KAINOS MAPHOSA
And
TAKUDZWA NYAKUDYA
And
FREEDOM MUTAKWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 14 and 28 January 2021

Bail Appeal

T Musara, for 1st and 2nd Appellants
A. J Dhliwayo for the 3rd Appellant
Mrs *J Matsikidze*, for the State

MWAYERA J: The appellants were arraigned before the Magistrate court on a charge of attempted Robbery as defined in s. 189 (1) (a) or (b) as read with section 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:25*]. It is alleged that on 28 November 2020 around 2350 hours the appellants or one or more of them approached the complainant whilst armed with machetes and catapults. They demanded for gold ore. They dragged the complainant to a mine shaft threatening him to disclose where the gold ore was. The complainant did not give in but screamed for help causing the appellants and others to run away. The matter was subsequently reported to the police following which the appellants were arrested. The appellants applied for bail in the Magistrate Court and were denied bail mainly on the basis of the seriousness of the offence and the likely sentence having a bearing on the applicants to abscond. Further the appellants were denied bail on fears of interference with the state witnesses.

In an appeal against refusal of bail by the court of first instance the appellate court is enjoined to confine itself to the four corners of record. What falls for consideration is simply

WHETHER OR NOT THE COURT *A QUO* MISDIRECTED ITSELF IN DENYING THE APPELLANT BAIL.

See *S v Malunjwa* HB 34/2003 and in *S v Mahachi* HH 4/19. If the court properly considered the circumstances and principles of bail pending trial, properly weighing the right to individual liberty on the other hand and the interest of administration of justice on the other hand, then there is no basis for interfering with the court *a quo's* decision. If however there is a misdirection then the appeal court is at liberty to interfere with the court *a quo*'s decision. A close look at the brief ruling of the court *a quo* shows that the court held that there were cogent reasons why the appellants should not be admitted to bail. The court held that the state case was strong by virtue of a confession by one of the appellants. That since the case was strong the appellants were likely to be sentenced to lengthy imprisonment in the event of conviction. This in turn would induce abscondment. There was also alleged fear of interference. It is settled that in determining whether or not to admit an applicant to bail factors are not considered in isolation but cumulatively. Thereafter a balance is struck between the constitutionally guaranteed right to liberty anchored on the presumption of innocence on the one hand and the interest of Administration of Justice which is anchored on the societal interest of ensuring that the interests of justice are met by logical prosecution of matters to the end.

In this case the court *a quo* correctly observed that the case of attempted robbery with Machetes by a gang is serious. It has been stressed countless number of times what the seriousness of an offence on its own is not good enough reason to interfere with the individual right to liberty. See *S v Hussey* 1991 (2) ZLR, *Kanoda and Ors v The State* HH 200/90 *and S v Felody Munsaka* HB 55/16. The court *a quo* held that the seriousness of the offence coupled with the strength of the state case militated against bail considering the likely sentence in the event of conviction. The problem evinced by the finding that the state case is strong is lack of evidence to establish the strong case. It appears the appellants were linked to the offence by a confession of one of them a co-accused. Considering that there are no other factors outlined by the state that confession on its own cannot colour the state case as strong. It is apparent from s 259 of the (Criminal Procedure and Evidence) Act [*Chapter 9:07*] that confessions by co-accused persons shall not be admissible against any other person. It might be evidence linking with the commission of an offence but in the absence of other details of evidence the deduction that the state case is strong is in the abstract. The allegations are said to have occurred at night and that the accused fled when the complainant called for help,

there is no evidence of how they were identified and arrested. Therefore other than the alleged confession by a co-accused there is no other evidence placed before the court *a quo* which justified the deduction of the state case being strong. The court *a quo* assumed that the state case is strong since the allegation of attempted robbery are serious. That deduction of a strong case in absence of evidence revealing the strength of the state case is a misdirection. If the state case has not been shown to be strong then the incentive to abscond is minimised considering the weakness of the state case. The respondent counsel suggested that the appellants are highly mobile and that since they are from out of this local court's jurisdiction they are possible flight risk. I must hasten to point out that the fact that the appellants do not reside in Manicaland does not remove them from the jurisdiction of High Court. The appellants are Zimbabwean of fixed abode and this court is The High Court of Zimbabwe. There was no evidence placed before the court *a quo* of the appellants having evaded arrest or attempted to flee from law enforcement agents. The suggestion of them being a flight risk is just speculative.

The issue of fear of interference with witness was also raised in the court *a quo*. No evidence was paced before the court on the likelihood of such interference with the witness and investigations the state fears on interference were not substantiated and established. In fact the ruling of the court *a quo* did not highlight that aspect.

Upon considering the record of proceedings from the court *a quo* written and oral submission by counsel in court, it is my considered view that by relying on the seriousness and unsubstantiated strength of the state case the court *a quo* misdirected itself. This is a case which if all factors which fall for bail consideration are considered any potential prejudice to the Administration of justice can be safely cured by imposition of bail conditions.

Accordingly it is ordered that:

1. The appeal against bail refusal is upheld.
2. The applicants are admitted to bail as follows:

1st Appellant

1. He deposits $20 000-00 with the Clerk of Court Mutare Magistrate Court.
2. He resides at Kesari Village Chief Malisa Silobela until this matter is finalized.
3. He reports at ZRP Silobela (Loreto) Police Station once every week on Fridays between 6am and 6pm.
4. He does not interfere with any state witnesses including the complainant.

2nd Appellant

1. He deposits $20 000-00 with the Clerk of Court Mutare Magistrate Court.
2. He resides at number 2305 Chipadze Street Bindura, until this matter is finalized.
3. He reports at ZRP Bindura Central Police Station once every week on Fridays between 6am and 6pm.
4. He does not interfere with any state witnesses including the complainant.

3rd Appellant

1. He deposits $20 000-00 with the Clerk of Court Mutare Magistrate Court.
2. He resides at House Number 13501 Gimboki Phase 2, Mutare until this matter is finalized.
3. He reports at ZRP Dangamvura Police Station once every week on Fridays between 6am and 6pm.
4. He does not interfere with any state witnesses including the complainant.

Gonese & Ndlovu Legal Practioners, 1st & 2nd Appellants' legal practitioners
Messrs T Harra & Partners, 3rd Appellant's Legal Practitioners
National Prosecuting Authority, Respondent's legal practitioners