HB 49-19
HCA 80/19
XREF BYO P491/19

JEPHAT CHAGANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 2 APRIL 2019 AND 9 MAY 2019

Bail Application

T Muganyi with *M Mahaso* & *N Sibanda* for the applicant
K Ndlovu for the respondent

MAKONESE J: The applicant and others are presently on trial in the High Court on allegations of theft of gold. The applicant faces a charge of defeating or obstruction the course of justice in contravention of section 184 (1) (e) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. This charge arises from investigations into the theft of 28kgs of gold from Plumtree Police station Armoury on 15 August 2018. The state alleges that during investigations information was received that a duplicate key used to open the armoury in order to facilitate the theft was cut at a certain locksmith shop in Bulawayo. The owners of the shop, Simangaliso Mpala and Sambo Magutshwa were questioned leading to statements being recorded from them. The two witnesses averred that the accused had approached them at their shop seeking to persuade them to close shop, change cellphone numbers and relocate from their places of residence to make it impossible for the police to locate them. The applicant is alleged to have offered the potential witnesses large sums of money if they agreed to this request. The matter was reported to the police leading to the arrest of the applicant. The state contends that this offence was committed whilst the applicant was undergoing trial in the High Court, under case number HC 118/18. This offence occurred whilst applicant was out of custody on bail. In the main trial, the applicant and his co-accused persons are facing a charge of contravening section 113 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], that is theft of gold

or alternatively defeating or obstructing the course of justice involving 14.7kgs of gold. In the main trial, the State has closed its case and applicant and the other co-accused are awaiting judgment on an application for discharge at the close of the state case. The state alleges that when the accused committed this offence, he was on bail, conduct which shows that he has a propensity to commit further and similar offences. Further, the state alleges that the fact that applicant has attempted to interfere with witnesses while the matter is still under investigation is evidence that he has no respect for the due administration of justice. If granted bail, the applicant, it is argued, is likely going to interfere with the proper conclusion of this case. In any event, it is argued on behalf of the state that the applicant's attempts at interference is an indication that applicant is aware that the state has a strong *prima facie* case against him. That realization might lead the applicant to abscond to avoid the finalization of this matter. In other words, there is likelihood of abscondment.

In his bail statement, the applicant contends that the allegation that he has interfered with a supposed witness is designed to frustrate the applicant in the ongoing trial, and to take away his liberty without just case. The applicant dismisses the allegations of interference as being malicious, frivolous and vexatious. The applicant avers that he alleged informants Sambo Magutshwa and Simangaliso Mpala are being used by the state in a grand scheme of things to try and get at the applicant for having successfully defended himself in the Plumtree Regional Court where he was acquitted at the close of the state case in the matter involving theft of 14.7kgs of gold and smuggling.

The applicant avers that the witnesses who were allegedly interfered with did not testify nor called as witnesses in the case before the High Court. This argument does not take the application for bail very far. The allegation in the present case is defeating or obstructing the course of justice. What has been put to the applicant is that he did attempt to obstruct justice by interfering with the alleged witnesses. The fact that applicant may have failed to convince the witnesses in the investigation of the case does not absolve the applicant. Whether or not the witnesses are called by the state as witnesses in court is an entirely different matter. The graveman of the offence is obstruction of justice. The applicant has raised a defence to the charges. His defence is that the allegations are false. In other words, the applicant is suggesting

that the allegations have been fabricated by elements bent on fixing him. The applicant is already on trial. The question is why anybody would want to put him in a fix.

Application of the Law

The applicant is facing a relatively serious offence. The seriousness of the charge on its own is not a ground for denying bail pending trial. The presumption of innocence still operates in favour of the applicant. However the law is fairly well settled in this jurisdiction that an accused person who interferes with evidence or with witnesses whilst on bail in another matter is not a suitable candidate for bail. See *S* v *Chiadzwa* 1988 (2) ZLR 19 (SC) and *S* v *Murambiwa* SC 62/92.

In terms of section 116 of the Criminal Procedure and Evidence Act [Chapter 9:07] this court is empowered upon application, to admit an accused person to bail pending trial. Section 50 of the Constitution of Zimbabwe (Amendment No. 20) 2013 provides that an arrested person is entitled as of right to bail pending trial, unless there are compelling reasons justifying the arrested persons' continued detention. This position was reaffirmed in the case of *Munsaka* v *The State* HB 55/16. There is thus a heavy onus on the state to show that there are compelling reasons that exist in a particular case to justify the continued detention of the applicant. The court must however not lose sight of the provisions of section 117 (6) (a) of the Criminal Procedure and Evidence Act, which stipulate that it will be in the interests of justice to refuse to grant bail on applicant, where there is a likelihood that the applicant will abscond and not appear to stand trial, or where the applicant will attempt to influence or intimidate witnesses; or where the release of the applicant on bail will undermine or jeopardise the proper functioning of the criminal justice system including the bail system. To discharge the onus on it, the state is obliged to place cogent reasons supported by evidence to satisfy the court that compelling reasons exist in the particular case to deny bail. See *S* v *Hussey* 1991 (2) ZLR 187 (SC).

In this matter the applicant is charged with the alleged breach of section 184 (e) of the Criminal Code. The graveman of the charge is interference with police investigations. It is alleged that the applicant tried to influence Sambo Magutshwa and another to relocate in order to frustrate police investigations. This alleged interference occurred whilst the applicant was

undergoing trial in a related case. It is of critical importance that an applicant in a bail application places the court in its confidence in all material respects. The applicant must profer a defence that is plausible. The applicant need not prove his defence in an application for bail. Where the defence proferred is a bare denial, the court is left guessing whether the applicant does indeed have a defence. The court has to strike a balance between the interests of the due administration of justice and those of the applicant in each particular case. In this case the state has laid down compelling reasons for the denial of bail. The accused's release on bail is likely to compromise the administration of justice

In the result, and accordingly the application for bail is dismissed.

Tanaka Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners