MARK TARUWONA
and
JOSHUA MASHAYAMOMBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 7 and 13 January 2005

Bail Appeal

Mr *Musimbe*, for 1st appellant
Mr *Kwenda*, for 2nd appellant
Mrs *Ziyambi*, for respondent

MAKARAU J: The appellants were convicted by a Regional Magistrate at Harare of one count each of contravening s3 of the Prevention of Corruption Act [*Chapter 9:16*]. They were sentenced each to 40 months imprisonment with 10 months suspended for 3 years on conditions of good behaviour. Immediately after sentence, the appellants indicated to the trial court that they intended to note an appeal against both conviction and sentence. This they have since done. An application for bail pending appeal was then made on behalf of both before the trial magistrate. It was dismissed. The proceedings before me are an appeal against that dismissal.

In the notice of appeal, the appellants do not give a basis upon which they challenge the ruling by the trial magistrate in refusing them bail pending appeal. They seek to incorporate the grounds of the appeal against conviction and sentence into the appeal against refusal of bail. They proceed as if my exercise of fresh discretion in the matter is given on the noting of the appeal without them alleging and proving a misdirection on the part of the trial magistrate.

The need on the part of the appellant to lay a basis for the fresh exercise of discretion by an appeal court is not an idle observation on my part. It was the point of divergence between the decision I handed down in the matter of *Samson Ruturi v The State* HH 31/03 and the one by CHINHENGO J in *The State v Samson Ruturi*, HH 26/03. (The judgment by CHINHENGO J is a later judgment although it bears an earlier judgment number.) In the earlier case, I had come to the conclusion that in an appeal

against the refusal of bail by the Magistrates' Court, this court need not find a misdirection on the part of the lower court for it to freshly exercise discretion in the matter. In a well reasoned judgement, CHINHENGO J explained how the amendment to the Criminal Procedure and Evidence Act [*Chapter 9:07*] of 1997, (Act No. 8 of 1997) had changed the law so that the position now is that this court cannot substitute its discretion for that of the lower court in the absence of a misdirection on the part of the lower court. This is what CHINHENGO J had to say on page 19 of the judgment:

> " I think that the 1997 amendment had the effect of placing the High Court in exactly the same position which the Supreme Court was in relation to an appeal against the decision of the High Court. This means that where the Supreme Court could not substitute its own discretion for that of a judge of the High Court as in Chikumbirike's case, (*supra*), and Aitken's case, (*supra*), the High Court cannot now substitute its own discretion, in the absence of a misdirection or irregularity, in an appeal against a magistrate's decision. The appeal to the High Court has in, in my view, become an appeal "in the narrow sense" as the words are used in Aitken *supra* at 252F. The statement by EBRAHIM J in Chikumbirike's case, supra at 146F now applies to the High Court, with the result that a "Court of Appeal will only interfere if the court a quo committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its own decision."".

I am persuaded by the soundness of CHINHENGO J's reasoning above.

Although the appellants did not allege a misdirection or irregularity in procedure on the part of the trial court, the ruling by the trial magistrate in dismissing the application does not reveal his reasons for denying the appellants the relief they sought. Mrs *Ziyambi* conceded, which concession was properly made in my view, that the trial magistrate misdirected himself in failing to give reasons for dismissing the application. His ruling is an attempt to reject outrightly the suggestion implicit in the application that the trial magistrate may have erred in convicting the appellants. Instead of deciding the application dispassionately and not view it as personal attack on his work ethics, the trial magistrate had this to say:

> "I have no doubts about the way I have followed the evidence, the way the reasoning in the judgement and I have no doubt even about the sentence. It is something that I worked thoroughly on. When I wake up in the morning to come to court, I come to court wholeheartedly and not just to be here. I work at it thoroughly, I look at it thoroughly, I look at everything thoroughly. I did so in this

case and I am quite satisfied but I want it shared amongst the fraternity of this system.
The application for bail pending appeal is dismissed."

It is trite in my view that when a judicial officer decides on an application, he or she must at least refer to that legal principle upon which the decision is based in addition to the facts upon which the legal principle is applied. In the above ruling by the trial magistrate, no legal principle is referred to and the evidence that he claims to have looked at thoroughly is not referred to. It is the lack of these basic features in the ruling by the trial magistrate that in my view constitutes the misdirection on his part.

Having established a misdirection on the part of the trial magistrate, I am now at large to exercise fresh discretion in the matter.

It is appears to me well settled in this jurisdiction that in considering an application for bail pending appeal, the presumption of innocence entitling the appellants to liberty is inoperative and the onus rests with the appellant to show that he or she has prospects of success on appeal and further, that there are positive grounds that entitle him or her to be released on bail. That onus, while still discharged on a balance of probabilities, appears to me heavier than when one seeks to be released on bail pending trial and before conviction when the presumption of innocence tips the scales in favour of the liberty of the individual. (*See S v Ncube* HB 4/03; and *S v Manyange* HH 1/03*).*

Upon receiving the bail appeal, the respondent filed a concession to the granting of bail to the appellants on the grounds that there were vital missing links in the evidence proffered by the State. Further, it was conceded that the trial magistrate did not indicate on which charge between the main and the alternative, he had convicted the appellants, thus entitling the appellants to be released on bail pending the determination of their respective appeals.

At the hearing before me, an application to withdraw that concession was made and bail was opposed. The application to withdraw the concession was opposed. It was argued that the fact that two officers in the Attorney-General's office held different opinions on the matter was sufficient to incline the court towards granting the application as this indicated that the appellants have an arguable case on appeal.

It is trite that the admission of an applicant to bail is in the discretion of the court. The opinion and participation of the Attorney-General in such applications is an integral part of the inquiry into the matter. He is an interested party in the matter as he is in charge of prosecuting the applicants and acts as the mouthpiece of the police before the court. His presence and participation in the inquiry act to complete the adversarial contest before the court. Where the Attorney-General concedes to the admission of an applicant to bail, the court examines such a concession to establish whether it is properly made and coincides with the views of the court. The court is however not bound by such a concession, as the court has to exercise its own discretion on each and every appeal or application placed before it. Where a concession has been made by the Attorney-General, it does not give the applicant or appellant any entitlement. It remains the opinion of the Attorney-General until endorsed by the court when it becomes an order of the court. Being an opinion, it strikes me as being vulnerable to change and withdrawal at the instance of the holder and for good reason given.

It is on the basis of the above reasoning that I allowed the respondent to withdraw its earlier concession and oppose the bail application. I am of the view that the earlier concession by the state had not been properly made.

The appellants sought to be released on bail mainly on the basis that their appeals against conviction had prospects of success. In particular, the appellants attacked the nature and cogency of the evidence used to convict them. They also sought to rely on an alleged irregularity in the wording of the conviction itself and on the fact that the trial magistrate, after pronouncing sentence, *mero motu*, indicated that he wished to have the matter reviewed by a superior court. Finally, they argued that a different court might impose a different sentence in the matter. In this regard, both relied on their respective grounds of appeal that the sentence imposed by the trial magistrate is so severe as to induce a sense of shock.

In attacking the nature of the evidence against them, the appellant alleged that there were inconsistencies in the evidence of the arresting team. Although this allegation was made in the written submissions, no examples of the inconsistencies were highlighted nor referred to me in the oral argument. Mr *Musimbe* for first appellant

addressed me to some length on the fact that the complainant himself did not give any evidence against the first appellant as all his dealings were with the second appellant. While it is true that the evidence reveals that the complainant never contacted the first appellant, there is other cogent evidence that links the first appellant to the second appellant and upon which the trial magistrate based his decision. The trial magistrate's decision was not based solely on the evidence of the complainant but on all the evidence that was before the court, including evidence from the appellants themselves. The trial magistrate's assessment of the cogency of the testimony before him appears to me faultless.

Both counsels also made much of the fact that the trial magistrate had indicated that he wished to have the matter taken on review even if the appellant did not do so. By stating this in open court, it was submitted that the trial magistrate had reservations about the propriety and correctness of the verdict and sentence he had just handed down.

I do not share the views of counsel in this regard. However, even assuming the correctness of the joint submission by counsel, in the proceedings before me, I would put the remarks of the trial magistrate under discussion on par with the opinion of the Attorney-General, persuasive but not binding. Despite whatever reservations the trial magistrate my have had about his assessment of the evidence before him, it remains my view that there is cogent evidence on record against both appellants, which negates their respective prospects of success on appeal.

I now turn to consider the alleged irregularity in the wording of the verdict itself. In returning a verdict in this matter, the trial magistrate had this to say:

> "The State has more than proved its case and on the alternative against both accused. They are found GUILTY AS CHARGED."

As indicated above, the appellants had been charged with contravening the Prevention of Corruption Act and with extortion in the alternative. The point raised in submissions on behalf of the appellants is that the trial magistrate did not indicate on which charge between the main and the alternative, he convicted the appellants.

In my view, the point is well taken. It is trite that an accused person must is entitled to be informed of the charge upon which he or she has been convicted and where charged in the alternative, he or she is entitled to an acquittal on the other.

From the wording of the verdict, it is clear that the trial magistrate found that the State had proved its case against the appellants on the main charge as well as on the alternative charge. I have already indicated above that I agree with the trial magistrate in this regard and find no fault with his reasoning. The issue that remain for determination is whether, by failing to specify on which charge he had convicted the appellants, the trial magistrate committed such an irregularity as may warrant the appeal court setting aside the "tainted" conviction.

It is my view that the irregularity raised by the appellants can be corrected by this court using its review powers without necessarily upsetting the conviction of the appellants and more importantly, without doing an injustice to them. I hold this view on account of the provisions of s29 (2) (b) (iii) of the High Court Act [*Chapter 7:06*]. This section reads:

> "(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings-
> (a) …….
> (b) Are not in accordance with real and substantial justice, it may, subject to this section-
> (i) ……..
> (ii) …….
> (iii) Set aside or correct the proceedings of the inferior court or tribunal or any part thereof or generally give such judgement or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made on any matter which was before it in the proceedings in question; or……"

Since these powers are available to the court even when it is sitting as an appeal court, the irregularity complained is not of such a nature as to vitiate the conviction of the appellants for it can be corrected on appeal without necessarily setting aside the conviction of the appellants and remitting the matter to the trial court.

Regarding sentence, I am not persuaded that the sentence imposed on the appellants is so severe as to induce a sense of shock. I hold this view taking into account the circumstances of the matter, especially the positions that the appellants occupied in

the justice delivery system and the sentencing approach of this court in matters of corruption involving public servants. The sentences imposed in similar cases in the past reveal a high degree of intolerance of such transgression. (See *S v Chogugudza* 1996 (1) ZLR 28 (S); The *Attorney-General of Zimbabwe v Bryan Johnson and Another* SC 119/98 and *Hamish Masocha* v *The State* HH 2/002.)

It is therefore my view that the arguments advanced by the appellants, individually and collectively do not persuade me that the appellants have prospects of success on appeal. Further, the appellants have not shown that there are any other positive grounds why they should be admitted to bail.

In the result, the appeal is dismissed.

J Musimbe & Associates, 1st appellant's legal practitioners
Kwenda & Associates, 2nd appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners