TAFADZWA TAKAWENGWA
and
CRISPEN KADO
and
DANIEL KADEMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 February 2021 & 14 April 2021

Bail pending appeal – Reasons for judgment

S Mugadza, for the applicants
N M Mangwa, for the respondent

CHITAPI J: On 15 February 2021 I dismissed this bail application pending appeal filed by the applicants. I gave a brief *ex tempore* judgment for the dismissal. The applicants have requested through the Registrar for a fully dressed judgment.

The first applicant is a small scale miner. The second and third applicants are police officers and members of the Zimbabwe Republic Police. They are based in Harare at Rhodesville police station. The three applicants appeared before the magistrate at Rusape on 14 January 2021 on initial remand. The applicants faced allegations that they were reasonably suspected of committing the offence colloquially referred to as "Armed Robbery" as defined in s126 of the Criminal Law (Codification & Reform Act), [*Chapter 9:23*]. Such description of the offence is not provided for in the Act. Where a robbery has been committed in circumstances set out in subs (2), it is described as a robbery committed in aggravating circumstances. *In casu*, the aggravating circumstances consisted in the use of a fire arm to threaten and cow the complainant into submission to relinquish control of his property in circumstances set out in the request for remand form 242 upon whose factual allegation as set out therein, the applicants were remanded. The first applicant was placed on remand on 15 January 2021. The second and third were placed on reprimand the day before on 14 January

2021. The allegations supporting the remand application were the same for all the three applicants. I briefly set them out in brief.

On 22 October 2020, the complainant was a passenger in a Honda fit motor vehicle travelling from Harare to Mozambique along Harare to Mutare highway. He had USDS248 664 in cash which he intended to use to purchase bales of second hand clothes for resale in Zimbabwe. Around the Headlands area, the Honda fit vehicle developed a puncture and the driver slowed down intending to stop. As the driver slowed down, a Toyota wish vehicle with five occupants came from behind the Honda fit vehicle. Instead of overtaking the Honda fit, it was driven parallel to the Honda fit. One of the occupants of the Toyota wish was ordering the driver of the Honda fit to stop but the latter did not take heed. At the same time, another occupant in the Toyota wish produced a pistol and fired a shot. The driver of the Honda fit in fear then stopped his vehicle. Four of the occupants in the Toyota wish disembarked from that vehicle and proceeded to the Honda fit where the complainant was seated. They ordered the complainant to surrender the cash which he had and his cell phone handsets. The complainant surrendered to the robbers, USD$248 664 and one itel and one Samsun phones. The robbers fled in their Toyota wish.

Police recovered a spent cartridge at the scene of the robbery. Investigations led to the recovery of a police service pistol serial No. ZRP 1674 at Rhodesville armoury. The pistol had been on issue to the second applicant from 16 to 23 October, 2020. A ballistic examination of spent cartridges fire from the pistol matched spent cartridges recovered at the robbery scene. The second applicant was then arrested on this link. Police also established that both the second and third applicants were using the pistol in issue during the period that it was booked out. Further, finger prints picked from the scene matched the applicants' finger prints.

It is at this stage important to appreciate that the failure by the applicant to challenge the grounds for their remand means that those allegations stand. It is not for the bail court to entertain a challenge to the grounds for remand made in a bail application. This is so because when an accused appears before the magistrate court on initial remand, the procedure is in the nature of an application made by the prosecutor to have the accused placed on remand. It is an application which the magistrate must determine. It is an application which may succeed or fail. The accused will be placed on remand if the magistrate determines that the allegations made against the accused ground a reasonable suspicion that the accused person committed the offence charged. The accused may challenge the allegations on the basis that they do not disclose any cognizable offense or that the facts as alleged do not raise a reasonable suspicion

that the accused committed the offence charged. A non-challenge amounts to a non-contest with the allegations. The bail court will treat the allegations as a settled matter. It is not its function to review the allegations or to act as an appeal court against the decision of the remand court.

The case for the prosecution against the applicant is upon a consideration of the undisputed allegation on which the appellants were remanded in custody, relatively strong. Ballistic evidence showed that spent cartridges recovered at the scene of the robbery matched the police cz pistol serial no. ZRP 1674 which at the material was on issue to the second and third applicants. An accomplice, one Bondamakara implicated the applicants in the commission of the offence. The applicants' fingerprints matched the prints uplifted from the scene of the robbery. The evidence of an accomplice is admissible subject to the provisions of s 267 of the Criminal Procedure and Evidence Act, [*Chapter 9:07]*. The nature of the alleged evidence linking the applicants to the commission of the offence is *prima facie* strong.

In their application, the applicants averred that the finger print evidence would be challenged at trial. The bail court is not the trial court. Therefore, to the extent that such alleged evidence was not challenged at remand stage, it remains a link factor between the applicants and the commission of the offence. In para 14 of their bail statement, the applicants stated as follows:

> "14. In any event the applicants were not found with anything that ties them to the offence and there is completely nothing which was found in their possession which shows that they have such loads of cash in their lives. There is no nexus at all to the offence other than mere speculation".

The above statement is a clear challenge to the magistrate's' finding that there existed on the alleged facts a reasonable suspicion that the applicants committed the offence charged. Such challenge is to be decided by the remand court. The decision of the remand court may be considered by the court on review or appeal in accordance with procedure for such processes.

The second and third applicants have a pending case at Harare Magistrates Court where they stand charged with the offence of Criminal Abuse of Duty by a public officer as defined in s 174 of the Criminal Law (Codification and Reform) Act. They were granted bail. The applicants counsel submitted that the present offence is not similar to the offence on which the second and third applicants are on bail. On the face of it, the offences are not the same. However, one does not lose sight of the fact that where a police officer offends the law which he or she is supposed to safeguard and becomes the villain instead of a defender of the law, the

court takes a serious view of the matter. In the matter on which the second and third applicants are on bail, the allegations of Criminal Abuse of Duty were that they assisted some robbers who should have been arrested and prosecuted to escape. In the current case the allegations are that they turned robbers themselves.

The main ground for opposing bail in this case was that the applicants were likely to abscond given the serious of the offence charged, coupled with the *prima facie* strong state evidence which made a conviction likely. The applicants bear the burden of showing on a balance of probabilities that it is in the interests of justice to grant them bail. In terms of the provisions of s 117(2)(a)(ii) of the Criminal Procedure and Evidence Act, it is deemed to be in the interests of justice to deny an accused person bail where there is a likelihood that the accused will not stand trial or appear to receive sentence. In terms of the provisions of s 117(3)(b), where bail is opposed on the grounds that the accused will not stand or appear to receive sentence the court shall have regard to the following factors as outlined therein as follows:

> "(i) the ties of the accused to the place of trial
> (ii)the existence and location of assets hold by the accused
> (iii) the accused's means of travel and his or her possession of or access to travel documents.
> (iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor.
> (v) the strength of the case for the prosecution and the corresponding incentive for the accused to abscond.
> (vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions.
> (vii) any other factor which in the opinion of the court should be taken into account."

The applicant is the one with the onus to separately deal with each of the factors (i)-(iv) to show on a balance of probabilities that he is not a person who is likely to abscond to bail. In this application, the applicants only pleaded their names, ages, addresses of their residences, employment and employer as well as salary or earnings. In para 25 of their bail statement, the applicants submitted that the state bore the burden to prove the existence of compelling reasons to justify the confirmed detention of the applicants. The applicants did not address the provisions of s 115C of the Criminal Procedure & Evidence Act on the incidence of onus in bail application. They equally omitted to address the provisions of s 117(2)(a)(ii) and 117(3)(b) of the same Act. In the absence of the applicants addressing the operative provisions of the law regarding bail applications in terms of the sections I have quoted, there was no material information pleaded in the application to enable the court to determine that it was in the interests of justice to grant the applicants bail.

I should mention that the investigating officer gave evidence in the bail hearing. This evidence simply echoed what was contained in the request for remand form and the annexure attached to it. He testified that bail was opposed upon a fear of abscondment. He accepted that the applicants were arrested without resistance but stated that this did not entail that they will not abscond trial. An arrest and the charging of an accused are different processes. It is only upon being charged that the accused then appreciates the enormity of the crime charged and his precarious position. *In casu,* the sentence for a robbery committed in aggravating circumstances is imprisonment for life or a definite period of imprisonment. The *prima facie* evidence connecting the applicants to the commission of the offence is *prima facie* strong. The applicant's whether by design or ignorance did not address the factors which impact on the determination of whether the interests of justice will be served by granting them bail where the ground of opposition is the fear of the likelihood of abscondment on the part of the applicants. The applicants' bail application was therefore dismissed for the more detailed reasons given herein.

Madanhi Mugadza & Company Attorneys at Law, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners