SAMSON RUTURI
versus
THE STATE

MAKARAU J
HIGH COURT OF ZIMBABAWE
HARARE 20 & 28 February 2003

BAIL APPEAL

Mr Chikumbirike for the appellant,
Mr Jagada for the Respondent.

MAKARAU J: The appellant and one Nicholas Border Musona (who is not appealing in the matter before me,) appeared before the Magistrates Court on 3 February facing allegations of fraud, alternatively, theft. At the hearing, it was alleged against the accused that during the course of their employment with the First National Building Society as Managing director and Financial Director respectively, the two, without lawful authority, issued cheques from the funds of the building society for their personal uses to the tune of $ 958 651 946,56.

The appellant and his co-accused were placed on remand on the basis of the above allegations. They then applied for bail. The application was dismissed.

The ruling of the magistrate in denying bail is brief and reads as follows:

> "*In considering the submissions made by both the state and the defence in their application for bail, it is the court's view that if the accused are granted bail, there is a likelihood that they abscond considering the amount involved which is close to a billion and also the fact that they are internationally connected. As such, bail is refused."*

The appellant noted an appeal against this denial of bail. A day after the appeal was noted, a further application for bail was made before the magistrates court on the grounds that there were changed circumstances in the matter. The alleged change in circumstances appears to have been the contents of the review report compiled by KPMG

on the balance sheet of the First National Building Society, showing how the sum of $958 651 946,56 was arrived at. The further application for bail was also dismissed. The magistrate was of the view that there were no changed circumstances in the matter.

In his notice of appeal, the appellant alleges that the magistrate misdirected herself in three main respects. Firstly, there was no evidence before her that the appellant was "internationally connected". Secondly, she should not have denied bail on the sole basis that the appellant is facing a serious charge. Finally, the appellant alleges that the magistrate ought to have considered the appellant's application separately from that of his co- accused.

It is apparent from the papers before me that the appeal was noted against the first refusal of bail. Nothing turns on the issue that a further bail application was made while the appeal before me was pending. Other than highlighting that this was the sequence of events, *Mr. Jagada* , properly in my view, did not take issue with the procedure adopted by the appellant in this matter. It is a matter of procedural correctness that the appeal before me can only be the magistrate's refusal to grant bail on 4 February 2003. No appeal was noted against the second refusal and no grounds have been advanced as showing the incorrectness of that decision. In essence, the second refusal of bail is of no practical effect to these proceedings.

It has been argued before me on behalf of the appellant that in deciding this matter, I am exercising my narrow appellate jurisdiction. As such, the argument proceeds, I must first find a misdirection on the part of the magistrate before I can be at large to consider the matter and substitute my own discretion for that of the magistrate. Mr *Chikumbirike* was quite clear in his submissions that, if I were to find as proven, any one

of the misdirections alleged by the appellant, I am then at large to use my own discretion in the matter and proceed to determine the application as if I were the magistrate.

What is being suggested by *Mr. Chikumbirike* is the approach that the Supreme Court adopts when considering an appeal from the High Court. (See *Chikumbirike v The State* 1986 (2) ZLR 145 (S)).

The procedure when the High court considers an appeal from the magistrate's court appears to me to be somewhat different. The difference was recognised by GUBBAY CJ (as he then was), in *Aitken and Another v The State 1992 (1)ZLR 249 (S).* Commenting on the powers of the Supreme Court when considering an appeal from the High Court, the learned judge referred in passing to the powers of the High Court when considering an appeal from the magistrates' court at page 252 E as follows:

> *"While the JUDGE PRESIDENT , in considering the appeal, was at liberty to substitute his own discretion for that of the magistrate on facts placed before the latter, the present appeal is one in the narrow sense. The powers of this court are, therefore, largely limited. In the absence of an irregularity or misdirection, this court has to be persuaded that the manner in which the JUDGE PRESIDENT exercised his discretion was so unreasonable as to vitiate the decision reached."*

In this *dicta*, the learned judge appears to be suggesting that an appeal before the High Court is not an appeal in the narrow sense. He appears to suggest that it is an appeal in the wide sense, meaning that the appellate court exercises and substitutes its own discretion on the same facts that were presented to the lower court. He however did not proceed as far as to say that it is a hearing of the bail application *de novo.*

The same point is in my view, implied in the comments by the author **John Reid-Rowland** in his book **Criminal Procedure in Zimbabwe** in section 6-14 when he notes that in an appeal in terms of s121 of the Code, a judge may make such order as seems just in the circumstances of the case. No mention is made of the fact that a judge has to

find a misdirection on the part of the court a quo before exercising his or her discretion in the matter. Again, the author does not proceed to say the hearing of the appeal before a judge in such circumstances is a hearing of the application *de novo.*

It thus appears to me settled that, in considering the appeal before me, I need not find a misdirection on the part of the magistrate before I exercise my discretion in the matter. What is not made clear in the authorities I have cited above is whether or not in exercising that discretion, I am at liberty to receive or call for additional evidence to buttress either of the cases that were made before the magistrate.

The issue under discussion is important in the present application in that attached to the respondent's response to the appeal, are two affidavits, whose contents were not before the magistrate who denied the appellant bail. The issue arises as to whether or not the two affidavits are properly before me and whether or not I can rely on their contents in arriving at my decision.

It appears to me that in the proper exercise of one's discretion, one may, in a proper case and without prejudicing any one of the parties, accept or even call for additional evidence and submissions. I, however, express no firm view on the issue. In the matter before me, it is my considered opinion that the appeal may be resolved without admitting the two affidavits tendered by the respondent. I have resolved not to admit the affidavits as to so may work an injustice to the appellant since the affidavits were filed as a direct answer to one of the grounds of appeal raised by the appellant, (that there was insufficient evidence before the magistrate). I will proceed to exercise my discretion on the facts that were before the magistrate.

I find myself coming to the same decision reached by the magistrate for the reasons that follow.

The appellant in this matter is facing very serious charges. I make this statement very advisedly and taking into account the valiant efforts that have been made by Mr *Chikumbirike* in the 3 hour long hearing to make holes in the state case against the appellant. In this regard, Mr *Chikumbirike* has sought to show that the review report that the state seeks to rely on as showing the guilt of the accused disowns itself by limiting the purposes to which it can be put and also by cautioning against accepting the accuracy of its findings. Further, in terms of this report, Mr *Chikumbirike* has tried to show that the amount appropriated to the appellant's use is in the sum of $188million and is considerably less than the amount of the full prejudice alleged by the respondent when it sought the remand of the appellant and his co- accused.

While accepting that the evidence before the court currently may not prove the guilt of the appellant beyond reasonable doubt, it need not do so. To place an accused on remand, the state need not prove its case even on a balance of probabilities. It simply needs to raise allegations that will show a prima facie case against the accused. In this case, the magistrate was satisfied that such a prima facie case had been made out. Hence she placed the accused on remand. Her decision in that regard has not been appealed against. Once it is accepted that there is a *prima facie* case against the appellant, the fact that he is facing serious charges becomes self evident. The seriousness of the charges arises not from the strength of the evidence against him but from the fact that he stands accused of defrauding the complainant of a sum of money that Mr. *Jagada* has described as unprecedented in this jurisdiction. Whether or not the case against him is strong

becomes part of the next inquiry when considering whether he is a flight risk. I now turn to consider this aspect.

It has been accepted by this and the Supreme court in a long line of decided cases, as a guiding principle when considering bail, that where an accused is facing serious charges, the greater the temptation is on his part to flee and avoid standing trial. This is based on the common sense approach that since serious offences inevitably attract harsh sentences, the desire to avoid the harsh sentence may tempt the accused to flee and avoid trial and thereby prejudice the interests of justice. To gauge whether the seriousness of the charge will induce the accused to flee, the court assesses the strength of the allegations made by the State as tending to link the accused to the offence. It is trite that the state need not prove the allegations at this stage of the proceedings. The weaker the allegations appear to be, the less the risk of flight on the part of the accused becomes.

In the matter before me, I consider not only the allegations but some of the available evidence against the appellant to be quite strong. I hasten to add that this is merely an opinion and not a finding of fact. It appears to me that in a bail application, the court cannot avoid expressing an opinion on the relative strength of the evidence against the accused even if such would not have been proven yet.

I base my opinion that the allegations and evidence against the appellant appears quite strong on the admission made by the appellant before the magistrate that he made use of at least $150 million of the funds of the Building Society which, he intends to pay back to the Society. To this extent, he has signed an acknowledgement of debt in the said sum and which document he tendered to the magistrate. In my view, the issue that remains for determination to establish the guilt or innocence of the appellant is whether

or not the society's funds appropriated by the appellant were misappropriated or were authorised loans. It follows that evidence tending to show that the funds were appropriated in consequence of authorisation will, to a large extent, absolve the appellant from culpability. Evidence of such authorisation was not produced before the magistrate. Without again in any way trying to prejudge the evidence, one would think that the appellant would have proffered this evidence at the time of arrest, at the time he was placed on remand or when he applied for bail. The absence of this evidence at this stage makes the State case against him appear quite strong. I talk of at this stage only.

The appellant is possessed of assets outside the country. He has a residence in South Africa. He is the holder of a number of foreign currency denominated accounts inside and outside the country. The balances of these accounts were not disclosed to the court. Evidence of the existence of these assets was tendered before the magistrate by the appellant himself. While he may not have family and friends that will offer him refuge and succour outside the country, the opportunity offered by these assets to the appellant to flee the jurisdiction and thereby avoid trial remains a real risk in my view.

On the basis of the foregoing, namely that the appellant is facing very serious charges, that the evidence against him appears quite strong at this stage, and, that he has assets outside the country that offer him an opportunity to flee the jurisdiction, I would dismiss the appeal and confirm the decision by the magistrate's court.

The respondent sought to argue that the appellant will interfere with witnesses and investigations if released out of custody. Due to the conclusion that I have arrived at, it is not necessary for me to deal with this issue.

In the result, I make the following order:

The appeal is dismissed.

Chikumbirike & Associates, appellant's legal practitioners
Office of the Attorney-General, respondent's legal practitioners