

LUCKSON CHIRWA

Versus

THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 8 JUNE AND 18 JUNE 2020

Appeal against Magistrate's refusal of bail

N.Ngwenya, for the appellant
Z. Tapera, for the respondent

DUBE-BANDA J: This is an appeal against the refusal of the Magistrates court, sitting in Kwekwe, to admit the appellant to bail pending the conclusion of his trial which is already on course. Appellant is charged with the crime of contravening section 3(1)(2)(3) of the Gold Trade Act [Chapter 21:04] "unlawful dealing in gold." It is being alleged that on the 27 January 2020, and at Mbizo 2 shops, Kwekwe, appellant not being a holder of a permit or licence authorising him to deal in gold, unlawfully bought or received 65 grams of gold. In the alternative, he is charged with the crime of receiving stolen property knowing it to have been stolen as defined in section 124(1) of the Criminal Law [Codification and Reform] Act Chapter 9:23. It is being alleged that on the 27 January 2020 and at Mbizo 2 shops, Kwekwe, appellant unlawfully took possession of 65 grams smelted gold knowing it had been stolen or realising that there is a real risk or possibility that it had been stolen.

The appellant's trial has commenced before the Magistrates Court, Kwekwe. Three witnesses have testified. During the trial, and as a result of a postponement of the matter, appellant launched a bail application with the trial court. He sought to be admitted to bail pending the conclusion of his trial. The court *a quo* refused to admit appellant to bail. For completeness, I reproduce here the ruling of the Magistrate:

This is a fifth bail application by the accused on the basis that there are new facts which had not been elicited in the previous application. It is the state's averments that there was a risk that accused might interfere with state witnesses and harm the interests of justice.

It is trite to note that this application was made two days after this court had made a ruling on an application of a similar nature by the applicant. In the previous application bail was denied on the basis that accused's 12 year old son who is supposed to be a witness in this case is missing. It is trite to note that the child is still missing and the police according to the state are investigating into the matter.

There is a reasonable suspicion that the applicant has already interfered with investigations and the witness who is his son. It would be improper for this court to turn a blind eye to this. I have said this in my previous rulings and I still maintain this position. It cannot be mere coincidence that the witness disappeared at the time the accused is arrested and is questioned and released on instructions to come back as was said by the arresting officer.

That the state failed to avail the officer from the Mines and Minerals Act cannot be said to be a new fact especially considering that the state had indicated that such a witness can only be availed in two weeks.

The state has not yet closed its case and such releasing the accused will be tantamount to defeating the course of justice.

It is therefore this court's contention that there are no changed circumstances that warrant the release of accused on bail.

The application for bail is dismissed.

Appellant being aggrieved by the refusal to admit him to bail, noted an appeal to this court. In his grounds of appeal, he complains that:

1. The learned magistrate erred and misdirected herself in refusing to admit to bail appellant to bail pending trial by paying lip service to appellant's merits. The learned magistrate did not give due consideration to the fact that trial was being inordinately delayed by the respondent which requested postponement as it sought to bring in a new unknown witness from the ministry despite the fact that all witnesses whose statements were given to appellant had tendered their evidence.
2. The learned magistrate erred and misdirected herself in refusing to admit to bail appellant to bail pending trial by ignoring appellant's fundamental right to personal liberty. Indeed it cannot be a just cause to deny bail pending trial for more than four months over non-violent alleged offence which is not a 3rd Schedule while appellant is the sole bread winner of his family. Appellant's right to be presumed innocent until proven guilty was rendered academic because appellant's continued incarceration.
3. The learned magistrate erred and misdirected herself in refusing to admit to bail appellant to bail pending trial on the basis that the child was missing. This is not a compelling reason to refuse appellant bail since had not been in his custody. As a matter of fact, the child disappeared whilst he was in prison. It is ironic that *Munhungeyi Mtisi* who had custody of the child would be granted bail for defeating or obstructing the course of justice whilst appellant languishes in prison.

The admission of appellant to bail is opposed by the State. The opposition is anchored on two grounds. These are: appellant is likely to abscond and that he has a propensity to interfere with witnesses.

The issue now before this court is whether the magistrate misdirected herself in refusing to admit the appellant to bail. The answer to this issue must be located in the judgment of the court *a quo*. See *S v Malunjwa* 2003(1) ZLR 275(H); *S v Ruturi* HH23-03). Put differently, the question that falls for decision in this court is whether, on the facts before it, the court *a quo* erred or misdirected itself in denying the appellants bail. In order for this court to make a determination on the issue, it is restricted to the reasons for the judgment rendered by the court *a quo*.

The legislative framework and jurisprudence in this jurisdiction shows that the entitlement to bail exists as of right. It is a constitutional right, its enjoyment can only be limited if exceptional circumstances are established. The legislature, in section 117 of the Criminal Procedure and Evidence Act set out circumstances in which the right to bail could be forfeited. See *Michael Mahachi v The State* HH 4-19.

Where the court refuses to admit an accused to bail, it can only do so if the grounds set out in section 117 of the Criminal Procedure and Evidence Act have been met. Section 117 (2) (a) (iii) provides that the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established— attempt to influence or intimidate witnesses or to conceal or destroy evidence. Section 117 (3) provides that in considering whether the ground referred to in— subsection (2)(a)(iii) has been established, the court shall take into account— whether the accused is familiar with any witness or the evidence; whether any witness has made a statement; whether the investigation is completed; the accused’s relationship with any witness and the extent to which the witness may be influenced by the accused.

The court *a quo* in its ruling made a factual finding that there is a reasonable suspicion that the applicant has already interfered with investigations and the witness who is his son. It cannot be mere coincidence that the witness disappeared at the time the accused is arrested and is questioned and released on instructions to come back as was said by the arresting officer. The court *a quo* made this factual finding on the basis of the evidence placed before it. Again, the court *a quo* is entitled in terms of the legislation in this jurisdiction, to refuse bail on the grounds that there has been an attempt to influence or intimidate witnesses. The

witness, a twelve year old son of the appellant has disappeared. The accused relationship with his son, makes it possible that he may influence him. I do not perceive any misdirection in the court *a quo*'s finding, and none has been shown.

The court *a quo* further reasoned that the allegation that the state failed to avail an officer from the Mines and Minerals department cannot be said to be a new fact especially considering that the state had indicated that such a witness can only be availed in two weeks. The court *a quo* correctly observed that the state has not yet closed its case, meaning it can call witnesses until such time that the prosecution case is closed. I do not see any misdirection in this respect.

Furthermore, I make the observation that the court *a quo* is properly seized with the trial of the appellant. The trial is on course. Three state witnesses have testified so far, and more are expected to testify. The court *a quo* is seized in the atmosphere of the trial. It is the court *a quo* that is better positioned to weigh and understand whether it is indeed in the interests of justice to release the appellant on bail at this stage. However, I accept that this court can intervene in the interests of justice, though I take the view that such intervention, when the trial is on course, must be the exception rather than the norm. Worse still, as in this case, where this court has not been furnished with a record of proceedings from the court *a quo*, this court must be very slow to disrupt the proceedings in the trial court. Let the trial run its course, without interference from this court, unless grave injustice is likely to occur. None has been shown in this case.

Disposition

There was overall no misdirection on the part of the trial magistrate in finding that the accused was not a suitable candidate for bail. In the result:-

The appeal is dismissed.

C. T. Mugabe and associates c/o T J. Mabhikwa & Partners, appellant's legal practitioners
The National prosecuting Authority, respondent's legal practitioners