TERRENCE MANJENGWA
and
BLESSED CHANGARA
and
BARNABAS GURA
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 24 September 2020 & 30 October 2020

APPEAL AGAINST BAIL REFUSAL

Ruling

K. Ncube, for the appellants
T. Mafuwa, for the respondent

NDEWERE J: The first appellant was arrested together with his two accomplices outside Rotten Row Court on 3 September 2020 and charged with contravening section 43 (1) (a) of the Criminal Law Codification Act [*Chapter 9:23*] and for contravening s 4 (1) (a) of the Public Health [Covid 19 Prevention, Containment and Treatment] (National Lockdown) Order S.I. 77/2020.

The allegations were that the first appellant and his accomplices were found with offensive weapons at a public gathering and that they had engaged in unnecessary movements during the national lockdown without any exemption. They appeared in court on 5 September 2020 and they were placed on remand. They applied for bail on 7 September 2020 and the application was dismissed on 8 September 2020.

They noted an appeal against refusal of bail on 10 September 2020. Their grounds of appeal were that the court erred in finding that there were compelling reasons to deny them bail. They said the court *a quo* erred in finding that the State case against the appellants was strong, yet the State case was very weak. They said the court *a quo* erred when it stated that

the first appellant had a propensity to commit similar offences yet first appellant had no previous convictions and if he was facing other charges they were mere allegations still to be proved. They said the court a quo erred by not considering that they were presumed innocent till proved guilty and that the offence carried the option of a fine. They said even the police had given them the option of paying fines at the time of arrest. The appellants also attacked the charge in the first count and said it was defective.

The State opposed the appeal in its response dated 21 September 2020. It stated that the evidence was overwhelming as offensive weapons were recovered from the appellants. The State further said the first appellant had pending cases of a similar nature and that he committed the current offence whilst on bail and if released, he was likely to continue committing similar offences. The State said the court *a quo* had not misdirected itself in denying the three appellants bail.

The appeal was set down for argument on 24 September 2020. During the hearing the State conceded to bail for the second and third appellants after noting that the offensive weapons comprising a catapult, various stones, bolts and nuts and three empty beer bottles were discovered in a motor vehicle after a search and this motor vehicle did not belong to the appellants. At the time of the bail hearing the police had not ascertained the owner of the motor vehicle in question. The State also noted that the offensive weapons were not possessed at a public gathering, yet this was an essential element of the offence.

The 2nd and 3rd appellant were immediately granted bail as a result of the state's concessions.

The State maintained its opposition of bail in respect of the first appellant. The reason they gave was that he had been arrested for this offence whilst on bail on two pending cases.

When I looked at the record of proceedings from the Court *a quo* I noted that the submission that the first appellant had been arrested for this offence whilst on bail was never made in the court *a quo*. As a result, the court *a quo*'s decision was not based on that submission. What the court *a quo* was told was that the accused had a tendency of committing similar offences since he had a pending case of a similar nature at the Harare Magistrates Court and Chitungwiza Court. *Attorney - General vs Phiri* 1987 (2) ZLR 33 was referred to by the magistrate in his ruling, but in *Attorney - General vs Phiri* the accused had

a previous conviction which is not the case in the present case. The current case involves an appellant who does not have any previous convictions.

The court *a quo* said it felt that the appellant had the potential of committing offences whilst on bail.

On page 3 of the record we see the following:-

> "The Court will state in conclusion that it appreciates bail as a right but the duty is on the State to provide cogent reasons and in this case the State has managed to show that there is overwhelming evidence, thus the State case is strong and the accused persons are denied bail."

So the reasons why the appellants were denied bail in the court *a quo* were because the State case was strong and because the evidence was overwhelming. The issue of committing offences whilst on bail did not arise. The issue of likelihood of committing offences whilst on bail had been referred to in passing earlier on.

Bail appeals are based on the record of proceedings. The parties are bound by what happened in the Court *a quo*. They are not allowed to adduce new factors and new evidence whilst on appeal. So the State's submission in its written response that the accused committed the current offence whilst on bail was a new factor which did not arise in the *court a quo*. It is not proper for this court as an appeal court to begin to entertain new facts raised by the State for the first time during the appeal.

The other problem is the State made a bald assertion that the appellant committed the offence whilst on bail for other cases. The State did not substantiate that assertion by providing the Court with details of the other case. It is trite that he who alleges must prove. In *Attorney – General vs Phiri supra*, the court said:

> "…….when to a bad criminal record is added the allegation, on evidence of substance, that the accused committed further and similar crimes when on bail, the matter becomes highly persuasive and cogent."

This case shows that it is not enough for the State to allege that the accused committed the offence whilst on bail, there must be evidence of substance that indeed he did commit an offence whilst on bail.

In the present case, there was no such evidence of substance, it was just a bare assertion. *In Attorney-General vs Phiri supra*, the court went further and said

> "A person who commits crimes while on bail shows a disregard for the rule of law and a contempt for the administration of justice, and the onus would be on him to satisfy the court that there is no likelihood of repetition if granted bail."

So even in cases when it is shown on evidence of substance that an accused committed an offence whilst on bail it does not mean that bail has to be denied. All that happens is that the onus then shifts to the accused to satisfy the court that there was no likelihood of repetition if he is granted bail again. Having explained the principles which are applicable to the first appellant, I turn now to the actual appeal before me.

A bail appeal is an attack by the appellant of the lower court's decision in denying him bail. The bail ruling of the lower court is contained on the concluding paragraph which stated that the State case was strong and the evidence was overwhelming.

The State conceded that the State case was not strong during the hearing after noting that the appellants were not arrested at a public gathering with any weapons but rather, appellant two and three were in a motor vehicle which was not theirs and this motor vehicle is the one which had the offensive weapons.

From the facts provided so far, the case against the first appellant is even weaker than that against his co-accused. At least his co-accused were found inside the motor vehicle which had the offensive weapons which they had boarded. At the hearing it was clarified that the first appellant was not even found in the motor vehicle which had the weapons. The State did not dispute this. So we have a motor vehicle which had some weapons which were found during a search of the motor vehicle when the first appellant was not even in the motor vehicle. Neither is the first appellant the owner of the motor vehicle. But he get charged for the possession of the weapons found in a third party's motor vehicle! Clearly, the State is unlikely to prove such a case beyond reasonable doubt. Therefore, the State case is weak. Therefore, the court *a quo* misdirected itself when it denied bail on the basis of a strong state case where evidence was overwhelming.

The appellants also said they were not at a public gathering. The State did not dispute this. That is why it conceded bail for appellant two and three. That concession shows that the charge in count one was defective.

It should be noted that the offence is not mere possession of these weapons. The weapons listed by the State are items people use every day; catapult, stones, bolts, nuts and

beer bottles. If mere possession of these items was an offence many people would get arrested. So the Legislature in its wisdom completed the offence by stating that if the items listed above are found with a person who is at a public gathering, then such person has committed an offence. No evidence was adduced by the State to show that the first appellant was at a public gathering. No evidence was adduced to show that the first appellant was in possession of the listed items at such public gathering. So indeed, as submitted by the appellants in the third ground of appeal, the charge relied on by the court *a quo* appears to be defective. This again shows that the State case is not as strong as the State initially submitted.

Clearly, the court a quo misdirected itself when it did not consider the defects in the charge and proceeded to deny the appellants bail. Therefore, there is merit in the grounds of appeal raised by the first appellant; that the State case was weak, that the charge was defective and that they were presumed innocent till proven guilty.

The issue now is whether the first appellant whose co-accused were released on bail following a concession by the State that the State case was weak on 24 September should remain in custody simply because of an unsubstantiated allegation made for the first time on appeal that he committed an offence whilst on bail, yet the facts provided to the court do not confirm the commission of an offence in that he was not found in possession of anything and he was not at a public gathering. Denying the first appellant bail in such circumstances would be a miscarriage of justice because there was no evidence that he committed the offence he was charged with.

Furthermore, the State never expressed fears of abscondment. In fact, the request for remand form contains addresses for all three appellants. In *State vs Fourie* 1973 (1) SA 100 at 103, the court stated that if the State does not suggest that the accused is likely to avoid trial, his release on bail is permissible despite a previous criminal record. In this case, the accused does not even have a previous record. There is therefore no prejudice to the administration of justice if the first appellant is released on bail just like his co-accused.

The Court cannot treat the first appellant differently from his co-accused because of an unsubstantiated claim by the State raised for the first time on appeal. *The State vs Lotriet & Anor, 2001 (*2) ZLR 225 at 229 B is authority for treating persons facing similar charges in a similar way. This principle was also adopted in *State vs Ruturi* 2003 (1) ZLR 537, that

persons jointly charged with an offence must be treated in the same way. Since the State did not establish any reasons, on evidence of substance, why the first appellant should be treated differently, his appeal too must succeed.

The trial court having misdirected itself, the appeal against bail refusal is hereby granted.

The decision of the Magistrate Court of 8 September 2020 denying the first appellant bail pending trial is hereby set aside and substituted with the following order:-

The first appellant be and is hereby admitted to bail pending trial in CRB No. 7924/2020 on the following conditions:

1. That the first appellant shall pay the sum of ZW$5000.00 to the Clerk of Court, Harare Magistrates Court, Rotten Row, Harare.
2. The first appellant shall continue to reside at number 4028 Glen Norah A, Harare until the matter is finalised.
3. The first appellant shall not interfere with state witnesses or investigations.
4. The first appellant shall report at Glen Norah Police station every Friday between 6am and 6pm.
5. Pending finalisation of the matter, the first appellant shall not move about with offensive weapons on his person or his motor vehicle.

Kossam Ncube & Partners, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners