**TALENT MUMPANDE**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 1 JULY & 9 JULY 2020

**Bail application**

*L. Chikwakwa* for the appellant
*Ms N. Ngwenya* for the respondent

**MAKONESE J:** The appellant in this case is facing a charge of contravening section 3(1) of the Gold Trade Act (Chapter 21:03). The state alleges that on the 15th of June 2020 and at 26 Adair Drive, Killarney, Bulawayo the applicant not being the holder of a licence or permit unlawfully and intentionally possessed 78 melted buttons of gold weighing 2 788,38g. The appellant denies the allegations.

The appellant appeared before a magistrate sitting at Bulawayo on the 17th of June 2020 and applied for bail pending his trial. The learned magistrate in the court *a quo* dismissed the application for bail. In his ruling, the magistrate held that the appellant had a propensity of committing similar offences and that the offence he was facing was a strict liability crime. The court *a quo* held that in the event of a conviction the appellant was likely to be sentenced to the mandatory minimum sentence of 5 years. It was the finding of the court *a quo* that there was likelihood of the appellant absconding and fleeing this jurisdiction to avoid trial.

The appellant has filed a written statement in support of his application and raises the following grounds of appeal:

1. The presiding magistrate erred in finding that there were compelling reasons to deny the appellant bail pending trial.

2. The learned magistrate erred in finding that appellant had committed a similar offence and that there was likelihood that he would be convicted and sentenced to a mandatory term of imprisonment.
3. The learned magistrate violated the appellant's presumption of innocence which still operates in his favour.
4. The allegations against the appellant had not been tested in court.
5. The appellant has not been shown to have a propensity to abscond and no cogent reasons are given to show a likelihood of the appellant absconding.
6. The court *a quo* erred by failing to realise that the test for compelling reasons goes beyond mere allegations.
7. The appellant is of fixed abode and no evidence was placed before the court to indicate that the granting of bail would compromise the interests of justice.

In an application of this nature the appellant is required to show that the learned magistrate in the court *a quo* erred in his approach to bail. It is my view, that a perusal of the record of proceedings indicates that the learned magistrate in the court *a quo* adopted a cursory approach to the application for bail. The learned magistrate correctly points out the appellant has a right to bail in terms of section 50 (1) (a) of the Constitution of Zimbabwe (Amend) No. 20 (2013). The learned magistrate also correctly points out that the court sitting in a bail application has a duty to balance the interests of justice and those of the accused. It is clear that the learned magistrate did not consider that the appellant was not on trial. His conclusion that; *"clearly the propensity of committing similar offences is so glaring in respect of the accused person",* suggests that the appellant was already guilty of the offence charged. In this application the appellant contends that he has a defence to the allegations. He states that he would argue that he was working for somebody who is a registered gold dealer. He indicates that there is evidence on record to show that the appellant was merely acting as an agent. The appellant clearly raised a defence, which it sustained on the facts during a trial would not necessarily lead to a conviction. In denying bail in the manner he did the learned magistrate, regrettably gives the impression that the conviction of the appellant was all but guaranteed. I am aware that the court *a quo* was persuaded by the fact that appellant has a previous conviction for dealing in gold. The appellant now faces a charge of possession of gold. It is my view, that the interests of justice

will not be served where an accused goes into a trial, with the court convinced that the guilt of the accused has been proven without even testing his defence against the evidence to be led against him by the state.

It would seem that in its consideration of bail pending trial the court *a quo* came to the conclusion that accused would abscond without any shred of evidence being placed before it to show that upon his arrest, or prior to his arrest accused had attempted to flee the jurisdiction of this court to avoid trial. Where an allegation of the possibility of abscondment is alleged there is need to set out the factors leading to such fears. The state should not rely on bold allegations. The seriousness of the charge is also not in itself a sufficient ground for opposing bail. See;*Aitken & Another* v *AG* 1992 (2) ZLR 249 (S).

In assessing the possibility of any risk of abscondment, I quizzed counsel appearing for the state to shed light on whether the Investigating Officer in his case had sworn to an affidavit explaining the fears that state had regarding the possibility that the appellant might flee. It became apparent that there was no evidence that such an enquiry had been made in the court *a quo*. No evidence of the appellant's ability to abscond was ever placed on record. In other words the learned magistrate in the court *a quo* came to that conclusion without any factual basis. That approach led to a misdirection.

In *Aitken & Anor* v *AG (supra)*, the learned Chief Justice held at page 254D-E as follows:

> *"In judging this risk, the court ascribed to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted; The strength of the state case; the ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial."*

During the course of hearing oral argument, it was disclosed that the gold in question was found at number 26 Adair Drive, Killarney, Bulawayo. It was further revealed that the appellant is not the owner of the premises. The owner of the premises is one Mr Tshuma who is alleged to be the appellant's employer. It was further revealed that appellant is not ordinarily resident at this address. He resides at number 1 Leander Avenue, Hillside, Bulawayo. The expired permit

authorising the holder of the gold in question is not in the name of the appellant but supposedly in the name of the appellant's employer. I gathered from counsel for the defence that the permit was presumably taken by the police during investigations. It cannot be said therefore, that the appellant's defence that the gold belonged to his employer and that he was merely an agent of the employer is not reasonably possible. Even if the licence had indeed expired in December 2019 as alleged by the state, the person to explain the discrepancy is the appellant's employer.

I can safely conclude that the learned magistrate in the court *a quo*, paid lip service to the appellant's presumption of innocence. The notion that an accused is presumed innocent until proven guilty must be applied in an application for bail pending trial. It is therefore the court's tradition to lean in favour of, and not against, the liberty of an applicant in an application for bail. The learned magistrate in the court *a quo* misdirected himself in failing to uphold the presumption of innocence and in fact approaching the matter as if the appellant's conviction was guaranteed.

In the result, and accordingly it is ordered that the appellant be and is hereby admitted to bail in terms of the draft order.

*Sansole & Senda*, appellant's legal practitioners
*National Prosecuting Authority*, respondent's legal practitioners