ANDREW CHENJERAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE; 13 & 24 June 2024

Appeal Against Refusal of Bail by the Magistrate

T S Dzvetero with *L Hlongo,* for the appellant
T Kangai, for the respondent

MANYANGADZE J: This is an appeal against refusal of bail. It arises out of a ruling handed down by the Regional Magistrate sitting at Harare, on 29 May 2024, during initial remand proceedings wherein the appellant was brought before the court on charges of robbery, as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code").

The facts of the matter are detailed in the Request for Remand Form (Form 242) filed of record. In brief, the allegations are that the appellant in the company of some accomplices confronted two security guards who were on duty at Paza Buster Car Sale, in the Graniteside industrial area, on 3 December 2023, around 2300 hours. They were clad in balaclavas and armed with pistols and rifles.

The appellant and his accomplices tied up the security guards with shoelaces and handcuffs. They broke into the company offices and used an electric grinder to open the safe. They took a total of US$2500,00 cash, the Director's HP Laptop, keys to Mercedes Benz S450 and Mercedes G Wagon vehicles and Paza Buster company documents.

One of the documents stolen in the robbery was recovered from the appellant. Attached to form 242 is an affidavit by the Investigating Officer, Detective Assistant Inspector Isaiah Chikanda, attesting to the facts outlined. The affidavit indicates that accomplices Bhekimpilo Ncube and Mehluli Ncube were arrested in connection with the robbery.

It is against this factual background that the magistrate denied the appellant bail. The matter has a peculiar background in that the appellant was denied bail in spite of the State's response that it was not opposed to the application for bail.

A perusal of the magistrate's ruling shows that bail was denied for the following reasons:

i) What the appellant proffered as a plausible defence was nothing more than an unsubstantiated bald assertion that he has a plausible defence. The State could not explain what the defence was. It simply referred to the defence counsel to explain. Defence counsel in turn, had to seek audience with the appellant, as she could not explain the defence. The appellant only made a bare denial, which was that the document in question was not recovered from him.

To make matters worse, the appellant claimed the document was at CID (Commercial Crimes Division) where he had made a report against the company directors. There was no proof that such a report had been made and the nature of the report was never explained to the court.

ii) The presumption of innocence was overridden by the evidence linking appellant to the offence, the recovered stolen document. The State failed to explain this link.

iii) Coupled with the above, is the seriousness of the offence and the severe prison term that will follow a conviction. This becomes an inducement to abscond.

iv) The State did not relate to the investigating officer's mention of accomplices Bhekimpilo Ncube and Mehluli Ncube, who are alleged to have committed the same offence, in similar circumstances.

v) The State's concession contradicted the averment in form 242, that there is overwhelming evidence against the appellant and hence the risk of abscondment. The State did not satisfactorily explain its stance *vis-avis* the allegations in form 242. Thus, the concession was misplaced.

At the hearing in this court, the case took a further peculiar twist. The State initially filed a response in which they were not opposed to the granting of the appeal. The matter was rolled over to the following day. The State then appeared with a different stance. They withdrew their initial response, and submitted that they were now opposed to the appeal. They indicated that further evidence emerged, revealing that the appellant was not a suitable candidate for bail. To this end, they called the investigating officer on the witness stand to elaborate on the further evidence. The adduction of further evidence was not objected to by the defence.

The salient aspect of the investigating officer's evidence related to the document that was allegedly found in appellant's possession, being a Form CR2. It is a document that shows who the shareholders of a company are, and the percentage of their respective shareholding.

Investigations established that the original CR2 was among the documents stolen in the robbery in question. The investigating officer picked information to the effect that the accused had submitted a photocopy of the CR2 to CID (CCD). In his warned and cautioned statement, in which he totally denied the allegations, the appellant stated that he had obtained this document through his legal practitioner. This was when the legal practitioner was involved in the sale of a Paza Buster building in August 2022.

The investigating officer noted that the agreement of sale was concluded in 2020, and the CR2 was issued in 2022. The dates were irreconcilable. It meant that the accused lied that he obtained the CR2 in 2020, when the sale of the building was executed.

The accused also claimed that he obtained the copy of the CR2 from the Deeds Office. The investigating officer verified with the Deeds office and it was stated that they only issue certified copies of documents requested from their office. The copy the appellant claimed he obtained was uncertified. That means he lied that he obtained the copy from the Deeds office.

The investigation officer indicated that he confirmed with Detective Assistant Inspector Anderson that the appellant had indeed submitted the photocopy in question. The witness further stated that when asked to bring the original CR2, the appellant was not forthcoming. He was not co-operative.

The witness was subjected to a protracted cross-examination which almost turned this bail enquiry into a trial. Legal practitioners should be reminded that a bail enquiry is just an enquiry into the suitability of the appellant for admission to bail. It is not a trial on the merits. This matter is compounded by the fact that it is before the court as an appeal, where the inquiry is focused on a bail enquiry already conducted by the court *a quo*.

The principles governing such an enquiry are well established. This court must not lightly or easily tamper with the findings and conclusion of the court *a quo*. It can only do so if it finds an irregularity in the proceedings, or that the court seriously misdirected itself and improperly exercised its discretion in denying the appellant bail pending trial. See *S* v *Chikumbirike* 1986 (2) ZLR 145 (SC), *Chimwaiche* v *The State* SC 18/13.

In the instant case, the first question that falls for consideration is whether the court *a quo* was correct in overriding the State's concession that the appellant be admitted to bail. The court stated that it was not bound by the State's concession.

In its initial response in this court, the State contended that the magistrate erred when she overruled the State's concession. It argued that the State is the one who has the onus to prove compelling reasons. If the State as *dominus litis* consents to bail, it means there are no compelling reasons to deny the appellant bail.

I am unable to uphold this contention. It implies that once a concession is made by the State, the court's hands are tied. It has no option, no discretion but to grant bail. The correct position is that, whilst the court gives due weight to the concession, it is not bound by the concession. The decision that grants or denies bail to the accused is that of the court, not the State, or the defence for that matter. These two sides only make submissions for the consideration of the court. The resultant order is that of the court, after due consideration of the submissions. The duty of the court is to enquire into the submissions and analyse them judiciously before making its determination.

In my view, the court is not usurping the powers of prosecution when, after a judicious appraisal of the facts before it, it declines bail notwithstanding the State's concession. Section 117 (5) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] makes it clear that the decision whether to grant bail is the duty of the court. The section reads as follows:

> "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)."

Of course, where a there is a concession by the State in a bail enquiry, the court must be slow in overriding such concession. It is only when the facts placed before it clearly indicate that the concession was not properly made and it is not in the interests of justice to admit the accused to bail, that it refuses bail notwithstanding the concession.

In casu, the ruling by the learned magistrate in the court *a quo* shows that, she was alive to the constitutional right to bail. Having appreciated that, she then went into a critical appraisal of the State's concession, indicating why she was not persuaded to release the appellant on bail. I have already highlighted the reasons why the magistrate was not persuaded by the State's concession. The learned magistrate found, *inter alia*, that the link to the crime established by

the company document found with the appellant was not satisfactorily explained or even explained at all.

The stance taken by the court *a quo* is vindicated by the further evidence adduced from the investigation officer, which made the State retract its concession.

After being found in possession of a copy of a crucial document, established to have been stolen from the robbery, the appellant lied about its source. That means the initial trust placed in him, even by the State, was drastically diminished.

Trust is a crucial element in the remand and bail system. The court very often has the onerous task of balancing the interests of the accused and those of justice and the community. This delicate balancing act was highlighted by GUBBAY CJ in *Aitken & Anor v The AG* 1992 (1) ZLR 249. The learned Chief Justice made the following pertinent remarks:

> "The basic purpose from society's point of the procedure known as bail is to strike a balance between two competing interests, the liberty of the accused, and the requirement of the State that he stands trial to be judged and that the administration of justice be safeguarded from interference or frustration."

An accused facing serious criminal allegations, such as in this case, is released on bail on the trust that he will avail himself for trial and will not tamper with witnesses or investigations until his case is finalised. If he misleads the court on an issue that is key to the investigations being carried out, that trust is seriously eroded.

In the circumstances, it cannot be said that the court *a quo* misdirected itself in denying the appellant bail, even in the face of the concession that had been made by the State.

In the result, it is ordered that;

The appeal against refusal of bail be and is hereby dismissed.

Antonio & Dzvetero Legal Practitioners, legal practitioners for the appellant
National Prosecuting Authority, legal practitioners for the respondent