

CHRISTOPHER TICHAONA KURUNERI
and
THE STATE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 2 November and 8 November 2004

Bail Application

Mr *Chikumbirike*, for the applicant
Mr *Jagada*, for the respondent

BHUNU J: The applicant is a prominent member of society, Honourable Minister of Finance, Member of Parliament, businessman and commercial farmer. He was arrested and detained in custody on one count of contravening the Citizenship of Zimbabwe Act [*Chapter 4:10*] and various counts of contravening the Exchange Control Act [*Chapter 22:05*] and Regulations.

He appeared on initial remand on 26 April 2004 and was remanded in custody. The applicant applied for bail without success in the High Court before Hlatshwayo J on 11 May 2004. His appeal to the Supreme Court found no favour with Gwaunza JA who dismissed the appeal on the 17th June 2004, under judgment number SC 40/04.

Following the above initial setbacks the applicant has now lodged a two pronged application in a desperate bid to regain his freedom pending trial. The application is however restricted to the allegations under the Exchange Control Act as determined by the Supreme Court.

The application is premised on sections 13(4) as read with section 18(2) of the Constitution and section 116(1)(c)(ii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

As regards the constitutional aspects the court has been urged to take cognizance of the applicant's fundamental right to freedom as enshrined under section 11 of the Constitution. Despite that

submission it is conceded that bail is not a right but subject to the discretion of the court. Thus the court has a duty to balance the accused's interests against those of the State to ensure that the ends of justice are not compromised.

Section 18(2) of the Constitution entitles the applicant to a fair hearing within a reasonable time by an independent and impartial court of law. If however for one reason or another, the applicant is shown not to have been tried within a reasonable time he is entitled to his release under section 13(4) of the Constitution. That much is not in dispute.

The section provides as follows:

"4. Any person who is arrested or detained –

a) ...

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 his having committed or about to commit a criminal offence is not tried within a reasonable time, then without prejudice to any further 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 proceedings preliminary to trial."

I interpret the above provisions to mean that where there has been an unreasonable delay in bringing an accused person to trial he is entitled to his release as of right provided that such release does not compromise or prejudice the ends of justice.

The court is therefore enjoined to determine whether or not the applicant has been subjected to an unreasonable delay in bringing him to trial since his arrest and detention in custody on the 26th April 2004. If the answer is in the affirmative then, the applicant is entitled to his release either conditionally or unconditionally. See *Kona and Others v Attorney-General* 1986 (1) ZLR 187 (HC).

That the applicant is entitled to a speedy and fair trial by a competent court within a reasonable time is a foregone conclusion. What then is a reasonable time frame within which an accused person must be brought to trial? An examination of the legal authorities and texts shows that there is no prescribed period within which an accused person must be brought to trial. Each case must be determined according to its own merits and exigencies.

The reasonableness or otherwise of the time frame has to be determined in accordance with the peculiarities and surrounding circumstances of each given case.

I now turn to consider the factual basis upon which I must determine the two competing interests comprising the freedom of the individual and the protection of the due administration of justice.

It is common cause that the nature of this case has necessitated extraterritorial investigations beyond the borders of this country in South Africa and Spain. Despite concerted efforts investigating officers have met with considerable insurmountable obstacles particularly in Spain. They have had to submit to the laws and procedures in foreign lands which has greatly retarded progress in investigations.

Thus given the exceptional circumstances of this case I am unable to say that the period of more than 8 months which has elapsed constitutes an unreasonable delay in bringing the applicant to trial.

The second rank of the applicant's plea for release on bail is that owing to the passage of time there has been changed circumstances as would warrant the granting of bail in terms of section 116(1)(c)(ii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

It is correct that since the applicant's arrest and detention a considerable period of time has passed and that there has been a

change of circumstances.

Unfortunately, the change of circumstances in the interim has not been for the better but for worse. It is common cause that the applicant had foreign currency which he used to purchase numerous properties outside this country.

His defence is that he used free funds. The nature of his defence, is such that he must satisfy the courts that the foreign currency he used were free funds lawfully held by him outside Zimbabwe.

The applicant claims to have obtained what he claims to be free funds from consultancy work. Investigations have since discredited the applicant's claims. The applicant himself has not been able to come up with credible evidence pointing to a lawful source of the foreign currency. For instance the applicant claims to have obtained the foreign currency from one Luiz Solano in April 2002 but investigations have since revealed that Luiz Solano died on the 13th October 2001. Common sense dictates that he could not possibly have obtained the funds from Solano in 2002 if Solano died in 2001. I must however hasten to point out that at this stage the State is not required to prove its case against the applicant. All what it has to do is to place before the court sufficient credible facts which if proved at the subsequent trial will result in a conviction. It is therefore not necessary to examine in greater detail all the allegations and evidence against the accused for to do so might unfairly prejudice either party at the trial. It is however sufficient to state that the State has demonstrated that in the interim it has definitely strengthened its case against the applicant.

The applicant has since obtained an undertaking from the Canadian Embassy in Harare that no passport or any other travel documents shall be provided to the applicant.

It is true that no such undertaking was placed before Hlatshwayo J when he denied the applicant bail. It therefore

constitutes changed circumstances. Regrettably that change of circumstances does not take his case any further.

As I have already demonstrated right at the onset, the applicant is an influential high ranking wealthy member of society with vast resources within and outside Zimbabwe. His conduct in obtaining and travelling on a foreign passport despite having taken the oaths of loyalty and allegiance to the State of Zimbabwe casts doubt in the eyes of any reasonable court as to his trustworthiness.

If he could deviously obtain a passport through the Canadian Embassy there is no guarantee that he may not obtain another passport or travel papers through any other embassy which has not made the necessary undertakings.

The long and short of it all is that the applicant has through his conduct demonstrated that he is not a man to be trusted.

In the result I come to the conclusion that there is no merit in the applicant's application for bail both on the constitutional and non-constitutional basis.

It is accordingly ordered that the application for bail be and is hereby dismissed.

Chikumbirike & Associates, applicant's legal practitioners.

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