Judgment No. HB 34/2003
Case No. HCB 5/2003

ABRAHAM THOMAS MALUNJWA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 24 JANUARY & 6 MARCH 2003

C.T. Hikwa for the applicant
Mrs M. Cheda for the respondent

Bail Application

NDOU J: The appellant applied for bail pending trial before a Bulawayo Magistrate and on 26 November 2002 and the latter dismissed the application. He now appeals against such dismissal. The appellant is facing two charges of theft by conversion and another charge of contravening section 3(1)(a)(I) as read with section 15(2)(e) of the Prevention of Corruption Act [Chapter 9:16]. It is alleged that between 8 January 2002 and 31 July 2002 and in Bulawayo, the appellant, who then was a Detective Inspector, was part of a team of Zimbabwe Republic Police detectives assigned to look for suspects Khulekani Ncube, Ngoneni Mafu, and Sidingumuzi Sibanda. The latter were being sought in connection with an armed robbery that occurred at the Johannesburg International Airport, South Africa, on 27 December 2001 where cash and jewellery worth ZAR117 million were stolen. In the course of his duties, it is alleged, the appellant, on or about 8 February 2002, recovered Z$950 000 suspected to be proceeds from the robbery from Thabile Dube of number B 214 Njube who is one of the suspect's aunt. The appellant allegedly converted the said amount to his own use. On 6 February 2002 the appellant recovered Z$3 million suspected to be proceeds from the robbery from one Sithembiso Dube, who is suspect

Sidingumuzi's mother. He allegedly converted part of that amount, i.e. around Z$936 500, to his own use. In July 2002 the appellant allegedly made several calls to suspect Sidingumuzi and his sister Ntokozo Sibanda, soliciting for a bribe of US$15 000 in order not to arrest Sidingumuzi for the South African armed robbery case.

In the court *a quo,* the appellant was content with limiting his application to oral submissions by his legal practitioner. He did file an affidavit in support of his application. Procedurally, there is nothing with that. In *Dumisani Ndlovu* v *The State* HH-177-01 at page 8 of the cyclostyled my judgment I referred to what DIEMONT J said in *S* v *Nichas* 1977(1) SA 257 (C):

> "It is a notorious fact that in a majority of cases *ex parte* statements are made both by the defence and by the public prosecutor who intimates what the police objections are. There are no formalities, no evidence is led, no affidavits are placed before the court and the record is so meagre that there may be little or nothing to place before the Superior Courts if the matter is taken on appeal. This easy-going procedure has both advantages and drawbacks."

This approach by the appellant, however, impacts on the quality of the evidence in support of the application. This is so such cases where the other party decides to call *viva voce* evidence in opposing the application.

Approach

The approach in this matter is whether the magistrate misdirected herself when she refused the appellant bail. I need to emphasise this aspect because the matter was argued as if I am hearing the bail as a court of first instance. The appeal should be directed at the judgment of the court a quo. It is the findings of the court *a quo* that the appellant should attack. From her judgment, the learned trial magistrate made a positive finding on the credibility of the sole witness who testified, the investigating

officer, Chief Superintendent Nyathi. This finding, in my view, is unassailable. In any event the appellant does not seem to challenge such a finding on the demeanor of Officer Nyathi. Such a positive finding does not necessarily mean that the appellant should have been refused bail. That decision is for the court to make after weighing all the facts at its disposal. It seems to me that the learned trial magistrate arrived at her decision on the basis of risk of abscondment and interference with the administration of justice. I propose to examine each of these findings to determine whether or not there were misdirections. The primary question for determination by the court *a quo*, was whether the appellant will stand trial or abscond. Of equal important was whether he will influence the fairness of the trial by intimidating/influencing witnesses or tampering with evidence. It is trite that in bail applications the court has to strike a balance between the interest of society (the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused person (who pending the outcome of his trial is presumed to be innocent) – see *Attorney-General, Zimbabwe* v *Phiri* 1988 (2) SA 696 (ZHC); *R* v *McCarthy* 1906 TS; *S* v *Mhlauli and Ano* 1963(3) SA(C) at 796B; *S* v *Hussey* 1991(2) ZLR 187 (SC) and *S* v *Aitken* (2) 1992(2) ZLR 463 (SC)

Risk of Abscondment

There are factors which may, either on their own or on a cumulative basis, assist the court in making a proper assessment of the risk. The court *a quo*, referred to the seriousness of the offences as a source of inducement to abscond on the part of the appellant. *In casu*, the appellant was a detective inspector who is alleged to have stolen sums of money recovered during the course of his duties. In the first count the

stolen large amount is Z$950 000 and in the second count Z$936 500. On the third count he is alleged to have corruptly tried to solicit a bribe of US$15 000 from a person who he knew was wanted for a very serious crime of armed robbery committed outside our jurisdiction. Each of these three offences would attract imprisonment if the appellant is convicted. Cumulatively they would attract a very lengthy term of imprisonment. By virtue of his position and experience in the police force the appellant is obviously aware of these possible consequences. In the circumstances, the court *a quo* did not misdirect itself in this regard. On its own, this factor, in the circumstances of this case, would not justify refusal of bail. It seems to me that the court *a quo* took it cumulatively with other factors as evinced by the remark on page 3 of the judgment.

"The other reason was the seriousness of the offence." (emphasis is mine)

The likelihood of a lengthy prison term being imposed (i.e.seriousness of the offence) is a factor to be taken into account in assessing the risk of abscondment – see *S* v *Hudson* 1980(4) SA 145 (D); *S* v *Ito* 1979(3) SA (w) 740 and *Dumisani Ndlovu* v *S (supra)*. There is no misdirection in the court *a quo's* finding the offences are serious and that this may likely be inducement to abscondment on the point of appellant. This is one of the factors taken into account in refusal of bail.

Interference with the administration of justice

The court *a quo* found that the likelihood of interference with evidence by the appellant was high. It also found that there had already been attempts to do so. It was found that the appellant works with most of the witnesses who were his subordinates. The court *a quo* also found that there was evidence of interference with the administration of justice attributable to the appellant. First, in respect of the arrest and

subsequent release of supsect Sidingumuzi's mother (the learned trial magistrate erroneously refers to Sidingani). Second, the disappearance of Ntokozo. In the circumstances, the court *a quo*, after making reference *S* v *Maratera* SC 93-91, held that it has been shown that there has already been attempts (page 2) to interfere with evidence. I agree that it is trite that where is has been shown that the accused had interfered with evidence, a court is justified in denying him bail – see also *S* v *Chiadzwa* 1988(2) ZLR 19; *S* v *Murambiwa* SC 62-92; *S* v *Maharaj* 1976(3) SA 205 (D). The court should, however, not refuse bail on the bare assertion of the state, there must be enough reason for such a conclusion – see *Sahumani* v *S* HB-91-84 and *S* v *Hussey (supra)*. In other words, grounds for refusal of bail should be reasonably substantiated – see *Mbele* v *Prokureur-General* 1966(2) PH, H 272 (T). The court *a quo*, did not misdirect itself in this regard.

As I am unable to find any misdirection on the part of the court a quo I cannot interfere with its determination. The court *a quo* took into account the cumulative effect of the above two factors and arrived at a decision that the appellant is not a suitable candidate for bail <u>at that stage</u>. The said finding is unassailable and the appeal must, therefore fail.

I accordingly, dismiss the appeal against the magistrate's decision to deny the appellant bail.

Mabhikwa, Hikwa & Nyathi appellant's legal practitioners
Criminal Division of the Attorney-General's Office respondent's legal practitioners