MOSES MPOFU
and
MIKE CHIMOMBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 20 August 2024

Appeal against refusal of bail pending trial

T Dzvetero for the first appellant
A Mugiya for the 2nd the appellant
F I Nyahunzvi and L Chitanda **for** the respondent

KWENDA J**:** The appellants were arraigned before the Magistrates Court at Harare on the 20th of June 2024 facing a charge of fraud. The charge emanated from the alleged use, by Blackdeck Livestock & Poultry (Pvt) Ltd (Blackdeck), of falsified documents as supporting documents, in a bid to secure a tender to supply 500 000 goats to the Ministry of Agriculture, Water, Fisheries and Rural Development for a Presidential Empowerment Scheme. The allegedly falsified documents, allegedly submitted with the bid for the purposes of meeting the requirements of the tender were, a Zimbabwe Revenue Authority Tax Clearance Certificate and a National Social Security Authority Compliance Certificate, both in the name of Blackdeck Livestock & Poultry (Pvt) Ltd. The State alleged that the appellants connived to and did submit the falsified documents well knowing that Blackdeck Livestock & Poultry (Pvt) Ltd was not registered in terms of the laws of Zimbabwe. By making such misrepresentation, the appellants allegedly intended to and did give the false impression that (Blackdeck) was a registered company and juristic person; and that its bid met the tender requirements for a valid bid. The State is alleged to have acted on the misrepresentation thereby allegedly dealing with a non-existent entity and treating Blackdeck's bid as valid culminating in the acceptance of the allegedly invalid bid and a subsequent award of the tender to Blackdeck, to the prejudice of the State and Blackdeck's competitors. Blackdeck is alleged to have failed to fully discharge its obligations allegedly causing actual prejudice to the State in the sum of US$7 712 197.00

The appellants' application for bail, pending trial, in the Magistrates Court was unsuccessful, after it was opposed by the State and dismissed by the magistrate on the 16th of

July 2024. This is an appeal against the decision. I set down the appeal for hearing on the 6th of August 2024. On the 6th of August 2024, the appeal could not be heard because the record of appeal was incomplete. I postponed the matter to the 8th of August 2024 for argument and directed the appellants' counsel to attend to the record by the end of the day on the 6th of August 2024 and the State to file its response on the 7th of August 2024. The directions were duly complied with and I proceeded to hear the matter on the 8th August 2024.

In opposing the appeal, the State advised me that the appellants had been indicted on the 7th of August 2024, for trial before the Anti-Corruption Division of the High Court, to start on the 1st October 2024 and the Registrar had been advised of that development. The indictment is common cause.

In its response filed of record, the State opposed the appeal on a point of law and the merits. On a point of law, the State objected to the hearing of the merits of on the grounds that the appellants' indictment had rendered their appeal moot and its determination pointless. The State submitted that the legal implications of the indictment were that ss 66(2) and 137 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], (hereinafter, the Criminal Procedure and Evidence Act), became operative. The appellants are now in detention pursuant to the provisions of s66 (2). The bail appeal, at best, can only result in the correction of the magistrate's decision. In terms of s137 of the Criminal Procedure and Evidence Act, as soon as indictments papers were served on the appellants, their case became pending in the High Court. A magistrate may not exercise jurisdiction to grant bail in a matter pending before the High Court. The State submitted that the appeal had, therefore, been overtaken by events and prayed for its dismissal.

The preliminary objection was opposed by the appellants who persisted that the appeal was not moot, and, even assuming it had become moot, the was a sound legal basis for the appeal to be determined.

The parties agreed that a determination of point of law in favour of the State, would dispose of the appeal without the need to go into the merits of the lower court's decision. It was on that basis I invited the parties to argue the point of law, first.

Mr *Dzvetero,* for the first appellant, argued that the State had taken an erroneous view of the law. He argued that the appeal must still be argued and determined on the merits because a finding of misdirection would mean that the decision of the lower court denying the appellants was a nullity, from the beginning. In that event, the wrong decision would be vacated and

replaced by an order granting the appellants bail. What that would mean is that the appellants would be deemed to have been on bail from the date on which they were denied bail by the magistrate, that is, prior to their indictment. The appellants would, therefore, be entitled to the extension of such bail upon indictment because in terms of s 66 2(a) of the Criminal Procedure and Evidence Act, if a person who is indicted by a magistrate for trial in the High Court, was on bail pending trial on the charge for which he or she is committed, the bail shall stand, unless a judge of the High Court alters the conditions of the recognizance or revokes the bail and commits the indicted accused person to prison. He submitted that, in any event, there was a sound legal basis for me to hear the appeal, despite the indictment of the appellants, because the appellants had the constitutional right to test the correctness of the decision of the lower court denying them bail. He submitted that if s 66(2) of the Criminal Procedure and Evidence Act was to be given the interpretation given to it by the State, then it would be constitutionally invalid and he would be constrained to move the court to issue a declaration of constitutional invalidity in terms of s 175(1) of the Constitution. He was, however, not moving for such an order but was moving the court not to interpret s 66(2) in manner that would negate the appellants' constitutional right to appeal an incorrect decision.

Mr *Mugiya* for the second appellant, adopted Mr *Dzvetero*'s submissions. He added that there was no law which rendered an appeal against denial of bail nugatory upon the service of indictment papers. He said it was not necessary for the appellants to abandon the appeal and make a fresh bail application before the High Court, as suggested by the State, because a bail application is made in terms of s 117(a) of the Criminal Procedure and Evidence Act whereas the appellants' appeal was in terms of s 121 of the Act. I was therefore enjoined to determine the appeal and determine same on the merits. I could not properly take into account the indictment of the appellants because that fact was not before me. I was confined to the four corners of the appeal record.

In response, Mr *Nyahunzvi* maintained that there was no constitutional matter before me. He said the provisions of s 66(2) of the Criminal Procedure and Evidence Act kicked in by operation of law upon the undeniable development that the appellants had been indicted to appear in the High Court for trial on the charge for which they were in custody at the time of indictment. He argued that since the appellants' matter is now pending in the High Court the appellants were expected to abandon the appeal and file a new application before a judge of the High Court.

I make the following findings.

It is not necessary for the State to lead evidence to prove that the appellants were indicted to appear in the High Court. The parties agree that the indictment papers were served on the appellants and have been lodged with the Registrar of this court in terms of s 137 of the Criminal Procedure and Evidence Act. I will, therefore, take judicial notice of the indictment because that development is easily ascertainable from this court's own Registry and is not denied by the appellants. In *Movement for Democratic Change and Ors* v *Mashavira and Ors* 2020 (1) ZLR 797 (S), at p815, the Supreme court made it clear that, faced with an objection based on mootness, the court may properly take into account occurrence of events outside the record which terminate the controversy between the parties. In this case, the appellants are detained by operation of s 66(2) of the Criminal Procedure and Evidence Act, because, they were in custody at the time of committal for trial in the High Court.

In terms of s 66(2) of the Criminal Procedure and Evidence Act, on receipt of a notice in terms of s 66(1), the magistrate shall cause the person to be brought before him or her and shall forthwith commit the person for trial before the High Court and, <u>if the person is in custody, shall issue a warrant for the further detention of the person in prison pending his or her trial before the High Court for the offence for which he or she has been committed</u>. In my view the words which I have underlined require no arduous interpretation. The clear intention of the Legislature in s 66(2) of the Criminal Procedure and Evidence Act is to secure an accused person, who was in custody at the time of being indicted, until he appears before the trial court.

As soon as the indictment served on the appellant, was lodged with the Registrar of the High Court, the appellants' case, immediately, was, by operation of s 137 of the of the Criminal Procedure and Evidence Act, deemed to be pending in the High Court. It is trite that any order substituted, by me, on appeal, granting the appellants bail pending trial, would become an order of the magistrate, as corrected. The order would be ineffectual because a magistrate may not exercise jurisdiction over the matter pending in the High Court.

In terms of s 121(4) of the Criminal Procedure and Evidence Act an appeal against refusal of bail does not suspend the decision appealed against. The order, whether granting or refusing bail, remains extant until it is, either confirmed or set aside by a judge on appeal. In other words, its legality is not affected. The argument by the appellants' counsel that the setting

aside of a magistrate's decision in a bail matter on appeal, means that the decision upset on appeal was a nullity from the beginning is, therefore, incorrect.

In *Movement for Democratic Change and Ors vs Mashavira and Ors, supra*, at p815, the Supreme Court per Patel JA, as he then was, ruled that a court would not normally hear an issue if subsequent events rendered the matter moot, in the sense that it is has become purely hypothetical or an academic matter. However, the court had the discretion to hear and give judgement if the matter was of practical significance and there was need to provide an authoritative determination on the issue, in the interests of justice. I find that the determination of the appeal before me would be an academic exercise. Even if I were to find a misdirection in the exercise of appellate jurisdiction, that would not change the fact that the appellants were lawfully in custody up to the time they were served with indictment papers. It would also not change the fact that that a magistrate may not exercise jurisdiction over the matter pending in the High Court and any order substituted on appeal granting the appellants bail would be ineffectual because, as stated above, it would still be the decision of the magistrate, as corrected. On indictment, the magistrate has no jurisdiction to liberate an accused person who has been served with indictment papers whilst in custody. The law enjoins the magistrate to extend the detention until the accused person appears before the trial court.

Section 66 (2)(a) would not aid the appellants because the decision of the magistrate denying the appellants bail remains extant and lawfully binding despite being taken on appeal. It cannot therefore be said to be a nullity because s 121(4) of the Criminal Procedure and Evidence Act validates it. In any case it would not be a nullity because it is a decision made procedurally. The substituted decision, would therefore, only take effect from the date of substitution by the judge and clearly, not retrospectively. It is therefore not correct to say that the appellants would be deemed to have been granted bail on the date on which they were denied bail.

I do not agree with the State that, at this stage, the appellants can make a fresh bail application before any judge of the High Court. In terms of s 117A of the Criminal Procedure and Evidence Act, an accused person may at any time apply verbally or in writing to the judge or magistrate, as the case may be, before whom he or she is appearing to be admitted to bail immediately or may make such application in writing. The words "or may make such application in writing to a judge or magistrate" are only permissive, in that an accused person who does not make an application for bail, immediately, before the judge or magistrate before

whom he or she is appearing, may make the application later in writing. The option should not be taken as an opportunity to forum shop. I will demonstrate my point by reference to notorious facts. It is common knowledge in this jurisdiction that the deployment of judges and magistrates is the prerogative of the heads of courts. The head of court, responsible for Magistrates courts, deploys magistrates to the courts of initial appearance. It is not up to the accused person to elect not to make his or her bail application before the magistrate in the remand court and take it to another court on the basis that such other court has jurisdiction. If, for any good reason, the accused person objects to the judge or magistrate deployed by the judiciary to deal with his or her matter, there are legal remedies which include, application for the recusal.

The appellants were indicted to appear before the trial court in the High Court. They are now accused persons facing trial in the High Court and in terms of s117A (1) of the Criminal Procedure and Evidence Act, their application to be admitted to bail pending trial, will be heard by the judge to preside or presiding at their trial. If the procedure on indictment is read as a whole, including s 169 of the Criminal Procedure and Evidence Act, it becomes clear that the Legislative intention was to, as much as possible, give the trial judge the prerogative to determine the issue of liberty pending trial. The logic is simple. After indictment the trial court takes into account, not only the facts which linked the accused persons with the charge at their initial remand, but also the evidence, now, presented with the indictment papers and may want to look at the accused persons' defence in the face of such evidence. The intention is also clear from the difference in wording between s66 (2) and s66(2a) of the Criminal Procedure and Evidence Act. In terms of s66(2a) if a person, who is committed for trial has earlier been granted bail on the charge for which he or she is committed, the grant shall stand <u>but a judge of the High Court may alter the conditions of the recognizance or revoke the bail and commit the person to prison</u>. The underlining is mine. Yet, in terms of s66(2) if the person indicted is in custody, the magistrate <u>shall issue a warrant for the further detention of the person in prison pending his or her trial before the High Court for the offence for which he or she has been committed</u>. There is no provision for the liberation of the accused person before he or she appears before the trial court. There is therefore a deliberate statutory derogation to the right to bail before trial. I have underlined the issue of the warrant because a person who is indicted whilst in custody is detained and kept in terms of a warrant issued in terms of s66 (2) of the Criminal and Procedure and Evidence Act until he appears before the trial court. Such a warrant is not subject of appeal. It falls away because it will have served its purpose.

Where a dispute has become moot or the determination of the dispute is of no practical significance, the court may dismiss the case.

In the result I order as follows:

The objection by the State to the hearing of this appeal based on mootness is upheld and the appeal is dismissed.

Mugiya Law Chambers, appellants' legal practitioners
National Prosecuting Authority, State's legal practitioners