TAPFUMANEI MUZARABANI

And

TRACY NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 18 JUNE 2024 & 11 JULY 2024

Appeal against refusal to release the appellants to bail pending trial

C. Dube for the applicant
T. Muduma for the respondent

DUBE-BANDA J:

Introduction

[1] This is an appeal against a judgment of the regional court (court *a quo*), sitting at Tredgold Magistrates Court, Bulawayo dated 24 April 2024 refusing to grant the appellants to bail pending trial. The appellants pray that the order of the court *a quo* be set aside and be substituted with an order granting them to bail. The appellants are charged together with two co-accused persons who are not part of these proceedings.

[2] Where the context permits the first appellant shall be referred to as "Muzarabani" and the second appellant shall be referred to as "Ncube".

[3] The appellants were arraigned before the regional magistrates court on four counts *viz* possession of copper without a licence or permit as defined in s 3(1) of the Copper Control Act [Chapter 14:06]; possession of any material used in connection with the generating, transmitting, distribution or supplying of electricity as defined s 60A 3(b)(4) of the Electricity Act [Chapter 13:19]; possession of material used for the provision of railway services as defined in s 38(3)(B) of the National Railways of Zimbabwe Act [Chapter 13:09]; and to

receive, destroy or take possession of any material used for telecommunication as defined in s 89(4) (c) of the Telecommunications Act [Chapter 12:05].

[4] The allegations against the appellants are that they rented a house in Bulawayo, being house No. 2024 Mahatshula (Mahatshula house) for the purpose of storage of stollen copper cables. In count 1, it is alleged that the police recovered from this house copper cables varying from overhead copper conductors, transformer copper bars, armored cables and scrap copper from electric motor winders and two digital scales. Scrap copper with a weight of 2600 kg valued at USD52 000.00 was recovered. In count 2, it is alleged that the Zimbabwe Electricity Transmission and Distribution Company (ZETDC) identified the recovered armored and overhead copper conductors with a total weight of 3420 kg valued at USD68 400.00 as its property used for transmission and distribution of electricity. In count 3, it is alleged that of the recovered copper cables, the National Railways of Zimbabwe (NRZ) identified a total of 340 kg of locomotive power copper with a total value of USD8 600.00 as its property. In count 4 it is alleged that, Telone Zimbabwe identified recovered copper cables with a weight of 100 kg and valued at USD2000.00 as its property.

[5] At the regional court the appellants applied to be granted bail. It was submitted before the regional court that the two appellants are a married couple and have two minor children of school going age. Counsel further informed the regional court that the two appellants have an immovable property, that is number 1785 Killarney and they were prepared to pledge this property as security for their attendance in court until their criminal matter was finalized. Counsel submitted further that there were no compelling reasons justifying the refusal to grant the appellants bail. Counsel argued that the appellants were not a flight risk; that they would not interfere with State witnesses; and that there was no likelihood of them committing offences while on bail. It was placed on record that the Muzarabani had a previous conviction. It was submitted that the two appellants deny the charges against them, and it was submitted that they would show that these charges arise from a set-up, in that property recovered by the police was planted, resulting in them being implicated. It was further submitted that this set-up arises from a turf war in the scrap metal business, and that they would show that they had no knowledge, control, nor were they in possession of the property allegedly recovered by the police.

[6] The State in opposing the application adduced evidence from the investigating officer. The officer testified that the exhibits subject to these charges were recovered at Mahatshula house. Prior to the arrests and the recovery of the exhibits the police carried out a two weeks surveillance at the Mahatshula house, and it was observed that the appellants made frequent visits to this property and on each visit, they would be carrying cables in their car. No one was seen visiting this property except for the appellants. Sometimes they would open the gate for themselves, and on other occasions the co-accused persons would open the gate for them. The two co-accused stayed at the property providing security. The appellants also kept vicious dogs at the house to assist in protecting the copper. The dogs were so vicious that during the arrests of the appellants, they had to be restrained for the police to be able to do their work. The officer testified further that on the date of arrest, the keys to the Mahatshula house were with Muzarabani, and he opened the gate for the police officers. He was in the company of his wife the second appellant. Muzarabani used keys to unlock each room where copper was found. The officer further testified that the appellants confirmed that the copper was theirs, and Muzarabani signed seizure forms at the scene.

[7] The officer testified that the appellants resided at No. 45A Balfour Road, Bellevue, Bulawayo and they used the Mahatshula house as a storage for the copper. According to the officer, the two appellants are in the business of illegal buying of scrap metal. The officer testified further that Muzarabani had two previous convictions. In one case he was charged and convicted of contravening s 3(1) of the Copper Control Reform Act, i.e., dealing in copper without a licence. Under cross examination the officer conceded that he was not in the police team that arrested the appellants. He arrived at the scene after the appellants had been arrested. His evidence about the arrest was premised on the investigations he made and the interview with those who executed the arrests.

[8] The regional court found that the appellants are facing serious offences, and the State has a strong case against the them such that they were likely going to be convicted. In the event of a conviction, they would be sentenced to heavy terms of imprisonment. And that the prospect of long prison sentences might induce them to abscond and not stand trial. The court further found that Muzarabani only disclosed one previous conviction when he had two, one of which was

relevant to this case. The court reasoned that if admitted to bail he might commit further offences. The crux of the regional magistrate was that it was not in the interests of justice to grant bail to the appellants.

Grounds of appeal

[9] Aggrieved by the refusal to grant them to bail, the appellants noted this appeal to this court on the following grounds:

i. The court a quo erred in ignoring that bail is a constitutional right and that the appellants should be denied bail where the State has advanced tangible compelling reasons to deny them bail.
ii. The court a quo erred in failing to appreciate, interrogate, define and address itself to what compelling reasons but wandered off what should have been the enquiry for a bail application.
iii. The court a quo erred in finding that there were compelling reasons to deny the appellants bail pending trial.
iv. The court a quo erred in finding that the appellants are facing a serious offence and it would attract a lengthy custodial sentence which would induce them to abscond trial.
v. The court a quo further erred in finding that the 1st appellant still has an appetite to commit similar offences.
vi. The court a quo erred in taking a blanket approach towards all the appellants, failing to address each applicant individually.
vii. The quo a quo misdirected itself in its findings.

[10] Before this court Mr *Dube,* counsel for the appellants submitted that although there are seven grounds of appeal, ground number two (ii) is the summation of all the grounds. My view is that ground two (ii) is too general and very vague. It is simply meaningless. It does not state the particular mistake that the regional court is alleged to have made. Further grounds number three (iii) and seven (vii) are equally too general and meaningless. The appellants' remaining grounds of appeal can succinctly be summarized as follows:

a) That the regional magistrate erred in disregarding that bail is a constitutional right and that the appellants could only be refused bail if there are compelling reasons justifying their further detention.
b) That the regional magistrate erred in finding that the appellants were a flight risk.
c) That the regional magistrate erred in finding that the 1st appellant would commit similar offences if released on bail.
d) That the regional magistrate erred in taking a blanket approach towards all the appellants, failing to address each appellant's case individually.

Submissions of the parties

[11] Mr *Dube* argued that the court *a quo* misdirected itself in relying on s 117(i)(ii) of the Criminal Procedure and Evidence Act [Chapter 9:07]. It was argued that s 117 has been superseded by s 50(1)(d) of the Constitution of Zimbabwe Amendment (No. 20) 2023 (Constitution). Further it was argued that the court *a quo* misdirected itself in finding that the State had a strong case, when it had before it only Form 242 and what counsel referred to as "speculative hearsay evidence from the investigating officer." Mr *Dube* argued that the State case was weak. It was argued further that the appellants had not shown any inclination to abscond, and they co-operated with the police. It was argued that regarding his previous conviction, the first appellant in that case was admitted to bail, attended his trial until he was convicted and sentenced. He did not abscond. It was argued that a previous conviction does not mean that the first appellant has a propensity to commit further offences. It was submitted that the State did not prove compelling reasons against the second appellant, but she was bundled together with first appellant resulting in her being refused bail.

[12] The regional magistrate was criticized for being allegedly prejudiced against the appellants. This criticism is supposedly anchored on the contention that he dealt with the matter as if the appellants were on trial and that he was pushing for a trial date. It was further contended that the magistrate "had at the back of his mind" convicted the appellants. Counsel argued that there were no compelling reasons to refuse to release the appellants to bail pending trial.

[13] The respondent in the written response to the appeal, opposed the admission of the appellants to bail on the premise that they were a flight risk. It was submitted that there was a very strong case against them and that a conviction was guaranteed. It was further submitted that the severity of the penalty likely to be imposed on conviction can incentivize the appellants to abscond and not stand trial. It was submitted further that the first appellant seems to have a propensity of committing almost similar offences. It was further argued that the two appellants were not good candidates for bail, and admitting them to bail will undermine or jeopardize the objectives or proper functioning of the criminal justice system, including the bail system.

[14] At the hearing of this matter, Mr *Muduma* counsel for the respondent made a turn and submitted that the admission of the appellants to bail was no longer opposed. Counsel submitted that the appellants were not a flight risk. He argued that court *a quo* misdirected itself in relying of s 117(2)(i)(ii) of the Criminal Procedure and Evidence Act which was no longer law in this country. Counsel submitted that s 117(2)(i)(ii) have been superseded by s 50 of the Constitution, therefore reliance on them was impermissible. Counsel submitted further that there was no reason why the State had not allocated this case a set down date for trial, notwithstanding the fact that investigating officer informed the court *a quo* that investigations were complete. Counsel said the appellants be released on bail and be ordered to surrender the deed of transfer of No. 45 Balfour Road, Belleview, Bulawayo as security to abide by the bail conditions. Counsel informed the court that the No. 45 Balfour Road is registered in the name of the appellants, and they have a deed of transfer. Counsel informed the court that if they fail to abide by the bail conditions the property will be forfeited to the State. Mr *Dube* informed the court that he could not confirm that this property was registered in the names of the appellants and that they have a deed of transfer to the property. Counsel said the only property that he knows of is the Killarney property, and it was still at agreement of sale stage. Mr *Muduma* when asked as where he got the information that No. 45 Balfour Road is registered in the name of the appellants and that they have a deed of transfer, said he was informed by the investigating officer.

[15] Mr *Muduma* agreed with Mr *Dube* that this court must release appellants on bail pending trial, subject to certain conditions that he highlighted. I quickly reminded him that the grant or refusal of bail is a judicial function. Determining a bail application calls for a delicate balance

between the liberty of the accused and the interests of society which demands that an accused should stand trial or avail himself for trial when he is so required. Where there are such competing interests, a court is enjoined to balance the competing interests by taking into account the evidence, facts and the circumstances of the matter, factoring into the equation the position taken by the State. In fact, this is what section 117(5) of the Criminal Procedure and Evidence Act regulates. It says that:

> "Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interests of justice as contemplated in subsection (4)."

[16] In a bail application, the views of the respondent are a relevant consideration, but cannot be decisive. The grant or refusal of bail is a judicial function. It is the court that must be satisfied that the admission of the appellants to bail will not prejudice the administration of justice.

The law and the facts

[17] It is trite that a court hearing a bail appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong, in which event the court shall give the decision which in its opinion the lower court should have given. Thus, this court can only interfere with the decision of the court a quo if the regional magistrate misdirected himself in some material way in relation to either the facts of the law. In the absence of a finding to that effect the appeal must fail. The decision of the court *a quo* will be wrong if it committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its discretion. See *Ncube v The State* SC 126/01; *Chimaiwache v The State* SC 18/13; *S v Barber 1979 (4) SA 218 (D) at 220 E-G; S v Mpulampula* 2007 (2) SACR 133 (E) at 136E.

[18] Bail applications are regulated by s 117 of the Criminal Procedure and Evidence Act as read through the lens of the Constitution. Section 117(2)(a)(i)-(iv) provides that the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established, namely: Where there is the likelihood that the accused, if he or she were released on bail- (i) will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or will not stand his or her trial or appear to receive his sentence; or (iii) will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.

[19] An arrested person is generally entitled to be released on bail if a court is satisfied that the interests of justice so permit. In addition, an accused person cannot be kept in custody pending his trial as a form of anticipatory punishment. In *S v Acheson* 1991 (2) SA 805 (NMHC) at 821 F-H the court said 'the presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice. The courts have observed that the interests of justice in regard to the grant or refusal of bail therefore do focus primarily on securing the attendance of the accused at trial and on preventing the accused from interfering with the proper investigation and prosecution of case. In this appeal the main issue is whether the decision to refuse the application to grant the appellants bail was wrong.

[20] Mr *Dube* submitted further that the regional magistrate was prejudiced against the appellants. There is nothing on the record to show, even remotely that the magistrate was prejudiced. It is clear that the court's function in a bail application is intended to be more proactive than in normal criminal proceedings. A bail hearing is a unique judicial function and the inquisitorial powers of the presiding officer are greater. It is the court that must seek to strike a balance between the liberty of the individual and safeguarding the proper administration of justice. The court has to ensure that it has before it sufficient facts and evidential material to make a just decision. Therefore, a court cannot be criticized for taking a more proactive approach in a bail application.

Whether the regional magistrate disregarded that bail is a constitutional right and can only be refused if they are compelling reasons

[21] Bail is a constitutional right. It is trite that the Constitution established a democratic state based on the values of the supremacy of the Constitution and the rule of law. In the Constitution the basic principles of bail have been constitutionalized in the Bill of Rights. The object of the right to bail is to minimise the interference with the accused's freedom and to avoid anticipatory punishment before conviction and sentence. The right to be released from detention if the interests of justice permit, subject to reasonable conditions at the first court appearance after being arrested, is constitutionally entrenched in s 50(4) (d). The Constitution itself expressly acknowledges and sanctions that accused persons may be arrested for allegedly having committed offences, and may in certain circumstances be detained in custody pending trial. It places a limitation on the right to bail.

[22] A reading of the regional magistrate's ruling shows that the court was alive to the legal principles regulating the bail regime. It is not necessary for a court to specifically refer to the constitution, what is required is that the ruling must show that it was alive to the constitutional requirements. The ruling shows that the regional magistrate was alive to the fact that the right to bail has been constitutionalized in this jurisdiction. And that it is not absolute. The regional magistrate considered the right to bail in the light of the provisions of s 117(2)(a) of the Criminal Procedure and Evidence Act [Chapter 9:07]. In exercising his discretion, the regional magistrate sought to balance the appellants' right to liberty and the proper administration of justice. And that bail can be lawfully refused if there are compelling reasons to do so. The contention that the regional magistrate ignored that bail is a constitutional right and that the appellants could only be denied bail if there existed compelling reasons has no merit.

Whether the appellants are a flight risk

[23] The regional magistrate in his reasons for refusing the appellants bail relied heavily on the seriousness of the charges and the strength of the state case. The appellants are charged with four counts, three of which, i.e., s 60A 3(b)(4) of the Electricity Act [Chapter 13:19]; s 38(3)(B) of the National Railways of Zimbabwe Act [Chapter 13:09]; and s 89(4) (c) of the Telecommunications Act [Chapter 12:05] each carries a minimum mandatory sentence of ten years imprisonment. The finding of the court *a quo* that the appellants are facing serious charges cannot be faulted.

[24] The court *a quo* found that the State has a strong case against the appellants. Before I deal with whether the State has a strong case, I have to comment on the attack against the evidence of the investigating officer that it is hearsay and speculative. This attack is primarily anchored on the premise that the officer was not part of the arresting team. I mention that bail proceedings are *sui generis,* the rules of evidence are more relaxed than in a trial. Hearsay evidence is admissible in bail proceedings, it remains a question of weight. In *S v Parafini* 2019 (3) ZLR 1259 (H) the court stated that the evidence of the investigating officer claiming that the State has a strong case against the accused must be accorded due weight. He is the one who is compiling the docket, interviewing witnesses and collecting exhibits. So when he says the State has on the merits a strong case against the accused, it must be accepted unless there is a reason to reject his evidence.

[25] The court below had no reason to reject the evidence of the officer, neither does this court have any reason to reject it. The evidence of the police surveillance at the Mahatshula house, shows that the appellants were in total control of this house. They put two persons and vicious dogs to guard the property. No other person had access to the property except the two appellants. They had keys to the gate, the main entrance to the house and keys to the rooms inside the house. They were observed bringing copper cables to the property. And further admitted to the arresting officers that the copper cables found at the house belonged to them. Before the court *a quo* the appellants did not say they had a licence nor permit to posses the copper cables found in their possession. The submission before the court *a quo* that the charges arose from a set-up from a turf war in the scrap metal business does not seem to make sense. It amounts to just a bare denial. I cannot therefore fault the regional magistrate for concluding that the State has a strong case against the appellants.

[26] The offences charged are serious and the State has a strong case. There is a likelihood, upon conviction of heavy sentences being imposed on the appellants. In *S v C* 1995 (1) SACR 639 C) 640*h* it was held that whilst the possibility of absconding is always a very real danger in serious cases, it remains the duty of the court to weigh up carefully all the facts and the circumstances pertaining to the case. In *S* v *Jongwe* SC 62-2002 the court denied bail on the grounds that the accused was facing a very serious offence which would attract a lengthy custodial sentence upon conviction. In *casu* the regional magistrate found that the expectation of substantial sentences of imprisonment would undoubtedly provide an incentive for the appellants to abscond and evade trial. I cannot fault this finding.

Whether the first appellant may commit further offences if admitted to bail

[27] In a bail application a previous conviction is relevant, but not decisive. In *S v Tshabalala* 1998 (2) SACR 259 (C) at 269d it was stated that the court must assess the appellant's future conduct in the light of existing or historical facts and circumstances. The first appellants' previous conviction and the number of charges he is facing in this case and the quantity of copper found at the Mahatshula house clearly indicates that it would not be in the interests of justice to admit him the bail. The magistrate correctly refused to grant him bail. I cannot fault the regional magistrate for taking this previous conviction as an added negative against the first appellant.

Whether the regional court took a blanket approach thus prejudicing the second appellant

[28] In general, I accept that it is important that when accused persons are jointly charged and apply for bail together, fairness requires, where appropriate that each accused's case be determined separately. Treating them as a group might in certain circumstances deny the court the opportunity to see beyond the group, and then paint all the accused with one color, to the prejudice of some of the accused in the group. However, this does not apply to this case. In the main, the circumstances of the appellants are the same, the only difference is that the first appellant has a relevant previous conviction. The previous conviction was taken into account as against the second appellant.

Disposition

[29] For the sake of completeness, the concession made by Mr *Muduma* that the appeal must succeed is rejected. It is clear that the concession is anchored on a misapprehension of the facts of this case and the applicable law. The regional magistrate found that two appellants are a flight risk, and that the first appellant may commit further offences if admitted to bail. This finding cannot be faulted. It is clear that the regional magistrate was fully cognisant of the constitutional imperative that no person ought to be deprived of his or her freedom arbitrarily, and if it is in the interests of justice to do so, an arrested person is entitled to be released from detention on bail.

[30] The appeal court does not have a free hand or reign to do whatever it wishes to do and it will not easily interfere with the discretion of the court of first instance unless it is clearly convinced that the lower court was wrong in the exercise of its discretion. If there is no misdirection in the lower court the court of appeal cannot interfere with the exercise of discretion in the lower court. This is normally the case even if the appeal court has doubt it would not interfere. See *R v Dlumayo* 1948 (2) SA 677 (A); *R v Barber* 1979 (4) SA 218 (D); *S v De Abreu* 1980 (4) SA 94 (W); *R v Dlumayo* 1948 (2) SA 677 (A); *R v Barber* 1979 (4) SA 218 (D); *S v De Abreu* 1980 (4) SA 94 (W). The appellants failed to establish that the decision of the regional magistrate was wrong. It is for these reasons that this appeal must fail.

In the result, I make the following order:

The appellants' appeal against the refusal to admit them to bail is dismissed.

Dube And Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners