BENSON CHINDOVE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 March 2020 & 13 April 2021.

Bail Pending Trial

S Chabuka, for applicant
A Muziwi, for the respondent

CHITAPI J: I dismissed this bail application on the turn on 24 March, 2020 and indicated that detailed reasons would be availed upon request. In determining the application I indicated to counsel that there were no prospects of success on appeal. I have been requested to provide the detailed reasons for judgment.

The applicant was listed as the fourth accused when he together, with three co-accused appeared before the provincial magistrate for trial on 3 December, 2019 charged with four counts of separate offences as follows:

(a) On count 1 and 2 they were charged of kidnapping as defined in s 93 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The applicant and his accomplices were accused of having forcibly removed two different complainants, namely Victor Kapikinyu and Tapiwa Kapikinyu from their homes at Lonely Park, Arcturus Mine on 15 November, 2019. The charge alleged that the applicant and his accomplices forced the complainants to a mining pit within the Lonely Park Farm area and detained them from 23:00 hours to 04:00 hours against their will.

(b) In count 3, the applicant and his accomplices were charged with the offence of unlawfully prospecting or searching for any mineral without a licence or permit as defined in section 368 (1) (4) of the Mines and Minerals Act, [*Chapter 21:05*]. It was alleged that on 15 November, 2019 at Lonely Park Farm the applicant and his

three accomplices unlawfully prospected or searched for gold without a licence or permit.

(c) In count 4, the applicant and his accomplices were charged with the offence of robbery as defined in section 126 (a) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was alleged that on 15 November, 2019 at Lonely Park Farm, Acturus, the applicant and his three accomplices unlawfully and intentionally used violence by use of a knife which they threatened the complainant with thereby inducing the submission of the complainant to part with US$300 which the applicant and his accomplices stole from the complainant

Following a contested trial, the applicant was duly convicted as charged on counts 1, 2 and 3. He was found not guilty and acquitted on count 4. In regard to sentence, counts 1 and 2 were taken as one for purposes of sentence. The applicant was sentenced to 60 months imprisonment with 12 months of that sentence suspended for 5 years on conditions of future good behavior. In count 3 the applicant was sentenced to 24 months imprisonment. The total effective sentence imposed was therefore 72 months in respect of the applicant.

The applicant on 12 February, 2020 noted an appeal against conviction only on all the three counts he was convicted on. The appeal is pending under case No CA 96/20. The notice of appeal lists five grounds of appeal as follows-

"Grounds of appeal : Ad conviction

1. The court *a quo* erred and grossly misdirected itself by entering a verdict of guilty when the state had not discharged the burden to prove beyond reasonable doubt that appellant had committed the offences.
2. The court *a quo* erred and misdirected itself at law when it failed to consider the defence of an *alibi* raised by the appellant which alibi was corroborated by the 1st accused but rather shifted the burden of proof to appellant.
3. The court *a quo* erred and misdirected itself at law when it convicted the appellant on the evidence of the state witnesses which evidence had gross inconsistencies.
4. The learned magistrate erred and grossly misdirected himself in concluding that appellant and his vehicle were positively linked to the offences yet disregarding the unsatisfactory circumstances surrounding the identification thereof.
5. The learned magistrate grossly erred in not taking judicial notice that clashes between illegal gold panners is the order of the day hence risk of fabrication was alive."

The applicant then filed this application for bail pending the determination of his appeal aforesaid. The applicant averred that the noted appeal enjoys prospects of success. In his defence

to the charges, the applicant pleaded an *alibi* and averred that he was not at the crime scene when the crimes were committed. He also averred that the offences occurred at night and there was no identification parade conducted by police to have him identified as one of the culprits. The applicant averred further that he was not known to the witnesses and this fact made it necessary for witnesses to describe the applicant using specific features for the evidence of identification to be reliable. The applicant also averred that as regard the alleged use of his vehicle in the commission of the offences, police presented the vehicle to the state witnesses who had not previously identified it, hence suggesting to the witnesses that the applicant's vehicle was the one used in the commission of the offence. The applicant lastly averred that the magistrate should have taken judicial notice of frequent clashes between rival gold panners in the area and that such conflicts induced the warring factious as witnesses to fabricate evidence to fix each other. The applicant averred that a cautionary approach to assessing the evidence should have been taken.

Turning to the grounds of appeal, the first ground of appeal is not a valid ground of appeal at all. To simply state that the magistrate erred to enter a verdict of guilty when the State had proved not beyond a reasonable doubt that the accused committed the offences charged is so vague and embarrassing that it cannot stand. The ground of appeal cannot be answered by the magistrate or the appeal Court. Grounds of appeal are supposed to be clear and concise. The ground of appeal begs the question, "in what way did the State fail to prove that the applicant committed the offences. Although I am not sitting as an appeal Court which has jurisdiction to declare the ground invalid, I can comment on whether the applicant enjoys success on appeal based on this ground. In my view, I do not envisage that the appeal Court will find the ground of appeal as a valid one.

The second ground of appeal attacks the alleged magistrate's failure to uphold the applicant's *alibi* defence which the first accused corroborated. It is alleged that the magistrate shifted the onus of proof to prove the *alibi* to the applicant. A reading of the magistrate's judgment shows that he captured that the applicant's defence that he was not at the scene of the crime. The magistrate analyzed the evidence and noted that the applicant was first seen at the mining pits and had a ford ranger vehicle. Complainant Victor Kapikinyu's evidence as accurately noted by the magistrate was to the effect that upon arrival at the mining pits, under kidnap, the applicant took the complainant aside and revealed an army uniform which he was putting on beneath his work suit. He then threatened the witness with death if the witness did not show the applicant where to

prospect for gold. The complainant's evidence was further to the effect that the applicant was being referred to by the name Chindove and that the applicant produced a knife which he gave to his accomplices. The knife was used to stab the kidnap victims or scare them, the magistrate also noted the evidence of the complainant to the effect that the applicant and accomplices were calling each other with their names. The complainants, Victor and Tapiwa gave the names to the police and the applicant and accomplices answered to those names.

The magistrate in his analysis of evidence noted that the applicant was indeed employed as a soldier. It therefore stood to reason that he would probably have been putting on his camouflage uniform beneath the work suit as testified to by Victor Kapikinyu. The applicant also attended at the police station driving a white ford ranger vehicle. The applicant was being referred to as Chindove which is in fact his surname. The magistrate determined that it was not mere coincidence that the circumstantial facts were consistent with the testimony of the complainants. Another piece of evidence against the applicant which the magistrate properly took into account was the approach made by the applicant on the complainants to influence them to withdraw charges and that he offered an apology. The magistrate justifiably concluded that the identity of the applicant had been sufficiently established beyond reasonable doubt.

The learned magistrate did not cast the onus to prove the *alibi* defence on the applicant. He simply did not find any evidence of an *alibi* or absence of the applicant at the scene as there was adduced proof beyond a reasonable doubt that the applicant and his accomplices committed the offence charged. The applicant for his part was acquitted on the fourth count involving robbery committed on 15 November 2019. The applicant in any event did not lay a foundation for his *alibi*. Even though the applicant has no onus to prove his *alibi,* he would have done good for himself had he even presented a letter to show that he was at work during the night of the kidnapping and other offences charged. It is not sufficient for the accused who relies on a defence of *alibi* to simply state by word of mouth that he was at work when the incident occurred. Some firm foundation to show that the accused was indeed on duty and physically present at the workplace at the particular time is required. Police can have a starting point and authenticate the *alibi* evidence.

Grounds 3, 4 and 5 are not meritable grounds. A ground which alleges that the court *a quo* erred in convicting the applicant on inconsistent state evidences is also not clear or concise. It begs questions like what inconsistences were present and escaped the magistrate's attention. Ground 4

that there was an unsatisfactory identification of the applicant's motor vehicle raises a question of fact. There is no motivation for this ground of appeal whose validity is questionable because the ground begs questions on what the unsatisfactory circumstances of identification were. Lastly ground 5 on the need for the court to take into account the existing clashes between illegal miners thus providing a motive for fabrication is a general statement and not a ground of appeal.

The case turned on the credibility of State witnesses. The magistrate accepted the evidence of the State witnesses as credible. Even though there is an attack on the credibility of the evidence of the investigating officer, little turns on this because the evidence which was determinant of the guilt of the applicant was that of eye witnesses.

In all the circumstances of the commission of the offences *in casu* and considering the magistrate's judgment against the proposed grounds of appeal, I determined that the noted appeal does not enjoy prospects of success. The applicant did not appeal against sentence. The bail application was dismissed for the reason that the applicant failed as required by s 115 (c) (b) to discharge the burden of showing on a balance of probabilities that it is in the interests of justice to release him on bail pending appeal. The application was accordingly dismissed.

Magaya Mandizvidza, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners