**ALOUIS GAKATA**
**AND**
**WELLINGTON JENA**
**AND**
**SHADRECK RORE**
**AND**
**DONALD DUBE**

**VERSUS**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO29 OCTOBER and 31 OCTOBER 2013

*Mr C. Chikore* for the Applicant
*Mr Mabhaudi* for the Respondent

Bail Appeal

**Makonese J:** This an appeal against the decision of a Magistrate sitting at Bulawayo on the 8th October 2013, dismissing the appellant's application for bail pending trial. The appellants are facing charges of bribery, that is to say, contravention of Section 170 (1) (a) of the Criminal Law (Codification and Reform ) Act (Chapter 9:23). The allegations against the appellants, who are all police officers, holding various ranks in the Zimbabwe Republic Police, are that sometime in August 2012 they received a bribe of US$10 000 from one Clever Khumalo and Nduna Moyo as an inducement to release the duo who were wanted in connection with cases of elephant poisoning in the Hwange National Park. The appellants were arrested in early October 2013 after having been implicated by the suspects Clever Khumalo and Nduna Moyo.

In his ruling, the learned Magistrate concluded that the granting of bail to the appellants would compromise the proper administration of justice. He held that there was danger that the appellants may abscond and further that there was likelihood of interference with witnesses and evidence. The learned magistrate further stated as follows:

> *" -- In as much as the court acknowledges that the principle of presumption of innocence operates in favour of the accused, it is important to note that when taking into account the gravity of the offence charged, the likely sentence to be imposed, and coupled with the relative strength of the State case this may militate against the granting of bail, for there is a possibility that the accused may be induced to abscond*

---''

The appellants vehemently deny the allegations and state that they have been wrongly implicated. The grounds of appeal against the magistrates ruling are as follows:

(a) the court *a quo* erred greatly in failing to weigh and balance the interests of justice against the liberty of the appellants.

(b) The court *a quo* erred in failing to take into proper consideration all the circumstances of the case, especially the evidence placed before the court at this stage.

(c) The court erred in failing to place weight on its observation that the appellants are facing charges of bribery and not the poisoning of elephants in Hwange.

The appellants'' legal counsel, *Mr Mutsahuni- Chikore's* main argument was that there was no basis for the magistrates finding that the appellants were likely to abscond if granted bail pending trial. He contended that no evidence had been placed before the court to prove that there was a reasonable apprehension that the appellants were likely to abscond if released on bail. He argued that the seriousness of the offence on its own was not sufficient ground to deny the appellant's bail pending trial. He went on to say that the allegations against the appellants as contained in the FORM 242 (Request For Remand Form) is not detailed enough to reveal the exact nature of the allegations against the appellants. *Mr Mutsahuni- Chikore* forcefully argued that the allegations in the Form 242 were so brief and vague to the extent that there was no basis to state that the appellants faced serious charges. He persuaded the court to apply the presumption of innocence and to find that the magistrate erred because no evidence was placed before him to arrive at the decision that there were allegations of a ''serious'' nature being faced by the appellants. In so far as the interference with evidence is concerned, the appellants also argue that there was adequate time for the police to finalise their investigations by the time they appeared in court.

The state opposed the application and *Mr Mabhaudi* appearing for the Respondent averred that the Magistrate did not err at all in his decision to deny appellants bail pending trial. He urged the court to note that the magistrate was correct in his decision in that the appellants who are all police officers, if convicted are likely to receive custodial sentences and that alone will act as an inducement for the appellants to abscond. Further, one of the police officers, one Detective Constable *Musonzi* could not be located and had left duty without official leave when he was wanted by the police in connection with the allegations.

I now turn to deal with the grounds of appeal in detail:-

1. **That the Magistrate failed to balance the interests of justice and the Liberty of the appellants.**

The principles governing the granting of bail are provided for under section 117 of the Criminal Procedure and Evidence Act (Chapter 9:07). Section 117(2) sets out the broad grounds for refusing bail, including the likelihood that the accused if released on bail, will not stand trial or appear to receive sentence.

It is trite that the onus in a bail application lies on the applicant to justify the granting of bail. As was stated by *GUBBAY CJ, in AITKEN & ANOTHER Vs ATTORNEY GENERAL* 1992 (1) *ZLR* 249(S) *at* 253.

> *''The onus is upon the accused to show on a balance of probabilities why it is in the interests of justice that he should be freed on bail''*

See also: *State* v *CHIADZWA* 1998 (2) *ZLR* 19 (S), *State* v *HUSSEY* 1991 (2) *ZLR* 187, *State* v *NCUBE* 2001 (2) *ZLR* 556. The correct approach to be adopted as to the onus in bail applications is expounded by *NDOU J* in *State* v *NDLOVU* 2001 (2) *ZLR* 261 (H) at 264 as follows:

> *''Once the police have made credible allegations against the accused which could provide grounds for refusing bail, the onus is upon the appellants to prove on a balance of probabilities that the court should exercise its discretion in favour of granting him bail''*

Turning to the matter at hand, it seems to me that the learned Magistrate carefully weighed the interests of the proper administration of justice against the liberty of the appellants. The decision is detailed and well reasoned. I cannot find any misdirection on the part of the court *a quo.* The learned magistrate properly applied the legal principles to the facts and circumstances of the case.

**(b) That the court erred in failing to take into proper consideration the evidence before the court at this stage.**

It must be emphasised that in bail applications the State is not required to prove a water tight case against the accused person. The State is however expected to place before the court sufficient facts to disclose an offence. The appellants aver that the allegations as contained in the FORM 242 are brief and do not provide sufficient detail. The Request For Remand Form is a standard form whose purpose is to briefly outline the allegations against the accused persons. The allegations against the appellants are very clear. They are alleged to have received the sum of US$10 000 for the purpose of facilitating the release of suspects whom they had arrested. The appellant's response to those allegations is a flat and bare denial.

I am of the firm view that the facts placed before the learned magistrate contained sufficient detail and the court did not err in concluding that the interests of justice were likely to be compromised if the appellants were released on bail. The critical issue for determination is whether the learned magistrate was correct in holding that the seriousness of the offence

coupled with other factors, such as the likely sentence the appellants would receive if convicted may provide sufficient inducement for the appellants to abscond if granted bail pending trial. In applications for bail pending trial it is now settled law that the seriousness of the case on its own is not a sufficient ground to deny an accused bail pending trial. In this matter I did not find that the approach adopted by the learned magistrate was flawed. The allegations against the applicants are clear and concise. It is alleged they received a bribe to facilitate the release of suspects they had arrested. If such allegations are sustained the possibility of a custodial sentences is real. This could very well act as an inducement for the appellants to abscond.

I therefore cannot find any basis for overturning the decision of the Magistrate denying the appellants bail pending trial. The grounds of appeal as set out by the appellants in this matter do not have any merit. The appellants are clearly not suitable candidates for bail. If granted bail, the proper administration of justice could be compromised. The learned magistrate's decision cannot be assailed.

In the result, the appeal is hereby dismissed.

*Messrs. Mutsahuni-Chikore & Partners c/o Messrs. Moyo & Nyoni*, Appellants' legal practitioners
*Criminal Division, The Attorney General's Office*, Respondent's legal practitioners