MEHLULI NDLOVU

And

PETER DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 12 &18 MARCH 2021

Appeal against refusal of bail pending trial

K. Ngwenya for the appellant
Ms N. Ngwenya for the respondent

KABASA J: The appellants appeared before the court *a quo* on initial remand on 16th January 2021. They are jointly charged with two counts, *viz* assault and robbery as defined in sections 89 (1) (a) and 120 (1) (a) of the Criminal Law (Codification & Reform) Act, Chapter 9:23.

The allegations are that the two appellants went to the first complainant, one Siambale Muzamba's homestead on 26 July 2019 armed with logs, axes and knives. Felix Dube who was with the appellants but is on the run, held the complainant before striking him with a fist on the forehead. He proceeded to produce a knife with which he stabbed the complainant several times before the appellants joined in the assault using logs and clenched fists. The complainant was rescued by his grandmother but he had sustained head injuries, a broken arm and injuries to the face and buttocks.

On the 4th of July 2019 at around 20:30 hours the appellants together with the yet to be accounted for Felix Dube proceeded to Tumene Surichiri's homestead. Upon arrival they asked for water from his mother in law. Thereafter the complainant escorted them out of his homestead but on approaching the main gate Felix Dube struck him twice with an iron bar before the two appellants joined in using an axe. They then searched the complainant and took ZW$80, 00.

At their initial remand the appellants denied the charges whereupon the state applied that they be remanded in custody as bail was opposed. The ground for such opposition being that the 2 were a flight risk. They could not be located until the 15th January 2021 when they were arrested after a raid at their homes.

An affidavit deposed to by the Investigating Officer was tendered as evidence. In that affidavit Constable Taguma Tapiwanashe stated that he took over the docket on 5 August 2019 and was tasked to arrest the appellants. On 7th August he proceeded to Kumbudzi Village in order to effect an arrest but was unable to locate them. Inquiries from one Effie

Ndlovu, Kelvin Moyo and other local villagers yielded no positive result regarding the whereabouts of the appellants.

On 8th August 2019 the Investigating Officer in the company of Hweni Chikwari, a member of the Neighbourhood Watch Committee went back to Kumbudzi Village and failed to locate the first appellant at his home.

On 16th August 2019 the Investigating Officer, in the company of Constable Maposa again proceeded to Kumbudzi Village and looked for the appellants at their respective homesteads but failed to locate them. Interviews carried out with Nomsa Moyo, Thobekile Ndlovu and others revealed that the appellants were on the run.

On 5th September 2019 another attempt was made to arrest the first appellant but he managed to escape.

Warrants of apprehension were thereafter applied for and subsequently issued on 27th September 2019. The appellants were eventually arrested on 15th January 2021.

Although both appellants disputed the fact that they were on the run, explaining that they never left their respective homes, the court a quo held that the state's averments were substantiated as evidenced by the warrants of arrest. Thereafter the learned magistrate concluded that:

> "The accused are a flight risk, the offence was committed in 2019 and the accused were only arrested in January 2021. There is an affidavit from the Investigating officer which shows that there were efforts that were made to locate the accused. As such it is on that reason bail is denied."

Aggrieved by the decision the appellants noted an appeal. The court a quo's decision is attacked on the basis that the learned magistrate based the decision on conjecture as the appellants did not show a propensity to flee. There are therefore no compelling reasons to deny them bail.

The issue to consider here is whether the court a quo's exercise of discretion is tainted by a misdirection or irregularity warranting interference by an appellate court.

In *S* v *Ruturi* 2003 (1) ZLR 537 (H) CHINHENGO J made the poignant observation that a "court of appeal will only interfere if the court a quo committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its own decision."(See also Mark Taruwona&Another v The State HH6-2005)

This court can only exercise fresh discretion where misdirection or an improper exercise of discretion has been shown.

In *S* v *Tsvangirai and Others* HH-92-03 GARWE J (as he then was) stated, inter alia, that the grant of bail is a consequence of the arrest and remand of an accused person on a specific charge. The nature of the offence charged and other relevant considerations are factors to be taken into account in determining the grant or refusal of bail.

What were the factors considered in *casu* which informed the court a quo's decision to refuse to admit the appellants to bail?

Section 117 (2) (a) of the Criminal Procedure and Evidence Act, Chapter 9:07 provides that:

> "(2) 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 –
> (a) Where there is a likelihood that the accused, if he or she were released on bail, will –
> (i) …
> (ii) Not stand his or her trial or appear to receive sentence"

In casu, the court *a quo* had before it an affidavit from the Investigating Officer in which he gave details on the efforts he made to arrest the appellants. A warrant of arrest was applied for after efforts to arrest the appellants came to naught.

Given these facts did the court *a quo* misdirect itself in denying the appellants bail? I think not. Counsel for the appellants argued that the failure to call the Investigating Officer so he could testify and be subjected to cross-examination amounts to a misdirection. I am not persuaded by this argument.

In bail applications the court may receive evidence on oath and affidavits tendered by the prosecutor may be considered by the court and a decision made based on such sworn statements.

In *A-G* v *Mpanga – Nhachi* 2009 (2) ZLR 150 (S) the Supreme Court made the point that bail proceedings are not the same as proceedings in a criminal trial. The court can utilise whatever information availed to it, including hearsay evidence.

Section 117A (4) provides that:

> "In bail proceedings the court may –
>
> (a) …
> (b) Subject to subsection (5) receive –
> (i) evidence on oath, including hearsay evidence.
> (ii) affidavits and written reports which may be tendered by the prosecutor, the accused or his or her legal practitioner."

The affidavit deposed to by the Investigating Officer articulated who he had talked to at the appellants' village and such detail could only have been as a result of what actually happened. To argue that the veracity of the sworn statement was not established is tantamount to suggesting that the affidavit contains untruths. Sight must not be lost of the fact that the appellants allegedly committed the offences in July 2019 and efforts to arrest them commenced in August 2019. It was only on 15th January 2021 that they were eventually arrested.

The affidavit by the Investigating Officer is bolstered by the undisputed fact that the appellants were arrested about 1 ½ years later. Why would the police wait for one and a half

years to arrest the appellants? The answer lies in the explanation contained in the Investigating Officer's affidavit.

The court *a quo's* reasoning and findings cannot be faulted. In terms of section 34 of the Criminal Procedure and Evidence Act;

> "34 (1) Every peace officer is authorised and required to obey and execute any warrant issued in terms of section thirty-three."

The warrant in casu was issued in terms of section 33. By applying for such a warrant of arrest the police were desirous to ensure any peace officer could effect an arrest on the elusive appellants. Such a decision could only have been arrived at as a result of the difficulty the Investigating Officer had encountered in trying to arrest the appellants.

The court *a quo's* reference to the issuance of the warrant of arrests as supportive of the state's averments that the appellants were a flight risk can therefore not be faulted. Their arrest took long because they were evading such arrest.

It cannot be said because the appellants were not aware that such warrants for their arrests had been issued they therefore cannot be adjudged as flight risks. All they needed to be aware of is that the police were looking for them and that they can safely be said to have been aware given the efforts made by the Investigating officer.

The first appellant ran away from the police on 5th September 2019. He was therefore aware the police were out to arrest him and it is not stretching things too far to conclude that he must have communicated his escape to the second appellant.

If both appellants were always at home thereby making it easy for the police to arrest them, would there have been need for raids at their respective homes? Certainly not. The word raid has the following synonyms, "attack, search, forced-entry, invasion, and foray".

The police had to mount a surprise attack in order to arrest the appellants. The very manner in which the appellants' arrest was eventually effected speaks volumes and their denial of bail can therefore not be faulted.

The court *a quo* was alive to the need to ensure that the interests of justice were not compromised and so decided to deny the appellants bail. The grant or refusal of bail involves a balancing act between the liberty of an individual on the one hand and the interests of the proper administration of justice on the other.

To say that there are no compelling reasons justifying the denial of bail is a refusal to accept reality. Whether the appellants will be found guilty or declared innocent is not the sole issue here but whether they will allow the wheels of justice to turn unimpeded.

The court *a quo* properly applied its mind to the following: the contents of the Investigating Officer's affidavit, the fact that the appellants were arrested in January 2021 for offences that had been committed in July 2019 and that warrants of arrest had to be applied for in an effort to arrest the appellants.

There was therefore a proper exercise of discretion by the court *a quo* and this court cannot interfere just so it can substitute its own discretion for the court a quo's.

In the result, the appeal is dismissed.

T. J Mabhikwa& Partners, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners