SIKHATHELE MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 18 JULY 2022 & 28 JULY 2022

Appeal against an order revoking bail

T. Mabika for the applicant
K.M. Nyoni for the respondent

DUBE-BANDA J:

1. This is an appeal against the decision of the Magistrates' Court sitting in Bulawayo. Appellant was charged with the crime of contravening section 113 of the Criminal Law (Codification and Reform) Act [Chapter 09:23]. She appeared in court and was released on bail pending trial. She was admitted to bail on the following conditions:

   i. To deposit the sum of ZWL 10 000.00 as bail recognizance.
   ii. To reside at the given address until the matter is finalised.
   iii. Not to interfere with State witnesses.
   iv. To report every week on Fridays between 0600 hours and 1800 hours at ZRP Dete until the matter is finalised.

2. Subsequent to her release on bail and the events that occurred thereafter the State made an application in terms of provisions of section 126 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for the revocation of her release on bail on the grounds that she breached one of her bail conditions. It was contended that she was not residing at the "given address" being number 1206 Bote Township, Dete as ordered by the court. Appellant contested the revocation of her bail, arguing that the "given address" as *per* the court order was Elijah Moyo's Homestead, Dopote Village, Chief Nelukoba (Dopote Village), not number 1206 Bote Township, Dete. Her contestation did not find favour with the court and her bail was revoked.

3. The court *a quo* found that according to the State papers the "given address" was 1206 Bote Township, Dete. It rejected appellant's version that she provided the police with the Dopote Village address. It reasoned that if that was the address she had provided her warned and cautioned statement and State outline would have reflected such an address. It said the given address was 1206 Bote Township, Dete and she violated her bail conditions when she went on to reside at Dopote Village. The court found that the only time she mentioned the Dopote Village address was when she was reporting at the police station as *per* bail conditions.

4. The court found further that appellant owns number 1206 Bote Township, Dete, but she does not reside at that address. It was leased to a tenant in 2020. It concluded that she did not reside at the "given address" as *per* the court order, and that such was a gross interference with investigations and the court could not condone such behaviour. It found further that appellant's actions amounted to an evasion of the administration of justice and it was in the best interests of justice that bail be revoked. Bail was revoked and she was committed to prison pending trial.

5. Aggrieved by the revocation of her bail she appealed to this Court against the decision of the Magistrates' Court. Appellant contended that the "given address" was the Dopote Village address and not number 1206 Bote Township, Dete. Therefore in residing at Dopote Village she did not violate her bail conditions. She contended further that she did not breach her bail conditions and therefore the court *a quo* misdirected itself in revoking her release on bail. She prays that the decision of the court *a quo* be set-aside and her bail be reinstated.

6. The appeal is not opposed. Respondent contended that there was nothing on record to show that appellant breached the condition regarding residence. It was contended further that appellant was reporting to the police as directed by the court, and she was complying with all her bail conditions. The net effect of respondent's submissions was that the court *a quo* misdirected itself in revoking appellant's bail pending trial.

7. Cut to the bone appellant is aggrieved by the factual findings of the court *a quo.* An appellate court's limited powers to interfere with a trial court's finding of fact is well established. In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will be disregarded if the recorded evidence shows them to be wrong. Put differently absent demonstrable, material misdirections and clearly erroneous findings the appellate court is bound by the trial court's factual findings. See: *Mupande & Ors v The State* SC 58/22; *S v Hadebe* & others 1997 (2) SACR 641 (SCA) at 645; *S v Kekana* [2012] ZASCA 75; 2013 (1) SACR 101 (SCA) para 8. For this court to interfere with the factual findings of the court *a quo* it must be satisfied that a material misdirection was committed.

8. In order to do justice to this appeal one must have regard to the relevant provisions of section 126 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which are as follows:

> 126 Alterations of recognisances or committal of persons on bail to prison
>
> (i) Any judge or magistrate who has granted bail to a person in terms of this Part may, if he is of the opinion that it is necessary or advisable in the interests of justice that the conditions of the recognisance entered into by that person should be altered or added to or that the person should be committed to prison, order that the said conditions be altered or added to or commit the person to prison as the case might be.
>
> (i) if the judge or magistrate who granted bail is not available, any other judge or magistrate as the case may be, may act in terms of this subjection.
>
> (ii) a judge or magistrate shall not act in terms of this subjection <u>unless facts which were not before the judge or magistrate who granted bail are brought to his attention".</u> (My emphasis.)

9. Before a court can act in terms of s 126 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] there should be new facts in existence which were not before court when bail was granted bail. It is therefore clear that where there are no such new facts a court cannot revoke bail. See: *The State v Munamba* HH 537/5. In *casu* the court *a quo* found that it was a new fact that the appellant did not reside at the "given address" i.e. 1206 Bote Township, Dete instead resided at Dopote Village and concluded that it was in the interests of justice that bail be revoked.

10. I should point out that the issue of violation of bail conditions is a very serious which in a proper case would warrant the revocation of bail. It manifests a disregard of a court order. An accused who is released on bail must abide by bail conditions, and he runs the risk of bail being revoked if he fails to observe the release conditions. The State bears the *onus* to prove on a balance of probabilities that the accused has breached the conditions of bail due to fault on his part, and that such breach is a new fact which warrants the revocation of bail. A court faced with an application for revocation of bail may consider first whether the condition (s) of bail have been breached. Once it has been established that bail conditions (s) have been breached the accused may avert the revocation if he can show on a balance of probabilities "such facts as are relevant to persuade the court not to revoke the bail."

11. In *casu* the court ordered *per* bail conditions that appellant must reside at the "given address" until the finalisation of the matter. In its ruling the court *a quo* found that according to the State papers the appellant's place of residence was 1206 Bote Township, Dete, and therefore that was the "given address." The State papers referred to are her warned and cautioned statement and the State Outline. A copy of the State Outline on record is not dated, but it is clear that it was written after the appellant had been admitted to bail. I say so because it refers to a Warrant of Search and Seizure (warrant) that is dated stamped 14 June 2022, and this is the warrant that the Investigating Officer (I.O) tried to execute after appellant had been released on bail. The I.O. failed to execute the warrant because she did not find appellant at number 1206 Bote Township, Dete. It is clear that the warrant was issued after appellant had been released on bail. Therefore it was factually wrong to find that the given address was 1206 Bote Township, Dete because such address was in the State Outline.

12. In his evidence in chief the I.O. was asked whether he managed to execute the warrant at 1206 Bote Township, Dete, his answer was "no", he was further asked whether he managed to execute it at Hwange Safari Lodge and his answer was that:

> I saw the Manager. His name is James Kuwanda aged 42 years (*sic*). Who stated that the accused was no longer residing at the Hwange Safari Lodge and did not know where the accused was staying…….It is now difficult for the police to recover the outstanding property because the accused misled the State by supplying an address that she does not reside at. Moreso, after leaving Hwange Safari Lodge where the other property was recovered she (*sic*) did not attempt to notify the police. (My emphasis).

13. In cross examination it was suggested to the I.O. that the appellant was arrested at Dopote Village and his answer was that he did not have a comment. He was further asked whether he disagreed that upon arrest appellant told the police that she resided at the Dopote Village, and his answer was he could not disagree.

14. In *casu* on the evidence on record the court *a quo's* finding that the "given address" was 1206 Bote Township, Dete was wrong. I say so because there are three addresses on record, 1206 Bote Township, Dete; Hwange Safari Lodge and Dopote Village. The I.O. did not dispute the suggestion that appellant was arrested at Dopote Village. The State Outline with the number 1206 Bote Township, Dete address was written after the appellant had been released on bail. Therefore nothing turns on the address in the State Outline. On the facts of this case the appellant's suggestion that the address (1206 Bote Township, Dete) in the warned and cautioned statement was provided by her but by the complainant was reasonably possible true.

15. I note that the court *a quo* in releasing appellant to bail ordered that she "resides at the given address until the matter is finalised." Mr *Nyoni* counsel for the respondent submitted that the bail order to the extent that is provided that "accused to reside at a given address" was defective and irregular. I agree. A bail order must be complete and be a stand-alone. Its completeness must not be depend on some other document or documents. It must specify the terms of the order in detail without ambiguity. Such that where ever it is found it must still tell its story without any need of assistance from some other document. My view is that a condition in the bail order that says "accused to reside at the given address" is vague and downright wrong. A bail order must clearly and precisely state the address where the accused must reside pending

the finalisation of the matter. Just to say at the "given address" is incompetent, vague and wrong and a recipe for contestation as occurred in this matter.

16. In the circumstances I find that the court *a quo* committed a demonstrable and material misdirection in finding that the 'given address' was number 1206 Bote Township, Dete. Therefore the court *a quo* misdirected itself in revoking appellant's bail on the grounds that she was not residing at the 'given address' as ordered by the court. There was no evidence before the court *a quo* that appellant violated the bail order. See: *State v Munamba* HH 573/15. I take the view that the respondent's concession was properly taken.

17. A misdirection has been established, and therefore this court is at large to set aside the order revoking appellant's bail and release her on clear and unambiguous conditions.

In the result, it is ordered as follows:

i. The appeal succeeds.

ii. The order of the Magistrates' Court is set-aside and substituted with the flowing: "The application to revoke accused's bail is dismissed."

iii. *Paragraph* (b) of the bail order granted at the Magistrates' Court is deleted and substituted with the following:

"Accused shall reside at Moyo's Homestead, Dokota Village, Chief Nerupuwa, Dete, until the finalisation of this matter".

Mugiya & Muvhami Law Chambers appellant's legal practitioners
Prosecutor-General's Office, respondent's legal practitioners