for these offences. The first appellant stated that his only crime was that he was the head of the relevant section on the day that Muropa unlawfully escaped from custody.

As for the second appellant, he added that he was off-duty at the time that Muropa unlawfully escaped from custody.

Mr *Nyahunzvi* argued as follows. It was not in dispute that Muropa unlawfully escaped from prison custody. The circumstances already show he did not accomplish that feat on his own. He was assisted by prison and correctional officers. The main and alternative charges reflect that there was planning before prison and correctional officers secured or aided Muropa to unlawfully escape. This means Muropa and such prison and correctional officers were known to each other otherwise they would not have planned together. The offences with which the appellants are charged are not the kind of offences that a prison and correctional officer would just wake up and from nowhere tell a prisoner, without the parties knowing each other, that such an officer has come to secure or aid the prisoner to unlawfully escape from prison custody.

Mr *Nyahunzvi* submitted that, in the circumstances, the identity of the prison and correctional officers who secured or assisted Muropa to escape from lawful custody does not come into play for purposes of assessing whether the court misdirected itself in finding that the case for the prosecution was strong and conviction likely. Counsel argued that when regard is had to the allegations, which are detailed, there is no merit in contending that the court ought to have found other than it did on the strength of the case for the prosecution, the likelihood of conviction and the correspondingly high incentive of the appellants to flee.

In my view, the court did not misdirect itself in opining that the case for the prosecution is strong, conviction is likely and that there is a correspondingly high incentive of the appellants to flee to avoid such a consequence. The fear of conviction, in this serious matter, quite apart from the likely sentence, will incentivise the appellants to flee. The lawmaker was aware that the strength of the case for the prosecution, even before adverting to the likely sentence is, in a suitable case, a relevant factor in assessing the risk of flight. That is why s 117(3)(b)(iv) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] reads as follows:

“(iv) the strength of the case for the prosecution and the corresponding incentive of the accused to flee.”

There are certain features of the main matter which, even at this stage, appear not to be in dispute. These are they:

- Muropa escaped from lawful custody.

- He pleaded guilty to that offence, was convicted and was sentenced to a custodial term.
- He was assisted by prison and correctional officers, stationed at Harare Remand Prison, to commit the offence.
- In so assisting him, those officers committed an offence.
- Muropa fingers the appellants as the officers who assisted him.

The detailed allegations in the Request for Remand Form were prepared on the basis of what Muropa told the police. Those allegations place both appellants at the heart of the escape from lawful custody.

The effect of what appears to be common cause is that the trial court will have independent features of the case against which to assess the credibility of Muropa as a witness. In addition, it seems to me, from the allegations, that Muropa is likely to give detailed testimony at the trial. If that happens, that will also assist the trial court in assessing his credibility. Accordingly, I share the magistrate's view that the case for the prosecution appears to be strong, that conviction is likely and that there is a correspondingly high incentive for the appellants to flee.

In addition, the magistrate was on firm ground in harnessing the seriousness of the offences and the likely penalty as further indicators that both appellants will flee. I have already highlighted that a person convicted for securing or assisting a person to escape from prison custody, where no violence or a weapon is used by the escapee, is liable to imprisonment for a period not exceeding seven years. There is no alternative of a fine.

I have not identified anywhere in the judgment appealed against where that court considered that the appellants were arrested and released before Muropa was re-arrested on 5 October 2021. That to me cannot be a misdirection. They were re-arrested after Muropa had been re-arrested and tendered the narration on which the detailed allegations are founded. The prosecution now has much more by way of evidence against them than it had before Muropa was re-arrested on 5 October 2021.

Both appellants, through counsel, did not suggest at the initial hearing the bail conditions that the magistrates' court could consider, not even the proposed amount of bail. That court is not a litigant. It could not be expected to propose bail conditions to itself and then proceed to consider

its own proposal. In short, the aspect of bail conditions, not having been an issue before the magistrate, cannot be an issue at this stage. The magistrate did not see the draft order that has now been placed before me. I do not have the benefit of his views on any bail conditions. I am sitting as an appellate court. What is before me is not a fresh application for bail. Consequently, I disregard not only the submissions made by counsel for the appellants on bail conditions but the draft order itself. Both are misplaced.

I have upheld the finding of the magistrate that the appellants will not stand trial or appear to receive sentence if they are admitted to bail. It becomes unnecessary to advert to the second ground on which bail was refused.

In the result, the appeal against the magistrates court's judgment dated 11 October 2021 under CRB Number HRE P5514-5 refusing bail in respect of both appellants be and is dismissed.

Mangezi Nleya and Partners, appellants' legal practitioners
The National Prosecuting Authority, respondent's legal practitioners