MIKE KACHIGAMBA
and
MARKO MAKAMBO
versus
THE STATE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 17 March 2015 & 10 April 2015

Appeal against refusal of bail pending trial

P. Makurumure, for the applicant
T. Mapfuwa, for the respondent

BHUNU J: This is an appeal against refusal of bail pending trial. Both appellants are charged with robbery as defined in s 126 of the Criminal Law (Codification and reform) Act [*Chapter: 9:23*]. It being alleged by the State that on 8 January 2015 and at the corner of Fife Street and Leopold Takawira Street acting in consort with two others still at large the appellants gave the complainant a lift with the intention of robbing him. When they got to the intersection of Chinhoyi Street and Union Avenue the first appellant produced a knife and robbed the complainant of a Samsung cell phone, $540.00 cash, a silver ring and a bag containing some books.

Having robbed the complainant the gang dumped him at a railway line in Southerton. The complainant is said to have positively identified both appellants at an identification parade as well as the Mazda Demio motor vehicle used in the robbery.

It was further submitted that the appellants were a flight risk as they had fled after committing the crime and their accomplices were still at large.

The State opposed bail on the basis that the appellants were facing a very serious offence and there was overwhelming evidence against them. A perusal of the brief record of proceedings shows that both appellants elected to represent themselves in the court aquo. In their respective applications they made no attempt to refute or challenge the state's

allegations that they were facing a very serious offence, there is overwhelming evidence against them and that they were a flight risk such that if granted bail they will abscond.

In a brief but concise ruling the presiding magistrate denied the appellants bail on the basis that the offence was serious and the severity of the sentence was likely to induce them to abscond thereby compromising the ends of justice.

At first glance a perusal of the record of proceedings apparently reveals that the presiding magistrate's finding is beyond reproach as it was consistent with all the available evidence and facts placed before him. As I have already said the appellants never made any attempt to challenge the damning allegations made against them by the state. All what they could say before the magistrate was that they were married, employed and of fixed abode such that they were unlikely to abscond.

At no time did they seek to deal with the allegation that the offence was very serious and the evidence against them overwhelming so as to induce them to flee from the ends of justice. The advent of the new Constitution has however since overturned the tables by reversing the onus of proof from the detainee to the State.

Section 50 (1) (d) of the new Constitution provides that any person arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention. The section is couched in peremptory terms and is a clear departure from the common law position that he who claims must prove his claim. In the ordinary run of things where someone is applying for bail he would be required to prove his claim and entitlement to bail. That position has since been reversed. Thus where a litigant applies for bail the presumption is that he is entitled to bail unless the State has proven otherwise. The section being a constitutional safeguard designed to protect the citizen's fundamental right to justice, freedom and liberty overrides all other common law and subordinate statutory provisions to the contrary.

The effect of that section is to relieve an arrested person of the burden of proving that he is entitled to bail thus shifting the burden to the State to prove that there are compelling reasons justifying the continued confinement of the detainee. In *Chalimba* v *The State* HH – 220/14 this Court held that in arriving at its determination the Court must consider evidence tendered by The State to the effect that it is not in the interest of justice that the applicant be granted bail. I might as well add that once the State has tendered its evidence the onus shifts to the arrested person to rebut the operation of any reasonable impression created by the evidence that there are compelling reasons justifying his continued detention.

The appellants however said nothing in rebuttal of the State's allegation in this respect. A reading of the record shows that the appellants who were unrepresented dismally failed to appreciate and address the material issues concerning their entitlement or otherwise to bail. For instance the relevant portion of first appellant's application reads:

> "Q. Where is your lawyer?
>
> A. I do not know. Anyway, I wish to represent myself.
>
> Q. Now go ahead and tell the court why you should be admitted to bail?
>
> A. May I be admitted to bail? I am married with 3 children. The eldest is doing form 4, second Grade 6 and the last is six old. I pay school fees for those children and I am their bread winner. I did not commit this offence at all.
>
> Q. Where do you stay?
> A. 1865 Nyadire Close Budiriro 5A
>
> Q. Are you employed?
>
> A. I was employed by one Precious as a driver.
>
> Q. Are you a holder of a passport?
>
> A. No. That is all."

The same cryptic enquiry was made in respect of the second appellant procuring a similar response. The presiding magistrate in the most perfunctory brief ruling denied the appellants bail on the basis of allegations of seriousness of the offence and likelihood of abscondment to which none of the appellants had been invited to respond. His determination reads:

> "RULING
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> After perusing the papers filed of record and hearing all parties the court is convinced indeed that both accused persons are facing a very serious offence that if convicted a very stiff penalty is probable. As such they are likely to abscond in fear of that likely conviction and sentence. The state case appears very strong very strong with overwhelming evidence. Accused persons may take flight in fear of conviction. As such both accused persons are not suitable candidates for bail and their applications are dismissed"

The above ruling was made despite the fact that apart from the Request for Remand form 242 stipulating what the appellants are alleged to have done no evidence was led or proffered and the appellants were not afforded a chance to rebut the allegations levelled against them. They appeared ignorant of what was required of them to assert their

constitutional right and entitlement to bail. The presiding magistrate appeared equally at sea and oblivious of his obligation to assist the unrepresented accused persons before him.

The presiding magistrate's duty to assist an unrepresented accused person to avoid a miscarriage of justice was amply articulated by Muchechetere J as he then was in *S* v *Manyani* H - B – 36 – 90 at 4 - 3 where the learned judge had occasion to remark that:

> "Another matter which is of concern is that the trial magistrate appeared not to have been sensitive to the fact that the accused before him was unrepresented. See *S* v *Matimhodyo* 1973 (1) RLR 76, *S* v *Wall* G - S – 190 – 81 and *S* v *Kambani Nyoni* H – B – 248 – 86. It is clear that in the end the accused who appeared to be a simple person was facing the prosecutor and an unsympathetic court.
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> The Zimbabwean system of criminal justice is essentially adversarial In nature. The essential characteristic of the adversarial system is that the presiding officer appears as an impartial arbiter between the parties. Although to the well-known dictum of Curlewis JA in *R* v *Heerworth* 19 28 AD 265 at 277, a judge must ensure that 'justice is done '- See *S* v *Rall* 1982 (1) SA 828 …
>
> When the accused is unrepresended, the judicial officer is then in an invidious position of being an arbiter and at the same time an adviser of the accused because he must explain the rules of procedure and evidence…"

The least that the magistrate could have done was to request the appellants to respond to the State's allegation to the effect that they were facing a very serious offence. The evidence against them was overwhelming such that they were likely to abscond to avoid the inevitable severe penult upon conviction. This the presiding magistrate did not do.

Upon being denied bail the appellants engaged their current legal practitioner who realised that the necessary facts and evidence had not been placed before the presiding magistrate. She then rushed to appeal without first looking at the law and the relevant legislation. Placing reliance on the case of *Chalimba* v *S* (*supra*) she argued with vigour that the magistrate ought to have considered the evidence tendered on behalf of the State when it is clear from the record of proceedings that apart from mere allegations the state led or tendered no evidence. The magistrate simply proceeded to make a determination without evidence one way or the other.

At the appeal hearing counsel for the appellants then sought to introduce new arguments from the bar based on no evidence or facts that were placed before the magistrate for his consideration. She endeavoured to challenge the identification of the appellants relying on mistaken identity an issue that had never been raised before the magistrate. She denied that any identification parade had been held where the applicants were identified.

The first appellant also sought to deny for the first time on appeal that he was seen driving the getaway motor vehicle a Mazda Demio registration number ADJ 8255.

Where there are vital competing interests between the liberty of an individual and public safety the courts cannot afford to make a decision one way or the other based on unsubstantiated guesswork and mere speculation. Considering that the appellants were facing a serious v crime of organised armed robbery thereby constituting a danger to society, it was incumbent on the magistrate to call for evidence so as to make an informed determination without compromising the safety of innocent members of society and the due administration of justice. In the case of *S* v *C* 1998 (2) SACR 721 (C), Conradie J held that bail may properly be denied where there is the likelihood that the accused if released on bail will endanger the safety of the public.

It is clear to me that the presiding magistrate determined this matter in haste without the full facts and evidence being placed before him to enable him to make an informed decision one way or the other. Counsel for the appellants having realised that there were vital facts and evidence which were not placed before the presiding magistrate fell into error by trying to introduce such evidence and facts for the first time on appeal.

Where a litigant's complaint is that the magistrate or judge determined the question of bail without some facts his remedy does not lie in the appeal court but before the same judicial officer who initially determined the matter or another officer of the same court In terms of s 117A (c) (ii) of the Criminal Law Procedure and Evidence Act [*Chapter 9:07*]. The section permits him to make the same application before the same judicial officer or another of the same court based on the new facts, it reads:

> "(ii) where an application in terms of section 117A is determined by a judge or magistrate, a further application in terms of section 117A may only be made, whether to the judge or magistrate who has determined the previous application or to any other judge or magistrate, if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination;"

During the appeal hearing the State however made a concession in respect of one of the appellants to the effect that there is a reasonable possibility of mistaken identity. Although the State's attitude is an important factor to take into account, in this case I feel that the presiding magistrate is in a better position to determine the validity of the concession after considering the totality of the evidence before him.

Since the appeal is to a large extent based on new facts that were not placed before the presiding magistrate the proper procedure would have been to make a fresh application before him or another magistrate based on the new facts. As things stand it would be improper for this court sitting as an appeal court to entertain the appeal on new facts which were never placed before the lower court. This matter is therefore improperly before this court.

That being the case the court exercises is review jurisdiction to strike the matter from the roll and refer it back to the magistrate's court. It is accordingly ordered:

1. That the appeal be and is hereby struck off the roll.
2. That the matter be and is hereby referred back to the magistrate's court for bail consideration on the basis of the new facts which have arisen.

Makuku Law Firm, the appellant's legal practitioners
The Attorney General's Office, the respondent's legal practitioners