

ISMAEL SIBANDA

And

ANDREW MASANGO

versus

THE STATE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 2ND SEPTEMBER & 14TH SEPTEMBER, 2020

Bail Appeal

Mr I. Murambasvina, for the appellants
Ms M. Mutumhe, for the state

ZISENGWE J: This is an appeal against the decision of the Magistrate Court denying the two appellants bail pending trial. The appeal is brought in terms of s 121(1) (b) of the Criminal Procedure and Evidence, Act [*Chapter 9:07*] as read with Rule 6(1) of the High Court (Bail) Rules, 1971.

1. The Background Facts

The appellants were arrested in Kwekwe on allegations of robbery (contravening section 126 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]). The allegations constituting the offence are set out in both the charge and the state outline attached to the papers filed of record in this appeal and are to the following effect.

That on 26 February, 2020 the two appellants were part of a group of people who teamed up to rob the complainants the latter who were employees at a certain mining location. To that end they and their yet to be accounted for accomplices armed themselves with an assortment of weapons amongst them sjamboks, machetes and axes. Aboard a certain truck, they then proceeded to the mine in question (Ingwenya 61 Mine).

On arrival they descended on the complainants in one fell swoop, viciously attacking them with the above mentioned weapons before making away with their ill-gotten haul comprising 7 tonnes of gold ore, 200 litres of diesel and a box of explosives.

It is alleged that the two appellants (having been recognised and identified by some of the victims) were arrested a short while later in Kwekwe.

Their application for bail before the Magistrate Court ended in failure. In that application which was quite brief, the prosecutor opposed the granting of bail and enumerated five grounds for adopting that position, these were:

- i. That the appellants had used dangerous weapons in the course of the robbery
- ii. That it was in the interests of justice to deny the appellants bail
- iii. That there was a disconcerting upsurge in cases of this nature
- iv. That the accused who were described as gold panners were of no fixed abode; and
- v. That bail should be refused in the interests of the safety of the public

The appellants who were unrepresented at that stage implored the court to release them on bail to enable them to continue fending for their families. Further, without elaborating they both denied any involvement in the commission of the offence or using any weapons. In addition the 2nd appellant offered that if released on bail he would continue residing at a given address in Kwekwe.

In his ruling (which consisted of only two sentences) the Magistrate in denying them bail stated as follows:-

“The court is of the view that cases of this nature are on the increase and that accused persons who are placed on remand on such matters are remanded in custody generally for public safety. Hence the court at this point is not moved as to release the accused persons and will remand them in custody pending changing (sic) circumstances in the”

2. The grounds of appeal

In attacking the above decision, it was contended that the court below had applied wrong principles in arriving at the same. More particularly it was averred that the Magistrate committed a “gross irregularity” in denying appellants bail without a finding that there were compelling circumstances justifying the same.

It was further contended that the Magistrate had failed to apply the guidelines set out in s 117 of the Criminal Procedure and Evidence Act.

In amplification of the grounds of appeal, the appellants submitted heads of argument. The thrust of those heads was to stress the following points:-

- (1) That the appellants’ constitutional right to be a presumed innocent until proven guilty (Section 70(i) (a)) of the Constitution) was violated.
- (2) That the court *a quo* appears to have already prejudged the matter and having assumed the duo’s guilt
- (3) That the court *a quo* appears to have adopted an inflexible approach to incarcerate alleged offenders facing this species of offence
- (4) That the court *a quo* had failed to strike the proper balance between protecting the individual liberty of the alleged offender on the other hand and the due administration of justice in the other
- (5) That justice is best served by giving the appellants bail with certain conditions.

This appeal is opposed by the State who took the position that there was no material misdirection by the court in refusing to admit the appellants to bail. Reference was made to the pervasive menace posed by machete wielding gangs. The upshot of their argument being that the court *a quo* exercised its discretion properly in denying the appellants bail given that at the material time the country was literally under siege from the marauding gangsters going by the appellation “Mashurugwi”. The corollary being that the court *a quo* was correct holding that the citizenry deserved protection from them.

3. The issue(s)

The main issue is whether there was a material misdirection on the part of the court, apparent or implicit, from its reasons for ruling vitiating its decision.

It is trite that the court before whom the original application for bail is made enjoys a discretion (properly exercised) whether or not to admit an alleged offender to bail. Barring a misdirection on the part of the court of first instance, the court of appeal does not interfere with that decision.

The words of GOWORA JA (*as she then was*) in the case of *Fradeck Chimwaiche v State* SC 18/2013 are instructive:

“The granting of bail involves an exercise of discretion by the court of first instance. It is trite that this court would only interfere with the decision of the learned judge in the court a quo if she committed an irregularity or exercised her decision so unreasonably or improperly as to vitiate her decision. The record of proceedings must show that an error has been made in the exercise of discretion, either that court acted on a wrong principle, allowed extraneous or irrelevant considerations to affect its decision or made mistakes of fact, or failed to take into account relevant matters in the determination of the question before it.”

See also *Chivhayo v The State* SC 94/95, *State v Chikumbirike* 1986 (2) ZLR 145 (SC) and *State v Ruturi* HH 26/03.

If no misdirection is found to exist, *cadit quaestio*. If, however, the decision by the court a quo is afflicted by a material misdirection then the appeal court is at liberty to substitute its discretion for that of the court a quo; *State v Ruturi (supra)*, *State v Chikumbirike (supra)*.

4. Addressing the grounds of appeal

The appellants’ grounds of appeal can be distilled into two main grounds, namely;

1. The alleged infringement of the Constitutional right to be presumed innocent, and
2. The alleged failure by the court a quo to take into account the appellants’ set of circumstances

Each of the two will be dealt with in turn.

4.1 The alleged infringement of the constitutional right to be presumed innocent.

In this regard the appellants allege that the Magistrate committed a grave misdirection in proceeding on the footing seemingly suggestive of the fact that they (i.e.) appellants have already been convicted and as such deserve to be visited with a “deterrent measure”.

More pertinently it was contended as follows by the appellants:

“It is clear in the mind of the learned trial [Magistrate] in the court a quo that the appellants are GUILTY of the allegation and deserved to be taken away from society. It is a gross misdirection to deny accused persons bail pending trial on such spurious and capricious reasoning. The bail system cannot be used as a deterrent measure or for retributive purposes as doing so is an infringement of an accused person’s constitutional rights.”

However, during oral arguments in this appeal, counsel was at pains to justify that interpretation given to the Magistrate’s ruling. No basis exists in my view for foisting such an interpretation. The Magistrate neither employed the terms “deterrence” or “retribution” in his ruling nor was that implicit from it.

Further s 117 of the Criminal Procedure and Evidence Act permits the court to refuse bail on the basis that the release of the accused might compromise the safety of the public. It provides in subsections (1) and (2) as follows:

“117 Entitlement to bail

- (1) Subject to this section and section 32, a person who is in custody in respect of any offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she be detained in custody.
- (2) 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 –
 - (a) Where there is a likelihood that the accused, if he or she were released on bail, will-
 - (i) **Endanger the safety of the public** or any particular person or will commit an offence referred to in the First schedule; or (emphasis mine)
 - (ii) ...
 - (iii) ...

- (iv) ...
- (b)...

As a general premise, therefore, no misdirection can be imputed to the court *a quo* for having had regard to the need to protect the safety of the public. Suffice to say that the argument that the Magistrate did not take guidance from section 117 of the Criminal Procedure and Evidence, Act cannot be sustained.

4.2 The alleged failure to take into account appellants' set of circumstances

This ground is quite a different matter. Here the complaint is that the Magistrate adopted a blanket or 'policy' approach to this species of offences. Such an approach, so the argument goes, amounts not only to a violation of the appellants' right to be presumed innocent until proven guilty but also goes against s 50 of the Constitution which guarantees bail as a right (save where compelling reasons justifying the refusal of bail exist).

I find that there is merit in that argument. By stating that "... *accused persons who are placed on remand on such matters are remanded in custody generally for public safety*" without anything further, the Magistrate appears to have adopted the rigid position that regardless of the facts, all offenders who are arrested on allegations of robbery in circumstances such as the present should and will not be granted bail.

The singling out of a particular species of crime, without anything more, and indiscriminately designating all matters falling under it as undeserving or unworthy to be considered for bail is of course erroneous and indefensible. Not only does it impinge on the right of an accused to be presumed innocent until proven guilty by a competent court of law but it is the very antithesis of s 50 of the Constitution which entitles an accused to bail (save where compelling reasons can be established justifying the refusal of bail).

It was incumbent upon the court *a quo* to, at the very least to demonstrate its appreciation of the various factors and principles at play and how these had a bearing on the appellants' peculiar set of circumstances and why it was felt that there existed compelling circumstances justifying the refusal of bail. Subsection 3 of section 117 provides guidance in this regard. It provides as follows:

(3) In considering the ground referred to in –

(a) subsection (2) (a) (i) has been established, the court shall, where applicable, take into account the following factors, namely

(i) the degree of violence towards others implicit in the charge against the accused;

(ii) any threat of violence which the accused may have made to any person;

(iii) the resentment the accused is alleged to harbour against any person;

(iv) any disposition of the accused to commit offences referred to in the first schedule, as evident from his or her past conduct;

(v) any evidence that the accused previously committed an offence referred to in the First Schedule while on bail

(vi) any other factor which in the opinion of the court should be taken into account

Failure to properly relate the above factors (or such of their number as was applicable) to the facts of the case provided ample ammunition to the appellants to attack the ruling on the basis that the court *a quo* misdirected itself in concluding that in all cases involving the so called “Mashurugwi” bail will be denied. In other words the court appears to have shut its mind to the possibility that within that class of alleged offenders, there may be some who genuinely deserve (for one reason or the other) to be released on bail. Put differently whereas generally speaking the court was at liberty to take into account the likelihood of appellants endangering the safety of the public, it needed to support such a conclusion from proven facts in support of that factor.

A material misdirection therefore occurred warranting the appeal court to have a relook at the facts and exercise its own discretion.

Robbery, particularly one committed in the circumstances such as the present one is an extremely serious offense which upon conviction is likely to attract a lengthy custodial sentence.

However, cases abound wherein it is stated that the seriousness of any offence alone is not a good ground to deny an accused bail, and the apprehension of abscondment in my view can be allayed by the imposition of appropriate reporting and other conditions.

It has not escaped my attention that whereas the prosecutor submitted in the proceedings *a quo* that appellants are of no fixed abode and as such are a serious flight risk, the state outline suggests otherwise. It states that the two reside in the Mbizo suburb of Kwekwe. The exact addresses are given. This probably explains in part how they were quickly tracked down and apprehended.

5. Disposition

In the final analysis I am of the view that a fairly substantial bail amount (reflective of the seriousness of the charge) coupled with appropriately stringent reporting (and other) conditions will strike that balance between respecting the liberty of the appellants on the one hand and ensuring the due and proper administration of justice on the other.

Accordingly, the following order is hereby given:-

6. The Order

It is ordered that:-

1. The appellants appeal against refusal of bail by the Magistrate succeeds and each appellant is granted bail on the following conditions –
 - (a) Each appellant to deposit the sum of ZWL\$10 000 (ten thousand Zimbabwe dollars) with the Clerk of Court, Gweru.
 - (b) The appellants to reside at House No. 502 Mbizo 5, Kwekwe until the finalisation of this matter.
 - (c) The appellants not to leave the confines of the city of Kwekwe without the express permission of the Investigating Officer of this case until the finalisation of this matter.
 - (d) The appellants to report twice a week on Mondays and Fridays at ZRP Mbizo between 6.00 am and 6.00 pm
 - (e) The appellants not to interfere with State witnesses and/or investigations.

National Prosecuting Authority, respondent's legal practitioners