DELISH NGUWAYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 22 March 2017

Appeal against magistrate's refusal of bail

A Rubaya with O Marwa, for the applicant
I Muchini, for the respondent

TSANGA J: The applicant, who faces three charges in the magistrate court one being for extortion as defined in s 134 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] the second being for possession of dangerous drugs as defined in s 157 of the same Code and the third being for possession of prescription preparatory Drugs as defined in s 30 (1) of the Medicine and Allied Substances Control Act, [*Chapter15:03*] was denied bail pending trial.

The state had argued in the court below that he was likely to interfere with witnesses especially the complainant herein as he had threatened the complainant during the commission of the offence. It was feared that he was likely to continue to threaten the complainant. It had also been argued that he has several other cases of extortion which he denied arguing that he was removed from remand and only had one remaining pending matter of extortion before the court and that he was innocent until proven guilty. In refusing bail the magistrate deemed that all the facts put together would compel the accused not to stand trial.

In essence, counsel for the applicant in this appeal against refusal of bail argued that the magistrate misdirected herself in basing her decision on interference with witnesses which occurred during the commission of the offence. It was also argued that matters which had been removed from remand could not be the basis of refusing him bail since they were now

simply unproven allegations. Only one had proceeded by way of summons and it was argued that applicant was innocent until found guilty.

The state in this application was of the view that there was no basis for interfering with the magistrate's decision as the reasons for the decision amount to compelling reasons for refusal of bail. The issue is therefore whether the magistrate misdirected herself on both of these counts as it is the judgment of the court which should be attacked. See *S* v *Malunjwa* 2003(1) ZLR 275(H); *S* v *Ruturi* HH23-03).

In terms of s 117 (3) (a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], in considering whether the accused is likely to endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule, the court is supposed to take into account

> "(i)
> (ii)
> (iii)
> (iv) **any disposition of the accused to commit offences referred to in the First Schedule, as evident from his or her past conduct**;
> (v) any evidence that the accused previously committed an offence referred to in the First Schedule while released on bail;
> (vi) **any other factor which in the opinion of the court should be taken into account**;"

The past conduct of the accused is therefore an element to be considered. Equally important is that the magistrate has latitude to take into account any other factor which in the opinion of the court should be taken into account in deciding whether or not to grant bail. Whilst it is a generally accepted legal principle that a person must be tried without reference to previous convictions, bad character or reference to acts similar to those which constitute the offence he is facing, there are however exceptions such as is the case with the above mentioned provision which relates to bail applications.

In the case of a bail application the aim is to show a systematic course of conduct which may inhibit the granting of bail. The wording of the provision in my view clearly does not say that it is only evidence of past convictions as alleged by counsel of the applicant. A proper reading of the provision is that it is much wider in that it talks of previous bad conduct which would appear to encompass previous convictions, bad character and indulgence in acts similar to those complained of even if not convicted. The reasons for the removal of the cases from remand are not canvassed in the judgment. However, even if one accepts the position

that with the removal from remand, the applicant no longer had any pending cases, the same disregard in my view cannot to be said to apply to the summons case which is also matter involving extortion. The fact that the state has proceeded with the case reflects that they are of the view that they have a strong case against the applicant. As pointed out there is nothing in s 117 (3) (a) that states conclusively that such cases that are indeed before the court ought not to be taken into account unless a person has been convicted. The fact the applicant has been brought to court to answer to the charges would be a very important consideration for the bail court.

In deciding whether an accused will attempt to influence or intimidate witnesses or to conceal or destroy evidence, in terms of s 117 (3) (c) the court has to take into account the following:

> "(i) **whether the accused is familiar with any witness or the evidence**;
> (ii) **whether any witness has made a statement;**
> (iii) **whether the investigation is completed**;
> (iv) the accused's relationship with any witness and the extent to which the witness may be influenced by the accused;
> (v) The efficacy of the amount or nature of the bail and enforceability of any bail conditions;
> (vi) **the ease with which any evidence can be concealed or destroyed**;
> (vii) **any other factor which in the opinion of the court should be taken into account**;"

Granted case law is clear as pointed out in *S* v *Bennett* 1976 (3) SA 652 at 655G-H that interference with witnesses must be real interference not possible interference. The likelihood of interfering with witnesses is to be looked at going forward. It is a likelihood that is assessed holistically from the case as a whole. The magistrate looked at past interference to impute the likelihood of future interference. Whether the accused is familiar with any witness or with the evidence, and, whether any witness has made a statement, are all in themselves valid considerations. This is a case where allegations of gross intimidation had been reported and a witness had given a statement. Furthermore at the time the investigations were ongoing. It cannot in my view be said that the magistrate misdirected herself in looking at the overall circumstances in the commission of the offence in putting forward concerns of interference.

But even assuming that the magistrate misdirected herself on the issue of interference with witnesses, overall there is a compelling case against the applicant from the facts which have been alleged, which make his conviction more than likely. The disputes of fact which he now puts forward regarding the cocaine and the money are for the trial court to decide. At

this stage where the application is for bail, the facts against him in the extortion matter are sufficiently compelling.

There was overall no misdirection on the part of the trial magistrate in finding that the accused was not a suitable candidate for bail.

The application is dismissed.

Rubaya and Chatambudza, applicant's legal practitioners
The National prosecuting Authority, respondent's legal practitioners