PETER MICHAEL HITSCHMANN
versus
THE STATE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 9 and 17 May 2006

Bail Application

Mr *Chiuya,* for the applicant
Ms *Ziyambe,* for the respondent

BHUNU J: The applicant Peter Michael Hitschmann is a registered firearms dealer based in Mutare, residing at 33 Arcadia Road, Tiger Kloof.

On the 6th of March 2006 police acting on information searched the applicant's residence. As a result of the search they recovered a large assortment of weaponry including:

(a) 7.62m EN rifle (with Telescope)

(b) 7.62 AK Rifle

(c) 9mm MPs SMG with silencer

(d) 9mm UZI SMG

(e) 9mm UZI SMG

(f) 9mm UZI SMG

(g) 9mm UZI SMG

(h) 9mm UZI SMG

(i) 9mm UZI SMG

(j) 9mm UZI SMG

(k) 1½ Inch Signal Pistol

(l) 9mm UZI SMG

The weapons were examined by Inspector Francis Cole of the Zimbabwe Republic Police on the 16th March 2006. He is an armourer based at Police

Forensic Ballistics Identification Office in Harare and has 2 years 9 months experience.

Upon examining the above weapons he came to the following conclusion:

> "I examined weapons (a) to (l) and found that they are all military weapons. Weapons (a) to (k) were found to be functional. Weapons (a) to (j) can fire on both rapid and automatic. Weapon (k) is a signaling pistol and fires single shots only. Weapon (l) was not functional.
>
> This means to say that the rapid fire is a single shot discharged each time pressure is applied on the trigger. Automatic fire is when pressure is applied to the trigger, the weapon continues to fire until the magazine is empty."

The applicant was also found in possession of:

(a) 19 Grenade Hand Anti Riot

(b) 6 Grenade Hand Stun M1A3

(c) 2 Schermuly Signal Smoke Hand

(d) 1 Grenade Hand illuminating

(e) 18 Rocket Flare illuminating R1M3

These were examined and classified by Inspector Cole as Riot Control Munitions, signaling and illuminating equipment used for military purposes.

The applicant was also found in possession of a variety of other weapons which do not concern us here as they were classified as non-military weapons.

Arising from his possession of the above weaponry the accused and others were arrested and subsequently arraigned before the courts on allegations of conspiracy to possess weapons for insurgency, banditry, sabotage or terrorism in contravention of section 10 of the Public Order and Security Act [*Chapter 11:17*]. The offence is punishable by life imprisonment. The State has since dropped charges against the applicant's co-accused persons.

Following his arrest and incarceration the applicant subsequently applied for bail before Chitakunye J who dismissed the application on the 23rd of March

2006. I have not been able to lay my hands on the learned judge's written reasons for dismissing the application. Counsel are however agreed that he dismissed the application for the following reasons:

1. that the charge was a serous one;
2. that there was overwhelming evidence against the accused
3. that he doubted the effectiveness of imposing any stringent bail conditions.

The applicant has now lodged a fresh bail application based on changed circumstances. It is trite that where bail has been previously refused by the court the same court can only grant bail if and only if there are changed circumstances warranting the granting of bail.

Relying on the case of *S v Stouyannides* 1992 (2) ZLR 126 (SC) counsel for the applicant argued strongly that the mere passage of time coupled with the State's failure to strengthen its case amounts to changed circumstances warranting the court granting the accused bail.

The rational in the *Stouyannides* case (*supra*) is captured in the head note which reads:

> "Held that the amount of time which had elapsed had to be considered together with the crucial factor of the lack of progress in the investigations in this case. The Attorney-General acts at his peril if he fails to put before the court specific facts which show that the State case has been strengthened after a long time." (my emphasis)

On a proper reading of the above sentiments it is clear that it is not the mere passage of time which constitutes changed circumstances warranting the granting of bail. It is the passage of some considerable time without progress in investigations.

In this case the period which has elapsed since the original refusal of bail is slightly over a month. Having regard to the seriousness and complexity of the

matter I am unable to say that there has been an inordinate delay in bringing the applicant to trial.

On the contrary we were advised that the State has now set down the matter for trial on the 26th June 2006. I have no reason to doubt the sincerity of the State counsel and indeed no reason has been advanced as to why I should disbelieve the State.

Having regard to the seriousness and circumstances of this case the State must be commended for proceeding with convenient speed and diligence.

The charge which the accused is facing is still a serious one in that it constitutes a threat to State security. At this hearing counsel for the applicant advised the court that the State is contemplating preferring more serious charges of treason against the applicant based on the same facts. This in my view is a turn for the worse rather than the better. The mere dropping of charges against the applicant's co-accused does not put a different complexion on the charge as argued by counsel for the applicant. This is because conspiracy is not an absolute requirement before one can contravene the relevant section. Even if I was to assume that it was an essential element that would still not assist the applicant because one can still be found guilty of conspiracy to commit a crime with someone not being charged of the same offence.

Undoubtedly there is overwhelming evidence against the applicant. It is common cause that he was found in possession of the alleged offensive weaponry. He only disputes the classification of such weaponry. The State has classified the disputed weaponry using a government official, an armourer of more than two years experience whereas the applicant apart from the mere say so of his legal practitioner from the bar has laid no basis for challenging the State's classification.

Section 10 of the Public Order and Security Act [*Chapter 11:17*] under which the accused is charged is couched in a way which divests an accused person

of the shield or benefit of the presumption of innocence before conviction, once it is established that he was found in possession of the prescribed weaponry. The section 10 reads:

"10(1) Any person who has any weaponry in his possession or under his control with the intention that such weaponry will be used in the commission of an act of insurgency, banditry, sabotage or terrorism shall be guilty of an offence and liable to imprisonment for life.

(2) If it is proved in a prosecution for an offence under subsection (1) that -

(a) the accused person was in unlawful possession of any weaponry; and

(b) the weaponry consists of any weapon, firearm or ammunition –

(i) referred to in section 24 of the Firearms Act [*Chapter 10:19*]; or

(ii) for the purchase, acquisition or possession of which the accused person has no good ostensible reason; or

(iii) that was part of a cache or was found in possession of the accused person in such a quantity as cannot be accounted for by use of personal use alone;

it shall be presumed unless the contrary is proved on a balance of probabilities that he possessed the weaponry with the intention that it be used in the commission of acts of insurgency, banditry, sabotage or terrorism."

The applicant having admitted possession of weaponry which was classified by a duly appointed experienced government armourer as falling under the purview of section 24 of the Fire Arms Act he is likely to bear the heavy burden of establishing his innocence by giving an innocent explanation for such possession. The law provides that for the lawful possession of classified weaponry one needs to have obtained ministerial authority authorising such possession.

While I am cognisant of the fact that the applicant is a licensed firearms dealer I note that he will have to satisfy the trial court that the disputed weaponry

is covered by the license and that he obtained the requisite Ministerial certificate. The accused himself at this juncture appears to acknowledge that no such Ministerial certificate was ever obtained by him.

In conclusion I note in passing that the courts invariably take a serious view of offences which constitute a threat to State security and public safety. The gravity of such offences is such that the courts cannot afford to experiment and play legal games while the security of the State and society at large is at stake.

The State having demonstrated beyond question that the applicant is still facing a serious charge and that the State has since the initial refusal of bail strengthened its case by completing its investigations and setting down the matter for trial within a reasonable time I can only come to the conclusion that there has been no change of circumstances warranting the granting of bail.

It is accordingly ordered that the application for bail be and is hereby dismissed with no order as to costs.

Bere Brothers, the applicant's legal practitioners.

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