SHEPHERD MUGOMEZA
and
JULIET RAURA
and
TREVOR CHIDEMO
and
MATSEKETSA ZVIPOZVASHE
and
BERITA SOKALIKAMBA
and
LIBERTY RUTSATE
and
GURUMANI REOBERT PAUL
and
MOREBLESSING NYANHONGO
and
PATRICK CHIMBADZO
and
KUDZAI MUZIKI
and
TAMBUDZAI PARIREHWA
and
BOTHWELL TSINDA
and
RODRECK KUDEMBA
and
GIVEMORE CHARUMA
and
TAFARA MANDISHONA
And
KEVIN MOYO
vs
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 25TH & 30TH March, 2022

Criminal – Bail Appeal

F. Chirairo, for the appellants
E. Mbavarira for the respondent

MAWADZE J: This is an appeal made in terms of s 121(2)(b) of the Criminal Procedure and Evidence Act, [*Cap 9:07*] against the refusal by the Magistrate sitting at Beit bridge on 16th March 2022 to grant all the sixteen (16) appellants bail pending trial.

All the 16 appellants were jointly charged with other two appellants Tichareva Nyaku and Priscila Gosa who were also denied bail pending appeal by the same court *a quo*. These two filed a separate appeal to this court on CRB 126 – 27/22 and the appeal was not opposed by the State (the respondent). Consequently they were admitted to bail pending trial by this court on 25 March, 2022.

At the commencement of hearing of this appeal by 16 appellants the State (the respondent) as per the response filed of record consented to the upholding of the appeal in respect of the 2nd appellant Juliet Raura, 3rd appellant Trevor Chidemo, 4th appellant Matseketsa Zviposhave, 5th appellant Berita Sokalikamba, 6th appellant Liberty Rutsate, 9th appellant Patrick Chimbadzo, 10th appellant Kudzai Muziki, 11th appellant Tambudzai Parirehwa and 12th appellant Bothwell Tsinda. Bail pending trial we therefore granted to all these mentioned appellants in terms of the draft order attached to the appeal.

This ruling or judgment therefore only relates to 1st appellant Shepherd Mugomeza, 7th appellant Gurumani Reobart Paul, 8th appellant Moreblessing Nyanhongo, 13th appellant Rodreck Kudemba, 14th appellant Givemore Charuma, 15th appellant Tafara Mandishona and 16th appellant Kevin Moyo.

The background facts surrounding this matter can be summarised as follows;

All the appellants together with the other two already referred to are being charged of contravening section 174(1)(a) of Criminal Law (Codification and Reform) Act, [*Cap 9:23*] which relates to Criminal Abuse of Duty by a Public Officer.

As per the Form 242 all the appellants are drawn from several government departments or state institutions which include the Zimbabwe Republic Police Support Unit, Criminal Investigations Department (CID), the Central Intelligence Organisation (CIO), Police Internal

Security Intelligence (PISI), Police General Headquarters, Air Force of Zimbabwe and the Zimbabwe National Army. These appellants reside at various different places which include Chikurubi Support Unit, the border township of Beit bridge, Gweru, Rusape and Victoria Falls.

The appellants were deployed at a place called Chicago road block site along the Beit bridge road near Beit bridge in an operation code name "Operation No To Cross Border Crimes".

Apparently the authorities got wind that these esteemed officers who were supposed among other things to combat illegal activities including corruption were themselves engaged in corrupt activities. They were allegedly soliciting bribes from buses travelling to and from South Africa in Zimbabwe. A trap was then set by detectives from the Police Anti-Corruption Unit.

The detectives from the Anti-Corruption Unit in execution of the trap boarded a Sable Class bus registration number "ITS TIME GP" which was pulling a trailer registration number HY 47XF which was being driven by one Boaz Mutyanda.

It is alleged that when the bus arrived at the road block site where the appellants were the 1st appellant Shepherd Mugomeza was handed over the trap money R2000 which was in R200 denominations and serialised. The 1st appellant Shepherd Mugomeza was thus arrested. It is alleged that the appellants who were also at this road block site upon witnessing this arrest fled from the scene scattering in different directions into the nearby bush. It is alleged some were followed up and arrested immediately but others were only arrested later after some follow up.

The state case is that those appellants who fled from the scene failed to give a satisfactory account as to why they had fled from the road block site. The state alleges that the only reason as to why they fled was that they were working in concert or in common purpose with the 1st appellant Shepherd Mugomeza whom they witnessed being arrested after receiving the trap money R2000 hence they were too complicit in soliciting and receiving the bribe cash. The R2000 allegedly received by the 1st appellant Shepherd Mugomeza was recovered on his person. It is further alleged at the scene a five litre container was recovered which also contained R2000.

The reasons for opposing the admission of the appellants to bail pending trial seem to be varied.

As per Part C of the Form 242 only two grounds are advanced for opposing the admission of the appellants to bail pending trial. These are;

(a) that the appellants are facing a serious offence for which upon conviction a lengthy custodial sentence would be imposed and,

(b) that the appellants are likely to intimidate state witnesses as they frequent the place the state witnesses reside.

I mention in passing that the penalty for contravening section 174(1) of the Criminal Law Code [*Cap 9:23*] is a fine not exceeding level 13 or imprisonment not exceeding 15 years or both. Further as already stated the appellants reside in various different places including Beit bridge, Chikurubi Support Unit Camp in Harare, Rusape and Harare. It is therefore not clear as to which state witnesses would be interfered with and at which places appellants frequent.

The investigating officer D/Ass Inspector Trymore Ndlovu deposed to an affidavit is attached to the Form 242 in which he gave three grounds for opposing the granting of bail to the appellants. These are;

(a) that the police wanted to verify the residential addresses of the appellants. I find this to be amazing if not surprising as all appellants are well known persons employed by the state, drawn from the security sector, were on official duty and had been deployed for specific duties. Surely their residential addresses cannot be an issue.

(b) that the appellants are likely to interfere with state witnesses some of whom are members of the public. Again this is difficult to appreciate as the appellants were arrested as a result of a trap set up by members of the Police Anti-Corruption Unit

(c) that some of the appellants like the 7th, 8th, 15th, 16th, 17th and 18th were a flight risk as they fled from the scene. However as it later turned out some of these appellants are not even part of this hearing as *in casu* there are only 16 appellants.

The decision of the court *a quo* was informed by the *viva voce* evidence of the Investigating Officer Ass Insp Trymore Ndlovu. It may be necessary to interrogate that evidence. The problem with the evidence of the Investigating Officer which the court *a quo* failed to appreciate is that he or she was not part of the arresting details and did not have sufficient knowledge as to what happened when the appellants were arrested. As an example all he or she could say wat that some of the appellants fled from the scene but could not specify which appellants and who were arrested few minutes thereafter and those arrested after a long time. The Investigating Officer had no clue as to how each of the appellants were arrested save to say some were arrested in the bush near the

scene. There is therefore no clarity as to where each appellant was arrested and most importantly what explanation each appellant gave for allegedly fleeing from the scene.

It is unclear as to why the Investigating Officer believed that only a custodial sentence was to be imposed in this matter if appellants were to be convicted of this offence. Again the Investigating Officer was at pains to explain what he or she deemed to be overwhelming evidence against all the appellants which would in turn induce them to abscond. I have already alluded to lack of clarity on how the appellants were likely to interfere with state witnesses. At the time of the bail hearing in the court *a quo* the warned and cautioned statements were already recorded from all the appellants. Statements had also been recorded from all state witnesses.

All in all the Investigating Officer seemed to be unfamiliar with a number of material issues. All he or she could say is that this incident happened at about 0600 hrs when the two shifts were exchanging duties. He or she said initially 27 officers were arrested for this offence but some were later released as only 18 officers were deployed at a time. The Investigating Officer was also not sure of the following;

(i) where exactly the R2000 bribe money was recovered. Was it all on 1st respondent or there was other R2000 found in a 5 litre container

(ii) how many appellants fled from the scene upon 1st appellant's arrest

(iii) which of the appellants were arrested near the scene and which appellants were arrested later after a follow up operation

(iv) whether there was any other basis for the arrest of other appellants other than that they fled from the scene

Grounds of appeal

I understand that there are basically only two grounds of appeal raised by the appellants. The third one is not a ground of appeal but rather the conclusion made by the appellants. The grounds of appeal can be summed up as follows;

(a) that the court *a quo* misdirected itself in making a finding that all appellants save for 1st appellant fled from the scene at time of their arrest which finding is at variance with the Investigating Officer's *viva voce* evidence and the affidavit attached to the Form 242

(b) that the court *a quo* failed to appreciate that this was a dragnet arrest hence made an incorrect finding that all the appellants committed the offence

Ruling by the court *a quo*

The decision of the court *a quo* is premised on two reasons in denying the appellants bail pending appeal. These are;

(i) that the state case is very strong as the trap money which was used was recovered

(ii) that the appellants are likely to abscond as evidenced by the fact that they fled from the scene upon arrest of the 1st appellant Shepherd Mugomeza more so as they are members of the security sector.

The Law

In an appeal of this nature it is the court *a quo's* decision to deny the appellants bail pending trial which should be attacked by the appellants. The case of *S* v *Malunjwa* 2003 (1) ZLR 275 (H) drives this point home. The Learned Judge in that case said;

> "*In appeals of this nature the approach to be adopted is looking at whether the Magistrate misdirected himself when he refused bail. The appeal should be directed at the judgment of the court a quo. It is the judgment of the court a quo that the appeal must attack*".

It should be noted also that the appeal of this nature is an appeal in the narrow sense. This is aptly captured in the case of *S* v *Ruturi* HH 26/03 wherein it is stated that;

> "*An appeal to the High Court against the decision of the Magistrate is an appeal in the narrow sense and the decision will be interfered with only if the Magistrate committed an irregularity or misdirection or exercise his direction so unreasonably or improperly as to vitiate his decision"*(my emphasis)

The law on bail pending trial is now well settled or can be deemed to be a well beaten path. One need not invent the wheel as it were. See *Peter Chikumba and Grace Nyaradzai Pfumbidzai* v *The State* HH 90/14; *Bvumai Kavaro & Ors* v *The State* HMA 14/16.

The supreme law of the country which is the Constitution provides in s 50(1) (d) as follows;

"*50. Rights of accused and detained person*

(i) any person who is arrested –

(a) irrelevant

(b) irrelevant

(c) irrelevant

(d) must be released unconditionally or on reasonable conditions, pending a charge or trial unless there are compelling reasons justifying their continued detention, and

(e) *irrelevant*"

The onus is thrust upon the shoulders of the state to show on a balance of probabilities that indeed there are compelling reasons justifying the continued detention of an accused. What constitutes compelling reasons depends on the facts of each case and no exhaustive list can be given. Suffice to say that useful guideline can and should be placed on the provision of s 117(2) of the Criminal Procedure and Evidence, Act [*Cap 9:07*]. I find no reason to regurgitate some of those factors in this judgment or ruling.

Application of the Facts to the Law

As already outlined the evidence adduced in the court *a quo* in support of the state's position leaves a lot to be desired. This is a proper case in which in my respectful view the arresting detail or details should have also been called in light of the issues in contention. To compound matters the reasons for the ruling by the court *a quo* are perfunctory to say the least. This probably explains as to why the appeal was not opposed in respect of the other two appellants on CRB B 126 – 27/22 as already said and was also not opposed in relation to 9 appellants *in casu* being 2nd, 3rd, 4th, 5th, 6th, 9th, 10th, 11th and 12th appellants.

The narrow isssue now is whether there is merit in opposing the appeal in respect of the remaining appellants.

My respectful view is that I find no such merit at all. While indeed this may be deemed to be a serious offence wherein law enforcement agents engage in corruption rather than fighting corruption it is not cast in stone that if appellants are convicted they would invariably be visited with effective custodial sentences, let alone lengthy custodial sentences. In any case the seriousness of any offence standing alone cannot be the reason to deny an accused person bail pending trial unless it is taken together with other factor(s) see *S* v *Hussey* 1991 (2) ZLR 187 (S).

While the state case may reasonably be strong in respect of the 1st appellant Shepherd Mugomeza since he allegedly received the trap money inside the bus and the trap money was allegedly found on his person the same cannot be said for the 6th, 8th, 13th, 14th, 15th and 16th appellants. Further the presumption of innocence operates in favour of all the appellants.

While at this stage the court does not deal with the merits of the case in the same manner as the trial court an accused person is enjoined to a least give a reasonable or logical account or explanation which forms part of his or her defence. Just like the proverbial "peeping Tom" the court should not fully ascertain the truthfulness of an accused person's explanation in denying the charge but simply to have a cursory assessment of such an explanation.

The 1st appellant denies soliciting for a bribe. Instead he alleges that the trap money was foistered on him as he was inside the bus. He avers that he never attempted to flee. While this explanation may be unconvincing the point is made that what actually happened inside the bus leading to the 1st appellant's arrest remain contentious and is food to be digested by the trial court which can decide what to swallow or not.

It is common cause that all the other appellants were outside the bus when the 1st appellant was arrested. An inference is simply drawn that they acted in common purpose with the 1st appellant and knew what the 1st appellant was doing. This is based on the circumstantial evidence that they fled from the scene upon 1st appellant's arrest. The evidence in this respect as already said is unclear. Some of the appellants simply allege that they scurried for cover upon witnessing armed people in the bus and that pandemonium ensued as 1st appellant was being arrested by armed people in civilian clothes. Again whether a single inference can be drawn from such conduct is for the trial court to decide.

The court *a quo* misdirected itself when it made a finding that all the appellants were likely to abscond since they allegedly fled from the scene.

It is conceded that no attempt was made to establish as to exactly where each of the appellants were when they were arrested save for the 1st appellant or how each of the appellants was arrested and what explanation each of them gave for the alleged conduct.

The court *a quo* simply made a bold and bare assertion that each of the appellants was likely to abscond if granted bail pending trial without making a factual and objective basis for such a finding. See *Madzokere & Ors* v *State* SC 8/12.

It was important for the court *a quo* to analyse the nature of the offence and the severity of the charge in relation to each of the appellants. The personal circumstances of each of the appellants should have been taken into account more so each appellant's ability to flee from Zimbabwe. This should have been juxtaposed with each appellant's assurance that he or she would

stand trial. The explanation given by each appellant was relevant in order to assess the strength of the state case vis-à-vis each appellant see *S* v *Ndlovu* 2001 (2) ZLR 261 (H).

While I am alive to the pressure of work faced by Magistrates in their daily discharge of duty I still make the exhortation that in matters dealing with the liberty of an accused person like applications for bail pending trial where the presumption of innocence is in favour of the accused it is imperative for the court to fully apply its mind to all issues at hand.

Disposition

It is my finding that the court *a quo* misdirected itself in making a finding that there are compelling reasons to deny any of the appellants bail pending trial. The interests of justice would not be jeopardised if the appellants are admitted to bail pending trial.

In the result I make the following order;

IT IS ORDERED THAT

1. The appeal be and is hereby upheld in respect of 1st, 7th, 8th, 13th, 14th, 15th and 16th appellants.
2. The order by the court *a quo* be and is hereby set aside.
3. Bail pending trial be and is hereby granted in respect of 1st, 7th, 8th, 13th, 14th, 15th and 16th appellants.
4. The 1st appellant Shepherd Mugomeza due to his peculiar different circumstances is ordered to pay RTGs$50 000 to the Clerk of Court, Beit bridge Magistrates Court.
5. The 7th, 8th, 13th, 14th, 15th and 16th appellants each is ordered to pay the sum of RTGs30 000 to the Clerk of Court, Beit bridge Magistrates Court.
6. All the appellants being 1st, 7th, 8th, 13th, 14th, 15th and 16th shall not interfere with state witnesses.

7.1. The 1st appellant shall continue to reside at House No. 8876 – 23RD Street, Glen View 8, Harare until the matter is finalised.

7.2. The 1st appellant shall report on every last Friday of each month at Glen Norah Police Station between 6.00 am and 6.00 pm until the matter is finalised.

8.1. The 7th appellant shall continue to reside at Josiah Tungamirai Air Force Base, Gweru until the matter is finalised.

8.2. The 7th appellant shall report at Gweru Central Police Station on the last Friday of each month between 6.00 am and 6.00 pm until the matter is finalised.

9.1. The 8th appellant shall continue to reside at No. 347 Patros Street, Waterfalls, Harare until the matter is finalised.

9.2. The 8th appellant shall report at ZRP Waterfalls Police Station on the last Friday of each month between 6.00 am and 6.00 pm until the matter is finalised.

10.1. The 13th appellant shall continue to reside at No. 266 ZRP Support Unit, Chikurubi, Harare until the matter is finalised.

10.2. The 13th appellant shall report at ZRP Highlands Police Station on the last Friday of each month between 6.00 am and 6.00 pm until the matter is finalised.

11.1. The 14th appellant shall continue to reside at ZRP Birchenough Bridge, until the matter is finalised.

11.2. The 14th appellant shall report at ZRP Birchenough Bridge on the last Friday of each month between 6.00 am and 6.00 pm until the matter is finalised.

12.1 The 15th appellant shall continue to reside at No. 517 Claverhill, Bindura until the matter is finalised.

11.2. The 15th appellant shall report at ZRP Bindura Police Station on the last Friday of each month between 6.00 am and 6.00 pm until the matter is finalised.

13.1. The 16th appellant shall continue to reside at ZRP Victoria Falls, until the matter is finalised.

11.2. The 14th appellant shall report at ZRP Victoria Falls on the last Friday of each month between 6.00 am and 6.00 pm until the matter is finalised.

Chirairo and Associates, counsel for all appellants
National Prosecuting Authority, counsel for the respondent