Judgment No S.C. 59\2002

Crim Appeal No 159\2002

JOHN RAPHAEL MASUKU v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE JULY 12 & 25, 2002

E. T. Matinenga, for the appellant

N.J. Mushangwe, for the respondent

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

The appellant was indicted by the magistrate on 11 counts of car theft. In compliance with section 110 of the Criminal Procedure and Evidence Act [Chapter 9:07] the appellant, who up to the date of his indictment was on bail, was committed to prison there to await his trial or "till admitted to bail or liberated in the course of law". The appellant made an application for his release, on bail, to the High Court which application was dismissed. Against the refusal of this application the appellant now appeals.

Mr *Matinenga*, who appeared for the appellant, at the outset accepted that the power of this court to interfere with the judgment of the lower court is limited to the finding of an irregularity or misdirection by the trial court or such an improper or unreasonable exercise of its discretion as to vitiate its decision. He cited the

following instances in which he alleged that the learned judge misdirected himself:

At page 4 of the cyclostyled judgment the learned judge stated that the application was for the release of the appellant on bail on the same conditions as pertained before his indictment. This, he alleged, was a misdirection because the appellant had in his application, suggested the more stringent conditions set out in the draft order attached to his notice of appeal.

At page 7 of the judgment the learned judge in referring to threats allegedly made to the prosecutor handling the prosecution said:-

> "In this case a law officer filed an affidavit which shows that a threat was made against the law officer concerned. The words uttered constrain me to accept that such a threat was made in connection with the charges which the appellant is facing. It does not seem to me to matter who made those threats. What matters is that they were made by someone for the benefit of the applicant".

It was submitted that this was a misdirection since there was nothing to show that the threats emanated from the appellant or from someone associated with the appellant.

At the hearing it was stated by the prosecutor that one of the state witnesses was robbed of important documents pertaining to a case in which the appellant is involved. It was submitted by Mr *Matinenga* that there was no evidence that the robbery was in any way connected with the appellant.

At page 8 of the cyclostyled judgment the learned judge said:-

> "At the hearing, the Attorney–General's representative also stated that dockets in respect of other counts which will bring the total counts to forty-four are with the Attorney-General's office. For the purpose of granting or refusing to grant bail, I cannot ignore such a statement even if, strictly speaking, I am considering bail in the light of an indictment involving only eleven counts of car theft. I think that this is a complex matter and one in which the decision in respect of the application cannot be confined to the narrow limits of the eleven counts on which the applicant has been indicted. It requires that I should have regard to all that has happened and is likely to happen.."

It was submitted that this was a misdirection on the part of the learned judge in that he had misdirected himself in having regard to dockets not yet completed. Because of these misdirections it was submitted that this court was at liberty to consider the matter *de novo*.

Mr *Mushangwe*, for the State, submitted that there was no miscarriage of justice occasioned by the alleged misdirections.

In my view the only misdirection, if one could describe it as such, was the observation by the learned judge that the application was made for bail on the same terms as before. That may have been due to an oversight on the part of the learned judge since it is common cause that more stringent conditions were suggested in the application. With regard to the other misdirections alleged, I do not agree that the learned judge misdirected himself. He was entitled to take into account the threats made to the prosecutor as well as the robbery of documents from the state witness in order to assess whether it was in the interests of justice that the appellant should be granted bail.

In any event, even if these can be regarded as misdirections, no miscarriage of justice has occurred. The learned judge, having considered all the circumstances, was of the view that there were "strong indications that the appellant may abscond or interfere with the process or with State witnesses." Having so found, he properly exercised his discretion against the appellant.

As I have already stated I find no misdirection by the learned judge which justifies my interference with the order that he made.

Accordingly, the appeal is dismissed.

James Moyo Majwabu & Nyoni, appellant's legal practitioners