IGNATIUS MORGEN CHIMINYA CHOMBO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 7 December 2017 & 11 April 2018

Bail application

MUSHORE J: This is an appeal against the refusal of bail (pending trial) in the Magistrates' Court in terms of section 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] on the following grounds:-

"1. The Magistrate misdirected himself in law in failing to find that 'compelling reasons" demanded by s 50 (1) (d) of the Constitution of Zimbabwe, 2013 had not been established by the State, particularly in that:-

1.1 There was neither evidence nor any other basis from which it could be said that appellant was likely abscond

1.2 There was neither evidence nor any other basis from which it could be said that appellant would interfere with witnesses,

1.3 Reference to 'public outcry' is, in itself, never a compelling reason given that it is the people themselves that entrenched a presumption of innocence in the Constitution;

1.4 The State did not address any of the bail conditions offered by the appellant, thereby failing to discharge the onus thrust upon it by law. A compelling reason is one that remains notwithstanding bail conditions.

2. The decision to deny bail on the basis of the above grounds is so outrageous in its defiance of logic or common sense that no reasonable magistrate, applying

his/her mind to the facts and conscious of the right to liberty, could ever have reached that conclusion, particularly in that:-

2.1. No reasonable magistrate could have failed to find that the bail conditions offered by the appellant overwhelmingly addressed and answered each of the grounds upon which bail could be refused;

2.2. No reasonable Magistrate could have failed to find that the appellant, in the circumstances, met all the requirements set out in law for release on bail"

Appellant is a former Member of Parliament and Cabinet Minister. He was arrested on 15 November 2017 at his home in Mount Pleasant. He stated that on the night in question, he heard an explosion at around midnight of 14 November 2017 but did not wake up until he had heard the sound of a second explosion which shook his house. His wife had woken up at the sound of the first explosion upon which she had observed certain persons jumping into the property. Appellant got up to investigate whereupon his bedroom door burst open and 5 to 8 men armed with AK47 rifles burst into the room,(who he described as being soldiers), pointed the guns at him and handcuffed him whilst blindfolding him with his T-shirt. He stated that the men were dressed in 'military uniform (green camouflage) including shoes'. Appellant stated that he was forced out of his home barefooted and blindfolded and placed lying sideways in a lorry with occupants securing his body, head and middle to prevent him from wiggling out of the vehicle. He described that after travelling for about an hour he was interrogated with accusations that had not run his Ministry (Ministry of Home Affairs) well, with one of the assailants or detainers complaining that the appellant had failed to provide him with a stand when he was Minister. He was taken to an undisclosed location and detained there for some days. He told the court that on the second day of his detention, his captors allowed him to write a note so that they could collect his medication from his home. He also stated that he also requested a shirt and trousers and toiletries. At some point, his captors brought his Doctor to attend to him whilst he was so detained. During his time in captivity, over the next few days he was interrogated by four to six men about decisions he had taken as Minister of Local Government. He said that he was guarded at all times by two to three people. He told the court that he was never assaulted by his captors and that they made efforts to meet his requests for provisions because he is diabetic with other illnesses. The day before he was taken to court, they removed his blindfold and drove him to his home. Upon arrival

appellant noticed policemen sitting in a car which was parked outside the gate of his house. He told the court that the Police who were blocking the entrance to his home, complied with an authoritative request made by his captors, for them to move their vehicle out of their way. His captors dropped him off. At his house his abductors allowed him to make a request to his wife to bring him his spectacles. His captors left and the Police who were at his house took over and basically ferried him away.

He recalled the specific date of his abduction as being 15 November 2015, because he had attended a Cabinet meeting earlier on the same day. Appellant vehemently denied that he had been arrested on 23 November 2017 which is the date of arrest reflected on the charge sheet. His charge sheet shows that he was arrested on three counts for the following crimes as alleged:-

"1. Count one- Section 4 of the prevention of Corruption Act [*Chapter 9:16*] - *"Does anything that is contrary to or inconsistent with his duty as a Public Officer*"

2. Count two- Criminal Abuse of Duty as Public Officer in terms of s 174 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]

3. Count three- *"Fraud"*

Count one pertained to actions allegedly taken by appellant in 2004 to 2009. Count two pertained to alleged criminal acts by the appellant on 13 December 2006 and 25 March 2008. Count three pertained to a fraud allegedly committed by the appellant between 8 December 2005 to 26 January 2006.

Appellant immediately applied for bail. The State opposed his application on the following grounds:-

"1. Considering the seriousness of the offence and the stipulated sentence if convicted, the accused is likely to abscond so as to evade prosecution.

2. Accused is the former Minister of Local Government who had access and control of the personnel hence the accused is likely to interfere with witnesses.

3. The current political situation is not favourable to the accused's safety. It is therefore proper for the accused to be remanded in custody for his safety"

The reasons given by the State both in opposing bail in the court *a quo*, and in opposing bail on appeal are not founded in fact. The Court *a quo* was not furnished with reasons or evidence upon which it could make a determination regarding whether or not the interests of justice would be best served by remanding appellant into custody. Section 117 (1) and (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] states as follows:

"117 **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.

(2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—

(a) where there is a likelihood that the accused, if he or she were released on bail, will—

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

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

or

(b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security"

No reasons were provided, nor any evidence led in support of the State's grounds for opposing bail. Neither did the court *a quo* make any enquiry to establish the veracity of the States reasons for opposing bail as would have been expected of it, prior to arriving at its determination refusing bail. The State didn't provide the reason for believing that appellant would abscond save to just merely allege that appellant may abscond; neither did it identify which witnesses appellant was likely interfere with if he was let out on bail. The court also failed to make an enquiry into the State's allegation that "the current political situation was not favourable to appellant" to the extent that appellant needed to be remanded in custody. The state case consisted of mere allegations; and the court misdirected itself in lending credence to those grounds of opposition by simply accepting them without enquiry. The court *a quo* grossly misdirected itself in its findings. See *Aitken v Attorney-General & Anor v Aitken* 1992 (1) ZLR 249 (S); *Air Zimbabwe v Phiri* 1988 (2) SA 696; *S* v *Ncube* 2001 (2) ZLR 556.

The errors and omissions committed by the court *a quo* in arriving at its determination to refuse appellant bail are so egregious that they warrant me invoking my powers of review in terms of s 27 (1) (c) of the High Court Act [*Chapter 7:06*]. I deem that the proceedings *a*

quo were not in terms of real and substantial justice. The gross errors committed *a quo* require correcting.

The decision made *a quo* was unconstitutional to the extent that the court did not observe, as it was obliged to, the provisions of s 50 of the Constitution. Appellant was subjected to inhumane and undignified treatment at the hands of his captors. He was not informed of the reason for his abduction, at the time that he was arrested in the dead of night at his home, or at any time prior to being brought to court on 23 November 2017.

Contrary to the peremptory provisions of s 50 (2) (b), appellant was held for far beyond 48 hours in an undisclosed location. I was troubled by the comments made by the court *a quo* in remaining complicit with the States' misleading statement that the date of arrest was when the Police arrested appellant, in circumstances where the appellant had been abducted and kept incommunicado by State agents several days before the Police 'arrested' appellant. It's obvious that the Police were in cahoots with the mysterious Sate agents given the fact that they took off where the State agents left off. The appellant was detained by State agents on 15 November 2017 and only bought before a court of law a whole week later. To that end the court sanctioned a breach of s 50 (5) of the Constitution. Appellant was kept incommunicado and thus denied his right to remain in communication with family or to consult in private with his lawyer or doctor during the period of his detention *per* s 50 (5) (c)

"(5) Any person who is detained, including a sentenced prisoner, has the right—

(a) to be informed promptly of the reason for their being detained;

(b) at their own expense, to consult in private with a legal practitioner of their choice, and to be informed of this right promptly;

(c) to communicate with, and be visited by—

(i) a spouse or partner;

(ii) a relative;

(iii) their chosen religious counsellor;

(iv) their chosen legal practitioner;

(v) their chosen medical practitioner; and

(vi) subject to reasonable restrictions imposed for the proper administration of prisons or places of detention, anyone else of their choice;

(d) to conditions of detention that are consistent with human dignity, including the opportunity for physical exercise and the provision, at State

expense, of adequate accommodation, ablution facilities, personal hygiene, nutrition, appropriate reading material and medical treatment; and

(e) to challenge the lawfulness of their detention in person before a court and, if the detention is unlawful, to be released promptly.

When looking at the reasoning of the court *a quo* in denying appellant bail, it is my overall view that the court *a quo* got swept up by the sensationalism of the case and allegations surrounding appellant's arrest. The Magistrate lost sight of the fact that she was seized with an ordinary application for bail because she did not deliberate upon the meaning and intention behind section 50 (1) of the Constitution which reads:-

"50 Rights of arrested and detained persons
(1) Any person who is arrested—

(a) must be informed at the time of arrest of the reason for the arrest;

(b) must be permitted, without delay—

(i) at the expense of the State, to contact their spouse or partner, or a relative or legal practitioner, or anyone else of their choice; and

(ii) at their own expense, to consult in private with a legal practitioner and a medical practitioner of their choice; and must be informed of this right promptly;

(c) must be treated humanely and with respect for their inherent dignity;

(d) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention; and

(e) must be permitted to challenge the lawfulness of the arrest in person before a court and must be released promptly if the arrest is unlawful."

The arrest and detention of the appellant were in my view illegal. The unfortunate and illegal actions which preceded appellant's appearance before the court *a quo*, and which illustrate the manner by which appellant was dealt with by State agents and the Police ran afoul to the presumption of innocence weighing in his favour. However as appalling as his treatment was, I am mindful of the fact that the charges would still not been tainted. See: *Jestina Mukoko v Attorney General* 2012 (1) ZLR 117 (SC) The appeal before me is for bail pending trial. In my view, this is a proper case for setting aside the decision of the court *a quo* on the basis that the court *a quo* grossly erred in denying appellant bail.

Accordingly, I order as follows:-

1. The appeal succeeds.
2. The appellant be and is hereby admitted to bail on the following conditions stated hereunder:-
    a) The appellant deposits an amount of US$5 000.00 with the clerk of court, Harare Magistrates' Court.
    b) The appellant to reside at 847 Golden Stairs, Mt Pleasant, Harare.
    c) The appellant to report three times a day one between the hours of 6 am to 10 am; 1 am to 2 pm; 4 pm – 6 pm at Marlborough Police Station, Harare.
    d) The appellant to surrender title deeds to his residential property.
    e) The appellant to surrender his passport and any other travel documents he may possess.
    f) The appellant is not to interfere with witnesses or tamper with evidence.
    g) The appellant is not to visit the offices of the Ministry of Local Government and those of the Reserve Bank of Zimbabwe.

Lovemore Madhuku Lawyers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners