ROBERTSON KHULEKANI KOTI

And

FROND MBIBA

And

MTHULISI BRIGHTON MPOFU

Versus

THE STATE

HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 23 JUNE AND 2 JULY 2020

Application for Bail Pending Trial

B Ndove, for the applicants
K Ndlovu, for the respondent

KABASA J: This is an application for bail pending trial.

The applicants appeared before a Regional Magistrate on trial charged with robbery as defined in section 126 of the Criminal Law (Codification and Reform) Act, Chapter 9:23.

The allegations against the applicants are briefly that they went to the complainant's home, armed with a pistol. They threatened the maid with that pistol and made off with the complainant's property, most of which was later recovered.

The applicants pleaded not guilty and proffered a defence of claim of right. The state called a total of five witnesses before closing its case.

The applicants, through their defence counsel then invoked section 70 (1) (i) of the Constitution, choosing to remain silent and arguing that they cannot be compelled to testify. The state accepted that the applicants had that right but argued that they could however be cross-examined by the state and also questioned by the court.

The court *a quo* ruled that whilst the applicants had a right to remain silent that did not take away the state's right to ask them questions and so allowed the state to proceed with cross-examination, whereupon the applicants sought the referral of the matter to the

Constitutional Court. The issue for determination was agreed upon by the defence and the state, the import of which is for the Constitutional Court to determine the Constitutionality of section 198 (9) of the Criminal Procedure and Evidence Act, Chapter 9:07.

The matter has since been referred to the Constitutional Court. The applicants now seek to be admitted to bail pending the conclusion of their trial.

The applicants argue that in terms of section 50 (1) (d) of the Constitution, 2013, they must be released unconditionally or on reasonable conditions unless there are compelling reasons justifying their continued detention. A reading of s50 (1) (d) suggests that the provision refers to a person arrested and detained in Police cells before appearance in court. I will however refrain from delving deep into an interpretation of this provision mainly because counsel were not afforded an opportunity to apply their minds to a possible different interpretation of s50 (1) (d) and address the court on the applicability of this provision where an applicant has appeared in court and is seeking to be released on bail.

Be that as it may, the offence the applicants are facing is a Third Schedule offence and located in Part 1 of the Criminal Procedure and Evidence Act. In terms of section 117 (6) (a) of the Act, where an accused is facing a Part I Third Schedule offence the onus is on him to prove on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release.

The state must however lay the basis upon which bail is being opposed before the applicant addresses those concerns showing that his admission to bail will not interfere with the proper administration of justice. The state's attitude is that the applicants are likely to abscond.

It has been argued on their behalf that the applicants are fairly youthful, evidence has already been adduced and so there is no risk of interference with witnesses, the state's case is not very strong and most of the property was recovered. The lockdown environment makes the issue of abscondment well nigh impossible; they also have no passports and no relatives outside Zimbabwe.

The state on the other hand argues that the applicants are likely to abscond, the case against them is strong and a conviction is likely to ensue. The seriousness of the offence is likely to result in a heavy sentence and so the likelihood of absconding is real thereby compromising the interests of justice.

It is accepted that this is an application for bail pending trial. The presumption of innocence therefore ordinarily operates in favour of the applicant. The court must therefore endeavour to strike a balance between the liberty of the applicants and the interests of justice.

In *State v Biti* 2002 (1) ZLR 115 the court held that bail should be granted where possible and courts should lean in favour of the liberty of an applicant unless the interests of justice dictate otherwise. The presumption of innocence is a factor that weighs heavily in favour of the applicant. (*State v Ncube* 2001 (2) ZLR 556 (S)).

In casu the court is not looking at mere allegations. I say so because evidence has been led and the state case has been closed.

The Constitutional challenge is not premised on the propriety of the charge but whether the applicants' right to remain silent is an absolute right. This presents two scenarios, should the challenge succeed the applicants will exercise their right to remain silent and the state's case will be as it appears now. The trial court will have to decide the matter on the basis of that evidence. If the challenge fails, the applicants will be subjected to cross-examination.

In *State v Luckson* Chirwa HB 121-20 DUBE-BANDA J dealt with an appeal against a refusal by a Magistrate to admit the appellants to bail. I am alive to the fact that this was an appeal against refusal of bail but the relevance is in that the matter involved appellants whose trial had commenced, 3 witnesses had testified and the trial was set to continue with more witnesses yet to testify. The trial was postponed and the appellant sought bail which the trial Magistrate refused to grant. In casu the trial has commenced and the state has led all the evidence it seeks to lead in proving its case.

In dismissing the appellant's appeal the learned Judge had this to say:-

> *"*I make the observation that the court *a quo* is properly seized with the trial of the appellant. The trial is on course. Three state witnesses have testified so far, and more are expected to testify. The court *a quo* is seized in the atmosphere of the trial. It is the court *a quo* that is better positioned to weigh and understand whether it is indeed in the interests of justice to release the appellant on bail at this stage. However, I accept that this court can intervene in the interests of justice, though I take the view that such intervention, when the trial is on course, must be the exception rather than the norm. Worse still, as in this case, where this court has not been furnished with a record of proceedings from the court *a quo*, this court must be very slow to disrupt the

> proceedings in the trial court. Let the trial run its course, without interference from this court, unless grave injustice is likely to occur."

Unlike the Luckson Chirwa case (supra) I had the benefit of reading the entire trial proceedings. It is accepted that "the trial court's living through a drama of a case is in a unique position to evaluate the evidence in its proper perspective ...." (per GUBBAY CJ in *State v Joseph Mbandu* SC 184-90). This is what the trial court will do, that is, evaluate the evidence, once the Constitutional challenge is disposed of. However, sight must not be lost of the fact that the completeness of the record before me is no different to the record an appeal court looks at when the decision of a court *a quo* is appealed against.

Much as an appeal court considers how well the evidence reads on record and can decide an appeal on the record, so it is *in casu*. I do not purport to be assuming the role of an appellate court but a reading of the record of proceedings makes the possibility of a conviction very likely.

The evidence of the maid, Sithokozile Sibanda painted a picture of a harrowing experience she was subjected to before and in the course of the taking of the property in question. Her evidence is at variance with the defence of claim of right. Sithokozile's employer, who is the complainant, also testified and his evidence equally reads well and casts grave doubt on the likelihood of the applicants' defence succeeding.

I propose to illustrate why I am of the view that the state case is very likely going to result in a conviction. The following is an excerpt from Sithokozile's evidence:

> "I was in the company of a four year old child who told me that there was a knock at the door. I then told her I was coming. By the time I went to attend to the knock two of the people were already in the house... the second and third accuseds. ... They indicated that they wanted to search for a pistol. I told them that there was no pistol in the house. I had never seen a pistol whilst doing my duties for cleaning (sic). The third accused took out handcuffs and told me to say the truth. He then threatened to arrest me. I told them there was no pistol. He then asked for my employer's bedroom, the lady of the house's bedroom. I hesitated to show them the bedroom. They then asked me again to show them the bedroom that is when I showed them. ... After entering the bedroom they ordered me to sit down on the bed. After sitting down they started removing clothes from the wardrobe and putting clothes on the floor. On the side of the wardrobe there were blankets which were folded and heaped. The third accused removed one of the blankets; he covered my face using that blanket. After having covered my face I could hear that they were searching. There were some movements and it was clear that they were searching.... I then tried to remove the blanket; I wanted to talk to them since they had introduced themselves to

me as police officers. I wanted to suggest that we approach a neighbour who was an elderly person who could know better of that place. The second accused took out a pistol and threatened to shoot me. He further told me to cover up myself with that blanket."

The complainant Donwell Chinara's testimony confirmed the ransacking of the house. The relevant part of his testimony reads:-

"I then went home and I saw everything scattered in my bedroom. In the sitting room the Plasma TV was missing. Also missing were decoders in the sitting room. In the kitchen the microwave was also missing."

The totality of these witnesses' evidence can hardly be described as making for a weak state case as argued by Mr. Ndove. The other witnesses' evidence showed that the property was quickly disposed of but was fortunately recovered from the buyers

In *Aitken and Another v AG* 1992 (1) ZLR 249 (S) GUBBAY CJ had this to say:

"If the case against the applicant is neither obviously strong nor obviously weak, that the state's fears of abscondment or interference with witnesses and the applicant's assurances to the contrary are equally balanced, then the presumption of innocence would require the court to lean in favour of the liberty of the accused person and grant bail."

In casu the state's case is very strong, the likelihood of a conviction very real and whilst technically this application is for bail pending trial, the trial is to all intents and purposes almost complete.

The penalty provision for a contravention of section 126 of the Criminal Code provides that:-

(2) "A person convicted of robbery shall be liable

(a) to imprisonment for life or any definite period of imprisonment, if the crime was committed in aggravating circumstances as provided in subsection (3)"

Subsection 3 provides that:-

"for the purposes of subsection (2) robbery is committed in aggravating circumstances if the convicted person or an accomplice of the convicted person –

(a) possessed a firearm or a dangerous weapon.
(b) Inflicted or threatened to inflict serious bodily injury upon any person."

There can be no doubt that the penalty is a severe one. In *State v Chikamba and Another* HB 120-2003 the court made it clear that whilst courts should lean in favour of the liberty of an individual, the individual's liberty should however, be balanced against the

protection of the proper administration of justice, which demands that the accused should stand trial. The factors to be considered include, *inter alia*, the nature of the crime, the severity of the punishment that may be imposed in the event of a conviction and the probability of a conviction.

Mr. Ndove argued that the penalty allows for a fine but the evidence of the complainant's maid was to the effect that a pistol was produced and threats to shoot her were made. That being so the robbery was committed in aggravating circumstances and so, in the event of a conviction, a fine will not be a competent penalty

On a scale of 1 – 10, the probability of a conviction *in casu* is 9, the penalty likely to be imposed will be severe and the offence is a serious one.

Whether the applicants succeed in their constitutional challenge or not is unlikely to change the complexion of the state case. The evidence led can hardly be described as so weak that the state is pinning its hopes on bolstering the state case through what may come out under cross-examination of the applicants.

In the event that the Constitutional Court strikes down section 198 (9) of the Criminal Procedure and Evidence Act, all that will be left is for the defence and the state to make their closing submissions and the matter will be ready for judgment.

I would therefore borrow from DUBE-BANDA J's remarks in *State v Luckson Chirwa* (supra) and equally say "let the trial run its course."

This is one case where the court should lean in favour of the proper and smooth administration of justice.

The fear of abscondment is a real one. The applicants are aware of the evidence that has been led against them and the penalty they are likely to face in the event of a conviction. Human nature would invariably go into 'self preservation' mode thereby inducing flight. Lack of travel documents or relatives outside our borders are no hindrance to flight when the odds are stacked against an applicant.

No 'grave injustice' will ensue if the trial is allowed to run its course with the applicants in custody. The scale is tipped against the applicants and in favour of ensuring the proper and orderly administration of justice

In the result I make the following order:-

The application for bail be and is hereby refused.

Messrs Ndove and Associates, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners