Judgment No S.C. 33\2002
Crim. Appeal No 69\2002

THE ATTORNEY-GENERAL v REMEMBER MOYO

SUPREME COURT OF ZIMBABWE
HARARE MAY 17, 2002

M. Gurure, for the appellant

E. Mushore, for the respondent

Before: ZIYAMBI JA, in Chambers, in terms of Rule 19 of the Supreme Court of Zimbabwe Rules

This is an appeal by the Attorney-General against the grant of bail to the respondent by the High Court, Bulawayo.

The grounds of appeal were stated to be:-

"1. That the learned judge erred in granting bail to the Respondent when there is strong evidence linking him to the offence which is likely to induce him to abscond - he was seen by witnesses kidnapping Limukani Luphahla and was identified at an identification parade.

2. That the learned judge did not take due cognisance of the degree of participation of the respondent in the kidnapping of both deceased persons and their subsequent murder.

3. That the judge erred in relying on what the Respondent stated on the witness stand in the Spooner case.

4. That the judge erred in ruling that, the notification to the court by the appellant's representative that he wishes to appeal against the court's decision in terms of Section 121 of the Criminal Procedure and Evidence Act [Chapter 9:07] as amended by Act No. 8 of 1997 does not suspend the bail order unless leave to appeal has been granted."

There was no appeal as to the conditions on which bail was granted.

In appeals of this nature this Court will be guided by the principles that the grant of bail is discretionary and will, therefore, only be set aside if there has been an irregularity or material misdirection if the court *a quo* exercised its discretion so unreasonably or improperly as to vitiate its decision. See *S v Chikumbirike* 1986 (2) ZLR 145 (SC) at 146F.

It was alleged by the appellant in its grounds of appeal:-

1. That the learned judge misdirected himself by relying on the evidence led by the respondent in a separate bail hearing in respect of his co-accused Simon Direen Spooner.

2. That the learned judge erred in granting bail to the respondent when there is strong evidence linking him to the offence which is likely to induce him to abscond.

Spooner is one of the persons charged together with the respondent with the murder of Limukani and Nkala. At his bail application the respondent gave

oral evidence as to how he was treated by the police after his arrest. I agree with the learned judge that the court was not remiss in taking into account the respondent's evidence given at the earlier hearing. In any event, the evidence of duress relied upon by the learned judge in his judgment appears to have been quoted verbatim from the statement filed by the respondent in support of his bail application and the court is entitled to take into account such a statement in assessing the merits of a bail application.

Another misdirection alleged in the appellant's heads of argument was the court's reliance on the premise that the respondent's confession and those of his co-accused were inadmissible.

In respect of one of the charges - the murder of Limukani - the appellant stated his intention to rely on:

- the evidence of persons who saw the respondent in Lupane
- the statements of the co-accused
- the respondent's confession.

The strength of the State case is one of the most important factors by which a court must be guided in deciding whether it is in the interests of justice to grant bail to an accused person.

In assessing the strength of the State case the court was entitled to take into account the nature of the evidence against the respondent. In terms of s 256 of the Criminal Procedure and Evidence Act an unconfirmed warned and cautioned

statement is only admissible in evidence after it has been proved to have been made freely and voluntarily. The evidence before the court was that the statement was made under duress. The probabilities are that the admission of the statement at the trial would be challenged.

With regard to the statements of the co-accused persons, it is trite that they cannot be used as evidence against the respondent. And, evidence that the respondent was in Lupane, without more, can hardly be construed as linking the respondent with the kidnapping and murder of Limukani.

Thus it cannot be said that there was, before the court, "strong evidence" linking the respondent to the murder.

As to the likelihood of abscondment, the court found that the State had not shown that it was justified in its fears that if granted bail the respondent would abscond. The court was of the view that there was insufficient admissible evidence to link the respondent with the murders on the two charges.

In my view it has not been established that the court committed an irregularity or a material misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision.

Accordingly the appeal is dismissed.

Webb Low & Barry, respondent's legal practitioners