EWAN ALEXANDER MACMILLAN
versus
THE STATE

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 21, 22, 23 & 24 May 2007

Bail Appeal

Mr *Chikumbirike*, for the appellant
Ms *Dube*, for the respondent

PATEL J: This is an appeal against the decision of the Magistrates Court, sitting at Harare on the 11th of May 2007, dismissing the appellant's application for bail. The appellant was arrested two days before on a charge of contravening section 3 of the Gold Trade Act [*Chapter 21:03*], viz. for unlawfully possessing gold without a licence or permit. The penalty prescribed for the offence, as recently amended, is a mandatory prison term of 5 to 10 years in the absence of special circumstances.

It is alleged by the State that police detectives searched the appellant's residence and recovered two smelted buttons of gold, hidden in one of the appellant's shoes in a built-in wardrobe in his main bedroom. The gold weighs 1.2 kilograms and is officially valued at *circa* $356 million. The appellant's defence is that the gold was planted in his home either by the police or by some other person unknown to him.

In his ruling on the bail application before him, the learned Provincial Magistrate confined himself to the question of abscondment and held that the appellant was unlikely to stand trial for various reasons. Firstly, he found

that the appellant was "a man of means" who owned "property of considerable value" in Zimbabwe and suggested that the appellant "can use that status to abscond". The magistrate further held that the offence was a serious one and that the stipulated mandatory penalty "can certainly ignite motives of abscondment". He then held that in view of the "credible allegations" made by the police against the appellant "the onus is now on the accused to show on a balance of probabilities that his admission to bail would not prejudice the interests of justice". The magistrate concluded that "the evidence against the accused is strong .... and this is enough to cause panic".

It was argued by *Mr. Chikumburike* for the appellant that the magistrate's approach as to onus was erroneous inasmuch as he relied upon the evidence placed before him at the remand proceedings which preceded the bail application. *Ms. Dube*, for the respondent, appeared to capitulate on this point and conceded the possibility of the magistrate having misdirected himself in that regard.

It is trite that the onus in a bail application lies on the applicant to justify the granting of bail. As was stated by GUBBAY CJ in *Aitken & Anor v Attorney-General 1992 (1) ZLR* 249 (S) at 253:

> "The onus is upon the accused to show on a balance of probabilities why it is in the interests of justice that he should be freed on bail".

See also: *S v Chiadzwa* 1988 (2) ZLR 19 (S) at 21; *S v Hussey* 1991 (2) ZLR 187 (SC) at 189; *S v Ncube* 2001 (2) ZLR 556 (S) at 559-560. The correct approach to be adopted as to the onus in bail applications is expounded by NDOU J in *State v Ndhlovu* 2001 (2) ZLR 261 (H) at 264 as follows:

> "Once the police have made credible allegations against the accused which could provide grounds for refusing bail, the onus is upon the applicant to prove on a balance of probability that the court should exercise its discretion in favour of granting him bail".

Turning to the matter at hand, it seems to me that the magistrate *a quo* did not misdirect himself as to the proper approach to be followed. Rather, he failed to apply himself with requisite diligence to the dictates of that approach. Firstly, there was nothing in the evidence before him to enable him to determine whether or not the appellant was indeed a "man of means". In any event, having made that finding, he did not conclusively indicate whether the appellant was or was not likely to abscond for that reason and left his own question on the point unanswered. Secondly, in similar vein, he properly canvassed the seriousness of the offence charged and the severity of the penalty prescribed therefor, but then left these aspects open-ended by not specifically addressing the appellant's disposition in that regard. Thirdly, he raised the issue of passports and again left his determination on this point to the vagaries of speculation and conjecture. Lastly and very significantly, although he found that "the evidence against the accused is strong", he failed to assess the strength of that evidence as against the relatively consistent defence proffered by the appellant. Ultimately, having done little more than pose a series of indeterminate issues, the learned magistrate failed to identify any cognisable indication that the appellant would abscond and not stand for trial if released from custody. As was enunciated in *S v Fourie* 1973 (1) SA 100 at 101 by MILLER J:

> "It is a fundamental requirement of the proper administration of justice that an accused person stand trial and if there is any cognizable

> indication that he will not stand trial if released from custody, the Court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence. ..... But if there are no indications that the accused will not stand trial if released on bail or that he will interfere with witnesses or otherwise hamper or hinder the proper course of justice, he is *prima facie* entitled to and will normally be granted bail."

In this context, EBRAHIM JA in *Hussey's* case (*supra*) at 192, observed that:

> "..... the State, by its failure to place cogent reasons supported by information before the judge *a quo*, put itself at a disadvantage which should have precluded the decision to refuse the granting of bail in this matter. The learned judge *a quo* misdirected himself in refusing to grant bail in this case".

In the instant case, I am satisfied that the magistrate *a quo* misdirected himself in several material respects in his evaluation of the likelihood of abscondment by the appellant. I am further satisfied that the evidence before him did not disclose any cognisable indication that the appellant would abscond, nor did it afford any other cogent reason for refusing bail. Accordingly, his decision to decline bail in this matter cannot stand and must be set aside.

The entitlement of an accused person to bail is now regulated in some detail by the recently enacted section 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] – inserted by section 9 of Act 9 of 2006. Section 117(2) sets out the broad grounds for refusing bail, including the likelihood that the accused, if released on bail, will not stand his or her trial or appear to receive sentence. In turn, section 117(3)(b) elaborates the specific factors to be

taken into account in evaluating the likelihood of abscondment, including "the efficacy of the amount or nature of the bail and enforceability of any bail conditions".

At the outset of this appeal, the State was opposed to the granting of bail and remained faithful to that position during the hearing of this matter. The State has since relented from its opposition and both counsel, with appropriate guidance from the Court, have been able to agree on a number of fairly stringent but practicable conditions of bail. These include the deposit of an appreciable amount of money and the tender of substantial security in the form of immovable property and an aircraft. They also cover specific reporting requirements and travel restrictions designed to obviate the possibility of abscondment pending trial.

In the result, the appeal against the ruling of the court *a quo* is upheld and the appellant is admitted to bail by consent in terms of the draft order filed today.

Chikumbirike & Associates, appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners