

ELTON MATARE

ESAU TASAUKA

MEMORY MAKONI

Versus

THE STATE

HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI, 24 October 2023

Appeal against bail refusal

J Mangeyi, for the applicants

T H Maromo, for the respondent

MUZOFA J This is an appeal against a judgment of a Magistrate, refusing bail in respect of the three appellants. The appellants pray that the judgment of the court *a quo* be set aside and substituted with an order that they be admitted to bail with appropriate conditions.

The appellants appeared before the Magistrates Court charged with one count of stock theft in contravention of s114 (2) (a) of the Criminal Law Code. The three appellants reside at 29 Geduld Farm Mhangura. The State alleged that on the 8th of September 2023 the first and second appellants stole five herd of cattle from the complainant. They handed over the cattle to the third appellant for safe keeping. On the 9th of September 2023 the third appellant sold four of the cattle to one Titus Nyahondo. The second appellant stood as a witness to the sale transaction confirming that the third appellant was the owner of the cattle.

After hearing submissions from both counsel bail was denied on the basis that the appellants are likely to abscond. In coming to the decision the court *a quo* considered the seriousness of the offence, the likely sentence and the strength of the State case against the appellants.

Dissatisfied by the decision, the appellants appealed to this court. The following are the grounds of appeal,

1. The court below grossly misdirected itself in denying bail on the fear that appellant may abscond on account of the strength of the State case when no evidence was placed on record substantiating that finding and further without considering other relevant factors including but not limited to the plausibility or otherwise of each accused's uncontroverted explanation.
2. In any event, the court below grossly misdirected itself in denying the appellant bail on a finding that they were likely to abscond, without even considering where (sic) or not that fear could not be allayed or curtailed by the imposition of appropriate bail conditions.

Before this court *Mr Mangeyi* for the appellants relied on the authority of *Madzokere v The State SC8/12* that the seriousness of the offence and the strength of the State case are on their own not enough to justify bail refusal. The court a quo must have considered all the factors under s117 (3) (b) of the Criminal Procedure and Evidence Act 'The Act'.

The respondent opposed the appeal. According to the respondent the court a quo did consider the submissions placed before it, especially the overwhelming evidence against the appellants, the likely sentence that maybe imposed and concluded that these may induce the appellants to abscond.

As properly submitted for the respondent the granting or refusal of bail is an exercise of discretion. The golden rule is that an appellate court can only interfere with an exercise of discretion where it is shown that the court a quo misdirected itself on a point of law or its decision has been influenced by some extraneous factors.

The elementary principles on bail which I state for completeness are that admission to bail is a constitutional right. Bail can only be denied where there are compelling reasons to do so. See s50 (1) (d) of the Constitution of Zimbabwe (Amend. No.20) 2013. The onus to show that there are compelling reasons is on the State in all matters except those falling under Part I and Part 2 of the Third Schedule to the Act. See 115C (2) (a) of the Act. In this case the appellants were facing a charge of stock theft. The onus was therefore on the State to show that compelling reasons exist to deny bail.

What constitutes compelling reasons has not been defined with mathematical precision. Each case depends on its own facts and the court has to make a value judgment peculiar to each case. The court should always be guided by the principle to strike a balance between the liberty of an accused person and the interests of justice. The interest of justice is to secure the accused's attendance for trial.

Section 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] gives useful guidelines on the considerations that a court should take into account in coming to a decision. The section is couched in mandatory terms so a court in exercising its discretion it must have regard to those factors. It provides as follows,

117 Entitlement to bail

(1) Subject to this section and section 32, a person who is in custody in respect of an 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 should 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

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system.

In this case bail was denied on the basis that the appellants are likely to abscond, the relevant section is ss3 (b) of s117 which provides,

‘(b) subsection (2)(a)(ii) has been established, the court shall take into account—

(i) the ties of the accused to the place of trial;

(ii) the existence and location of assets held by the accused;

- (iii) the accused's means of travel and his or her possession of or access to travel documents;
- (iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor;
- (v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee;
- (vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
- (vii) any other factor which in the opinion of the court should be taken into account;

One salient factor raised by the appellants is that there was no evidence placed before the court a quo to establish the averments set out in the state outline. Subsection (2) of s117 requires that certain facts be 'established'. This means there must be evidence before a court that establishes the averments. Facts can only be established by evidence. A state outline is not evidence neither are the oral submissions by counsel in court.

The State did not place any evidence before the court a quo by way of an affidavit or by calling the investigating officer to establish its case. The application before the court a quo was reduced to simple submissions from the two legal practitioners on both factual and legal points with one alleging certain facts and the other denying the facts yet both were not privy to the events surrounding the commission of the offence.

Similarly, the appellants did not place any evidence before the court to refute the allegations by the State. I am aware that the appellants have no onus to show that compelling reasons exist but they can file an affidavit of evidence to outline their defence. In *Mubaki v The State HB192/11* the court considered that the State had placed evidence before the court through the investigating officer's affidavit and the appellants had simply denied the averments without placing any evidence before the court. The court relied on the evidence from the State and denied bail. This case shows the importance of placing evidence before the court. Where there is no evidence the allegations or statements by the accused remain bare claims.

Indeed, there was no evidence before the court a quo for it to consider whether the State established compelling reasons that the appellants should be denied bail. Evidence in a bail application is essential especially where the State is opposing bail. The only competent way to establish compelling reasons is by way of adducing evidence through an affidavit or

oral evidence before the court. In this case the court relied on the State Outline which is not evidence. It misdirected itself.

I comment on the other point taken in the first ground of appeal that the court a quo failed to take into account the appellant's uncontroverted explanation to the offence. Before this court it was submitted that the defence was plausible. There was no evidence from the appellants by way of an affidavit, it was the legal practitioner's submission which is not evidence. Simply put there was no explanation from the appellants to consider.

In view of the finding that there was no evidence to assist the court to assess if the State had established compelling reasons, that point disposes of the matter. It becomes unnecessary to delve into the other issues on how the court a quo came to its decision.

Accordingly, the following order is made,

1. The appeal is allowed.
2. The decision by the court a quo is set aside and substituted by the following
'The accused persons be and are hereby admitted to bail pending trial under CRB Number MH-CD 218-20/23 on the following terms,
 - i. That each accused shall deposit bail in the sum of ZWL\$250 000.00 with the Clerk of Court, Chinhoyi Magistrate`s Court.
 - ii. That each accused person shall continue to reside at plot 19 Broadlands Farm, Mhangura until this matter has been finalized.
 - iii. That each accused person shall not interfere with State witnesses.
 - iv. That each one of the accused shall report once every Friday between 6am and 6pm at Mhangura Police Station until his matter is finalized.'

Mangeyi Law Chambers, appellants' legal practitioners.

The National Prosecuting Authority, the respondent's legal practitioners