KAMURIWO MUDZIWAONA
and
WINTSON MATIZANADZO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUCHAWA & DEMBURE JJ
HARARE, 9 & 16 August 2024

Bail Application

D C Mupudzi, for the first and second applicants
A Mupini, for the respondent

DEMBURE J: This is an application for bail pending trial. The applications were filed separately but since both applicants were jointly charged and were all seeking bail pending trial on generally similar grounds the state applied for the consolidation of the matters. On 8 August 2024, we granted the application by the state for the consolidation of the two applications with the consent of the applicants who were all represented by Mr *Mupudzi*. Kumuriwo Mudziwaona and Wintson Matizanadzo are referred to herein as the first and second applicants respectively. We directed that the state must proceed to file its response and postponed the hearing of the applications to 9 August 2024. The applicants are seeking the relief that:

1. They be admitted to bail pending trial on the following conditions:
    a) That each applicant deposit US$ 200 or the equivalent in ZIG at the prevailing bank rate with the Clerk of Court, Harare Magistrates Court.
    b) That the first applicant resides at number 11014 Timire Park, Ruwa and the second applicant resides at number 20115 Solomio, Ruwa until the matter is finalized.
    c) That the first applicant reports at Ruwa Police Station twice per week between 6 a.m. and 6 p.m. until the matter is finalised. There were no reporting conditions stated in the draft order filed for the second applicant's application. However, at the

hearing of the matter, Mr *Mupudzi* submitted that both applicants were prepared to report daily at the police station to allay state fears of them absconding trial.

d) That the applicants shall not interfere with state witnesses.

The State opposed the application by both applicants to be admitted to bail pending trial.

The applicants together with other seven co-accused persons are charged with five counts of armed robbery as defined in terms of s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("*the Criminal Code*"). The applicants did not attach the Annexure to Form 242 with the details of the five counts. The counts were, however, detailed in the annexure to Form 242 which one of their co-accused Kudakwashe Vhazhure filed together with his application for bail pending trial in case number R-HCHCR2157/24.

In respect of the first count, it is alleged that on 16 May 2024 around midnight, the applicants together with their co-accused persons entered the offices of J & P Security at number 17 Walterhill Estate, Eastlea, Harare by scaling the precast wall. They were allegedly all armed with pistols and rifles. They manhandled the members of staff, tied their hands and legs and locked them up in a toilet. They took the keys to the strong room and stole cash amounting to US$142 995 and an assortment of six firearms. Only US$4 900 was recovered.

As for the second count, it is alleged the accused attacked one Denford Chizanga in Windsor Park, Ruwa on 25 February 2024 while armed with a revolver and other pistols. They tied him up with cables but failed to blast open a safe. They, however, stole 3 laptops, a tool kit, a tablet S9, two laptop bags, one travel bag and some foodstuffs. The value of the stolen property is US$4 952, and the value recovered is US$1 500.

The allegations for count three are that on 11 March 2024 at around midnight they attacked a security guard one Assulani Jackson who was armed with a 303-rifle loaded with 5 live rounds. They disarmed him and stole his Itel cellphone. They wrapped him on the face with white and red tape and dragged him into a kiosk located at the service station. The accused took a Chubb safe containing cash in the amount of US$12 and the 303-rifle. The total value stolen is US$600 and the value recovered is US$400.

For count four, it is alleged that the accused approached one Liberty Tsingano and Elton Kadembetembe who were at work at a fuel station on 27 March 2024 at around 1800 hrs purporting to want to buy fuel. They were in two vehicles, a silver Nissan Ad van and a white Mitsubishi whose registration numbers are unknown. When US$10 was demanded for fuel

supplied for the Mitsubishi Colt, one of the accused persons disembarked armed with a pistol. Elton Kadembetembe fled the scene, and his colleague Liberty Tsingano fired a warning shot. This led to all the accused disembarking from the two vehicles armed with suspected AK rifles and six unidentified pistols. They disarmed Liberty Tsingano, tied him up and put him in a separate room under guard. They broke the screen door to the office and used explosives to blast the safe open. They failed to get it fully open and managed to get away with US$1 200.
In relation to the fifth count, it is alleged that the accused attacked a woman and her son at their house. They tied the son using shoelaces, ransacked the house and stole approximately US$650, a Samsung cellphone, an iPhone 11 cellphone, a Google Pixel cellphone and a Lenovo laptop. They also took away keys to the complainant's motor vehicle. The total value stolen is US$2 350 and only US$600 was recovered.

It is common cause that one of the applicants' co-accused Tapiwa Chigwaze, accused number 5 was granted bail pending trial by this court on 14 June 2024.

Both applicants filed bail statements in support of their application. In addition, the first applicant filed a supporting affidavit from one Emma Ugaro who stated that the first applicant was a church mate at Mugodhi Apostolic Church in Solomio, Ruwa and that he will avail himself for trial and abide by the conditions of his bail. The second applicant also filed a bail statement together with a supporting affidavit from one Tarisai Magore who stated that the second applicant was his church mate at Mugodhi Apostolic Church in Solomio, Ruwa. He also stated that he only knows one of the co-accused (accused number 4) one Promise Mussa as someone who resides in the same neighborhood.

Mr *Mupudzi*, for the applicants, submitted that the applicants were proper candidates for bail, which is their constitutional right. As for the first applicant, he submitted that he is a family man, of fixed abode and was only linked to the offence by implication and nothing else. He stated that in terms of s 259 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] ("*the CP & E Act*") a confession shall not be admissible as evidence against the applicant. That the statements were extra-curial statements which were inadmissible. There was no evidence linking him to the commission of the offence. The first applicant had gone to see his churchmate, the second applicant and he was, therefore, "at the wrong place at the wrong time" when he was arrested. Since accused number five, Tapiwa Chigwaze was granted bail he should be treated the same way as well. The said Tapiwa was also arrested at the second applicant's house and based on implication and that the applicant was also similarly linked to

the offence by implication. He also submitted that his circumstances are the same. The first applicant denies admitting to committing the offence. The indications were done under duress and will be challenged. That the first applicant denies any involvement in the offences alleged and that he had cooperated well with the police who, however, heavily assaulted him. He is prepared to report daily to the police at CID Homicide until the matter is finalized.

In respect of the second applicant, Mr *Mupudzi* submitted that he was arrested only on implications. The extra-curial statements are inadmissible as s 259 of the Criminal Procedure & Evidence Act does not permit such evidence. The call history of the alleged communications between the accused persons tendered as evidence in Kudakwashe Vhazhure's application by the Investigating Officer ("*the IO*") Detective Sergeant Munda was never tendered as evidence by the state against the second applicant. That the firearms allegedly recovered from him were planted by the police in his bedroom to simply nail him as a way of fixing him in order to clear pending cases. That he is a man of fixed abode and a family person. He did not flee from the police upon arrest and has no previous convictions the same as the first applicant. He further submitted that the co-accused number 4, one Promise Mussa who implicated him stayed in the same neighbourhood and simply did so because of the torture he endured at the hands of the police.

Mr *Mupudzi* also submitted that by virtue of the provisions of s 56(1) of the Constitution, the second applicant must also be treated the same as Tapiwa Chigwaze who was granted bail under case number HCHCR2598/24. He was also implicated the same way as Tapiwa and their circumstances are the same. He offered more stringent bail conditions than those ordered in respect of Tapiwa's application including reporting to the police CID Homicide daily. That they can increase the quantum of the bail deposit from US$200.00 to any reasonable amount. He accordingly, submitted that the applicants should be released on bail pending trial.

Per contra, A *Mupini*, for the State, submitted that it is not in the interests of justice for the applicants to be released on bail pending trial. That the first affidavit filed of record is from the lead investigating officer Detective Munda and the other affidavit by Detective Chademana confirms he is the arresting officer. The applicants' counsel tried to mislead the court by saying that the affidavits were from persons who did not participate in the arrest of the applicants and were not admissible. Further, that the applicants are facing serious charges and there is overwhelming evidence against them. That it is unreasonable that of all people Promise Mussa

would simply implicate the applicants because of torture in a community where there are many other people. The applicants were both found by the police together. The only reasonable conclusion is that they were mentioned because they knew each other and what connects them is this offence. Further, that the police were led to the applicants by their co-accused Promise Mussa and were not aware that the said Promise had already been apprehended by the police.

The State counsel further submitted that the firearms were recovered in the second applicant's bedroom. The police affidavits show that he is the one who led them to the discovery of those firearms. The stolen firearms recovered have been linked to other armed robberies which the police are now investigating. There was no reason for the police to plant the said firearms. There was no reason for them to fix the second applicant. She further stated that the applicants could not flee because there was no chance for them to flee. They were caught unaware after believing they would be going on another robbery mission.

As for the fact that one of their co-accused Tapiwa Chigwaze was granted bail, the State submitted that the applicant cannot be treated the same as they are a flight right. The evidence linking them to the offences is overwhelming. Their other accomplice one Owen Mbayi, accused number 3 was also denied bail on the same charge. The applicants have a propensity to commit crimes and the firearms recovered have led to more investigations on other robberies committed in the other areas. Releasing such dangerous elements would erode public confidence in the criminal justice system. They are a danger to the public and will not stand trial if released on bail.

The principles of law on bail applications are well settled. Firstly, s 50(1)(d) of the Constitution of Zimbabwe, 2013 is imperative that any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention. This court shall refuse to grant bail if one or more of the grounds set out in s 117(2) of the Criminal Procedure & Evidence Act are established. The court may, therefore, find compelling reasons for denying the applicant bail if one or more of the following grounds are established:

(i) where there is a likelihood that if released on bail, an accused person would endanger the safety of the public or any particular person or that he would commit an offence referred to in the first schedule,

(ii) where there is a likelihood that the accused person will not stand his or her trial or appear to receive sentence,

(iii) where there is a likelihood that the accused person will attempt to influence or intimidate witnesses or to conceal or destroy evidence.

(iv) where there is a likelihood that the accused person will undermine or jeopardise the objectives of proper functioning of the criminal justice system, including the bail system,

(v) in exceptional circumstances where there is a likelihood that the release of the accused person will result in the disturbance of public peace or security.

The other relevant provision where the offence is a Third Schedule offence is s 115 C(2)(a) of the Criminal Procedure & Evidence Act Act which states that:

> "(2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail—
> (a) before a court has convicted him or her of the offence—
> (i) the prosecution shall bear the burden of showing, on a balance of probabilities, that there are compelling reasons justifying his or her continued detention, unless the offence in question is one specified in the Third Schedule;
> (ii) the accused person shall, if the offence in question is one specified in— A. Part I of the Third Schedule, bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail, unless the court determines that, in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden; B. Part II of the Third Schedule, bear the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail…"

There have been different views on the issue of the burden of proof arising from the provisions of s 115C(2)(a) of the Criminal Procedure & Evidence Act Act for third schedule offices provided under Part I in view of s 50(1)(d) of the Constitution. It has been held that the provision of s 50(1) of the Constitution imposes on the State the onus to prove on a balance of probabilities the existence of compelling reasons for the accused's continued detention pending trial. In *S* v *Munsaka* HB 55/16 MATHONSI J (as he then was) opined that whether or not that law has been realigned to the Constitution is immaterial, any provisions of the law that are at variance with the Constitution are no longer part of our law and are to the extent of their inconsistency invalid. On the other hand, other decisions of this court have held that the law permits the reversal of the onus of proof in cases of Third Schedule offences listed under Part I in the Criminal Procedure & Evidence Act Act and until this has been challenged and expunged from our statute books every accused charged with a third schedule offence will be required to show, on a balance of probabilities that it is in the interests of justice that he be admitted to bail. See *S* v *Bonongwe* HH 655/23. In a later case to that of *Munsaka* (*supra*) of

S v *Zenda* HB 101/17 MATHONSI J (as he then was) had the following to say on the burden of proof in respect of offences falling under Part I of the third schedule:

> "The accused person only bears the burden in respect of offences specified in Parts I and II of the Third Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*]".

Due to the presumption of constitutionality, this court will not get into a debate on whether the provisions of s 115C(2)(a) are consistent with the Constitution. There is no constitutional challenge before us neither are there full arguments on the issue though the applicants referred to it in passing in their bail statements. What is before us is simply an application for bail pending trial. The provisions of s 115C(2)(a) remain part of our statute books and the decisions above show that the burden of proof is on the accused person if he is charged with a third schedule offence. This court, however, must at the end of the day balance the interests of the administration of justice of seeing that the applicants stand trial and the applicants' right to liberty weighing up the factors set out in s 117(2) of the Criminal Procedure & Evidence Act Act. The issue is whether or not the applicants are proper candidates to be granted bail pending trial.

In determining the issue of whether or not the applicants are proper candidates for bail the court must treat accused persons in a similar fashion as their co-accused who would have been granted bail unless there are compelling reasons for not doing so. See S v *Lotriet & Anor* 2001 (2) ZLR 225 which was also quoted with approval in *S* v *Dhlamini* HH 57/2009.

Both applicants face serious offences with the possibility of receiving lengthy periods of imprisonment, if they are convicted. They are of course presumed innocent until proven guilty. The likelihood of a lengthy sentence of imprisonment is a factor that can induce a person to abscond. The court is, however, aware that the seriousness of the offence alone is not a good ground to deny the accused person bail: See *S* v *Hussey* 1991 (2) ZLR 187 (S). We do not agree that the State evidence against both the applicants is merely based on implication by their co-accused Promise Mussa or that there is no evidence linking them to the offences in question. In addition to the implication by the fourth accused person, there is evidence of the arresting officer, Detective Sergeant Chademana placed on record in the form of an affidavit which links both applicants together with Promise Mussa to the offences in question. The call history evidence which shows the applicants communicating with the co-accused before and after the commission of the offences, though not placed before this court, can be produced by the State

at the trial of the applicants. This is not a trial court. That evidence from the IO who is one of the State witnesses is not an extra-curial statement.

The applicants were both arrested at the second applicant's home after the police were led to that house by Promise Mussa. The defence by the two that they were simply discussing church issues and by the first applicant that he was at the "wrong place at the wrong time" are not plausible defences. It cannot be reasonable that their co-accused was only led to the house where they were because of torture and merely due to the fact that he knew the second applicant as a resident in the area. The only reasonable inference is that the two applicants were well known by the said Promise and were connected to the commission of the offences in question. Both applicants know each other very well as they confirm that they are also churchmates and it was not a coincidence that they were found together. From the evidence of the arresting officer on record, the two had discussed that they wanted to go out to carry out another robbery and were not aware that their co-accused, Promise Mussa had already been arrested.

In addition to the evidence from the police officers who arrested the applicants, it is common cause that there is a video recording of the formal indications by the two applicants together with the first accused, one Innocent Chawaguta at one of the places of the robbery in Ruwa that is available. The applicants state that they were tortured to make those indications but that is an issue for a trial within a trial. It is not an issue we should decide at this stage. Further, the evidence of their communications before and after the commission of the offence as submitted by the state will also be fully ventilated at the trial. There is strong *prima facie* evidence that the applicants knew each other and their other co-accused. Upon their arrest, the first applicant had converged with the second applicant at his house. Both applicants have been strongly linked to the offences and the other accomplices. This is why also they were placed on remand. If there was no reasonable suspicion that they had committed the offences they ought to have challenged their placement on remand in the first place.

Further, the second applicant when he was arrested with the first applicant, led the police to the recovery of firearms, stolen from other robberies, from his bedroom. While he claimed these were planted by the police, we did not find his explanation plausible at all. The firearms have led to more investigations of other robberies committed using the same. He did not dispute that the Nissan motor vehicle used in one of the robberies was searched at his house and balaclavas and cable tiers were found. This proves the State's position to be correct that they were planning another robbery and had not realised that their co-accused had been arrested

by the police. Their defences are far-fetched and unbelievable. Of course, the law does not require them to prove their innocence but they must have placed before the court in their bail statements a reasonably probable defence. See *Tshuma* v *State* HB 130/22. Their defences, in our view, are not plausible or reasonably probable. That further creates a likelihood of them absconding trial.

The offences were committed by a gang armed with dangerous weapons and some of the co-accused are still at large. The applicants' release would endanger the safety of the public. They are also likely to interfere with the police investigations taking place following the recovery of the stolen firearms from the second applicant's house. In light of the above, the risk of abscondment by the applicants is very high and cannot be allayed by the daily reporting conditions or any other conditions which have been submitted by the applicants including increasing the quantum of the deposit payable.

The law on equal treatment of co-accused is settled: accused persons jointly charged with the same offence must be similarly treated. CHINHENGO J (as he then was) in *S* v *Samson Ruturi* HH 26-30 at p 9 of the cyclostyled judgment stated that:

> "Thus stated, the general principle is that persons jointly charged with an offence must be treated the same way. In practice however, it is not often that persons jointly charged with the same offence are treated equally in every respect. One accused may have to be treated differently from another because of certain factors, either personal or related to the offence, which him part from the other person with whom he is jointly charged. In the case of admission to bail on jointly charged persons may in the view of the court, be likely to abscond and the other not. One may be more likely to interfere with evidence or witnesses and the other not. One may be more likely so commit the same or similar offences and the other not. And one may be much more closely connected to the offence and more liable to be convicted and the other not. These are some of the factors which may justify the granting of bail to the one and its denial to the other. In broad terms, therefore, factors personal to jointly charged persons may set them apart for purposes of the grant or refusal of bail."

On the same legal position, in *S* v *Shamu* HMA 18/21 at p 6 the court had this to say:

> "In my view equal treatment does not necessarily imply similar outcomes, equal treatment to my mind means being subjected to the same objective criteria in the resolution of the matter as opposed to being subjected to whimsical or capricious considerations. It is not uncommon therefore that the equal treatment of persons (in the sense of being subjected to the same criteria) whose circumstances are different would yield different outcomes."

In this case, while it is common cause that Tapiwa Chigwaze, the applicants' co-accused was granted bail, we do not agree that the evidence against the applicants is merely based on implications as alleged was with regard to Tapiwa Chigwaze. There is more evidence linking the applicants to the offence including the video of their indications, the recovery of the firearms at the second applicant's house where the two were arrested and the evidence of

the communications they had before and after the commission of the offence. There is also evidence from the police arresting details as to how they were arrested and connected to the fourth accused person. The two applicants are strongly connected to each other and to the offence than the fourth accused who was granted bail. The firearms recoveries have also led to fresh investigations concerning other robberies committed using the same firearms and it would not be safe to release the applicants at this stage of the investigations. They will likely interfere with those investigations and are also flight risks in view of the strong links which exist for the serious offences they are facing and the high chances of them being jailed upon conviction. The expectation of a substantial sentence of imprisonment would undoubtedly induce the applicants to abscond trial. See *S* v *Jongwe* 2002 (2) ZLR 2009 (S).

They both made formal indications recorded on video with the first accused, one Innocent Chawaguta for the robbery at Africa Development Trust in Ruwa. These indications do not involve the one who was granted bail. The issue about the admissibility of such evidence is for the trial court to consider at the appropriate stage. At this stage, we are satisfied that the state has a strong *prima facie* case against the applicants.

For the above reasons, this court finds the applicants to be flight risks and not suitable candidates for admission to bail. Given the circumstances, it will not be in the interests of justice to admit them to bail pending trial. No exceptional circumstances have been established that permit their release.

In the result, it is ordered that:

The application for bail pending trial be and is hereby dismissed.

DEMBURE J:…….....

MUCHAWA J:……**Agrees**

Muchiweresi & Zvenyika, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners