

WELLINGTON MASUNA

And

KUZIWA DENIS ZAMBUKO

And

FAKAZI SWATI

And

CLEMENCE MBOFANA

Versus

NATIONAL PROSECUTING AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
NDUNA J
BULAWAYO, 13 NOVEMBER 2024

Bail Application

Mr T Tavengwa for all the three applicants
Mrs Ngwenya for the Respondent

NDUNA J: This an application for bail pending trial. The application is by the four accused persons who are members of the police. They were arrested on allegations that they criminally abused their offices as police officers and took, in two cases, the amounts of money amounting to USD23 700-00 and USD1 700-00 respectively. The accused persons were all arrested and are detained at Khami Prisons.

The state opposes the applications on the basis that they took their case to be very strong against the accused and they allege that;

1. Their case is very strong against the accused,
2. That the accused are likely to interfere with the case since there is strong evidence against them,
3. That the accused might jeopardies the investigations, and,
4. That the accused are likely to abscond if granted bail.

The law allows the court to release an accused on bail. Section 117 outlines the issues that must concern the court in deciding on the question of bail. It is provided as follows:

Entitlement to bail

- (1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.

It further states what must be established in order for a person to be remanded in custody. In section 117(2) such is provided is as follows:

- (2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—
 - (a) where there is a likelihood that the accused, if he or she were released on bail, will—
 - (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
 - (ii) not stand his or her trial or appear to receive sentence; or
 - (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
 - (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or
 - (b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

It is in accordance with the above quoted provisions of the law that the court will abide by in determining the question of bail in this matter.

It is simply alleged that the accused stole the money which is in the sums listed above. They were called to come to the police station and the accused persons claimed to have gone to the police station. Upon their arrival there they were then arrested over the offence. The accused persons are also putting forward defence to the charge; they deny the charge.

The main source of law in as far as it applies to bail is codified in the Criminal Procedure and Evidence Act. Section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07] operationalises the right to pre-trial liberty and the presumption of innocence as enshrined in ss 50 (1) and 70(1)(a) of the Constitution respectively. The constant reference to the above quoted provisions of the Constitution in bail matters is therefore sterile because s 117 reproduces the words of the Constitution regarding the right to pre-trial liberty and the limitation to that right. Section 117(1) is unambiguous that any person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody. The Act now enjoins the

bail court to undertake what I may describe as a guided thought process. The bail court must always be alive to the closed list of compelling circumstances to be taken into account as stated in s 115 (C) as read with s 117 (2) of the Act or exceptional circumstances stated in s 115 (C) of the Act depending on whether the nature of the crime and incidence of ‘burden of showing’. The bail court may only dismiss an application for bail where one or more of the compelling reasons have been shown to exist or have not been negative, depending on who between the State and the accused, bears the burden. There is a closed list. The Act does not leave room for any other compelling reasons.

Care must therefore be taken in referring to case law. The law has changed. For example, while the words ‘fear of abscondment or fleeing the jurisdiction’ are used in case law, those are not the words of the statute when it describes compelling reasons for denying bail. As will more fully become clearer hereunder, the ability to travel outside the country, frequency thereof and the capacity to sustain a life outside the country now rank lower than compelling reasons as mere factors which the bail court must weigh against other factors in considering whether the accused is unlikely to stand trial if released from custody.

The compelling reasons are in s 117 (2). They are as follows:

The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established: -

1. where there is a likelihood that the accused, if he or she were released on bail, will
 - a. endangers the safety of the public or any particular person or will commit an offence referred to in the First Schedule to the Act; or
 - b. not stand his or her trial or appear to receive sentence; or
 - c. attempt to influence or intimidate witnesses or to conceal or destroy evidence;or
 - d. undermines or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system;or
- 2) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

It is clear that the state is not alleging all these against the accused persons. It alleges what can be listed as follows in the quest to have the accused denied bail by this court; that the accused committed a very serious charge. The offences being charged by the state refer to alleged corruption. That alone is not enough for the court to deny the accused persons’ bail. An

accused's bail is a constitutional right which we must be slow to terminate. It can only be with held by the courts where the issues set in are available in their case. In this case there is none.

According the accused persons ought to be admitted to bail on the following conditions:

1. Each deposit USD300-00 or its equivalent in Zimbabwean Dollars as a bail deposits.
2. Accused persons number 1 – 4 must continue residing on their given addresses as follows;
 - a) Accused 1 at 13 Second Avenue, Cement, Bulawayo
 - b) Accused 2 at ZRP Ross Camp, Bulawayo.
 - c) Accused 3 at 85/2589, Mpopoma Bulawayo, and,
 - d) Accused 4 at ZRP Donnington Camp Bulawayo.
3. The accused persons must report every 15th day of the month at Police Anti-Corruption Unit, 1st Floor Southampton Building between the hours of 0800am to 1600 hours till the matter is finalised. They will start to report on 15 November 2024.
4. That the applicants shall not interfere with all state witnesses.

NDUNA J

Mutuso, Taruvinga and Mhiribidi applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners