Judgment No. HB 77/2003
Case No. HCB 12/2003

**BENJAMIN MAKETO**

**And**

**ROWAN DUBE**

**And**

**JOSEPH NYONI**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 19 FEBRUARY AND 10 JULY 2003

*N Mazibuko* for the appellants
*Mrs M Cheda* for the respondents

Bail Application

**NDOU J:** The appellants are appearing before a Bulawayo Magistrate on charges of contravening section 4(a) as read with section 15(2)(e) of Prevention of Corruption Act [Chapter 9:16], alternatively, attempting to defeat or obstruct the course of justice. They initially applied for bail pending trial. The magistrate refused them bail resulting, in protestation, to an appeal to this court. The outcome of that appeal was negative as reflected in HB-132-02. The appellants subsequently approached the magistrate launching another bail application on the basis that the circumstances have materially changed since the outcome of their appeal in HB-132-02. The magistrate rules against them. They once more appealed to this court. The appellants are before me on that basis. I propose to deal with appellant Joseph Nyoni separately from the other two appellants, because on 19 February 2003 I granted him

bail and denied the other two appellants bails. I indicated then that the reasons for doing so will follow. The reasons are in the form of this judgment.

**Joseph Nyoni**

Although this was not articulated *ab initio* I raised the issue of whether it is proper to charge this appellant with the other two for bail purposes. He was not involved in some of the serious charges faced by the other appellants. The bail application was apparently considered together out of convenience. The learned magistrate seems to have missed this crucial point and determined the question of bail as if this appellant was involved in the other charges. More importantly, the trial magistrate did not seem to appreciate that this appellant, unlike the two others, was not part of the investigating team in which Khulekani Ncube was implicated of robbery. His communication with the latter may indeed be innocent as long as he is not aware that the latter is a wanted suspect. If he was not aware that Khulekani Ncube is on the list of wanted criminals he may have innocently dealt with him. By failing to appreciated this material fact the trial magistrate misdirected herself when she denied this appellant bail. This factor impacts on the quality of evidence at the disposal of state during appellant's trial. It seems from the facts placed before the court *a quo* that the only evidence that the state has is the fact that this appellant communicated with a person on wanted list of criminals. The state would then seek the court to infer that he must have known that Khulekani Ncube was a wanted person for criminal activities. Such circumstantial evidence does not seem to be very strong. The strength of prosecution case is a factor in bail applications – see *Ndhlovu* v *S* HH-177-01. By overlooking this factor, the magistrate misdirected herself. Taking this factor together

with the other factors for and against the granting of bail, the scale should have titled in favour of the appellant's liberty. 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); *S* v *Hussey* 1991(2) ZLR 187; *S* v *Aitken* (2) 1992 (2) ZLR 463 (SC). It is because of the above reasons that I granted appellant Nyoni bail.

**Benjamini Maketo and Rowan Dube**

As far as these appellants are concerned, I did not find any misdirection on the part of the magistrate and their appeals were, therefore, unsuccessful. The trial magistrate properly dismissed the legal argument made by the two appellants resulting from the interpretation of section 4 of the Extradition Act. The success in prosecuting the appellants is not dependent on the successful extradition of Khulekani Ncube and Ngoneni Mafu. It is common cause that the latter were arrested at the behest of the South African Police. After such arrest the appellants, as police officers, had to deal with them as suspects irrespective of the status of their extradition. In any event one of them had brought the stolen money into the jurisdiction of the court thereby subjecting himself to prosecution in this jurisdiction for theft. Theft is a continuing offence. Soliciting bribes from suspects and showing favour to suspects by policemen investigating are offences under the Prevention of Corruption Act [Chapter 9:16]. The successful prosecution of the offending policemen is not necessarily dependent upon the successful prosecution (or rather conviction) of the

suspects from whom bribes were solicited or to whom favours were shown. As far as Maketo is concerned the evidence at the disposal of the magistrate clearly shows that there indeed changed circumstances. The changed circumstances were, however against his cause in that they added to the seriousness of the allegations against him. His position is worse off then it was when he lost his appeal in HB-132-02. There was no misdirection on the part of the magistrate in dismissing his application for bail.

As far as Dube is concerned, there is no significant change in his favour from the date he lost his appeal in HB-132-02. The magistrate rightly found that there is no material change in the circumstances. The judgment in HB 132-02 was handed down on 14 November 2002 and about a month later, he launched this application without showing any material change in the circumstances. It is for that reason that his appeal was found to be unsuccessful.

*Calderwood, Bryce Hendrie & Partners* appellants' legal practitioners

*Attorney Generals Office* respondent's legal practitioners