

JUSTICE MARUFU
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 8 October 2018 & 21 December 2018

Appeal against refusal of bail pending trial

A. Gurira, for the appellant
E. Makoto, for the respondent

NDEWERE J: The appellant applied for bail pending trial on 14 September, 2018 and he was denied bail.

He appealed to the High Court against the magistrates' decision.

His grounds of appeal were as follows:

- (a) The court *a quo* erred at law in refusing the appellant bail on the basis that there had been a shift of onus to the appellant to show that he would stand trial when in fact no credible allegations had been made by the State which would result in the shifting of onus. The court *a quo* fundamentally erred by failing to dig into the factual issues of the matter. The State dismally failed to adduce evidence linking the appellant to the offence.
- (b) The court *a quo* erred at law in refusing bail to the appellant by holding that the standard of proof expected of the State was that on a balance of probability and yet s 50 (1) (d) of the Constitution provides that there must be "compelling reasons" justifying refusal of bail hence highlighting that the standard of proof expected of the State should surely be greater than that on a balance of probability. The State did not adduce any compelling reasons justifiable at law for the refusal of bail. As such the court *a quo* in that regard erred and misdirected itself in failing to note and

appreciate that entitlement to bail is of right. It is on that misdirection that the ruling of the court *a quo* was based which is a wrong position of the law.

- (c) The court *a quo* erred at law in refusing bail to the appellant on the basis that there was propensity to commit offence by the appellant when in actual fact no evidence was led that linked the appellant to the offence as such refusal of bail in such a circumstance is a misdirection by the court *a quo*.
- (d) the magistrate erred by not considering the impact of the defence or explanation raised by the appellant. The court *a quo* did not make it clear whether it rejected the appellant's explanation and whether or not there was any evidence adduced by the State to disprove the appellant's explanation. The failure to discredit the appellant's explanation or defence and the subsequent dismissal of the application for bail pending trial was a misdirection.

To start with, the appellant's grounds of appeal were not properly presented to the court. Although he was represented, the appellant's grounds of appeal were defective in that they mixed up the points being raised as the grounds of appeal with submissions or arguments to support the grounds. For example, in ground of appeal (a), the first sentence was sufficient to formulate the ground of appeal. What followed thereafter were submissions in support of the first sentence. In ground of appeal (b), the first sentence also was sufficient. The rest were arguments in support of the ground. In ground (c), the last part of the sentence from

"...when in actual fact no evidence..." was not necessary since that part was a submission in support of the ground. Ground of appeal (d) should have been the first sentence in that paragraph only. The rest were arguments to support the ground.

The above defects in the grounds of appeal could have resulted in the appeal being struck off the roll for failure to comply with the Rules of Court which require that grounds of appeal be concise and to the point. However, out of abundance of caution, the court decided to consider the appeal on the merits.

The background facts are that the appellant was charged with eleven counts of unauthorised use of password or pin number as defined in s 168 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] as indicated in Annexure A, the Request for Remand Form. The facts linking the accused to the offence were that he was positively identified by the complainant and other

witnesses and a photo of the password that belonged to the complainant's corporate CBZ account was seen in the accused's Samsung handset. Money amounting to US\$105.00 and \$2 259 bond notes which the accused stole were recovered from his house. The total value stolen was US\$13 000.00 and only US\$105.00 and \$2 259 bond notes were recovered hidden in the accused's house. At the time of arrest, the accused had hid himself in the ceiling of his house.

The State opposed bail for the following reasons, that the accused was facing a serious charge involving a large amount of money and there was overwhelming evidence against him and this may induce him to abscond. It said the accused had other pending similar charges and was likely to commit other similar offences if released on bail. It also said investigations were still continuing since some of the stolen money had not yet been recovered and if the accused got released he may interfere with police investigations.

During submissions, the appellant's counsel confirmed that the appellant was facing other charges at Mbare and at Harare magistrates court for theft and theft of trust property and that he was on bail on those other matters. The appellant submitted that he should be granted bail in this third matter as well.

In his ruling the magistrate said accused was arrested whilst hiding in the ceiling. He said this shows an inclination to flee. The magistrate also took into account the fact that the accused had other pending cases involving dishonesty. He said the court had to consider whether the due administration of justice will not be jeopardised by granting bail to an accused who continued to commit similar offences whilst on bail. He said there was need to protect the public from an accused who is likely to commit similar offences whilst on bail and dismissed the application for bail pending trial.

Did the magistrate misdirect himself? The court's view is that in the circumstances of the present case the magistrate did not misdirect himself.

Ad ground of appeal (a).

The court *a quo* looked at the factual issues of the appellant's case and concluded that the fact that he hid himself from the police in the ceiling whilst naked was a factor demonstrating that if he got the chance of freedom whilst on bail, he is likely to abscond and avoid standing trial. The password which was found in appellant's lap top and the money hidden in his house which was

recovered linked the accused to the offence. Ground of appeal (a) therefore has no merit and is dismissed.

Ground of appeal (b):

There is nowhere in the magistrates' ruling in the record of proceedings where the court said the standard of proof for the state was proof on a balance of probability. Therefore this ground of appeal is incorrect and should be struck off.

Ground of appeal (c):

The link between the appellant and the offence has already been referred to in the comments on ground of appeal (a). The link was the presence of the complainant's CBZ account password in the appellant's laptop and the recovery of money in his house as well as the appellant's communication and transfer of funds to a foreign currency dealer.

There being no misdirection in the court a quo's decision to refuse bail, the appeal against refusal of bail is hereby dismissed.

TK Takaendesa Law Chambers, appellant's legal practitioners
The Attorney General's Office, respondent's legal practitioners