ARNOLD KUZANENHAMO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 27 JANUARY 2022 & 3 FEBRUARY 2022

Appeal against refusal of bail

Mrs Drau for the applicant
K.M. Nyoni for the respondent

DUBE-BANDA J: This is an appeal against the decision of a magistrate court refusing to release appellant on bail pending his trial on a charge of contravening section 157(1)(a) of the Criminal Law (Codification and Reform) Act Chapter 9:23 - "possession of dangerous drug cocaine" - without a licence. Appellant launched a bail application before the Magistrates Court sitting a West Commonage in Bulawayo. His application was dismissed. The appellant is aggrieved by the dismissal of his bail application and now appeals to this court against the decision of the magistrate not to grant him bail.

The appeal to this court is in terms of section 121 of the Criminal Procedure and Evidence Act [Chapter 9:07]. It is a settled principle that a court hearing a bail appeal is not entitled to set aside the decision against which the appeal is brought unless it is satisfied that the decision is wrong. In *Chimaiwache v The State* SC 18/13 the court held that the granting of bail involves an exercise of discretion by the court of first instance. The appeal court would only interfere with the decision of the lower court if it committed an irregularity or exercised its discretion so unreasonably or improperly as to vitiate the decision. The record of proceedings must show that an error had been made in the exercise of discretion: either that the court acted on a wrong principle, allowed extraneous or irrelevant considerations to affect its decision or made mistakes of fact or failed to take into consideration relevant matters in the determination of the question before it. The following pronouncement in *S v Barber 1979 (4) SA 218 (D) at 220 E-G* is apposite:

> It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be

> persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.

This approach has been underscored in a number of decisions. See: *S v Madamombe* SC 117/21; *S* v *Malunjwa* 2003(1) ZLR 275(H); *S* v *Ruturi* HH 23-03. In order to interfere on appeal it is necessary for this court to find that the lower court misdirected itself in some material way in relation to fact or law. If such misdirection is established, the appeal court is at large to consider whether bail ought, in the particular circumstances to have been granted or refused. In the absence of a finding that the lower court misdirected itself the appeal must fail.

During the hearing before the court Magistrate's Court the State led evidence from the investigating officer. The investigating officer testified that she is stationed at the drugs and narcotics section. She told the court that appellant fled at arrest and the police had to use minimum force to arrest him. As he was fleeing in a motor vehicle he caused an accident and still managed to drive away. He was arrested while hiding inside a toilet of a certain house.

Under cross examination the investigating officer testified that the police instructed appellant to stop and he refused to comply. The police officers were not in uniform but identified themselves to the appellant. Although she was not part of the arresting team, she saw the appellant's accident damaged vehicle at Traffic West Police Station. The officer testified that a preliminary tests was done in the presence of the appellant and it showed that the substance found in his possession contained cocaine. She said the actual report would come from the Forensic Department but at that point she had an affidavit. She testified that the State had a *prima facie* case based on the preliminary test. The last question put to her in cross examination was that the State did not have a *prima facie* case and she agreed.

After hearing the evidence of the investigating officer and the submissions from counsel the court *a quo* ruled thus:

The right to liberty is one of the fundamental human rights and should not be lightly interfered with unless the state establishes the necessity to deprive an accused of his liberty pending trial. The presumption of innocence must also be upheld until one is proven guilty and there should be a balance between the interests of society and the liberty of the accused persons. In this case, after having considered all that, the state and the defence submissions, I am of the view that the charges which accused person is facing are very serious and if convicted attracts a lengthy imprisonment term. That can induce the accused person to flee or to abscond court. Considering the matter in which the accused person was arrested, he fled from the police and in the process caused an accident. Although the accused wanted the court to believe that the police had not identified themselves when they approached him and believed them to be robbers, I do not believe that the police would have been that unprofessional. That made me to conclude that he is a flight risk. Because of the above stated reasons, the application of bail is hereby dismissed.

The appellant was aggrieved by this ruling of the Magistrate's Court and noted an appeal to this court. The grounds of appeal are as follows:

1. That the court *a quo* did not properly apply its mind in assessing the flight risk of the appellant in that it was not guided in its analysis by the factors set out in section 117(2)(a)(ii) as read with section 117(3)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07].

2. Furthermore, the court *a quo* misdirected itself in deducing from the scuffle which applicant had with the police as indicative of a flight risk on the part of the appellant.

Mrs *Drau* counsel for the appellant argued that the court a *quo* in finding that appellant is a flight risk did not consider that he is an established person in Bulawayo, he is of fixed abode owning and residing at number 65105 Tshabalala Extension. He is a family man with two minor children and is the bread winner for his family. He is self-employed running a shop and sells electrical gadgets and motor spares. It is argued these facts show that appellant has strong ties to the place of trial i.e. Bulawayo and that he cannot abscond and evade his trial.

Counsel argued that the strength of State case is suspect. It is contended that the investigating officer conceded under cross examination that the State did not have a *prima facie* case against the appellant. It is said this is so because appellant was arrested on the strength of preliminary test which were not later confirmed in order to satisfy the court that what was found in his possession was

actually four grams of cocaine. It is contended that the court lower court *erred* in regarding the offence as serious when applicant is charged with possession and not dealing in dangerous drugs. It is argued that a conviction for possession could be fine and not imprisonment and such could not induce him to abscond. It is contended that the court *a quo* misdirected itself in finding that appellant is a flight risk.

Further Mrs *Drau* argued that the lower court misdirected itself in finding that the scuffle between the appellant and the police was indicative of him being a flight risk. It is contended that emotions of panic may induce any reasonable person to react in the manner appellant did. It is said appellant was being accosted by men dressed in civilian clothing and using a private vehicle. He thought they were robbers not policemen. It is contended that the fact that he was eventually arrested hiding in a toilet shows that he is not person who is capable of absconding and evading trial. It is argued that the Magistrate's Court misdirected itself in finding that it is not in the interest of justice to release appellant on bail pending trial.

The respondent in its written response opposed the release of appellant on bail. The response speaks to the presence of compelling reasons to oppose the release of appellant on bail and that there are "no prospects of success in the appellants appeal." It is also contended that the State has a strong *prima facie* case and there "are no prospects of success on appeal." The reference to prospects of success on appeal suggests a failure by counsel to apply his mind to the facts of this case. This is not an application for bail pending appeal but an appeal against the refusal of the Magistrate's Court to release appellant on bail pending trial. The issue of prospects of success on appeal does not arise in such a case. This must be basic and elementary.

However during the hearing Mr *Nyoni* counsel for the respondent made a turn and supported the appeal. Counsel argued that there is no evidence that the substance found in the possession of appellant is cocaine. He criticised the reference by the investigating officer to what she called "preliminary test" which showed that the substance found in possession of appellant contained cocaine. Further counsel argued that the misdirection is that in the lower court the State conceded that it did not have a *prima facie* against the appellant. Counsel contended that appellant is not a flight risk, he has a house and a business. Mr *Nyoni* argued with so much vigour and emotion that one would have been forgiven to conclude that he was counsel for the appellant. Counsel went as far as critiquing the decision of the lower court to place appellant on remand. Counsel did so

notwithstanding the fact that this is an appeal and appellant did not place his placing on remand as an issue in this court nor did Mrs *Drau* make it an issue.

I now turn to consider the grounds of appeal *viz* the facts of this case and the findings of the court *a quo.* In essence the grounds of appeal challenge the court *a quo's* finding that appellant is a flight risk. The basis upon which this court may interfere with the decision of the lower court is limited. In this regard this court is called upon to determine whether the lower court misdirected itself in reaching its decision to refuse to grant the appellant bail. However, it is not open to this court to replace the decision of the court *a quo* with that of its own merely because it differs with such decision.

The lower court made a factual finding that the appellant fled from the police trying to evade arrest. Appellant was driving a motor vehicle and whilst fleeing he caused a traffic accident. He was eventually arrested hiding in a toilet at a certain house. The court did not believe his version that he thought he was running away from robbers. The lower court cannot not faulted in refusing to believe this version. On the facts of this case and solely for the purpose of determining this appeal I take the view that appellant's version is just a falsehood.

The lower court accepted that appellant was fleeing from the police fearing an arrest. It is trite that an appellate court may only interfere with the factual findings of a lower court on the ground of gross unreasonableness. No gross unreasonableness in the findings of the lower court has been established. Quite to the contrary the factual findings of the court *a quo* are in sync with the facts of this case. The court had evidence before it to come to the conclusion it did. I do not find myself in agreement with the contentions of the appellant in respect of this ground of appeal.

The court *a quo* made a finding that the charge against the appellant is very serious and if convicted attracts a lengthy imprisonment term and that such can induce him to flee or to abscond court. For the purposes of a bail application there was admissible evidence before the lower court that the substance found in possession of appellant was tested in his presence and it was found to contain cocaine. The investigating officer testified that the preliminary test was done in the presence of the appellant and she had an affidavit which showed that indeed the substance contained cocaine. She was not challenged in this respect. Further she testified that the actual report would come from the Forensic Department. The lower court considered this in its ruling and concluded that the State has a *strong prima* facie case against the appellant. Such a finding cannot be faulted.

To argue that the investigating officer conceded that the State did not have a *prima facie* case against the appellant is unattainable. Nothing turns on the concession made by the investigating officer that the State did not have a *prima facie* case. The issue of whether the State has a *prima facie* case against the appellant is a question of law which the officer is generally not competent to comment on. It is an issue to be addressed by the prosecutor and he did. The prosecutor argued before the lower court that the State had established a *prima facie* case against the appellant and the court agreed. This finding cannot be faulted.

If one considers the judgment of the lower court in its entirety, the appellant's reasons for seeking to be admitted to bail were considered holistically. The decision to refuse the appellant's bail was not taken capriciously. It is apparent from the reasons for refusing bail that the lower court took into account all the relevant factors and gave due consideration to each. It was clearly alive to the law on bail i.e. the presumption of innocence and the right to liberty of the appellant.

I have considered the grounds of appeal and the submissions of both Mrs *Drau* and Mr *Nyoni* and I am not persuaded that the court lower court was wrong in arriving at the decision that it did. The lower court properly assessed and gave due weight to all the relevant factors. I do not find that there are any grounds upon which this court may interfere with the decision of the court *a quo* and replace it with its own. I am satisfied that the lower court was not wrong in its decision finding that the interests of justice do not permit the release of the appellant on bail. Accordingly, the decision of the court *a quo* must stand.

In the result, the appeal against the decision of the Magistrate's Court is dismissed.

Pundu & Company applicant's legal practitioners
National Prosecuting Authority respondent's legal practitioners