ADRIAN ZVIVADA
and
LAST MHLATINI
and
FARAI HAKAMERA
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 13 October, 2021 & 29 March, 2022

Reasons for dismissal of appeal against refusal of bail by the Magistrate's Court

I. Murambatsvina, for the appellants
T. Kangai, for the respondent

FOROMA J: The accused were charged with 5 counts of contravening s 89 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] it being alleged that on the 8 September 2021 at Lonekop Village, Kadoma they jointly assaulted the five complainants namely Wiseman Mashizha, Patrick Tichareva, Tichaona Mutindi, Jeffrey Chisaka and Blessed Takudzwa Gore with knives, switches, metal rods, machetes, axes and catapults after forcibly ejecting the complainants from a mine shaft. The assaults were particularly savage and brutal in that some of the complainant sustained severing of their ears and stab wounds which possibly on account of excessive loss of blood caused them to fall unconscious.

The appellants applied for bail pending trial before the Magistrates Court at Kadoma which applications were dismissed. Appellants then noted an appeal against the dismissal of their bail application to this court and the matter came before me for argument. I dismissed the appeal in an *ex-tempore* ruling on the basis that I did not find the court *a quo* to have committed an irregularity or a misdirection in one of its findings which resulted in the court refusing the applications for bail even though the appellants had succeeded in impugning the magistrate's judgment on one of the grounds for dismissing the bail applications. Appellants have since requested the court to prepare detailed reasons for the dismissal of the appeal and these are they.

In its opposition to appellants' application for bail before the magistrate the prosecution raised the following grounds for opposing bail namely (i) that the accused persons had a propensity to commit further crimes because each of the accused persons were facing pending cases as follows – Adrian Zvivada was facing 5 pending cases which were identified by relevant CRB references, Last Mahlatini had pending cases committed while on bail on CRB KADP 707/21 and Farai Hakamela was also on bail on CRB KADP 769/21.

The second ground for opposing bail was that there was a likehood of the applicants interfering with witnesses.

The prosecution led evidence in support of its opposition to bail and in the process went beyond supporting the 2 grounds of opposition indicated herein above as the State witness testified that the accused persons were flight risks and that if the applicants were released on bail it would cause public disorder. The witness also testified that the applicants had a propensity to commit similar offences and that while in police custody the applicants had threatened that if released they would kill the complainants.

The learned magistrate dismissed the bail application on two grounds namely that:

(1) The applicants were not suitable candidates for bail as they had abused their right to bail by allegedly committing this offence while on bail on other pending matters.

(2) There was need for the court to protect the public from immediate danger as the complainants had viciously been attacked using lethal weapons resulting in ears of 3 complainants being cut off.

The appellants contended on appeal that the court *a quo* had misdirected itself in both findings.

I accept the applicants' argument that there can be no finding of a propensity to commit similar offences where (a) there is no similarity of the crimes alleged and (b) no evidence of previous conviction in respect of similar offences has been produced. In other words no matter how many counts of similar criminal conduct are alleged against the accused (even when committed while on bail pending trial for all of them) such will not satisfy the test of propensity to commit crimes of a similar nature. The court *a quo's* finding that the appellants' alleged commission of crimes while on bail pending trial justified denial of bail did not sustain a finding that the prosecution had succeeded in proving propensity as understood at law even though that

would constitute a different ground for denying bail which *in casu* had not been pleaded by the prosecution. I find that there was no proper finding of propensity and that it was irregular for the court *a quo* to deny bail to applicants on grounds that the prosecutor had not relied on for opposing bail even if on the evidence adduced such a finding would be sustainable. To permit that would be tantamount to sanctioning an irregularity i.e the court descending into the arena.

Although I considered that the finding based on the ground that appellants had a propensity to commit offences was an irregularity I did not find that the second basis for denying bail to be assailable. The prosecution opposed bail on the three grounds namely propensity, that appellants would interfere with witness and that the release of applicants on bail would endanger the public safety in terms of s 117 (2) (b) as read with s 117 (3) (e) (v) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (as an additional ground). Appellants were afforded a chance to challenge this additional ground of opposition through the witness. The court *a quo* found in its ruling that the court should restore public confidence in the justice delivery system by denying the appellants right to bail. It is appropriate to quote the basis of the court's decision from the court *a quo's* ruling. "The facts of this case are very sad. Ears of three complainants were cut off. Some complainants were struck on the head using machetes, lethal weapons were used in the commission of the offence. This was more of a gang warfare which erupted on that day. There is need for the court to protect the public from immediate danger". I do not find any fault with this reasoning by the court in the exercise of its discretion to deny the appellants bail pending trial.

Two of the appellants argued that they were not at the scene of crime on the day in question thus they put up the defences of *alibi* and accordingly argued that they should have the benefit of the presumption of innocence in their favour. Although the prosecution witness testified that the *alibi* had been investigated and found to be false a bail court is not a trial court and need not make a finding on the defences pleaded by applicants in a bail application. The fact that the court *a quo* did not comment adversely on the evidence by the prosecution witness on the issue of the appellants' *alibi* implied that the defence did not weigh with the court for purposes of the exercise by the court of its discretion in the determination of the application for bail by the appellants.

It was on the basis of the foregoing reasons that I did not find any misdirection by the court *a quo* justifying any inference with the decision dismissing the appellants' bail application.

Murambasvina Legal Practice, appellants' legal practitioners
National Prosecuting Authority, state's legal practitioners