CHRISTINE CHIDEME

vs

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 12 & 16 April 2019

BAIL APPEAL

Mr L. Mhungu for the appellant
Mr T. Chikwati for the respondent

MAWADZE J: On 12 April 2019 after hearing counsel I delivered an *ex tempore* judgement and granted the following order;

"IT IS ORDERED THAT :-

1. *The appeal be and is hereby upheld.*
2. *The appellant is admitted to bail pending trial on the following conditions;*
   a) *That the appellant shall deposit the sum of $500.00 RTGS with the Clerk of Court at Chipinge Magistrates Court.*
   b) *That the appellant shall continue to reside at No. 95 Mcnaughton, Southerton, Harare until this matter is finalised.*
   c) *That the appellant shall report at Southerton Police Station every Friday between 0600 hrs and 1800 hrs.*
   d) *That the appellant shall not interfere with any state witnesses.*
   e) *That the appellant shall surrender her passport to the Clerk of Court at Chipinge Magistrates Court."*

On 15 April 2019 I received a letter from counsel for the appellant Mr L. Mhungu requesting written reasons for the judgement. I am not privy as to why such written reasons

were required especially by counsel for the appellant more so after I had given a detailed *ex tempore* reasons for judgement informing the order I granted on 12 April 2019. Be that as it may these are they:-

The 63 year old appellant unsuccessfully applied for bail pending trial before a magistrate sitting at Chipinge on 6 April 2019.

The aggrieved appellant then petitioned this court against that decision to deny her bail pending trial.

The appellant ordinarily resides in Harare where she is employed as a Deputy Director in the Ministry of Women's Affairs. At the material time she had been assigned duties to monitor the distribution of relief items donated to victims of cyclone Idai in Chimanimani district.

The allegations against the appellant are that on 3 April 2019 at about 1700 hrs while purportedly performing her duties she stole various perishables meant for the victims. It is said as she was driving her motor vehicle a Toyota Land cruiser registration number WAG – CD 23 leaving Bulk Storage shed in Chimanimani a certain member of the Zimbabwe National Army Terence Majonga requested to search her motor vehicle. As a result various perishable goods too numerous to itemise in this judgement and valued at RTGS $3000 were discovered. These goods were not part of the purported issue voucher which the appellant had. This led to the appellant's arrest.

On her initial remand as already said the appellant unsuccessfully applied for bail pending trial before a Chipinge magistrate. Full written reasons were given for denying her bail pending trial. There were however only two reasons given for dismissing the appellant's application. These were that;

a) that the appellant is likely to interfere with state witnesses in this matter and
b) that the appellant is likely to abscond if admitted to bail pending trial.

During the hearing of this appeal *Mr. Chikwati* for the respondent seemed unimpressed by the reasons given by the court *a qou.* In fact he conceded that the two reasons given by the court *a qou* were not compelling reasons in the circumstances of this case to deny the appellant to be admitted to bail pending trial. *Mr Chikwati* for the

respondent nonetheless submitted that the appellant was not a proper candidate for bail for a different reason. *Mr Chikwati* sought to argue that in the circumstances of this case it would cause shock and outrage if the appellant was to be admitted to bail pending trial. *Mr Chikwati* reasoned that the alleged stolen goods were donated by Government, Local and International donors to the victims of cyclone Idai and that it was unconscionable for a high ranking government official to steal such goods in light of the sad and tragic consequences inflicted upon the victims of cyclone Idai in Chimanimani and surrounding areas. In a rather emotional outpouring *Mr Chikwati* sought to persuade this court that it was therefore in the interests of the proper administration of justice for the appellant to remain in custody pending her trial.

It was *Mr Chikwati's* submission that this was a new ground for denying the appellant bail pending trial not ventilated by the court *a qou.* Nonetheless *Mr Chikwati* contended that this court could on appeal exercise its discretion as provided in *S 121 (5*) of the *Criminal Procedure and Evidence Act [Cap 9:07]* which provides as follows;

(5) *A judge who hears an appeal in terms of this section may make such order relating to bail or any condition therewith as he considers should have made by the Judge or Magistrate whose decision is the subject of the appeal."*

Mr Chikwati submitted that this provision empowers this court, on appeal, to still deny the appellant bail pending trial albeit for a different reason or reasons from those given by the court *a qou* if such reasons are apparent from the alleged facts. It was on that basis therefore that *Mr Chikwati* argued that this court should not admit the appellant to bail pending trial, which reasons are different from those given by the court *a qou* but are apparent from the facts alleged. I mention in passing that I find no fault in *Mr Chikwati's* interpretation of *S 121 (5)* of the *Criminal Procedure and Evidence Act [Cap 9:07]*.

In an appeal of this nature the appellant is enjoined to attack the decision of the court *a qou* in refusing to admit the appellant bail pending trial. **See** *S v Malunjwa 2003 (1) ZLR 275 (H).* The basis for such an attack is to show that the court *a qou* committed an irregularity or misdirection or that it exercised its discretion in an unreasonable or improper manner to such an extent that its decision should be impugned on appeal. **See** *S v Ruturi 2003 (1) ZLR 259. (H).*

The position of the law as regards the admission of an accused person to bail pending trial is clear and well settled. In terms of *S 50 (1) (d)* of the *Constitution of Zimbabwe* the granting of bail pending trial is right which right can only be taken away if there are compelling reasons justifying the refusal to admit such an accused person to bail. The burden of proof to show on a balance of probability that there are such compelling reasons justifying the refusal to grant an accused person bail pending trial rests on the shoulders of the state. The presumption of innocence operates in favour of the un-convicted accused person. This is in line with the best international practice and resonates with International instruments as enshrined in *Article 11* of the *Universal Declaration of Human Rights 1948* and Article *14 (2)* of the *International Convention on Civil and Political Rights 1996.* On a national level the provisions of *S 117 (2)* of the *Criminal Procedure and Evidence Act [cap 9:07]* outlines some of such compelling reasons although that list is not exhaustive.

Turning to the case at hand, a proper consideration of the court *a qou's* reasons for denying the appellant bail pending trial clearly shows that the court *a qou* followed its heart rather than its legal mind as it were. It have no doubt in my mind that the decision made by the court *a qou* is not borne out of a proper and correct assessment of the facts presented before it but rather on misplaced emotions. This constitutes a misdirection which warrants this court to interfere with such a decision.

The tragic consequences caused by cyclone Idai in Chimanimani and surrounding areas are beyond question. Indeed it would be unconscionable for anyone to steal goods or items donated to the victims of such a devastating national disaster. If convicted any such culprit should without doubt face the full wrath of the law after a due and impassionate consideration of all the surrounding circumstances of each case. Having made this general observation, I am not persuaded that the court *a qou's* decision is borne out of a proper consideration of the facts of this matter.

While the offence the appellant is facing may be regarded as a serious offence given the circumstances of the case that alone can not be the reason or basis to deny the appellant bail pending trial. It may be a valid reason to do so if considered with other factors. **See** *S v Hussey 1991 (2) ZLR 187 (S).*

The appellant has an arguable case as per her defence. I understand her defence to be that she genuinely believed that all the goods or items found in her motor vehicle which were not hidden were properly signed for and supported by the issue voucher she had. The appellant said she had previously taken members of the Zimbabwe National Army to task reprimanding them for stealing the donated goods. Consequently the appellant believes that the extra goods later found in her motor vehicle after the said "search" were loaded into her motor vehicle as a way of trapping and fixing her by members of the Zimbabwe National Army. What is not clear from the facts alleged is the exact procedure on how goods were loaded into the appellant's motor vehicle. Indeed this is an evidential issue and should be food to be digested by the trial court. As at now it can not simply be said that the state has a close and shut case.

Even assuming that the appellant is convicted of this offence it can not be said with absolute certainty that the only proper sentence would be a custodial one. The trial court would have to grapple with the question of an appropriate sentence in the circumstances of this case. The starting point is that this offence of theft is not punishable with a mandatory prison term. The penalty provision provides for a fine and or other options. The value of the goods involved which is RTGS $3000 and other mitigatory factors which include *inter alia* that all the goods were recovered, that the appellant ultimately derived no benefit from her criminal conduct, that she may lose her job and her advanced age are some of the factors to be weighed against the aggravating factors in deciding the appropriate sentence.

The personal circumstances of the appellant are such that she is unlikely to defeat the ends of justice by absconding. The appellant is a fairly old widow of fixed abode and holds a senior position in the Civil Service. At her age she may now be about to retire. Given all these factors the appellant may well want to have her day in court and slug it out given the nature of her defence.

From the evidence placed before the court *a qou* there is nothing to suggest that the appellant is indeed a flight risk. Apparently she did not resist to be searched. She did not try to abscond before, during and or after the recovery of the said goods. There is therefore no objective basis to harbour the belief that she is likely to remove herself from the jurisdiction of the trial court.

Given all these factors I have discussed it was improper for the court *a qou* to make a finding that the appellant is a flight risk. That finding is clearly not supported by the objective facts.

I now turn to the finding that the appellant is likely to interfere with state witnesses and or evidence. Again this finding is not rational in the circumstances of this case. I say so because from the facts not in issue all the alleged stolen items were recovered and the relevant issue voucher is in the possession of the State. It is not in issue that the alleged goods were found in the appellant's motor vehicle which she was driving. The narrow issue which falls for determination during her trial may well be how these items or goods found their way into her motor vehicle as she was *prima facie* in possession of the said goods.

The state witnesses to be called can not be described as vulnerable witnesses. They include, but not limited to, an Army Major, the District Administrator and the Provincial Social Welfare Officer for Manicaland. It is difficult to imagine that the appellant would have the capacity, let alone the temerity to interfere with such witnesses. Further, it has not been shown how she may likely interfere with these witnesses. In addition to that a condition can always be made that she should not interfere with these witnesses.

Lastly, turning to *Mr Chikwati's* submission my view is that it was merely aimed at trying to play on the emotions of this court by laying bare the tragic consequences caused by cyclone Idai and the plight of the victims. It is trite that the court should always assess each case on its own facts in a dispassionate, rational and objective manner without falling prey to emotions. Indeed the court should take on board the interests of all the parties involved and strike a proper balance. A sober approach is indispensable at all material times hence the old adage that justice is blind. At the end of the day putting emotions aside the question this court should simply answer is whether there are compelling reasons to deny the appellant bail pending trial.

In conclusion I am satisfied that the court *a qou's* findings in denying the appellant bail pending trial are not based on a proper and balanced assessment of the facts of this matter. The findings were based on some extrinsic factors. That constitutes a misdirection.

I find merit in the appellant's case. There are no compelling reasons to justify the refusal to admit the appellant to bail pending trial. Accordingly the appeal should be upheld.

The appellant should be admitted to bail pending trial and proper conditions should be imposed in order to safeguard the interests of justice.

These are the reasons which inform the order I granted.

Mhungu and Associates, the appellant's legal practitioners.

National Prosecuting Authority, the respondent's legal practitioners.