JOHANNES TOMANA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 2 August 2016 & 22 August 2016

Bail Ruling

T. Mpofu, for the appellant
E. Nyazamba, for the respondent

MUNANGATI-MANONGWA J: The appellant who is facing charges of criminal abuse of duty as a public officer as defined in s 174 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], alternatively defeating or obstructing the course of justice as defined in s 184 (1) (a) (e) of the same code appeared before the magistrate court on 12 July 2016.

The appellant was admitted to bail on the following conditions:

(i) to pay deposit of US$2000-00 to the Clerk of Court, Harare magistrate court, Harare
(ii) to surrender surety in the sum of US$250 000.00
(iii) to surrender travel documents
(iv) to report three times a week on Mondays, Wednesdays and Fridays at CID Law and Order Harare
(v) not to interfere with witnesses and investigations.

The conditions were to prevail until the finalisation of trial. The appellant has since complied with the conditions that required immediate actioning and continues to comply with the remaining ones e.g. reporting conditions.

Relying on s 121 (1) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (as amended by the Criminal Procedure and Evidence Amendment Act of 2016) the appellant has appealed against that order for bail. For avoidance of doubt the section reads as follows:

(1) Subject to this section where a judge or magistrate has admitted or refused to admit a person to bail
   (a) The Prosecutor-General or the local public prosecutor, within forty-eight hours of the decision; or

   (b) The person concerned, at any time may appeal against the admission to or refusal to bail or the amount fixed as bail or any conditions imposed in connection with bail."

The grounds of appeal are as follows:

(a) The learned magistrate erred in proceeding to make a ruling without the benefit of any submissions from the appellant's counsel in clear violation of basic rules of natural justice which demand that one must be given an opportunity to be heard before a decision affecting rights is made.

(b) The learned magistrate erred in ruling that he could place appellant on bail when s 117 (1) of the Criminal Procedure and Evidence Act clearly states that the right to bail applies to person that are in custody.

(c) The learned magistrate erred in placing the appellant on bail *mero motu* when this was specifically not requested by the State.

(d) The learned magistrate erred in determining the amount and bail conditions without holding any enquiry or hearing any application as provided in s 117 A of the Criminal Procedure and Evidence Act.

(e) The learned magistrate erred in ordering excessive bail conditions against the appellant in contravention of s 120 of the Criminal Procedure and Evidence Act.

In view of the purported misdirection the appellant seeks the following order:

1. That the decision of the magistrate Mahwe under CRB 9563/16 admitting the appellant to bail be and is hereby set aside.

2. The appellant is remanded out of custody under CRB 9563/16

3. The Clerk of Court, Harare is ordered to refund the bail paid under CRB 9563/16 and to return the recognizance surrendered to the court.

The appeal is opposed by the State on the basis that there was no misdirection by the court *a quo* as follows:

"(i) the court still deals with the bail application in terms of s 117 (1) as the accused was in the custody of the police although the Police allowed him to proceed to court without restrain.

(ii) the court had not placed the appellant on bail *mero motu* as the State had on Form 242 indicated conditions it was proposing

(iii) appellant was heard and appellant's counsel had indicated that "we accept the concession by the State". The concession related to bail.

(iv) nothing was wrong regarding the procedure adopted, and further the court has discretion viz the conditions to be imposed.

(v) Bail was not excessive as the appellant managed to pay for the bail. The respondent further opposed the application on the basis that the appellant could not appeal in terms of s 121of the Criminal Amendment Act No. 2 of 2016."

As the basis of lodging the appeal is challenged, it is pertinent to deal with that point before getting into the merits. Section 121 of [*Chapter 9:07*] referred to above states as follows:

"(1) Subject to this section, where a judge or magistrate has admitted or refused to admit a person to bail:

a) the Prosecutor-General or the public prosecutor, within forty eight hours of the decision or

b) the person concerned, at any time may appeal against the admission to or refusal to bail or the amount fixed as bail or any conditions imposed in connection with bail.

The appellant has certainly relied on (b) being "the person concerned" referred to in the section. Section 121 (1) (b) could not have been more clearer, it allows the person concerned, apart from the Prosecutor-General or a public prosecutor who are specifically mentioned, to appeal. The fact that there is further provision "for the person concerned" shows that the legislature did not want to limit that right to the State alone. In fact the appellant being aggrieved by the admission to bail and by conditions imposed in connection with his bail he is within his rights to appeal as so provided in the cited section. The State's argument that the provision to appeal against the admission to bail is meant to afford the prosecutor the right to appeal where he is aggrieved by the admission of accused to bail is not correct, the section provides for all (the State and any other person) to appeal against a decision on bail. That being so I find that the appeal is properly before me.

It is pertinent to give a brief background of this matter for one to appreciate the appeal. On the 7th July 2016 as appellant was leaving court after a routine remand on the other charges that he is facing, he was invited to the police CID Law and Order Department. The appellant was informed of additional charges related to the manner in which the appellant had performed his duties dating back to 2009. The appellant was informed by one

Assistant Commissioner Ncube that the State intended to join the counts with the previous ones so that there would be a single trial dealing with all counts. A warned and cautioned statement was recorded whereafter the appellant was advised that he was free to go, but would be advised when to come to court for formal charges to be filed.

Such invitation came on 12 July 2016 when the appellant was informed through his legal practitioner that court proceedings were to start at 14:15 hours, but the parties were to pass through the police station. Indeed the appellant and his legal practitioner passed through the police station and the parties proceeded to court, the police in their own vehicle and accused in his. At court, on being arraigned before the court the State relied on Form 242 request for remand.

Apparently, whilst bail was opposed on Form 242, an endorsement in writing indicated that bail was not opposed, and certain conditions were endorsed. Also of note was the indication that accused had a pending case at court under CRB 1837/16. In applying for the accused (appellant) to be placed on remand the public prosecutor stated as follows;

> "Bail is not opposed. The accused came on his own. He was arrested on Friday 8 July 2016 and he was released. He came to court on his own and my reading of s 117 of the CP & E Act is that if not in custody of police the issue of bail falls away. In any event accused is facing similar charges wherein he is appearing in court 14 on 20 July 2016. We apply to have the accused remanded to 20 July in court 14 so that the charges can be married. That is all."

In a short response, the appellant's counsel indicated that they were not opposed to the accused being placed on remand and the matter being remanded to 20 July 2016, and they accepted the concession by the State.

The court *a quo* disagreed with the fact that bail was not an issue and pronounced that the court is at large to consider the issue of bail. The Magistrate proceeded to remand the appellant to 20 July 2016 and set the conditions of bail which are the subject of this appeal. The defence counsel immediately protested that he had not been given the opportunity to address the court. As a ruling had already been made the Magistrate indicated that he was *functus officio*. Appellant proceeded to file this appeal.

I note that the grounds of appeal could have been sequential to make sense but, there are breaks to the legal thread. In that regard I will deal with the grounds in a manner as to create a flow. In dealing with the appeal grounds, I find it logical to deal with the second ground of appeal first:

<u>That the court a quo erred in placing the appellant on bail in view of s 117 (1) of the Act</u>.

Mr *Mpofu* for the appellant argued that the issue of bail could not have properly arisen as the appellant was not in custody. Indeed s 117 (1) refers to a person who is in custody as the subject at issue. It reads as follows:

> **"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."

The fact that the section refers to the release on bail imputes that this person was encumbered. A person in custody would be under the control of someone, in this instance, the police, and their freedom of movement would in my view be curtailed. They are under the authority of someone and are not free in a sense to leave as they please, they are confined. The facts before me do not show that, that was the case *viz* appellant. He was not detained, he came from his home, just passed through the police for the convenience of the parties to arrive at court together for proceedings.

Despite the fact that the appellant was not in custody, I do not think that the Magistrate had no authority to consider bail. The appellant was facing fresh charges and was being placed on remand. Where a remand is sought, incidentally the question arises as to whether the accused is being remanded in or out of custody. One cannot but note that the State itself had indicated in its request for remand that bail is not opposed. It then went on to submit that the prosecutor's understanding is that if accused is not in custody bail falls away. This was a mixed signal, moreso when on the Form 242 the State had proposed bail conditions. Ultimately, the public prosecutor later indicated that the state was "abandoning the conditions." As the court rightly remarked, the court was at large to consider the issue of bail. I find no misdirection on that aspect. Incidentally this would cover the third ground of appeal where the appellant alleged: that the court *a quo* erred in placing the appellant on bail without being requested by the state. I am of the view that where the interests of the administration of justice are served by imposition of conditions on an accused, the court is at large to consider that aspect irrespective of the attitude of the state vis the issue. Accordingly I find that the second and third grounds of appeal have no merit.

That the magistrate erred in proceeding to make a ruling without the benefit of hearing submissions from the appellant's counsel

and

That the magistrate determined conditions of bail without an enquiry or hearing an application in terms of s 117 A of the Criminal Procedure and Evidence Act.

I find it proper and convenient to deal with these two grounds together as in essence they amount to the same issue.

The record of proceedings shows that the court *a quo* simply disagreed with the construction of s 117 (1) of the Act as understood by the state and appellant's legal practitioners. The magistrate believed he was at liberty to consider bail. That in itself was not problematic. Most disturbing is what the magistrate proceeded to do. Without hearing any submissions from the appellant's legal practitioners nor the state he went on to set bail conditions. Having decided that he was to consider the issue of bail, it was imperative to be addressed on the application as appellant and the public prosecutor had not made submissions on the issue of bail believing it would not arise. This explains the protest by the appellant's counsel even after the ruling.

The right to be heard is the central pillar that supports the right of access to justice. One has to be heard. A decision reached without hearing an accused (save where he has exercised his right to silence) has the risk of being arbitrary and capricious. In bail applications a judicial officer has to hear the applicant, consider the applicant's circumstances as presented to him and of cause also hear the state's submissions. It is through weighing the facts presented and balancing the same with the interests of justice that a fair and competent decision can be arrived at. This simply did not take place. Failure to hear the appellant's submissions was a gross misdirection and this vitiates the proceedings. One is forced to ask, what then was the basis for arriving at the bail conditions, when the court was not privy to the appellant's circumstances.

If the court had heard the appellant's submissions, in my view it would not have been necessary to even set new bail conditions but rather order the appellant to continue observing the already set conditions since the charges were to be married. There would not have been any prejudice to the interests of justice. Moreso when one considers that appellant was never detained on the new charges, he came to court from his home, parties agreed that the purpose of remanding the case to 20 July 2016 was so as to marry the charges so that there could be one trial. Further, facts on the ground show that appellant had already surrendered his passport, paid $1000-00 bail and was reporting to the same police department that was handling the new charges CID law and Order Harare. These facts could have been easily

placed before the court had the Magistrate allowed the parties to address him on the issue of bail.

The court *a quo* was thus in the wrong in arriving at a decision without hearing the appellant's counsel, moreso when the matter pertained to issues of liberty. Section 50 (1) (d) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013 even provides for unconditional release of arrested persons unless there are compelling reasons justifying detention. This is how serious the liberty of persons is considered. Accordingly the two grounds of appeal that I merged are upheld.

I find it proper to link the foregoing with the last ground of appeal which is that:
The magistrate ordered excessive bail in contravention of s 120 of the Act.

The conditions set by the magistrate include the surrender of surety in the sum of US$250 000.00 and payment of bail amount in the sum of US$2000-00. Mr *Nyazamba* for the state argued that this was not excessive as the appellant was able to comply. It is not in dispute that the appellant had to surrender his father in law's title deeds. Yes, surety from third parties is acceptable, however if bail conditions are set beyond the reach of an applicant it equates to denial of bail. For me however, the pertinent issue is that these conditions were arrived at without hearing the appellant so that in itself impugns upon the decision.

The *audi alteram partem* rule is *sacro sanct* and it is in my view the cradle of justice and fairness in all legal proceedings. Once a litigant be it in criminal, civil, administrative, disciplinary or any proceedings that affect a person's rights, is denied the opportunity to present their case, the outcome thereof cannot be in accordance with real and substantial justice. It is due to the foregoing that I find that there was a misdirection by the court *a quo* arising out of a procedural irregularity which vitiated the court's proceedings. In the result the order it gave in the form of bail conditions cannot stand. The appeal is thus upheld. It is therefore ordered as follows:

1. The decision of Magistrate Court under CRB 9563/16 admitting the appellant to bail be and is hereby set aside.
2. The appellant is remanded out of custody under CRB 9563/16
3. The appellant shall continue to observe conditions set in CRB 1837/16
4. The Clerk of Court, Harare magistrates court shall refund the sum of US$2 000.00 paid as bail under CRB 9563/16 and return the recognizance surrendered to the court, to the appellant.

Mambosasa, appellant's legal practitioners
The Prosecutor-General's Office, respondent's legal practitioners