Judgment No. HB 132/2002
Case No. HCB 188-90/2002
CRB 9922-3/02

BENJAMIN MAKETO **1st APPELLANT**

And

ROWEN DUBE **2nd APPELLANT**

And

JOSEPH NYONI **3rd APPELLANT**

versus

THE STATE **Respondent**

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 6 & 14 NOVEMBER 2002

N Mazibuko for the appellants
Mrs M Zimba-Dube for the respondent

Bail Application

CHIWESHE J: The appellants appeared before a magistrate facing charges of contravening section 4(a) as read with section 15 (2) (e) of the Prevention of Corruption Act, Chapter 9:16, alternatively attempting to defeat or obstruct the course of justice. They applied for bail pending trial. The magistrate dismissed the application on the grounds that the applicants may abscond or and interfere with state witnesses. They now appeal against the decision denying them bail.

According to the form 242, the allegations against the appellants are as follows:

The first appellant who was then the Officer Commanding Criminal Investigations Department Law and Order Section, Bulawayo, received information relating to the presence of a suspected armed robber at a house in Mahatshula.

A team of police detectives was dispatched to the area to investigate. They proceeded to arrest one Khulekani Ncube who was wanted in connection with an armed robbery case which took place in Johannesburg, South Africa on 27 December 2001. The robbery concerned involved the sum of 117 million Rands. The team of detectives also recovered from the said suspect a motor vehicle, namely a Nissan Hardbody twin cab – registration number 758-227J and a CZ pistol. First and second appellants were later called to the scene where it is alleged they corruptly connived to release the said suspect and the Nissan Hardbody twin cab. It is alleged that at the time second appellant had stated that the suspect was an accused in the Johannesburg robbery case but that he had since been cleared of those charges. As a result the first appellant after discussions with the second appellant and the said suspect then ordered the release of the suspect. It is alleged that both first and second appellants knew that the said Khulekani Ncube was wanted in connection with the Johannesburg robbery. The investigating officer opposed bail on the grounds that in view of the serious nature of the offence the appellants may abscond and that they may interfere with witnesses and jeopardise police investigations. He also stated that the Nissan Hardbody and another vehicle a Mazda twin cab recovered during investigations and corruptly released by the first and second appellants are yet to be located.

The allegations against third appellant are that he corruptly processed a firearm licence application for the suspect Khulekani Ncube. In it he is alleged to have recommended that the said suspect be granted such certificate when he knew very well that the suspect was wanted in South Africa in connection with a case involving armed robbery. The file pertaining to that application has gone missing.

It is suspected that third appellant was involved in the disappearance of the file.

It is further alleged that on 14 August 2002 Khulekani Ncube filed a complaint at Sauerstown Police Station to the effect that one Sergeant Kennedy Mavudzi was soliciting a bribe from him for Ncube's involvement in the Johannesburg robbery. Both second and third appellants dealt with the complainant and deliberately refrained from arresting Khulekani Ncube when they knew he was wanted in South Africa.

It is further alleged that between April 2002 and July 2002 the third appellant communicated with Khulekani Ncube on his cellphone on several occasions despite the fact that they knew that the said Ncube was a wanted criminal.

The appellants allege that in denying them bail pending trial the magistrate misdirected herself in view of the facts elicited during the bail application. They note that it was common cause that the appellants are married. The first appellant has five minor children, the second appellant has four. All three appellants are the sole breadwinners in their respective families. Further it was also common cause that first and second appellants have passports. The third appellant does not hold any travelling documents. It had been argued that the appellants could surrender their passports as part of their bail conditions. The learned magistrate was of the view that surrender of one's passport was no guarantee that one would not abscond. This view on the part of the magistrate according to the appellants amounts to a misdirection. *Mr Mazibuko* for the appellants argued that the purpose of imposing such bail conditions was to reduce the probabilities of abscondment and not necessarily to guarantee that the appellants would not abscond. It is only incarceration that can

guarantee against abscondment. *Mrs Zimba-Dube* for the respondent defended the magistrate's view on the grounds that cases of "border jumping" are rampant and that the magistrate was justified in taking the view that she took. The magistrate's view if taken to its logical conclusion amounts to the proposition that since any bail conditions that may be imposed by a court are in themselves no guarantee that the accused person will stand trial then in any case where it is feared that an accused person may abscond, bail must of necessity be refused. There is neither authority nor justification for such a proposition. Such a proposition flies in the face of the whole concept of bail pending trial. I am satisfied that the learned magistrate's remarks constitute a misdirection on her part.

The appellants further contend that the magistrate misdirected herself in concluding that appellants were likely to abscond simply because they were facing a serious charge. In my view the criticisms laid against the magistrate in this regard are without merit. A reading of her judgment indicates that she did not refuse bail simply because the appellants were facing serious charges. She also considered factors such as the likelihood of interference with witnesses and investigations. She was clearly conversant with the relevant authorities in that regard and showed a clear grasp of the principles enunciated in the case of *Hussey* v *The State* SC-181-91.

The learned magistrate is also criticised for delving "quite extensively" into the merits of the case to the extent of making a determination on the credibility of the appellants. The appellants gave evidence on oath in support of their application for bail. Naturally they were subjected to cross-examination. The purpose of their giving evidence was to pursuade the magistrate to grant them bail. The magistrate was in my

view perfectly entitled to assess their credibility with regards their testimony. I am satisfied from a reading of the record that her comments in that regard were justifiable and relevant to the application then before her.

It was also submitted on behalf of the appellants that as they are family men who own immovable property and are prepared to surrender travel documents where applicable, the conclusion by the magistrate that they were likely to abscond was not supported by the evidence and that in the circumstances, the evidence of the appellants to the effect that they would not abscond should have been accepted. I am however satisfied that the magistrate was alive to the submissions made in this regard. The record shows that she applied her mind to the issues before her. She sought to strike a balance between the interests of the administration of justice on the one hand and the appellants' liberty on the other. In the process she came to the conclusion that it would not be in the interest of justice to accede to the application.

It is further alleged by the appellants that the learned magistrate misdirected herself by holding that the appellants were likely to interfere with investigations merely because they had interfered with investigations in the Johannesburg case involving suspect Khulekani Ncube. If it is accepted that the appellants interfered with investigations in the case of Khulekani Ncube, would it be unreasonable for a court to entertain fears that the appellants could similarly interfere with investigations in their own case? The magistrate's reasoning in this regard is beyond reproach. It is argued however that since Khulekani Ncube has not yet been tried in the Johannesburg case, the magistrate's view as to whether he was interfered with by the appellants amounts to mere speculation. In my view at this stage the magistrate is

essentially assessing probabilities. If the information before her tends to show that the possibility does exist that the appellants interfered with the said Khulekani, she would be perfectly entitled to take that possibility into account for purposes of deciding a bail application. In my view the magistrate acted within the parameters of her discretion in applications of this nature.

The appellants are experienced and high ranking police officers. The concern expressed that they would be in a position to interfere with or influence the course of investigation cannot be dismissed out of hand. Although the first appellant has just retired from the force the other two are still serving. I agree with the appellants that appropriate bail conditions would exclude the possibility of such influence or interference and that the force could administratively neutralise such negative tendencies. Because I express that view it does not necessarily follow that in taking a different view the magistrate necessarily misdirected herself. She had the discretion. I am unable to say that she did not exercise that discretion judiciously.

It is also contended that the third appellant could not have had a hand in the disappearance of the file relating to a firearm licence application because the file disappeared in Harare and from a department or office outside his control. That notwithstanding the possibility does remain that the third appellant could have influenced the course of events in Harare even if at all relevant times he remained in Bulawayo. He would have had an interest to do so. It is not always that a police officer renders that kind of assistance to a man who he knows to be a suspect in an armed robbery case.

It has been shown that of the two vehicles originally alleged missing the Mazda has since been accounted for. There is controversy surrounding the whereabouts of the Nissan Hardbody. The appellants are adamant that it is parked at a police yard. They invited the magistrate to do an inspection *in loco* to confirm this fact. No such inspection took place. It is contended that the failure by the court to so conduct an inspection *in loco* amounted to a misdirection. I disagree. It was not necessary for the court to take that course of action in order to establish such a simple fact. In any event the dispute now seems to be not so much as to whether there is a Nissan hardbody in the yard as to whether it is the same Nissan Hardbody that was recovered from the suspect. The relevant government department can shade light on this issue.

A lot has also been said concerning the attempts by the appellants to retire from the force almost immediately. The state would suggest that this fact is indicative of an intention to abscond. But it is also possible appellants did so in order to safeguard their terminal benefits. However given the circumstances then existing it cannot be said that the fear on the part of the state was unreasonable or totally unfounded. In entertaining that concern it cannot be held that the magistrate misdirected herself.

The appellants have not denied releasing the suspect as alleged. They however, contend that they relied on a fax from the South African Police which they interpreted to mean that there was no longer any case against the suspect and therefore there was no longer any basis upon which to arrest the suspect. It is argued therefore that the state case is necessarily weak as a result. A cursory reading of the fax would

tend to show that it was meant to be a brief by the South African Police to their Zimbabwean counterparts regarding progress made so far in terms of investigations. It reads in part;

> "During interviews and interrogation the pointing of the scenes and confessions the suspects mentioned names of other persons involved with them in the robbery. The names of Sosha Ndaba Mafu and Khulekani Ncube currently in custody in Zimbabwe were mentioned with the names of others by the arrested suspects."

In the last but two paragraphs the fax reads:

> "After the arrest of the two above mentioned suspects in Zimbabwe the investigating officer Captain Olivier discussed the arrests with the state advocate who came to the conclusion that the two suspects currently arrested in Zimbabwe cannot be charged with the accused already standing trial … and that at this stage there is insufficient evidence against the arrested suspects to ensure a conviction.
>
> It will however be of immense value if the fingerprints of the mentioned suspects could be made available to this office in order to test their prints against those retrieved at the relevant crime scene."

Does this fax exonerate the appellants? Does it state that the South African Police are no longer interested in the suspects held by their Zimbabwean counterparts? On the face of it it is unlikely that this fax will be interpreted to mean what the appellants say it does.

On the whole I would hold that the magistrate did not misdirect herself in coming to the conclusion that she did. Any misdirections on her part were not of such magnitude as would warrant the intervention of this court.

Accordingly the appeal is dismissed in its entirety.

Calderwood, Bryce Hendrie & Partners appellants' legal practitioners
Attorney-General's Office respondent's legal practitioners