TAPIWA KASEMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 5, 6 and 8 January 2021 &10 February 2021

Appeal against refusal of bail

I Muchini, for the appellant
G Ziyadhuma, for the respondent

KWENDA J: Background. The appellant is a public prosecutor who among other duties represents the State in bail matters on the authority of the Prosecutor General. He appeared before the Anti-Corruption Court at Harare Magistrates Court charged with criminal abuse of duty as a Public Officer as defined in s 174 (1) (a) of the Criminal Law Codification & Reform Act [*Chapter 9:23*].On 8 December 2020 he appeared in the High Court representing the State in a bail application filed by certain suspects namely Mussa Taj Abdul, Tapiwa Rudolf Kamhanga and Godfrey Mupamhanga who were facing a multiplicity of robbery in aggravating circumstances and murder charges which, according to the State, number in excess of 53 counts. The appellant consented to bail and the suspects were granted bail by this court. The State alleges that the appellant acted contrary to his duty as a public prosecutor for the purpose of favouring the suspects. His conduct in consenting bail was inconsistent with standard operating procedures obtaining in the Prosecutor General's office and, in any event, lacked transparency. He had the obligation to follow certain Standard Operating Procedures before consenting to bail in robbery cases. He was required to communicate his intention to consent to bail to his superior at the National Prosecuting Authority, giving the factual and legal basis for his opinion and obtain authority of a designated superior before implementing the intention irrespective of the offence charge. He was also required to oppose bail in all cases of robbery involving the use of firearms or other lethal weapons. Further, in robbery cases, he was required to consult in detail with the investigating officer irrespective of whether or not the investigating officer submitted an affidavit. With regards to murder cases the appellant was required to check

the cause list and where the matter has been set down for trial he had to oppose the granting of bail. He did none of the above thereby favouring the suspects. The State submitted *a quo,* that the appellant knew of his duty in terms of the operating procedures existing at the time he consented to bail and had endured for a long time. He is a public prosecutor with many years' experience having worked as prosecutor from the year 1999. He occupies the senior position of Principal Law Officer. In addition to that, the State produced a written memorandum confirming the operating procedure dated prior to his conduct forming the basis of the charge.

Proceedings *a quo*

The appellant applied for bail in the court *a quo.* The State opposed the bail application on the grounds that the applicant was likely to flee and that constituted a compelling reason militating against his admission to bail. The appellant was likely to flee because of the nature and seriousness of the crime. The State evidence is overwhelming and the realisation that he risked imprisonment was likely to make him flee. The appellant had demonstrated that he is a flight risk because when he became aware that the police were looking for him as part of their investigation into his consent to bail he evaded them. He could not be located at all places where he was reasonably expected to be, that is at home, work and his mother's residence. He absented himself from work without leave of absence. No one at home or at work knew his whereabouts. His mobile phones were unreachable. He only surfaced when including his photograph accompanied by the fact that he could not be unaccounted for was splashed all over the print and electronic media. He then handed himself to the Police. The State submitted that conditions of bail were likely to deter him because the appellant is a risk taker. He openly disobeyed a directive by the Prosecutor General on whose authority he prosecutes when he consented to bail in matter involving robbers who are on record for exchanging gunfire with the Police. His admission to bail was likely to jeopardise public order and security and bring the bail system into disrepute. The State submitted that bail should to be denied because compelling reasons existed as envisaged in s 117 of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].

In response, appellant's counsel submitted that bail is enshrined in the constitution. The court is not a court of public opinion and as such must not be swayed by public outrage but should be guided by the law. The court was required to discharge its judicial function without fear. The decision to admit the accused persons bail was made, not by the appellant, but by a judge who had not been charged with any criminal offence. In any event, the order granting bail remained extant and the State had not taken any steps to have it "reversed." The appellant

was not a flight risk. He did not evade the Police as alleged. He had no reason to flee at the time he could not be located because the Police had not preferred any charges at that time. He had not been invited to the Police Station. No one had told him that he was wanted by the Police for questioning. The Police had no reason to look for the appellant at other places especially his mother's home because he did not stay there. His phones were not switched off as implied. He was just unreachable but he spent the day consulting his lawyers. There was no evidence from the service provider that he had switched off his phones. On the day that he failed to report for work and could not be found at home, he had gone to consult his legal practitioner so that the lawyer could find out whether there was any report against him. On 17 December 2020 he voluntarily presented himself to the Police. He has no passport. An appropriate order could be made directing the Registrar General not to issue him with a passport. Appellant's counsel submitted that stringent conditions would suffice to allay fears of abscondment. He submitted that the appellant was unaware of the Standard Operating Procedure since none had been published by the Prosecutor General as contemplated in s 13 of the National Prosecuting Authority Act. A prosecutor is not prohibited from consenting to bail. The exercise of discretion should not be criminalised. The appellant consented to bail because he had become aware that the accused persons' co-accused had been admitted to bail. He therefore had the obligation to help the court arise at a just decision. In any event violation of an internal memorandum was an administrative issue.

Decision by the court *a quo*

The court *a quo* denied the appellant bail after finding that there were compelling reasons necessitating his detention in custody pending trial. The court *a quo* made the following key findings in its judgment: -

1. the court found that the seriousness of the offence was not on its own a reason to deny the appellant bail.
2. the appellant had not been located at two addresses
3. he had not reported for work
4. he was unreachable on his phones when the police were looking for him.
5. It rejected the appellant's assertion that he could not be located because he was consulting his lawyer because at that time no charge had been preferred against him. He therefore had no criminal case to consult on.
6. The court *a quo* therefore found that the appellant had taken flight and stringent conditions would not deter him because his behaviour had shown that he could flee.

The appeal before me

I am now seized with an appeal against the decision to deny bail. The grounds of appeal are paraphrased below: -

(1) The court *a quo* erred in rejecting the appellant's explanation that at the time that he could not be located he had gone to consult his lawyer.

(2) The court *a quo* erred in failing to place sufficient weight on the fact that the appellant handed himself to the Police.

(3) The court *a quo* erred in accepting the State's submission that the appellant had switched off his phone when there was no evidence proving that.

(4) The court *a quo* erred in that it did not seriously consider the imposition of suitable bail conditions.

The appeal is opposed by the State which submitted that the court *a* quo did not misdirect itself and in any event its decision is correct.

The law

The law is that when exercising its appellate jurisdiction this court will only be at large to interfere with the decision of the lower court where it finds a misdirection committed by the lower court. Even where the lower court misdirected itself, the court will not necessary change the decision. Where the misdirection did not result in a miscarriage of justice this court will allow the decision to stand. The court will therefore only correct the decision of the decision appealed against resulted in a miscarriage of justice. The correctness of the decision of the lower court depends on the view which this court takes of the evidence that was before the court *a quo* but only a misdirection unlocks that enquiry. Put differently this court does not, in the exercise of its appellate jurisdiction lightly interfere with the exercise of discretion by a competent court of law or another the judicial officer *albeit* at a lower level.

In *Emma Kundishora* v *Zimbabwe Red Cross Society* SC 48/70 MAKONI JA at p 8 of her cyclostyled judgment quoted with approval a passage in *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) 67 *per* KARSAL JA

> "The general rule of the law as regards irrationality is that an appellate court will not interfere with the decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence before the trial court, the finding complained of is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at such a condition."

Findings of this court

The facts upon which the court based its decision that the appellant is a flight risk are common cause. Indeed, the appellant could not be found at residents where he was reasonably expected to be. Close members of his family could not shed light on his whereabouts. They either did not know where he was or did not want to disclose. He failed to report for work and had no leave of absence. The investigating officer testified that he left messages for the appellant to report at the Police Station after trying to call the appellant to no avail. The fact that the appellant had improperly consented to bail in a matter involving accused persons facing serious charges was awash in newspapers. His photograph was published. It is correct that the appellant handed himself to the Police after public outrage had been reported in the media.

I am not persuaded that the court *a quo* took a wrong view of the facts because as stated above, the facts were common cause. The conclusion which the court arrived at is not vitiated by irrationality. It is a conclusion supportable on the facts that were and remain common cause. The court took the view that stringent conditions would not suffice this was an exercise of discretion. The fact that a different court would have dealt with the likelihood of abscondment differently does not vitiate the exercise of discretion by the court *a quo*. It was not unreasonable for the court to find that the appellant could still abscond even without a passport. The submission made in the bail statement that the appellant exercised his discretion in consenting to bail and that he is not bound by the Prosecutor General's directives go to the merits of the charge to be determined at the trial. In any event that is not the reason bail was refused. However, had the appellant disclosed the factual basis for consenting to bail that could have swayed the court *a quo.* Without the factual basis for his decision to consent to bail, the assertion that he exercised his discretion remains a bold contention. The appellant decided not to favour the court *a quo* with the factual basis upon which he consented to bail. The fact that the persons charged together with the accused applying bail had been admitted to bail had nothing to do with the personal and peculiar circumstances of each person applying for bail. Although there is case law to the fact that accused persons in similar circumstances should be treated alike, that should not be elevated to automatic admission to bail. Each case is decided on its own merits. Section 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07]* gives guidelines which must be considered with respect to the particular person applying for bail. Most importantly though there is no connection between exercise of discretion and the grounds of appeal against refusal of bail.

I therefore find no misdirection and order as follows:

The appeal be and is hereby dismissed.

Kachere Legal Practitioners, appellant's legal practitioners
Prosecutor General, respondent's legal practitioners