

Judgment No. SC 35/06
Criminal Appeal No. 92/06

**CHRISTOPHER TICHAONA KURUNERI v
THE STATE**

SUPREME COURT OF ZIMBABWE
HARARE, MAY 26 & 31 AND JULY 31, 2006

J Samkange, for the appellant

F Chimbaru, for the respondent

Before SANDURA JA, In Chambers, in terms of s 121(2)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

This is an appeal against the refusal by the High Court to vary the conditions on which the appellant was granted bail by CHIDYAUSIKU CJ on 27 July 2005.

The relevant facts are as follows:

The appellant is charged with four counts of contravening the Exchange Control Act [*Chapter 22:05*] and one count of contravening the Citizenship of Zimbabwe Act [*Chapter 4:01*]. His trial commenced sometime ago and has not yet been completed.

On 27 July 2005 the appellant was granted bail on a number of conditions. The second condition was as follows:

"That he resides at house number 730, Glen Hellen Way, Glen Lorne, Harare where he will be under 24 hours police guard until the finalisation of this case, and that he can only leave the house in order to attend court."

Subsequently on 3 March 2006, after the appellant's trial had been adjourned *sine die* because of the unavailability of his counsel, the appellant, through his counsel, applied for the variation of his bail conditions by the deletion of the second condition and the substitution of the following:

"That applicant resides at his farm namely Ascotvale Farm, Mazoe, Bindura."

The application was opposed by the respondent and was dismissed by the learned trial judge.

Thereafter, on 3 April 2006 the appellant was granted leave by the learned trial judge to appeal to this Court.

In his notice of appeal the appellant relies upon the following grounds:

- "1. The court *a quo* erred in failing to take cognisance of the fact that the respondent considered it reasonable to allow the appellant to reside at his farm subject to the condition that he report to the police daily.
2. The court *a quo* erred in finding that the appellant's submissions and proposals had been considered by this Honourable Court.
3. The court *a quo* erred in failing to find that the respondent's fears and concerns were unreasonable having regard in particular to the appellant's conduct since being admitted to bail."

Before dealing with the grounds of appeal, I would like to indicate the basis upon which this Court would interfere with the decision of the learned

judge in the court *a quo*. The basis was set out by BECK JA in *S v Chikumbirike* 1986 (2) ZLR 145 (SC) at 146 F–G as follows:

“The next matter to be decided is whether this court in hearing the appeal should treat it as an appeal in the wide sense, that is to say, that it is to be treated as if it were a hearing *de novo*. Once again that matter has been decided by the case of *The State v Mohamed* 1977 (2) SA 531 (AD) at 542 B-C where TROLLIP JA said that in an appeal of this nature the 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 decision.”

With that principle in mind, I now examine the three grounds of appeal relied upon by the appellant.

THE FIRST GROUND OF APPEAL

There are two allegations in this ground of appeal. The first is that when the application was heard in the court *a quo* the respondent indicated that it was reasonable to allow the appellant to reside at his farm subject to the condition that he reported to the police at Mazoe Police Station once daily. In other words, the allegation is that the State, through its counsel, conceded that the twenty-four hour police guard was no longer necessary. And the second allegation is that the learned judge in the court *a quo* erred when she ignored the State's concession and dismissed the appellant's application.

In my view, a perusal of the record of the proceedings in the court *a quo* does not support the allegation that the State made the alleged concession. On the contrary, State counsel, Mr *Jagada*, indicated in his written and oral submissions that the application was opposed and that as the appellant faced serious charges it was feared that if he resided on the farm the police would find it very difficult to monitor his movements. Consequently, it was feared that the

appellant would have a greater opportunity of absconding than he would have otherwise.

A transcript of the learned judge's notes shows that Mr *Jagada* made the following oral submissions:

"(The) Chief Justice's concern was (that a) 24 hour guard would be difficult for the police to fulfil. This caused the Chief Justice to refuse that condition. That is still relevant.

... If (the) court is inclined to vary (the bail conditions) how does (the) court propose to have control of the movement of or by (the) accused? (The) farm is too huge a place.

If it was not he remains where he is and reports say everyday and would then have (the) opportunity to visit (the) farm whenever he wishes.

I am not consenting to variation. (It is) not fair to ask (the) State to ask the Police to guard him at (the) farm – that will be cumbersome ..."
(emphasis added)

Mr *Samkange*, who appeared for the appellant, relied upon the third paragraph and submitted that Mr *Jagada* made the alleged concession on behalf of the State.

I do not think that the third paragraph as set out above indicates that the alleged concession was made. In my view, the whole paragraph is meaningless. In any event, the fourth paragraph makes it quite clear that Mr *Jagada* did not consent to a variation of the bail conditions.

In addition, it is clear from the oral submissions made by Mr *Jagada* in the court *a quo* that the State considered the 24 hour police guard to be necessary, and that as it would be very difficult to enforce it at the farm, the appellant should continue residing at the house in Glen Lorne.

In the circumstances, there is no evidence which supports the allegation that the State conceded that the appellant could reside at the farm subject to the condition that he reported to the police at Mazoe Police Station once daily. The appellant has, therefore, failed to establish that the alleged concession was made.

Consequently, the second allegation in the first ground of appeal falls away. The learned judge in the court *a quo* could not take into account a concession which had not been made by the State.

THE SECOND GROUND OF APPEAL

The allegation in this ground of appeal is that the court *a quo* erred in finding that the appellant's submissions and proposals had been considered by this Court.

The relevant paragraph in the judgment prepared by the learned judge reads as follows:

"The applicant's submissions and proposals were apparently considered by the Supreme Court. The applicant's counsel submitted that although the proposal for the applicant to reside at the farm was made before the Honourable Chief Justice, he decided to order the applicant to stay at the Glen Lorne house. In the present matter the respondent entertains the same concerns and fears regarding the proposed variation. As the respondent's counsel submitted, a farm covers a vast expanse of land, and it would be difficult, if not impossible, for the police to effectively control and monitor the applicant's movement thereat. The condition now sought to be varied effectively addresses the State's justifiable concerns whilst the proposed amendment does not."

I do not think that the learned judge erred at all as alleged. What she meant was that when the appellant was granted bail by CHIDYAUSIKU CJ, the proposal or submission that the appellant reside at the farm was made, considered and rejected, and that the same proposal or submission had again

been made before her by the appellant's counsel, with the same reason being given, i.e. that half of the appellant's cattle had been stolen from the farm because of the appellant's absence from the farm.

THE THIRD GROUND OF APPEAL

The allegation in this ground of appeal is that the learned judge erred in failing to find that the State's fears and concerns were unreasonable, bearing in mind the appellant's conduct since being granted bail.

In this regard, it was submitted that the 24 hour police guard was no longer necessary because there had been many occasions when the appellant could have absconded from the house in Glen Lorne but had not done so. It was, therefore, submitted that the learned judge misdirected herself when she found that the State's fears and concerns were justified. Mrs *Chimbaru*, who appeared for the State, agreed with that submission.

It is clear from the submissions made by Mr *Jagada* in the court *a quo* that the State feared that unless the appellant was placed under an effective 24 hour police guard he was likely to abscond, bearing in mind the fact that he was facing very serious charges. Mr *Jagada* also submitted that a 24 hour police guard would be difficult, if not impossible, to enforce at the farm. The learned judge agreed with both submissions.

In my view, the fact that the appellant had not absconded up to the time of making the application in the court *a quo* did not necessarily mean that if he was permitted to reside at the farm he would not abscond. In judging the risk of absconding, the Court ascribes to the accused the ordinary motives and fears which sway human beings. The more serious the charge and the heavier

the sentence expected upon conviction, the greater will be the temptation to abscond. See *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S) at 254 D-F.

In the present case, the appellant is charged with serious violations of the Exchange Control Act [*Chapter 22:05*] and if he is convicted the appropriate sentence is likely to be a heavy one. The learned judge did not, therefore, misdirect herself when she found that the State's fears and concerns were justified. After all, she had heard the State's evidence against the appellant and was in a position to assess the strength of the State's case.

Accordingly, the concession made by Mrs *Chimbaru*, that the learned judge misdirected herself when she found that the State's fears and concerns were justified, was not properly made.

In the circumstances, none of the grounds of appeal relied upon by the appellant has any validity, and no irregularity or misdirection has been proved to have been committed by the learned judge when she dismissed the appellant's application. Consequently, the appellant has failed to establish any basis on which the learned judge's decision can be interfered with.

The appeal is, therefore, dismissed.

Byron Venturas & Partners, appellant's legal practitioners

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

