MTHOKOZISI MOYO

And

ROBSON MOYO

And

DECENT NDLOVU

And

KHULUMANI DUBE

And

MCEDISI MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 10 May 2023 & 1 June 2023

Appeal against refusal of bail pending trial

T. F. Nyathi, for the applicant
N. katurura, for the respondent

DUBE-BANDA J:

[1] This is an appeal against the refusal of the Magistrates' Court to release the applicants on bail pending trial. The appellants are charged with the crime of public violence as defined in s 36 of the Criminal law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 1 April 2023 the appellants were drinking beer at a bar, a fight started, empty bottles and chairs were thrown around and windows were broken. The appellants were denied bail after a substantive application. They now appeal this decision by virtue of the provisos of s 121 of the Criminal Procedure and Evidence Act [Chapter 9:07].

[5] In opposing bail at the Magistrates' Court the prosecutor submitted that the accused were facing a charge of public violence arising from their rowdy conduct at Masiso Bar. They fought with any group and broke windows in the vicinity of the bar. The prosecutor contended that the

accused may be charged with the crime of malicious injury resulting from the breaking of windows at Masiso Bar. A person died because of the public violence wherein the accused were fighting with rival gang. Investigations are still in progress, and the State fears that if the accused are released on bail, they may abscond or interfere with State witnesses.

[6] On their part the first applicant contended the now deceased was in his company when he was killed. The person who caused the death of the now deceased absconded. The second applicant contended that if released on bail he will not abscond. The third applicant said he was not present when the now deceased met his death. If released on bail he will assist in the search of the person who caused the death of the deceased. In fact, he was initially taken as a witness. The fourth applicant contended that if released on bail he will not abscond. He was phoned by the police to report at the station for the purposes of recording a statement. He was not present when the deceased met his death. The fifth applicant said he was called by the police to have a statement recorded regarding the circumstances surrounding the death of the now deceased.

[7] The magistrate's judgment in refusing bail is very long. The court found that in the event of a conviction the accused were likely to be sentenced to severe sentences and this may incentivise them to abscond. The court stated that the level of public violence was of high magnitude and that the release of accused persons will make the public loss confidence in the justice delivery system. The court found further that the release of the applicants will endanger the lives of the witnesses who all reside in the same area as the applicants. Statements have not been recorded from the witnesses.

[6] The grounds of appeal in this matter as extracted from the papers are essentially the following:

i. The court *a quo* erred in finding that there was a great temptation to skip bail when it is clear that there was no incentive to abscond as the state's case against the appellants is not particularly strong at all and bail could be granted with safeguarding conditions.
ii. The learned magistrate erred in pinning the loss of life to the appellants, when they are likely to be state witnesses to the said loss of life, and without establishing how the loss of life came about and why the appellants did not appear in his (*sic*) as accused persons to the charge of murder.

iii. The court *a quo* erred in refusing bail on the basis that the state witnesses would withhold their evidence when appellants are released on bail.

iv. The learned magistrate erred in failing to appreciate that the state's attitude towards admission of the appellants to bail was just relevant further to which was not decisive (*sic)* as the court had to make a decision at her (*sic*) end of day.

v. The court *a quo* erred in finding that it was in the interests of justice for the accused to be remanded in custody when nothing had been done by any one of the appellants personally to undermine the objective or proper functioning of the criminal justice system.

[7] It is trite that this court's right to interfere with the discretion of the court of first instance in refusing bail is limited. This court must give due deference and appropriate weight to the finding of the court of first instance vested with a discretion to decide the bail application. And it must eschew any inclination to substitute its own decision unless it is persuaded that the determination of the court of first instance was wrong. In *S v Barber* 1979(4) SA 218 (D) at 220 E-F the court remarked as follows:

> "It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the Magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly. Without saying that the magistrate's view was actually the correct one, I have not been persuaded that it is the wrong one."

[8] This appeal therefore turns on whether the learned Magistrate excised his discretion judiciously in the light of the applicable law and the facts that were before him.

[9] The statutory bail law is that 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: where there is a likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or not stand his or her trial or appear to receive sentence; or attempt to influence or intimidate witnesses or to conceal or destroy evidence; or undermine or jeopardise

the objectives or proper functioning of the criminal justice system, including the bail system; or where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

[10] The applicants are facing a charge of public violence arising from their rowdy conduct at a Bar. They were fighting with a rival gang. Windows of the bar were broken. They fought with any group and broke windows in the vicinity of the bar. The gang fight resulted in the death of a one person. The investigations are still in progress, and the State fears that if the accused are released on bail, they may abscond or interfere with State witnesses. What appears in Form 242 is that the applicants were positively identified by the witnesses and that they were found in possession of axes; machetes and catapults. And they committed similar offences before and as such they have pending cases.

[11] The court *a quo* applied the law to the facts and found that considering the seriousness of the case and the sentence that the applicants might face if convicted, there is a likelihood that the applicants might evade the trial resulting in the interest of justice being put into disrepute. This finding has not been shown to be wrong. In fact, the finding of the court a quo have not been shown to be wrong.

[10] On consideration of the matter as a whole, the applicants failed to establish that the decision of the Magistrates' Court was wrong. I am not satisfied that the Magistrate Court, misdirected itself on the legal principles involved, or on the facts in this matter. The court a quo was not persuaded that it would be in the interests of justice to release the applicants on bail. This finding cannot be faulted.

In the result, I order as follows:

The appeal against the Magistrates' Court refusal to release the applicants on bail pending trial is dismissed.

Makiya & Partners, applicants' legal practitioners
National Prosecution Authority, respondent's legal practitioners