

BENJAMIN MADUNGWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15, 18, 23 & 24 November 2016 & 8, 9 December 2016

Bail application pending trial

N. Chikono, for the applicant
A. Muziwi, for the respondent

CHITAPI J: I dismissed the applicant's bail application pending trial on 8 December, 2016. I indicated then that I would in due course provide reasons for the dismissal. The applicant appears to have engaged new counsel as appears from a letter dated 4 January, 2017 from Samundombe and Partners legal practitioners who indicated therein that they had been instructed by the applicant to act for him. They make a follow up on the reasons for my order as indicated in my order of dismissal that my reasons for dismissal were to follow. Herein following are the reasons for my order.

The applicant and his co-accused were arrested on 25 October, 2016. They were charged with the offences of Armed Robbery as defined in s 126 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*] and unlawful possession of a firearm and ammunition in contravention of s 14 of the Fire Arms Act, [*Chapter 10:09*] respectively. In respect of these two counts, the applicant's co-accused was named as Ngonidzashe Clever Mukupe. In brief the allegations against the applicant and his co-accused were that on 21 October, 2016 at house No. 9140 Budiriro 5B at 2030 hours they were in the company of two accomplices still to be arrested when they waylaid the complainant and his wife who were coming from work. They allegedly robbed the complainants just outside their house. They are said to have threatened the complainants with a pistol and demanded cash and other valuables. The complainants resisted and shouted for help thereby alerting neighbours and members of the public who came to their aid. The applicant and his accomplices allegedly snatched a handbag which was in the possession of one of the complainants. The handbag contained personal belongings, two cell phones and cash amounting to US\$ 2 100-00. The

gang fled but members of the public gave chase and apprehended one of the gang members leading to the recovery of the handbag, the phones and the cash. It was alleged that on being interviewed after arrest the applicant led police to the recovery of a revolver loaded with one round of ammunition and five spent cartridges still in the chamber.

The applicant was facing yet another two charges of Unlawful Entry into premises as defined in s 131 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*] and unlawful possession of a fire-arm and ammunition in contravention of s 14 of the Fire-Arms Act, [*Chapter 10:09*]. With respect to these two charges, the applicant was charged together with another co-accused. The co-accused was also part of the gang involved in the two counts involving the offences committed on 25 October, 2016. The two offences in this paragraph were allegedly committed on 14 June, 2016 in Kadoma. It was alleged that the applicant and his co-accused cut the fence to and forcibly entered the complainants' premises. They then stole various items which included a laptop, a blood pressure testing machine and a revolver with 3 rounds of ammunition. This is the same revolver whose recovery was allegedly made on indications made by the applicant after the armed robbery of 21 October, 2016 in Budiriro. The applicant combined or consolidated his two applications for bail. With respect to the first two charges which I will conveniently call the Budiriro case, the applicant appeared in the magistrates' court for remand under case No. CRB 13786/16. In respect of the next two charges which I will call the Kadoma case the applicant appeared before the magistrates' court for remand under case No. 13784/16. The two records were dealt with in the same court one after another on 27 October, 2016. The applicant was remanded in custody on both records and now seeks his release on bail of US\$100.00 on each record coupled with other conditions to ensure his due appearance for his trial.

It is trite that where an applicant applies for bail pending trial on a charge specified in Part I of the Third Schedule to the Criminal Procedure & Evidence Act, [*Chapter 9:07*], the applicant bears the burden on a balance of probabilities to show that it is in the interests of justice that the applicant be released on bail. The court may however determine that the burden to prove any specific allegation should be borne by the prosecution. Section 115 C (2) (a) (ii) A of the Criminal Procedure & Evidence is instructive in this regard.

In casu, the applicant was linked to the commission of the offences in that he is alleged to have led police to the recovery of the firearm which had been used in the commission of the offences or forms the basis of the second charge of contravening s 14 of the Fire-Arms Act. In his bail statement, the applicant averred that the recovery of the fire-

arm was stage managed by the police. He also denied that he tried to avoid or evade arrest. He denied knowledge of the commission of the offences. The State counsel filed a generalized response opposing bail. The response filed on 16 November, 2016 was not informative because the State counsel simply regurgitated what was contained in the request for remand form. A bail response should not be a summary of what is contained in the form 242 remand form because the court can read through the form 242 and make its own summary. The practice has become common that the investigating officer deposes to an affidavit in which he motivates his reasons for seeking that the applicant should not be admitted to bail pending the completion of investigations and/or the applicant's trial.

When I sought an explanation as to why there was no affidavit from the investigating officer as has become customary the State counsel advised the court that he had experienced difficulties in getting the co-operation of the Homicide Department because he was being told that the investigating officer was on time off. The court was not satisfied that time off or occasional leave was a good ground for a police officer not to attend to court duties when called upon to do so unless he was indisposed. The State counsel submitted that he had tried his best to get the co-operation of the police officer concerned to no avail. Had the matter been a civil suit I would have simply released the applicant. I however considered that the offences which the applicant was facing were very serious. Bail concerns itself with balancing the interests of the applicant and in particular his right to liberty based on the constitutional right of every arrested person to the presumption of innocence until proven guilty before a competent court against the need to also safeguard the due administration and interests of justice.

Since bail applications are informal and more in the nature of an enquiry, I directed the registrar to issue a subpoena for the due attendance of the investigating officer before the court. The investigating officer duly attended. It further turned out that he had prepared his affidavit before the applicant had filed his application. He had prepared it on 10 November, 2016 and the application for bail had been filed on 11 November, 2016. It then turned out that there had been a communication breakdown with respect to the delivery of the affidavit to the state counsel. Be that as it may, the investigating officer Detective Constable Antonio gave evidence. He was not the arresting officer but the investigating officer. He testified to the recovery of the revolver on the indications of the applicant. He also testified that the trial date had been set for 12 December, 2016 and witnesses warned. The police were still

investigating other outstanding cases to see whether the fire-arm recovered on the indications of the applicant matched the scenes.

The State counsel conceded that as far as the Budiro case was concerned, there was no direct evidence of the applicant's involvement except that the applicant was implicated by the co-accused. The applicant's explanation that the recovery of the fire-arm was stage managed by the police is not worthy of belief. The arresting detail also filed an affidavit. He is detective constable Chikungwa. He deposed that the applicant tried to escape in his motor vehicle when police approached his house intending to arrest him. The applicant was intercepted. The applicant allegedly implicated one Ngoni Clever Mukupe in the commission of the offences. The applicant was said to have led the police on indications in the Lochnvar/Rugare bush area where he indicated the place where he had buried the revolver. There were two civilians who were tending their fields. One of them supplied a hoe which the applicant used to dig for the fire-arm and the fire-arm was recovered. The applicant was said to have signed for the fire-arm together with the two civilian witnesses in the police note book. It was after the recovery of the fire-arm that the applicant then led the police to his co-accused Ngoni Mukupe.

I have indicated that I found the applicant's explanation on the recovery of the fire-arm not worthy of belief. It is so incredible that only a gullible court would find it probable. It is the main reason why I considered that the applicant's explanation being incredible would be rejected by the trial court thus making a conviction a certainty which conviction would be visited by a substantial term of imprisonment. The prospects of conviction and a long custodial term being a certainty, the risk of abscondment was high. The applicant did not deny that a fire-arm was recovered in his presence. He however alleged that the hoe which was used to dig out the earth to recover the fire-arm was already there. He submitted that the police must have had prior knowledge of the presence of the fire-arm. What this meant was that the police would have been shown the exact location of the fire-arm, left it there, looked for a hoe, left it there and wanted to arrest the applicant and thereafter taken him to the scene, pointed out the location of the fire-arm and asked the applicant to dig it out. I asked Mr *Chikomo*, the applicant's counsel whether he thought that such a scenario made sense that police would act in this manner. Mr *Chikomo* resignedly said that those were his instructions.

The fire arm in question was stolen from Kadoma during a break in. The recovery of the fire-arm on the indications of the applicant sufficiently linked him to the Kadoma case. Whilst it could not be said that the evidence regarding the Harare case was as strong as for

the Kadoma case, the Kadoma case even standing alone was serious. Whilst the seriousness of an offence would not, standing alone, ground a basis for denying the applicant bail, see *S v Hussey* 1991 (2) ZLR 187 (S), where there is overwhelming evidence, it would not be in the interests of justice to admit to bail an applicant facing a serious offence where the evidence against him is *prima facie* overwhelming and a conviction is certain with prospects of a long prison term being imposed consequent upon conviction.

The applicant's trial was reportedly slotted for 12 December 2016. The fact that a trial date which is near has been set is also not a good ground for denying bail to an applicant, see *S v Chiadzwa* 1988 (2) ZLR 19(S). However in bail applications, the court adopts a common sense approach. The various factors which militate against the exercise of a discretion to admit an applicant to bail are collectively considered and not treated in isolation. Ultimately the deprivation of bail pending trial will be justified despite the presumption of innocence until proven guilty where the administration of justice will likely be defeated if bail was granted. Section 117 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] lists the factors which the court should consider when determining whether the interests of justice will be served or defeated by the admission of an applicant to bail pending trial. The considerations are not open and shut and the court will take into account any other relevant circumstances depending on the facts of each case.

It was argued that the co-accused Ngonidzashe Clever Mukupe had been admitted to bail by myself under case No. B 1195/16. It is true that I granted bail in the quoted case on 11 November, 2016. In the first instance the applicants bail application in case No B1195/16 was not opposed by the state. Even then the State's consent does not bind the judge but is considered against the circumstances of the cases. The consent falls for scrutiny as provided for in s 117 (5) of the Criminal Procedure and Evidence Act. If it is not well informed the court will refuse to act in accordance therewith. Mukupe's bail application had merit because other than the consent, the facts presented to the court did not reveal any nexus between the applicant and the Budiro case. The role played by Mukupe was not established. In fact, it was not even clear as to why he was placed on remand. Mukupe did not feature in the Kadoma case. Had the applicant herein only been on remand on the Budiro case, the argument as to treatment of co-accused equally would have been more persuasive though I should warn that the equal treatment principle, this is not a rule of thumb since each applicant must be treated separately with respect to specific allegations made against him or her and his

or her personal circumstances. In short co-accused will be treated similarly where there is little to differentiate them. This is not the case here.

I was therefore satisfied that the applicant would not stand trial if released on bail because he appeared to be too involved or linked to the Kadoma case through the recovery of the fire-arm. The fire-arm was recovered on his indications and the allegations that the police stage managed the fire-arm recovery did not make sense. There was nothing spectacular about choosing the site where the fire-arm was found and police did not have to drive across the Harare divide to bury the fire-arm in Lochnvar and then drive the accused there and make him to dig it out of the ground. They could easily have planted the fire-arm in the applicant's house or car had they been mindful to set the applicant up.

For the avoidance of doubt, I denied the applicant bail because I was satisfied that the evidence against him on the Kadoma case in respect of both counts was so strong and a conviction likely. The offences merit heavy prison terms and the prospects of being jailed for a long period would act as an inducement for the applicant to abscond. Despite the applicant being of fixed abode, I was satisfied that the applicant had not discharged the onus to satisfy me that the interests of justice would be best served by releasing him on bail as opposed to keeping the applicant in custody. Bail was therefore denied.

Ngarava Moyo & Chikoro, applicant's legal practitioners
National Prosecuting Authority of Zimbabwe, respondent's legal practitioners