JOB SIKHALA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 16 & 29 August, 2022

Bail Appeal

B Mutetwa, for the applicant
T Mapfuwa, for the respondent

MAXWELL J: On 3 August, 2022, Appellant's application for bail pending trial was dismissed. On 5 August, 2022, Appellant noted an appeal in terms of s 121 (1) of the Criminal Procedure and Evidence Act (CP & E Act) [*Chapter 9:07*) as read with Rule 6 (1) of the High Court of Zimbabwe Bail Rules.

Background

The Appellant was charged with Defeating or Obstructing the Course of Justice as defined in s 184 (1) (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].The basis of the charge was Appellant's address to mourners gathered at the late Moreblessing Ali's funeral in Nyatsime. He appeared before the magistrate's court and was placed on remand. He applied for bail pending trial which was dismissed and he subsequently appealed to this court.

The Grounds of Appeal

Appellant approached this court on the following grounds

"4. The learned Magistrate grossly erred and misdirected himself when he wholly departed from the grounds on which the State had premised its opposition to bail as set out in the Form 242.

4.1. The learned Magistrate further erred and misdirected himself when he relied on a ground that had not been advised to the Appellant in the Form 242, was not relied upon by the investigating officer in his oral evidence and in respect of which Appellant had not been afforded the right to be heard on the alleged breach of a previous bail condition as this only arose when the State addressed the court in response. Appellant therefore had no notice of such ground in breach of his right to a fair hearing which requires that he

be informed in advance of the case against him.

4.2. The learned Magistrate a quo further erred and misdirected himself when he denied the Appellant bail on the basis that he did when;

a) He had no jurisdiction to inquire into and determine whether the Appellant had violated bail conditions set by the High Court.

b) No inquiry, in any event was conducted by the High Court or any other court to determine whether or not the Appellant had violated his bail conditions in CRB ACC 97/20.

c) No finding was made by the High Court or any other court, after following due legal process and an inquiry which would have observed the *audi alteram partem rule*, that the Appellant had in fact violated previous bail conditions.

d) The court a quo therefore made a decision based on an ambush that was never advised to the Appellant in advance and which arose after he had cross-examined the investigating officer.

5. The learned Magistrate further erred and misdirected himself when he failed to consider and make a determination on the fact that the Appellant at all times acted as a duly appointed legal practitioner for the ALI family and that he should therefore not be personally associated with his client's case.

6. The leaned Magistrate a quo further erred and misdirected himself when he failed to consider and take into account the following facts and circumstances:

6.1 That the alleged facts and circumstances relied upon by the state in both CRB Nos. ACC 216-17/22 and ACC 316/22 arose from the same alleged incident which occurred at exactly the same alleged time and place and that the second charge could not properly be characterized as showing propensity to commit other crimes.

6.2 That the only State witness, the investigating officer, could not substantiate the grounds on which he had opposed bail as he admitted that:

a) He was yet to record statements which could exonerate Appellant;

b) He did not know who had uploaded the videos relied upon on both YouTube and ZimLive websites, thus putting into question the allegations on which the court a quo relied to find that the Appellant had recorded and uploaded the videos on the two websites.

c) He did not know whether or not the videos relied upon had been edited by whoever uploaded them on the said websites.

7. The learned Magistrate further erred and misdirected himself when he took into account against the Appellant that he had pending cases when:

7.1 The Appellant enjoys the presumption of innocence and should not have his rights curtailed on the basis of surmise and conjecture

7.2 The ground relied upon is not provided for under Section 117 of that CP & E Act.

7.3 The reliance on provisions of the Cyber & Data Protection Act, which the State had not relied upon, was based on surmise and conjecture of what the State might be able to do as opposed to what the State had said it would rely upon.

7.4 That the Appellant, who has been arrested a record 67 times but has never been successfully prosecuted and has no criminal conviction, is in fact a victim of police propensity to arrest him without justification in order to create a false narrative that he has a propensity to commit offences.

8. The learned Magistrate *a quo* further erred and misdirected himself when he failed to consider and take into account the fact that the police could not have been investigating a murder before the mutilated body of MOREBLESSING ALI was found and that the period given in the Form 242 and the charge is therefore *prima facie* incorrect.
   8.1 That this was so was confirmed by the police statement dated 30th May, 2022 which does not refer to any murder and which gave the false narrative that the abductor was MOREBLESSING's lover. **Attached hereto as Annexure "F"** is a copy of that statement.
9. The Magistrate further erred and contradicted himself when he found that he would undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system, without stating how this would be done and without any evidence as to how this could be achieved taking into account the alleged circumstances of the case."

Appellant prayed for the setting aside of the ruling of the lower court and his admission to bail.

Response by the State

The State opposed the appeal on the basis that there was no misdirection on the part of the court a quo in dismissing the application for bail pending trial. It submitted that in terms of section 115 C of the CP & E Act, the grounds specified in s 117 (2) of the same Act should be considered as compelling reasons justifying denial of bail pending trial. It pointed out that when the court *a quo* made a finding that it had been established that there was a likelihood that Appellant would undermine or jeopardize the objectives or proper functioning of the criminal justice system, including the bail system, it was empowered at law to dismiss the application for bail pending trial. It further pointed out that the court a quo based its decision on the fact that when the Appellant is alleged to have committed the current offence he was on bail in B 1445/20 wherein he had been ordered not to post videos or audios on social media platforms or address any gathering, or virtual meeting using words or gestures likely to incite others to commit acts of violence. The response by the State also highlighted that the court *a quo* was alive to the relevant considerations in an application for bail pending trial and it properly applied its mind to the application that was before it. Further that the fact that Appellant was the appointed legal practitioner for the ALI family did not give him the right to commit offences in furtherance of his client's interests and further did not give him the right to violate his bail conditions. The response pointed out that the court *a quo* did not err in relying on the Cyber and Data Protection Act as the State had made reference to it in in

its submissions. It further pointed out that the discovery of the mutilated body of Moreblessing Ali had no relevance to the charge preferred against the Appellant as realization of a real risk or possibility that the police may be investigating the commission of an offence or suspected commission of a crime is an essential element of the offence for which Appellant was charged The State urged the court to dismiss the appeal.

Analysis

In the first ground of appeal, Appellant faults the court *a quo* for departing from the grounds on which the State had premised its opposition. It is trite that the court is not bound by submissions for the State. The court has a duty to weigh up the personal interests of an applicant to bail against the interests of justice in deciding whether it is in the interests of justice to grant bail. For that reason the State can consent to bail and the court still deny an applicant bail. To that end s 117 (5) of the CP & E Act states; -

> "(5) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interests of justice ……."

I am not persuaded that the departure from the grounds relied upon by the State on its own can be sufficient justification to interfere with the discretion of the lower court. It is trite that an appellate court will not interfere with the discretion of the lower court if the discretion has been exercised on judicial grounds and for sound reason. It is further trite that an Appellate court will not interfere even if it considers that if it had been in the position of the lower court it would have taken a different course. See *Attorney-General* v *Howman* 1988 (2) ZLR 402 (S).

Appellant further laments the failure to be afforded the right to be heard. In my view that issue can properly be raised on review as it is a procedural issue. In this ground Appellant is not questioning the substantive correctness of the lower court's decision. He did not allege that the lower court reached a wrong conclusion on the facts or the law. It is trite that where the grievance is against the method of trial, it is proper to bring the case on review. See G. Feltoe in *Administrative Law Guide in Zimbabwe,* 4th ed. The first ground of appeal therefore fails.

In the second ground, Appellant alleges that the Magistrate had no jurisdiction to inquire into and determine whether the Appellant had violated bail conditions set by the High Court.

Appellant's submissions ignored the reasons given by the Magistrate for making the inquiry. On page 8 of the lower court's ruling, the following appears:

> "This court, by its own right is permitted to make inquiries of any nature including making a determination on whether the applicant abided by previous bail conditions."

The magistrate quoted the provisions of s 117 (3) of the CP & E Act and proceeded to say:

> "This court is not being asked to revoke any previous bail. The state is only asking the court to consider whether applicant violated any bail conditions. In so doing, the court has to look at the previous bail orders."

This being an appeal, it is my view that the approach taken by the Appellant is misdirected. Clearly, the magistrate stated that he was allowed to make the inquiry. The appeal ought therefore to have challenged that decision. In any event, Appellant has not pointed to any law that requires an accused who is appearing on remand in the lower court to be brought before the High Court for such an inquiry. Section 133 of the CP & E Act allows such an inquiry to be made by a judge or magistrate of the court before which an accused person has to appear in terms of any recognizance. The rest of the issues highlighted in support of that ground are in my view procedural issues. That no inquiry was held, that the *audi alteram partem* rule was not observed or that Appellant was not advised in advance of an ambush are all procedural issues best tackled on review. In any event, in a judgment by my sister MUNGWARI J in *Job Sikhala & Another* v *The State* HC 874/22, it is stated that Appellant, who was the first Appellant therein, admitted the breach of the bail conditions. This ground of appeal also fails.

In the third ground, Appellant criticizes the Magistrate for not considering and making a determination on the fact that at all times he acted as a duly appointed legal practitioner for the Ali family. Again, in my view, this is a procedural issue as the remedy should be an order directing the Magistrate to make the determination.

In the fourth ground of appeal, Appellant criticizes the Magistrate for failing to take into account a number of facts and circumstances. Firstly, that the facts and circumstances relied upon in CRB Nos. ACC 216-17/22 and ACC 316/22 arose from the same alleged incident and therefore the second charge could not properly be characterized as showing a propensity to commit other crimes. A reading of the ruling by the Magistrate which appears on pages 16-24 shows that he made reference to CRB ACC 97/20 and B1445/20. It follows that that reference shows that the

Magistrate considered the existence of an offence committed in 2020. It is therefore not correct that the conclusion of a propensity to commit other crimes was a result of considering facts and circumstances that arose from the same alleged incident which occurred at exactly the same alleged time and place as alleged by Appellant.

Secondly, that the only state witness, the Investigating Officer, could not substantiate the grounds on which he had opposed bail. This is almost the same issue raised in the first ground of appeal. The reasons given above in respect of the first ground of appeal apply to the facts and circumstances highlighted herein as well. The fourth ground of appeal also fails.

In the fifth ground, Appellant faulted the Magistrate for taking into account the fact that he had pending cases. He argued that he enjoys the presumption of innocence and should not have his rights curtailed on the basis of surmise and conjecture. The record of proceedings shows that the Magistrate was alive to the fact that Appellant enjoys the presumption of innocence and referred to the case of *S* v *Sibanda* HMA 23/21 in which ZISENGWE J stated that the presumption of innocence does not provide an impregnable shield of protection as it may be forced to yield to the more compelling reasons aimed at the protection of the public and the due administration of justice. The Magistrate highlighted the compelling reasons which have not been impugned in this appeal.

Appellant also argued that the ground relied upon is not provided for under s 117 of the CP & E Act. This is surprising as the Magistrate quoted section 117 (2) (a) of the said Act on page 4 of his ruling. Sub- paragraph (iv) states:

> "(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system."

This is the reason given by the Magistrate on page 9 of his ruling. The Appellant's submission on this regard is therefore misleading.

Appellant further argued that the reliance on provisions of the Cyber & Data Protection Act which the State had not relied upon was based on surmise and conjecture. The State in its response pointed out that in its submissions in the lower court which appear on page 121 of the lower court's record, it had made reference to that Act. That submission was not challenged, leading to the conclusion that Appellant sought to mislead the court again. Appellant also argued

that he is a victim of police propensity to arrest him, has been arrested a record 67 times but has never been successfully prosecuted. The approach by the Magistrate cannot be faulted. On page 3 of his ruling he observed that each case depends on its own facts and the court has to make a value judgment peculiar to each case. No matter how many times an accused has been arrested without being prosecuted, each subsequent case is dealt with on its own facts. This ground of appeal therefore lacks merit.

In the sixth ground, Appellant faulted the Magistrate for failing to consider and take into account that the police could not have been investigating a murder before the mutilated body of Moreblessing Ali had been found. The State, in its response, pointed out that the discovery of the body had no relevance to the charge preferred. That submission was not controverted. The basis for criticizing the Magistrate on that issue was therefore no established.

In the last ground, Appellant alleged that the Magistrate did not state how the objectives or proper functioning of the criminal justice system, including the bail system would be undermined or jeopardised by his admission to bail. The Magistrate's ruling is clear that that finding was based on the fact that Appellant did not challenge the existence of B 1445/20 and the court was not convinced by the efforts to deny any violations thereof. The court further observed that the Appellant is on remand for conduct closely associated with what he was ordered not to do. How the criminal justice system and the bail system would be undermined is therefore apparent from the reasoning of the lower court. It cannot be seen to turn a blind eye to a total disregard of an existing order and expect society to have faith in the effectiveness of the system. This ground also fails.

For the reasons given above, I dismissed the Appellant's appeal.

Mtetwa & Nyambirai, appellant's Legal Practitioners
Natioanl Prosecuting Authority, respondent's Legal Practitioners