MISHECK MANYUCHI

and

KNOWLEDGE TSHUMA

and

RABIUS NCUBE

and

ENIAS NCUBE

and

CONELIOUS NCUBE

and

ADMIRE VUSA SIBANDA

versus

THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 27 & 29 APRIL 2020

Bail appeal pending trial

B. Khupe, for the appellants
B. Maphosa, for the respondent

DUBE-BANDA J. This is an appeal against the decision of the magistrate refusing to admit the appellants to bail pending trial. The appellants appeared in the court of the magistrate on the 23rd March 2020, facing five counts of robbery as defined in section 126 of the Criminal law Codification and Reform Act [Chapter 9:23].

The first count alleged that on the 14 March 2020 at around 0200 hours, the appellants proceeded to *Chisale* Homestead, Village B5, Hope Fountain and opened the sitting room door which was closed but not locked to gain entry into the house. While inside the house, one of the appellants ordered the complainant to remain sleeping on the bed and assaulted her on both sides of the ribs with a metal bar and struck her with a knife on the knee as the gang

demanded money. It is alleged that in the process, the appellants searched the wardrobe and took cash in the sum of ZW$1 500 00 and two cell phones, the property of the complainant, one *Siphazamiso Ngwenya.* Nothing was recovered.

In the second count it is alleged that again on the 14 March 2020, the appellants raided the *Vundla* Homestead, Village B5, Hope Fountain, and forcefully entered the bedroom where the complainant, *Elijah Vundla*, was in bed, once inside the appellants demanded money. One of the appellants assaulted the complainant with the flat side of the machete on his back several times. The complainants gave the appellants cash in the sum of ZW$18 000 00, 22 grams of gold, US$500 00, two digital scale mini pocket and four cell phones.

In the third count it is alleged that the appellants raided the *Chisale* Homestead, Village B5, Hope Fountain, and opened the sitting door which was closed but not locked and gained entry into the house. While inside the house, one of the appellants ordered the complainant, *Samuel Chisale*, to remain sleeping on the bed, and assaulted him several times on his back with the flat side of the machete and once on the left hand using a metal rod. The complainant the surrendered cash in the sum of ZW1 600 00 and two cell phones. It is the said they tied complainant's legs with a belt, and then left.

In the fourth count it is alleged that the appellants raided the *Mpofu* Homestead, Village B5, Hope Fountain, used a metal bar to break the bedroom door to gain entry into the house. When inside the house, they demanded money, assaulted the complainant, one *Atrina Sinjania.* One of the appellants assaulted the complainant with a metal bar which broke her lower limb. The appellants forcible took ZW$1007 00 and an SQ7 cell phone.

In the fifth count it is alleged that on the 14 March 2020, the appellants raided *Mpofu* Homestead, Village B5, Hope Fountain, and used a metal bar to break the bedroom door to gain entry into the house. While inside the house, one of the appellants assaulted the complainant, *Emmanuel Mpofu*, once on the left cheek with a flat side of the machete. They forcible took Z$1 400 00 and a cell phone.

After a contested bail hearing, the court *a quo* refused to admit the appellants to bail pending trial. The court *a quo's* decision was anchored on the following: that the appellants while being apprehended attempting to flee from arrests at the Hospital, where one of the victims had identified them as the alleged robbers; that one of the victims was still hospitalised and his medical condition had not yet been ascertained; and lastly, that the

number of the counts are several likely to induce the appellants to flee as testified to by the investigating officer.

Aggrieved by the refusal to admit them to bail, the appellants noted an appeal to this court. The respondent is not opposed to the appellants being admitted to bail, and in its written response explains the basis of the concession. Notwithstanding the concession by the respondent, I directed that parties to make oral submissions.

The jurisprudence in this jurisdiction shows that court is not bound by the concession made by the respondent. The court does not merely-rubber stamp the position of the State. The grant or refusal of bail is a judicial function. It is the court that admits, or refuses to admit an accused to bail, it must therefore be satisfied that the concession put forward by the State, factors into the equation the law on bail and the particular facts of the case. The court must be satisfied that the concession has been properly made. Representations made by the State, important as they might be, form part of the mosaic that the court has to consider in the determination of the matter. Such a concession cannot be "the be all and end all."

Bearing in mind that the allegations faced by appellants are serious by any standard, the court asked counsel to make submissions in respect of their respective positions. It became apparent that both counsel were expecting the court to merely rubber-stamp the position taken by the State. Ms *Khupe* for the appellants, managed to make a submission here and there, however, Mr *Maphosa* for the respondent could not even make a single submission in support of the concession made by the State. All he could say was that "I stand by the response filed of record." It became clear that he had not familiarised himself with the facts of the case. He pointed out that he was not the author of the State's response, he merely got involved in the matter in the proverbial eleventh hour. I take the view that it is important, even where a concession is made by the opposing litigant, counsel to be ready to argue their respective cases if called upon to do so.

Determining a bail matter calls for a delicate balance between the liberty of the accused and the interests of society which demands that an accused should be able to stand trial or avail himself for trial when he is so required. Where there are such competing of interests, a court, in an appropriate case cannot merely rubber-stamp a position taken by a litigant, it has a duty to interrogate whatever position is advanced. Therefore, a measure of seriousness befalls all those who are involved, to enable the court to reach a just decision in the case.

Generally, the *onus* in a bail application rests with the prosecution. It has to show that they are compelling reasons that disentitle the accused to admission to bail pending trial. As Mathonsi J (as he then was) said in *S v Munsaka* 2016 (1) ZLR 427 (H), the *onus* of proving compelling reasons for not granting bail lies on the State. The degree of proof required is a balance of probabilities.

Section 115C of the Criminal Procedure and Evidence Act [Chapter 9:07] (the Act) shifts the *onus* to the accused where he is charged with a crime listed in Part I of the Third Schedule to the Act. In that event the accused bears the *onus* of showing, on a balance of probabilities, that it is in the interests of justice for him to be admitted to bail.

In terms of the Act, robbery, involving the infliction of grievous bodily harm by the accused or any co-perpetrators or participants in the crime is listed in Part 1 of the Third Schedule to the Act. This means that in such cases, the *onus* rests with the accused, to show on a balance of probabilities that it is in the interests of justice for him to be admitted to bail pending trial.

The allegations against the appellants are serious. In count I it is alleged that while inside the house of the complainant, one of the accused ordered the compliant to remain sleeping on the bed and assaulted her on both sides of the ribs with a metal bar and struck her with a knife on the knee as they demanded money. In respect of count 2 it is alleged that one of the accused assaulted the complainant with the flat side of the machete on his back several times. In count 3 it is alleged that one of the of the appellants assaulted the complainant several times on his back with the flat side of the machete and once on the left hand using a metal rod as they demanded money. In count 4 it is alleged that one of the accused assaulted the complainant with a metal bar and complainant sustained a broken lower limb. In count 5 it is alleged that one of the appellants assaulted the complaint with the flat side of a machete.

Despite of all these alleged vicious attacks on the complainant, no medical evidence was placed before the court *a quo*, to show the extent of the injuries sustained by the complainants. There is no evidence of the infliction of grievous bodily harm on the complainants. It is for this reason that I accept that Part I of the Third Schedule, which casts the *onus* on an accused of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail, does come into operation in this case. Therefore, the *onus* remains on the state to show that there are compelling reasons justifying the refusal to admit the appellants to bail pending trial. This appears to have been lost by prosecution in

the court *a quo* as shown by the lackadaisical approach adopted in opposing the admission of the accused to bail.

The issue now before this court is whether the magistrate misdirected himself in refusing to admit the appellants to bail. The answer to this issue must be located in the judgment of the court *a quo*. See *S* v *Malunjwa* 2003(1) ZLR 275(H); *S* v *Ruturi* HH23-03). Put differently, the question that falls for decision in this court is whether, on the facts before it, the court *erred* or misdirected itself in denying the appellants bail. In order for this court to make a determination on the issue, it is restricted to the reasons for the judgment rendered by the court *a quo*.

The legislative framework and jurisprudence in this jurisdiction show that the entitlement to bail exists as of right. It is a constitutional right, its enjoyment can only be limited if exceptional circumstances are established. The legislature, in section 117 of the Act set out circumstances in which the right to bail could be forfeited. See *Michael Mahachi v The State* HH 4-19. The specific right of an accused person to be presumed innocent until proven guilty, is sacrosanct and is the basis for the entitlement to bail set out in s 117 (1) of the Act.

Where the court refuses to admit an accused to bail, it can only do so if the grounds set out in section 117 (2) (a) of the Act have been met. These are: where there is a likelihood that the accused, if he or she were released on bail, will - endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or not stand his or her trial or appear to receive sentence; or attempt to influence or intimidate witnesses or to conceal or destroy evidence; or undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or 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.

In *casu*, the court *a quo* refused to admit the appellants to bail, reasoning that they attempted to flee at the time of arrest, that's creating a real danger that upon admission to bail they may abscond and not stand trial. In terms of s117 (3)(a) of the Act, in considering whether the accused is a good candidate for admission to bail, the court take into account any other factor which in its opinion should be taken into account. Therefore, the conduct of the accused at the time of arrests can be taken into account in assessing whether he should be granted or refused bail. See *Delish Nguwaya v The State* HH 199-17.

In this instance no weight can be attached to the allegation that the appellants attempted to flee at the time of their arrest. First, the arresting officer, was not called to testify and present evidence on the events surrounding the arrests of the appellants. This evidence was presented by the investigating officer, who was not part of the arresting team. It is trite that hearsay evidence is admissible in bail proceedings, it remains a question of weight. Then the question is, what weight should a court attach, in the circumstances of this case, to this kind evidence? I take the view that no weight should be attached to this evidence, for the following reasons; no reason was given to the court as to why the arresting officer was not called to testify. Further, without any foundation, the prosecutor in examination in chief of the investigating officer, throw in a leading question, it went like this; Q. *Did they attempt to flee*? A. *Yes*. Such leading, even in a bail application, is objectionable. Notwithstanding the flexibility of the rules of evidence in bail hearings, the evidence must still remain that of the witness. I take the view that there was no credible evidence before the court *a quo,* to make a factual finding that the appellants attempted to flee at the time of arrest.

The court *a quo* found that one of the victims of the robbery identified the appellants as the alleged robbers. The record shows that it is in cross examination that the issue of identification was raised. There are six accused persons before court, the investigating officer says only three of them were identified by one or some of the complainants. The court was not told which of the three were identified. The court *a quo* was kept in the dark about the identities of those three appellants who were identified. The investigating officer when asked the reason for the arrest of the other three who were not identified, his answer was simply that "they moved as a gang." Surely it would a travesty of justice to arrest a person solely, without more, that he was found in the company of a suspect. Even in re-examination, the prosecution did not seek to clarify the issue of identification, i.e. to ask the witness to tell the court the identities of the three appellants who were identified by the witnesses. The state shouldered the *onus*, to show the court, by way of evidence the accused persons who were identified by the complainants. This was not done. It was a misdirection for the court *a quo* to find that the accused were identified, when there is no evidence of who amongst the six was identified.

Further, the court *a quo* also refused bail on the basis that one of the victims of the robbery was still hospitalized and his medical condition had not yet been ascertained. No medical evidence was furnished to the court *a quo*, to show that indeed such a complainant was detained in hospital, and the extent of the injuries, if any that he or she suffered from the

actions of the alleged robbers. A court of law deals with evidence, not speculation. It was a misdirection to refuse bail on this basis.

Further the court *a quo* found that the number of the accounts are such that they will induce the appellants to abscond. Refusing to admit an accused to bail is a serious matter. It must be taken serious. It is a serious limitation of the right constitutional right to liberty. To merely find that the number of counts are such that will induce an accused to abscond, without more, is seriously inadequate. It is a misdirection on the part of the court *a quo.*

If there is evidence that the accused is not a good candidate for bail, let such evidence be placed before court in order of a just decision to be made in accordance with the law. In the absence thereof, the court will have to rule on the basis of what is available. The prosecution in the court *a quo,* failed to place cogent evidence before. The prosecution did not demonstrate that State had established any of the grounds required by the law to be stablished before an accused is denied bail.

A court which gives an order adverse to the interest of a party before it is expected to give reasons for its decision. Those reasons must be detailed enough, and at least sufficient, to demonstrate the rationale of the judgment. To do otherwise will be to invite derision of the order. The reader will be left to think that it was capricious and therefore irrational.

It is for the above reasons that I find that the court *a quo erred* at law in refusing to admit the appellants to bail pending trial. Therefore, the concession of the respondent has been properly taken, and I find that the appellants are good candidates for admission to bail at this stage.

Disposition

For these reasons, I find that the court *a quo erred* at law by finding that the prosecution had provided compelling reasons to refuse to admit the appellants to bail. I therefore, find that the appellants are proper candidates for admission to bail pending trial. In the result, I order as follows:

1. The following appellants, namely; MISHECK MANYUCHI; KNOWLEDGE TSHUMA; RABIUS NCUBE; ENIAS NCUBE; CONELIOUS NCUBE; ADMIRE VUSA SIBANDA are and hereby admitted to bail on the following conditions:
    i. That each of the appellants, individually pays the sum of ZW RTGS 1 500 as bail cognizance to the Registrar, High Court, Bulawayo.

ii. That MISHECK MANYUCHI, shall reside at No. 21 Investon Road, Queens Park West, Bulawayo, and he shall report at Queens Park Police Station once a week on Fridays between 6 am and 6 pm until his trial on the five counts of robbery is finalized.

iii. That KNOWLEDGE TSHUMA, shall reside at Tshuma's Homestead, Tshapewa Village, Silobela, and he shall report at Silobela Police Station once a week on Fridays between 6 am and 6 pm until his trial on the five counts of robbery is finalized.

iv. That RABIUS NCUBE, shall reside at Tshuma's Homestead, Tshapewa Village, Silobela, and he shall report at Silobela Police Station once a week on Fridays between 6 am and 6 pm until his trial on the five counts of robbery is finalized.

v. That ENIAS NCUBE, shall reside at No. 3582 Nkulumane 5, Bulawayo, and he shall report at Nkulumane Police Station once a week on Fridays between 6 am and 6 pm until his trial on the five counts of robbery is finalized.

vi. That CONELIOUS NCUBE, shall reside at Maseko's Homestead, Tshapewa Village, Silobela and he shall report at Silobela Police Station once a week on Fridays between 6 am and 6 pm until his trial on the five counts *is* finalized.

vii. That ADMIRE VUSA SIBANDA, shall reside at No. 7138 Pumula North, Bulawayo and shall report at Pumula Police Station once a week on Fridays between 6 am and 6 pm, until his trial on the five counts of robbery is finalized.

2. That each appellant, shall not interfere with witnesses in this matter.

Matatu, Masamvu& Da Silver-Gustavo, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners