Judgment No S.C. 106\2002

Crim. Appeal No. 317\2002

(1) REMEMBER MOYO (2) SAZINI MPOFU (3) KETHANI AUGUSTINE SIBANDA v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE NOVEMBER 18, 2002

P. Matinenga, for the appellants

N.J. Mushangwe, for the respondent

Before: ZIYAMBI JA, in Chambers, in terms of Rule 5 of the Supreme Court (Bail) Rules

This is an appeal against the refusal by a Judge of the High Court to grant leave to the appellants to appeal against her decision denying them bail pending trial. At the end of the hearing in chambers I dismissed the application. The following are my reasons for so doing.

The three appellants, prior to their indictment, were charged with the murder of Lumukani Luphlahla and Cain Nkala.

Upon indictment the first and third appellants were indicted on both counts while the second appellant was indicted on one count only, the murder of Cain Nkala.

All appellants were on bail prior to their indictment. However, in terms of section 110(2) of the Criminal Procedure and Evidence Act [Chapter 9:07] they were committed to prison upon indictment.

The appellants then made an application in the High Court for their release on bail. The application was dismissed by MAVANGIRA J. An application for leave to appeal to the Supreme Court against that decision was also dismissed by the same judge on the grounds that her dismissal of the application was based on a proper application of the principles applicable in such matters as applied to the facts before her and she was of the view that that there were no reasonable prospects of the appellants succeeding on appeal.

The appellants alleged in their grounds of appeal that the learned judge had "erred in refusing them bail and further refusing them leave to appeal against her decision."

An application for leave to appeal must comply with the established criteria. It must establish facts which show that there are reasonable prospects of success on appeal. Leave to appeal must never be granted merely for the asking, or upon the possibility that another court may take a different view. See *Dube v S* S-C 18-87.

The learned judge in the court *a quo* was satisfied that there were no reasonable prospects of the appeal succeeding. The question arises whether this court can interfere with that finding on appeal.

As Mr *Mushangwe* for the State submitted, the power of this court to interfere with the decision of the High Court in bail applications is limited in that in the absence of a misdirection or irregularity, this court must be satisfied that the

manner in which the learned Judge in the court *a quo* exercised her discretion was so unreasonable as to vitiate the decision reached. See *S v Chikumbirike* 1986 (2) ZLR 145 (S) at 146 E-F; *S v Barber* 1979 (4) SA 218 (D) at 220 E-G.

The learned judge based her decision to deny the appellants bail on the fact that this was an application made post indictment; that the second and third appellants had made incriminating confessions and indications which resulted in the recovery of a "body, vehicle and other items of evidence;" that a second accomplice had absconded since the grant of bail to the appellants prior to their indictment; that having regard to the seriousness of the offences "and the compelling evidence against them, convictions were likely and the ultimate penalty or lengthy prison terms may result and the appellants might be induced to abscond and not face their trial".

Before me, Mr *Matinenga* advanced only one argument - namely, that when the matter was argued before the learned judge, all the parties believed, and were labouring under the impression that, the second accomplice, one Army Zulu, had absconded while this has now been shown to be untrue. He alleged no misdirection or irregularity or improper exercise by the learned Judge of her discretion. The thrust of his submission was that had this fact been before the learned Judge she would have reached a different decision on the issue of the bail application.

Had the abscondment of Zulu been the only reason given for the refusal of bail to the applicants, there might have been some substance in Mr *Matinenga's* submission. However the learned judge was satisfied on the evidence before her that the evidence against the appellants was compelling and by reason of

the convictions and subsequent sentences likely to ensue, the incentive to abscond was great.

The evidence relied on by the learned judge in the application for bail was not placed before me but even if it had been I am bound by the limitations expressed above.

It may be that Mr *Matinenga* is correct in his submission that the learned Judge might have come to a different conclusion if she had been aware that the second accomplice, Zulu, had not absconded. This might be sufficient justification for filing another application for bail on the grounds of changed circumstances but it is not a finding that I can make on the papers before me.

It was for the above reasons that I dismissed the appeal.

Gill Godlonton & Gerrans, appellants' legal practitioners