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MILTON GOMANA

v

THE STATE

**SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 23, 2020 & November 25, 2020**

Appellant in person
E. Mavuto, for the respondent

IN CHAMBERS

UCHENA JA: This is an appeal against the dismissal of the appellant's bail application by the High Court. Judgment No. SC 166/20 Criminal Appeal No. SC 320/20

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FACTUAL BACKGROUND

The appellant and his co-accused Kudzai Chiza were arraigned before the magistrate's court facing 19 counts each; 10 counts each being of unlawful entries into premises in contravention of s 131 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and the other nine (9) counts each being of thefts from those premises in contravention of s 113 of the Act. The two were arrested in Gweru on 9 June 2014, after they had broken into and stolen property from Shangani Post Office in the early hours of that day. A satchel containing property stolen from Shangani Post Office, and tools used in the commission of the offence was found in the truck which the appellant and his co-accused had travelled in from Shangani to Gweru. They had been given a lift by a truck driver who on

arriving in Gweru gave information to the Police leading to the arrest of the appellant and his co-accused. The investigating officer told the court that the driver told the police that the satchel belonged to the appellant and his co-accused. The appellant and his co-accused were thereafter implicated in the commission of other offences and taken for indications at several other institutions which they had broken into and stolen from namely, (Primero Energy Service Station - Kadoma, Ntobe Store –Silobela, Zim Post Office-Mhangura, Selous Post Office- Selous, Ram Petroleum Service Station-Lions Den, Redan Service Station-Makuti, Nyamatani Primary School- Sanyati Kadoma, Nyamatani Secondary School- Sanyati Kadoma, Hovani School – Gokwe, Shangani Post Office - Shangani). The appellant pleaded not guilty to the charges preferred against him.

After the trial the appellant and his co-accused were each convicted of nine (9) counts of unlawful entry into premises and nine (9) counts of theft. The magistrates' court found that the indications were made freely and voluntarily as the evidence from both civilian and police witnesses proved that they were conducted with the consent and free participation of the appellant and his co-accused. The evidence led established that a black Samsung cellphone which was stolen from Selous Post Office was recovered from a purchaser who had bought it from the appellant's co-accused. It further found that the appellant and his co-accused used a clear *modus operandi* to break into premises after which they used explosives to blast open safes from which property and cash would be stolen. The same tools they used (pick head, screwdrivers, explosive tubes and codes amongst others) as narrated in their indications were found in the satchel which was recovered in their possession after they committed similar offences at Shangani Post Office in the early hours of 9 June 2014. The satchel which was found in their possession contained the property stolen from Shangani Post Office and the tools used to break in and explode the safe. The appellant was sentenced to a

total of 28 years imprisonment of which five years were suspended leaving an effective term of 23 years.

Aggrieved by the convictions and sentence imposed on him, the appellant noted an appeal to the High Court, after which he applied for bail pending appeal. The appeal is still pending. In determining the appellant's application for bail pending appeal, the court *a quo* held that there were no reasonable prospects of success on both conviction and sentence and that there was a possibility of the appellant absconding if he is granted bail pending appeal. The court *a quo* found that the appellant and his co-accused were not assaulted to force them to make indications because their medical reports did not bear evidence to that effect. It further held that the appellant's grounds of appeal were centred on factual findings and that it was trite that appellate courts do not lightly interfere with findings of facts by trial courts. Accordingly, the application for bail pending appeal was dismissed. Aggrieved by the dismissal of his application, the appellant appealed to this Court.

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The appeal raises two issues for determination

1. Whether or not the appellant has prospects of success on appeal against both conviction and sentence?
2. Whether or not the appellant is likely to abscond in light of the gravity of the offences for which he was convicted and sentenced.

SUBMISSIONS MADE BY THE PARTIES.

The appellant submitted that his appeal should be allowed as he has prospects of success in the main appeal. He averred that the court *a quo* erred by not finding that there was

insufficient evidence linking him to the offences. The appellant argued that the indications which were relied on to convict him were not backed by photographs and videos and were thus, not adequate to secure his conviction. He further argued that the indications which were relied on as evidence linking him to the offences were induced by duress and were not made freely and voluntarily. The appellant contended that the court *a quo* erred in finding that the satchel linking him to the offence was his as there was no conclusive evidence to that effect because the truck had been boarded by many people and the truck driver had not given evidence. The appellant argued that he was improperly convicted on circumstantial evidence. He further submitted that he was not a flight risk as he was going to avail a guarantor if granted bail and was willing to submit to stringent bail conditions.

The respondent opposed the appeal. Counsel for the respondent submitted that the appeal was devoid of merit and ought to be dismissed. He submitted that the granting or refusal of bail involves an exercise of discretion which is rarely interfered with by appellate courts unless it is proven that the court erred in exercising its discretion. He argued that the court *a quo* did not err in dismissing the appellant's bail application. He argued that most of the appellant's grievances are on factual findings made by the trial magistrate which the court *a quo* relied on. In that regard, he argued that appellate courts do not lightly interfere with factual findings of trial courts, unless it is proven that they are grossly unreasonable.

Counsel for the respondent submitted that the court *a quo* correctly relied on the factual findings of the trial magistrate who found that the appellant was in possession of a satchel which contained property stolen from Shangani Post Office. He argued that although most of the respondent's witnesses did not positively identify the appellant, the pick, explosive tube and code recovered from him corroborated their evidence as all unlawful

entries involved the same *modus operandi* of breaking in and using explosives to blast open safes from which contents would be stolen. On sentence, he submitted that the court *a quo* correctly found that the sentence imposed by the trial court was appropriate in view of the seriousness of the offences. Counsel for the respondent argued that the appellant had failed to establish a basis for interference with the court *a quo*'s exercise of discretion and its findings of fact.

THE LAW

Counsel for the respondent correctly submitted that the granting of bail involves an exercise of discretion by the court of first instance. It is trite that an appellate court will not interfere with the exercise of discretion by a lower court or tribunal unless there is a misdirection. It is not enough that the appellate court thinks that it would have taken a different view from the trial court. It must appear from the record of proceedings that there has been an error made in the exercise of discretion such as that the trial court acted on a wrong principle; allowed extraneous or irrelevant considerations to affect its decision or made mistakes of fact or failed to take into consideration relevant matters in the determination of the question before it. See *Barros & Anor v Chimponda* 1991 (1) ZLR 58 (S); *Aitken & Anor v Attorney General* 1992 (1) ZLR 249 (S).

The purpose of exercising discretionary power vested in the court in terms of s 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is to secure the interest of the public in the administration of justice by ensuring that a person already convicted of a criminal offence will appear on the appointed day for his/her appeal or review. It is for that reason that the Act provides, that upon sufficient evidence being led to justify it, a finding that a convicted person is likely not to appear for his/her appeal or review when released on

bail is a relevant and sufficient ground for ordering his/her continued detention pending appeal or review. See *Madzokere & Ors v The State* SC 08/12.

The main factors to consider in an appeal against a refusal of bail by a person convicted of an offence are twofold: Firstly, the likelihood of abscondment. See *Aitken, supra*. Secondly, the prospects of success on appeal in respect of both conviction and sentence. See *S v Williams* 1980 ZLR 466 (A) at 468 G-H; *S v Mutasa* 1988 (2) ZLR 4 (S) at 8D; *S v Woods* SC 60/93 at 3-4; *S v McGowan* 1995 (2) ZLR 81 (S) at 83 E-H and 85 C-E. Other factors to bear in mind are the right of the individual to liberty and the delay before the appeal can be heard. See *Mungwira v S* HH 216\10.

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The gravamen of the appellant's contention against the judgment convicting and sentencing him largely depends on factual findings and evidentiary issues. The appellant argued that the trial court erred when it held that the satchel found in the truck belonged to them. He avers that it could have belonged to other travellers who boarded the truck before they arrived in Gweru. The appellant also contends that he was improperly linked to other similar offences committed around the country when there was no conclusive evidence to that effect besides the alleged similar *modus operandi*. He asserts that he was incorrectly linked to the crimes on circumstantial evidence. He avers that he was improperly convicted on indications which were not voluntarily made but influenced by duress and not backed by photographs and videos.

The court *a quo* held that the decision of the magistrate's court is unlikely to be altered on appeal. A perusal of the record establishes that the conviction by the magistrates' court cannot be faulted as it was supported by evidence, particularly indications and testimonies from the respondent's witnesses. The factual finding by the magistrates' court that the appellant and his co-accused cooperated with the police resulting in them leading the police on indications to several other places which had been broken into and similarly subjected to theft is insurmountable and consistent with the rest of the evidence on record. The indications and cooperation of the appellant and his co-accused in relation to the breaking in and theft from Selous Post Office resulted in the recovery of a black Samsung cellphone, from a purchaser who had bought it from the appellant's co-accused. Selous Post Office had been broken into and stolen from. The finding by the court *a quo* that the accused persons were not assaulted in order to force them to make indications is reasonable and is supported by their medical reports which did not find any evidence of injuries on the appellant and his co-accused.

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The magistrate's court found that there were similarities in the *modus operandi* used by the accused persons in breaking into premises and using explosives to explode safes open, from which property and cash would be stolen. The same tools they used (the pick head, screwdrivers, explosive tube and codes) as narrated in their indications were found in the satchel which was linked to the offences committed at Shangani Post Office in the early hours of 9 June 2014. The satchel also contained property stolen from Shangani Post Office. A perusal of the record confirms these factual findings.

The court *a quo* correctly found that the only reasonable inference which could be drawn from the proven facts was that the appellant together with his co-accused were the

ones who committed the series of unlawful entries and thefts using the same *modus operandi*. This was corroborated by their indications, the tools and property found in their possession on 9 June 2014 after a break-in at Shangani Post Office. The appellant took issue with the fact that their indications were not backed by photographs and videos. The failure to take photographs and videos of the indications, does not invalidate them as it depends on the availability of resources. Indications at each break-in were commented on by local witnesses who observed how the appellant and his co-accused made the indications. They commented on how their indications proved they were familiar with the offices which had been broken into. They were able to lead the Police into the right offices and correctly identified where the safes were located. The witnesses were seeing the appellant and his co-accused for the first time. The Police could not have brought the appellant and his co-accused to these premises without the knowledge of these witnesses, as they were employed there, and the premises and offices could not be accessed without their knowledge and cooperation. In most instances the witnesses testified that the appellant and his co-accused had during indications, accurately narrated how they had broken into their premises, and accurately told the Police what they had stolen.

In respect of the break-in at Selous Post Office a witness, told the trial court of how the appellant freely and voluntarily made indications leading to the recovery of the Samsung cell phone in Harare, therefore the lack of photos and videos did not affect recoveries made as a result of such indications. The evidence is also supported by their medical reports which contradicted their allegations of having been assaulted to force them to make indications.

In respect of the break-in at Redan Service Station in Makuti a witness identified the appellant as he had a day prior to the break-in come to the service station in a Mark 2 motor vehicle pretending to be drunk and asked for prices of oil. On the day of the break-in he on realising that the premises he was guarding had been broken into went into the office to check. He, using a torch, saw the appellant standing by the safe. He ran away to a nearby Hotel to phone the Police. While he was at the Hotel he heard an explosion coming from their premises. He eventually found that the safe which the appellant had been standing next to was blast open with explosives.

It is trite that an appellate court will only interfere with factual findings of a lower court when it is alleged and proved that the finding was arrived at irrationally. See *Hama v NRZ* 1996 (1) ZLR 664 at 670. There is no basis to interfere with the court *a quo*'s exercise of discretion. The appellant has not shown good cause for such interference. In *The Attorney General v Siwela* SC 20/17 it was held:

“The power of this Court to interfere with the decision of the court *a quo* in an application for bail is limited to instances where the manner in which the court *a quo* exercised its discretion is so unreasonable as to vitiate the decision made. See *S v Ncube* 2001 (2) ZLR 556 (S). Another ground for interference with a decision of a court *a quo* is the existence of ‘a misdirection occasioning a substantial miscarriage of justice’ by the court *a quo* – *S v Makombe* SC 30/04.”

In light of the above, the appellant has not established a basis for interference with the decision of the court *a quo*. He does not have prospects of success in his main appeal pending in the High Court.

Further, there is in our jurisdiction case law justifying conviction on circumstantial evidence. The cardinal rules of logic governing the use of circumstantial evidence were aptly illustrated in *Moyo v The State* SC 65/13, wherein this Court quoted with approval the remarks made in *R v Blom* 1939 AD 188, at 202-203 that:

- “1. The inference sought to be drawn must be consistent with all the proved facts and;
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.” Also see *State v Marange & Ors* 1991 (1) ZLR 244 (S) and *S v Shoniwa* 1987 (1) ZLR 215 at 224 C-D (S).

In casu, it was established that the inference drawn by the trial court is consistent with the facts and is the only one that can be drawn from the proved facts. The evidence against the appellant plugs all the loopholes which he sought to create.

The regional magistrate took into account all factors surrounding the offence before convicting the appellant. There are, therefore, no reasonable prospects of success on appeal against both conviction and sentence. The court *a quo* therefore, correctly dismissed his application for bail pending appeal.

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WHETHER OR NOT THE APPELLANT IS LIKELY TO ABSCOND IN VIEW OF THE GRAVITY OF THE OFFENCES AND THE SENTENCE IMPOSED?

The court *a quo* held that the appellant is a flight-risk. It held that in view of the long term of imprisonment he is serving and there being no reasonable prospects of success on appeal, he is likely to abscond if granted bail pending appeal. The appellant argues that he is not going to abscond as he is going to avail a guarantor if granted bail and is prepared to submit to stringent bail conditions. In my view, the appellant has a high probability of absconding considering the gravity of his offences and that he has no reasonable prospects of success. The appellant was convicted and sentenced on 23 July 2014. He has experienced the rigours of imprisonment for over six (6) years, which most probably led to his belated application for bail pending appeal. He still has a long way to go as he was sentenced to 28

years in prison of which 5 years were suspended leaving him with an effective sentence of 23 years. The remaining sentence is likely to cause him to abscond if he is granted bail pending appeal.

The offences for which the appellant was convicted are serious, particularly, the use of explosives in blowing open safes. He was involved in organised crime with a clear *modus operandi* which poses danger to society. He cannot be released into society pending his appeal which has no reasonable prospects of success. In *Mutizwa v The State* SC 13/20, it was held that:

“Bail pending appeal is not a right. An applicant for bail pending appeal has to satisfy a court that there are grounds for it to exercise its discretion in his favour. In the case of bail pending appeal, the proper approach is that in the absence of positive grounds for granting bail, the application will be refused. The applicant having been found guilty and sentenced to imprisonment is in a different category to an applicant seeking bail pending trial. See *S v Tengende & Ors* 1981 ZLR 445 (S) at 447H – 448C... **The State v Williams** 1980 ZLR 466 (S) wherein it was stated that considerations of reasonable prospects of success on the one hand and the danger of the applicant absconding on the other, are inter-connected and have to be balanced. Furthermore, that the less likely the prospects of success on appeal, the more inducement there is on an applicant to abscond. It also emphasised that in every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail.” (emphasis added)

In casu, it is my view that the appellant has no reasonable prospects of success.

This may cause him to abscond. He is a flight-risk.

The appeal has no merit. It is accordingly dismissed.

Appellant in person

Attorney-General's Office, respondent's legal practitioners

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