SIMON MUCHEMWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 2 June 2021 and 9 June 2021

Bail appeal

I. Muchini, for the appellant
A. Muziwi, for the respondent

CHIKOWERO J: This is an appeal against bail refusal following the appellant's placement on remand on a charge of fraud as defined in s 136 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*] "the Code"

FACTUAL BACKGROUND

The nub of the allegations is that on 11 May 2021 the appellant in applying for a passport, submitted a forged passport application form together with forged supporting documents.

The annexure to the Request for Remand Form sets out the circumstances as follows.

The papers were received by the Passport Officer, from the appellant, for processing. The application form was in the name of one Cynara Tanaka Maxine Nyahoda who was purported to be in South Africa.

Upon perusing the application form, the Passport Officer realized that it, together with all the supporting documents, bore the Consulate of the Republic of Zimbabwe's (South Africa) date stamp. The Officer was not satisfied with the authenticity of the application form. He escalated his concerns to the Senior Security Officer.

The Senior Security Officer took the application form and checked with the office of the Consulate. What came out was that the latter office neither processed nor issued the application

form. This prompted the Civil Registry Security Staff at the passport office in Harare to arrest the appellant.

Their interrogation of the appellant relative to where he had obtained the application form led to appellant implicating his co-accused as the one who had handed over the documents to him with an instruction to proceed to the passport office to apply for a passport.

Appellant then phoned the co-accused to come to the passport office to assist with the processing of the passport. Upon arrival the Civil Registry Security Staff arrested the co-accused. The latter alleged that she had handed over the documents to the appellant. Her reason for doing so was that she was committed at work.

In opposing a joint application for bail launched by the appellant and the co-accused the prosecution led evidence from the investigating officer. This witness was cross-examined, re-examined and clarified certain issues upon being questioned by the magistrate. Thereafter, both counsel made oral submissions. The court *a quo* dismissed the bail application, giving reasons for its decision.

THE COURT A QUO'S FINDINGS AND THE REASONS FOR DENYING BAIL

The findings and reasons were these. It found as established that there was a likehood that the appellant, if released on bail, will not stand his trial. It took the view that the charge was serious and the case against the appellant strong. Since the prospect of conviction was high and the likehood of a severe custodial sentence real this would incentivize the appellant to abscond. The use of fraudulent documents to acquire a passport to travel outside the country was an indication that the appellant had the propensity to abscond. It also showed that he could easily travel outside the country. Ordering the appellant to surrender his passport would not help to secure the availability of the appellant at trial as he could easily acquire a passport using fraudulent means particularly when regard is had to the fact that both the tools used to manufacture the forged documents had not yet been recovered and the source of those documents not yet established. The court took the view that there was a very high risk of the appellant fleeing the country. It also found that the appellant was likely to join another co-accused who was already on the run and also impede efforts to recover the material used in forging the documents which formed the subject matter of the charge. In satisfying itself that the seriousness of the offence also militated against the admission of the appellant to bail the court said the following at p 6 of the judgment:

> "The offence in question is a sophisticated one, one with a high degree of dishonesty where the accused persons planned about this and came up with the daring decision to go to the passport offices to surrender these documents. It is in light of this that the Court believed that these circumstances would demonstrate or show that the accused persons are not people who can be trusted with bail.
> So in the circumstances the Court believes the two accused persons are not suitable candidates for bail. Bail is therefore denied."

THE LAW IN A BAIL APPEAL

No oral argument was presented by Counsel on the position of the law in an appeal of this nature. The legal position was correctly set out in the appeal filed on behalf of the appellant as well as in the bail response filed by the respondent.

This court can only interfere where, in relation to the merits, there is an irregularity or misdirection found in the decision appealed against or where the discretion was so improperly exercised as not to have been judicially exercised. See *S* v *Chikumbirike* 1985 (2) ZLR 145 (SC). In *Chimwaiche* v *State* SC 18/13 GOWORA JA explained in simple terms the circumstances where the appellate court would interfere. There, at p 4 of the cyclostyled judgment, HER LADYSHIP said:

> "The record of proceedings must show that an error has been made in the exercise of discretion, either that court acted on a wrong principle, allowed extraneous or irrelevant considerations to affect its decision or made mistakes of fact, or failed to take into account relevant matters in the determination of matters before it."

THE GROUNDS OF APPEAL

I set these out, but not in the order appearing in the appellant's papers. They are:

"(1) error in using a wrong test in determining the bail application, namely that bail should be granted unless there were exceptional circumstances warranting refusal. The correct test is that bail should be granted unless there are compelling reasons to deny bail.
(2) error in finding that there was a likelihood of abscondment.
(3) error in failing to seriously consider the imposition of suitable conditions to deal with the respondent's fears of abscondment
(4) error in finding that appellant was likely to interfere with investigations"

DID THE COURT *A QUO* APPLY THE WRONG BAIL PRINCIPLES?

The criticism stems from p 3 of the judgment where the court said:

> "I will now move to the law pertaining to applications of this nature. Section 50(1)(d) of the Constitution of 2013 has spelt out in clear and uncertain terms that bail is now an entitlement that exists as a right. As a constitutional right, its enjoyment can only be limited if exceptional

> circumstances are established. The onus in terms of this section lies with the prosecutor to prove the existence of the exceptional circumstances. As a corollary or addition to that right, section 117 entrenched the entitlement to bail by providing that any person who is arrested and in custody shall be entitled to be released on bail unless the court finds it in the best interests of justice to detain him in custody pending finalization of the trial.
>
> What is noted from section 117 together with section 50(1)(d) is that bail has been entrenched as a right that can only be limited where exceptional circumstances are provided. These would be the cogent and compelling reasons justifying the continued detention of the accused person in custody pending his trial. Several factors were also added particularly by section 117(2) that will be used in determination of bail."(underlining is mine)

Mr *Muchini* argued that the magistrate erred by applying an unknown, wrong test of "exceptional circumstances" to deny the appellant bail. The court ought to have applied the correct legal principle of "compelling reasons". It is only in respect of Third Schedule Part II offences[1] that the principle of special circumstances is applied, in respect of which the onus would be on the applicant for bail to show, on a balance of probabilities, that special circumstances exist which in the interests of justice permit his or her release on bail.

I agree with Mr *Muziwi* that there is no merit in this ground of appeal. The magistrate used the words "exceptional circumstances" where it was preferable to stick to the phrase "compelling reasons". That said, I have no difficulty in finding that what the magistrate meant by "exceptional circumstances" was really "compelling reasons." He said so himself. He mentioned the correct provisions of the law where the applicable bail principles are set out. He consistently did so in the passages that I have cited. The court referred to pertinent case law to the effect that cogent reasons backed up by evidence was the threshold which the respondent needed to attain if bail was to be refused. Most important of all, the court applied the correct legal principles in determining the application before it. In all the circumstances, therefore, the court's use of the phrase "exceptional circumstances" really alluded to the intention of the Legislature that there has to be a forceful case for denial of bail. Implicit in this is that it is only in rare instances that bail should be denied. At the end of the day I find that this ground of appeal is academic, it raises an issue of semantics. It seeks to elevate form over substance. I dismiss it.

[1] Section 115(2)(ii) B of the Criminal Procedure and Evidence Act [*Chapter 9:07*]

ERROR IN FINDING THAT THERE WAS A LIKELIHOOD OF APPELLANT NOT STANDING TRIAL

The magistrate committed an irregularity by partly assessing the seriousness of the offence on the basis that the appellant is facing a charge of bribery. The correct charge is a single count of fraud. The court said the following at p 5 of the judgment:

> "The offence itself, that is the offence of bribery, is a serious one. It is also prevalent especially in these days such that the expectations of a substantial custodial sentence upon conviction would be taken as high and this may provide an incentive for any person to abscond. On this aspect, the court will refer to the case of *S* v *Lulani & Anor* 1976(2) AS LR at page 204."

The court considered the seriousness and the prevalence of the offence of bribery as well as the likelihood of a substantial custodial term upon conviction for such an offence as incentivizing the appellant to abscond. This was an irregularity. To this extent the court was determining a matter which was not before it.

However, in the peculiar circumstances of this matter this irregularity did not occasion a substantial miscarriage of justice because Mr *Muchini* conceded that even the charge of fraud is serious. I advert to this in more detail later.

What is critical is that the magistrate did not consider the appellant's defence in making the finding that the prosecution had a strong case against the appellant. Mr *Muziwi* properly conceded that the court grossly misdirected itself in this regard. It is settled law that it is a gross misdirection for a court, in exercising its discretion, not to consider a relevant consideration. See *Hama* v *National Railways of Zimbabwe* 1996(1) ZLR 664(S); *Barros* v *Chimphonda* 1999(1) ZLR 58(S); *Madovi* v *Standard Chartered Bank of Zimbabwe (Private) Limited* SC 136/20.

I agree with Mr *Muziwi* that the effect of the admitted irregularity does not automatically lead to the success of the appeal. All it means is that this court is now free to relook at the issue of bail at the end of which exercise it may or may not reach the same decision, on the merits, as was reached below. In discharging this function this court uses the same material as was before the magistrates' court. See *Chiwenga* v *(1) The National Prosecuting Authority (2) The Clerk of Court Rotten Row Magistrates Court* SC 17/21. In *Chin'ono* v *State* HH 519/20 CHITAPI J expressed this position of the law, at page 3 of the cyclostyled judgment, in these words:

> "If, however, the appellant establishes a misdirection committed by the magistrate in the determination of the bail application, the appeal judge may grant bail or still refuse to grant bail

> depending on whether in the judge's assessment of the whole proceedings before the magistrate it is in the interest of justice to grant bail. In this regard, denial of bail would be in the interests of justice if the State has, from what it submitted at the bail hearing before the magistrate, established compelling reasons to persuade the judge that bail be denied."

Mr *Muchini* conceded, properly in my view, that the charge preferred against the appellant is serious. The maximum custodial sentence for fraud is thirty-five years imprisonment[2]. This particular offence is indeed serious. Even if one accepts Mr *Muchini's* argument (which I do not) that the circumstances of this matter do not speak to a "particularly serious" offence of fraud the bottom line is that counsel made the proper concession that the appellant has been charged with contravening a serious offence.

Appellant's defence is contained in paragraph 5 of the annexure to the Request for Remand Form. It reads:

> "Upon questioning by Civil Registry Security Staff on where he obtained the application forms, accused 1 then implicated accused 2 as the person who handed the application forms to him to process at the passport office."

I observe that this explanation finds support from the co-accused herself. To this end, paragraph 7 of the same annexure records:

> "Accused 2 then allege that she handed over the application forms to accused 1 because of commitment at work."

Appellant resides in Chitungwiza. He is unemployed. The co-accused resides in Harare. She works at a Hair Salon in the same city. Both are not employed at the Passport Office. Yet both possessed:

1. a completed forged application form with a fake serial number
2. a forged authorization letter purportedly authored by the Consul General of Zimbabwe's office in South Africa instructing the Passport Office in Harare to process the application for a passport.
3. a forged Government of Zimbabwe receipt purporting that appellant paid R300 to obtain the passport application form.
4. a letter instructing appellant to process the application.

All these documents bore a forged stamp. The signature of the Consul General was also forged.

[2] Section 136 of the Code

This evidence was adduced from the investigating officer when the magistrate sought clarification at p 5 of the record by asking:

"Q If you may clarify what exactly was forged?"

It came out during the cross examination of the investigating officer that the serial number on the passport application form matched the one on a passport application form at the Gwanda Passport Office. Yet the latter form had not been issued to anybody. The following also transpired when counsel for the appellant (and the co-accused) was cross-examining the same witness:

"Q Do you have any evidence that the accused forged the document?
A They were in the possession of the accused persons.
Q The said documents were handed to the accused by Tapiwa Mvere?
A I do not have that evidence. But they are the ones who tendered it".

The document which was being referred to was the forged passport application form bearing not only a fake stamp, purportedly from the Zimbabwe Consul General's Officer in South Africa but also the fake serial number. The latter matched the genuine serial number from the Gwanda Passport Office which I have altered referred to. The "said documents" comprised of the entire set of forged papers.

Appellant did not state why the incriminating forged Government of Zimbabwe receipt was issued in his name if his role was limited to innocently transmitting the set of documents to the Passport Office, without him knowing that they were forged. He did not state why the forged letter instructed him, rather than the co-accused, to process the passport application. He did not state why he told the Security persons at the Passport Office that he obtained the entire set of documents from the co-accused when his counsel was putting it to the investigating officer that the appellant and the co-accused obtained those documents from Tapiwa Mvere. I make these observations fully cognisant of the fact that I am not sitting as the trial court. But these are issues that arise, in my view, in an assessment of the strength or otherwise of the case for the prosecution. It was not denied *a quo* that all the documents were forged. Neither was it in dispute that appellant submitted them to the Passport Office to induce the latter to issue a passport. My view is that his defence is weak.

He not only possessed the incriminating documents. His name is embedded in them. Having taken his defence into account I reach the same conclusion as was reached by the magistrate. The prosecution has a strong case against the applicant. There is a high prospect of the

appellant being convicted and, if that happens, the imposition of a not insubstantial imprisonment term seems a virtual certainty. When this is coupled with the seriousness of the offence I am satisfied that there is every incentive for appellant not to stand trial in fear of the imposition of a stiff custodial sentence.

The implication of my decision is that the magistrate's decision is not irrational.

In *ZB Bank* v *Masunda* SC 32/19 ZIYAMBI JA, in delivering the judgment of the court, said at p 8:

> "In other words, the decision must have been irrational, in the sense that of being so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question could have arrived at such a conclusion".

The decision *a quo* does not reach this high standard. There was evidence to fortify the Magistrate's finding that appellant is a flight risk. An accomplice was already on the run. See *S* v *Ndhlovu* 2001 (2) ZLR 261 (H). There was nothing outrageous in finding that appellant was likely to follow suit if released on bail. After all, he was closely connected to the offence. It is a given that our borders are porous. Imposing a condition that appellant surrenders his passport to the Clerk of Court as a safeguard against abscondment would, so it seems to me, be an exercise in futility where the allegations are that the appellant used forged documents in an endeavour to unlawfully acquire a passport. It is worth repeating what the magistrate said at p 6 of the judgment:

> "The offence in question is a sophisticated one, one with a high degree of dishonesty where the accused persons planned about this and came up with the daring decision to go to the passport offices to surrender these documents. It is in light of this that the court believes that these circumstances would demonstrate or show that the accused persons are not people who can be trusted with bail".

The appellant is unemployed. There is no evidence that he owns any immovable property whose title deeds he can tender as security. No such offer was made *a quo*. Appellant did not offer to deposit any amount as bail at the time that he launched his bail application. I cannot consider ordering any quantum of bail when no such offer was made before the magistrate. That cannot be an issue on appeal when it was not an appeal before the magistrates court.

<u>ERROR IN NOT SERIOUSLY CONSIDERING BAIL CONDITIONS TO ALLAY THE RESPONDENT'S FEARS OF ABSCONDMENT</u>

The only condition offered *a quo* was the surrendering of the passport to the Clerk of Court. The magistrate considered that condition and gave reasons for discounting it. The reasons are sound.

The appellant was legally represented. He cannot criticise the magistrate for not considering other conditions when no such other conditions were suggested to the magistrate. A court decides a matter on the basis of that which has been placed before it. It follows that I disagree with Mr *Muziwi*'s concession that the magistrate misdirected himself in not considering the imposition of other bail conditions. The appellant cannot argue on appeal a case different from that presented in the proceedings below. See *Mawire* v *Rio Zim Ltd (Pvt) Ltd* SC 12/21.

ERROR IN FINDING THAT THERE IS A LIKELIHOOD OF APPELLANT INTERFERRING WITH INVESTIGATIONS

In view of the fact that I have reached the same conclusion on the merits as the magistrates court, it is unnecessary to pronounce myself on whether there is a likelihood of appellant interfering with investigations.

Ultimately, my being at large on the issue of bail has not resulted in the success of the appeal.

DISPOSITION

The appeal against bail refusal be and is dismissed.

Kachere Legal Practitioners, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners