CONCILLIA CHINANZVAVANA AND 5 OTHERS
and
THE STATE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J.
HARARE, 04 February 2009

Bail Application

Mr *Kwaramba*, for applicants
Mrs *Ziyambi* and Mr *M. Dube*, for respondent

CHITAKUNYE J: The applicants, namely Concillia Chinanzvavana, Fidelis Mujabuki Chiramba, Violet Mupfuranhehwe, Collen Mutamagau, Manuel Chinanzvavana, and Pieta Kaseke, applied for bail pending trial. The respondent opposed the application and raised a point *in limine* contending that the application was not properly before this court as the applicants had not been formally placed on remand.

The basic facts were that the applicants were taken to the magistrates' court on 24 December 2008. The applicants challenged their appearance in court before remand proceedings were conducted, on the basis that they stood released by virtue of an order issued by Justice HUNGWE on 11 November 2008 in HC 6420/08. On 25 December 2008 Justice OMERJEE had also granted an order at the instance of the applicants basically enforcing HUNGWE J's order of 11 November 2008. The respondent appealed against the order by Justice OMERJEE.

The respondent in the meantime was pressing for the applicants to be placed on formal remand but applicants were resisting.

It is in those circumstances that the respondent raised the point *in limine* when applicants applied to this court for bail pending trial.

The issues for determination as admitted by counsel for both sides are:-

(1) at what point can an application for bail pending trial be properly made before this court and

(2) Whether or not the current Application for bail pending trial is properly before the court in view of the fact that the remand proceedings against the applicants have not yet been conducted.

Mr *Kwaramba* for the applicants contended that this application is properly before this court. He argued that an application for bail can be made at any time after an accused has

appeared in court on a charge. In this regard he referred to sections 116 and 117(1) of the Criminal Procedure and Evidence Act, [*Cap 9:07*]. He also referred to s 117A of the same Act which states that: -

> "Subject to the proviso to section 116, an accused person may at any time apply verbally or in writing to the judge or magistrate before whom he or she is appearing to be admitted to bail immediately or may make such application in writing to a judge or magistrate"

He further argued that in this case the accused are in custody. Their first appearance was on 24 December 2008. They are facing a charge of contravening s 24(a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] or alternatively contravening s 187 (1) (b) as read with s 24(a) of the Criminal Law (Codification and Reform) Act.

It was apparent that he was alive to the fact that the accused had not been informed of the charges in court. To confirm this in paragraph 17 of his submissions he stated that:

> "it is important to note that sections 116, 117, and 117A of the Act aforementioned do not make it a condition precedent to an application for bail, that the accused person must have been formally placed on remand or formally advised by the court of the charges he or she is facing…."

The question that arises is when is it deemed one has appeared in court on a charge to invoke one's entitlement to apply for bail? In other words, what constitutes appearing in court on a charge for purposes of applying for bail pending trial? Counsel for the respondent contended that the sections in question must be construed to mean that when one appears in court the charge is read out and he is informed of why he has been brought to court and the presiding magistrate or judge is also informed of the same. Only then will one be said to have appeared in court on a charge entitling one to apply for bail. The applicants on the other hand maintained that the mere appearance in court coupled with the fact that applicants had already been informed of the charge by the police that sufficed for the purposes of applying for bail pending trial.

In their arguments counsel cited virtually the same case authorities as in the case of *S v J M Mukoko* HH24/09. Virtually all the issues in this case are the same as in the *S v J M Mukoko* case. The cases relied on were Inre Mlambo 1991(2) ZLR339 (SC) and *Shumba v Attorney-General* 1997 (1) 589 (S). A reading of those two cases shows that they dealt with the question of when it is deemed one has been charged in the context of s 18(2) of the Constitution. The term charged was being interpreted for purposes of determining the

reasonableness of the delay in prosecution. In re Mlambo (*supra*) at 346 GUBBAY CJ said that: "the time frame to be considered starts to run from the moment a person is charged. The key word is "charged". What does it mean in the context of section 18(2)? Does the provision envisage only the situation where the accused is called upon in court to plead to a formal charge? To my mind such a restrictive construction has the effect of rendering the protection almost nugatory. It squares more with arraignment…

I have no hesitation in holding that the time frame is designed to relate far more to the period prior to the commencement of the hearing or trial than to whatever period may elapse after the accused has tendered a plea. This meaning is consonant with the rationale of s 18(2) - that the charge from which the reasonable time inquiry begins, must correspond with the start of impairment of the individual's interest in the liberty and security of his person…"

It was in this context that he went on to approve that the word "charge" maybe defined as the official notification given to an individual by the appropriate competent authority of an allegation that he has committed an offence.

In *Shumba v Attorney- General* (*supra*) GUBBAY CJ again alluded to the fact that the issue concerned the meaning to be given to the word 'charged' in s 18 (2) of the Constitution.

In *casu*, the issue is when is one deemed to have appeared in court on a charge in the context of sections 116 and 117 of the Criminal Procedure and Evidence Act for one to apply for bail pending trial and not when is one deemed to have been charged.

Section 116 states that:-

> "Subject to this section and sections 32 and 34, a person may, upon an application made in terms of s 117A, be admitted to bail or have his or her conditions of bail altered –
>
> (a) in respect of any offence, by a judge at any time after he or she has appeared in court on a charge and before sentence is imposed.
>
> (b) In respect of any offence, except an offence specified in the third schedule, by a magistrate within whose area of jurisdiction the accused is in custody at any time after he or she has appeared in court on a charge and before sentence is imposed."

Section 117(1) provides that:-

> "subject to this section and s 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 pr she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interest of justice that he or she should be detained in custody."

Thus the time to apply for bail pending trial is stated as: "at any time after he or she has appeared in court on a charge and before sentence." In *J M Mukoko v The State* (*supra*) I indicated that:-

> "..to trigger the process one must make an initial appearance in court on a charge. The magistrate or judge before whom one appears must be apprised of the charges the accused is appearing in court for and the accused must be informed why he has been brought to court. This is done by having the allegations against the accused put to him before the judicial officer. To say that just because one has passed through a court room therefore one has appeared in court on a charge is missing the point. The initial process initiating a criminal trial must surely be undertaken."

It is during that initial process that court is enjoined to make a very fundamental step of determining whether there is legal justification to place the accused on remand. If court finds that there is no legal justification to place the accused on remand court is enjoined not to remand him. The question of bail pending trial only arises where a decision has been made to place the accused on remand.

In this regard I found support in the words of GREENLAND J. in *S v Poli* 1987(2) ZLR 30 wherein he said that "the sections of the Criminal Procedure and Evidence Act which deal with arrest, detention and postponements of trials must be read in the light of the provisions of s 13 of the Constitution. Section 13 of the constitution provides that:-

(3) any person who is arrested or detained

> (a) for the purpose of bringing him before a court in execution of the order of a court or an officer of a court; or
> (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,
>
> and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of having committed or about to commit a criminal offence in not tried within a reasonable time, then, without prejudice to any other proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

The judge went on to hold that "s 13 of the Constitution of Zimbabwe 1980 makes it peremptory that a reasonable suspicion of the commission or imminent commission of an offence should exist before a person can lawfully be arrested, detained or remanded. If no such suspicion exists, even a remand on bail is incompetent."

It is apparent therefore that before court can consider the issue of bail pending trial, the state ought to establish that there is a reasonable suspicion that the accused has committed or was about to commit a criminal offence. It is only when such legal justification has been established to the satisfaction of court that the issue of release of the accused unconditionally or on conditions can be entertained. To grant bail ,or to even consider the issue of bail, without first ascertaining whether there is legal justification to place the accused on remand would be incompetent. The initial remand process must be undertaken to ascertain the justification for placing the applicants on remand.

Accordingly the application is not properly before this court and it is hereby dismissed on that preliminary point.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners.
The Attorney- General's Office, respondent's legal practitioners.