

VINCENT KONDO
and
EDMORE MARWIZI MAPURANGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 7 December 2016 & 29 December 2016

Bail Pending Trial

G Shumba, for the applicant
D H Chesa, for the respondent

CHITAPI J: I dismissed the applicants bail application pending trial on 29 December, 2016. I indicated then that I would provide reasons for my decision in due course. The applicants' legal practitioner has by letter dated 9 January 2017 made a follow up on the promised reasons for my order. I set them herein below.

The applicants appeared before the magistrate at Harare on 14 November, 2016 for remand. They faced allegations of three counts of Armed Robbery as defined in s 126 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*] and four counts of unlawfully possessing a fire-arm in contravention of s 4 (1) of the Fire – Arm Act, [*Chapter 10:09*]. The applicants were remanded in custody. Since they faced Armed Robbery charges the magistrate had no jurisdiction to entertain their applications since the offence of armed robbery is listed under the Criminal Procedure & Evidence, [*Chapter 9:07*] as a Part 1. Third schedule offence in respect of which a bail application must be determined in this court unless the Prosecutor General has consented to the magistrates court to exercise jurisdiction in relation to a bail application relating thereto.

The applicant's bail application is not in proper form. It is important to remind legal practitioners to follow and be guided by rules of court on matters where court rules have been provided. Court rules are not there just for the sake of it. They exist so that matters falling to be determination under the specific rules are methodically dealt with. In *casu* the applicants' application was not guided by the High Court of Zimbabwe (Bail) Rules S.1 109/91. It is important for counsel to strictly comply with r 5 of the aforesaid rules. The application herein did not state the dates of the applicants' first appearance at court, the criminal record book number, the police station and investigating officer. The application should also state whether its being made as a first instance application or whether bail was previously refused. The applicants attached a copy of a form 242 request for remand form. The rules do not make mention of such form though where it is available to the applicant, it should be attached. The form informs the judge or court of the allegations which the magistrate was presented with. The applicant in the bail application must at least identify and speak to the form. The applicants did not in their bail statement incorporate the form nor speak to it. From an evidential point of view, it must be noted that a document does not speak. Therefore it is important that a party relying on a document it speaks to it and also explain why such document has been included in the applicants' papers. Despite the imperfections in the application, I condoned the short comings as I am entitled to in terms of r 4 of the bail Rules aforesaid. A word of caution to be kept in mind by the applicants and legal practitioners making bail applications is that r 4 should not be abused as in circumstances where the applicant falls foul of the rules for no excusable reason. In such a case, the proper course would be for the court to strike the application off the roll. The applicant can then comply with the rules and reset the application.

In their application the applicants averred that they are entitled to their release unconditionally or on reasonable conditions pending a charge or trial "unless there are compelling reasons justifying their continued detention." They rely for this proposition on s '50 (d) of the Zimbabwe Constitution Amendment (No. 20) Act 2013. They also cited the judgment of this court in *S v Kadigamba* HH 353/15. They submit that it was a decision of BERE J. I do not know where the applicants' counsel got this from because the judgment in that case was by BHUNU J (as he then was). He delivered the judgment on 10 April, 2015 and the correct case name is *S v Mike Kachigamba & Marko Makamba*. Counsel should correctly provide case

names, citations and if they elect to, the judge's name. When the judge looks for the case on the case website sometimes he or she uses the judges name in searching for the case. A wrong reference to the judge concerned obviously delays the search process. Further the section of the constitution which counsel sought to rely upon is not 50 (d) but 50 (1) (d). There is no s 50 (d) in the constitution.

I have carefully considered the judgment aforesaid. The learned judge in interpreting s 50 (1) (d) of the Constitution stated as follows:

“..... the section is couched in peremptory terms and is a clear departure from the common law position that he who claims must prove his claim. In the ordinary run of things where someone is applying for bail, he would be required to prove his claim and entitlement to bail. That position has since been reversed. Thus where a litigant applies for bail, the presumption is that he is entitled to bail unless the state has proven otherwise. The section being a constitutional safeguard designed to protect the citizen's fundamental right to justice, freedom and liberty overrides all other common law and subordinate statutory provisions to the contrary.

The effect of that section is to relieve an arrested person of the burden of proving that he is entitled to bail, thus shifting the burden to the state to prove that there are compelling reasons justifying the continued confinement of the detainee.....”

I must confess that I do not read s 50 (1) of the constitution as referring to an accused who has appeared before a court following his arrest. Section 50 (1) (d) should in my reasoning be read outside the whole ambit of s 50 (1) (a-e). In my view s 50 (1) (d) must be read as referring to an arrested person who is yet to appear before the court on a charge or for his trial. I however leave it open for further ventilation because the interpretation to be placed on the section was not argued fully before me. It would however appear that the person who has been arrested in terms of s 50 (1) or detained because there are compelling reasons to detain him or her must in terms of s 50 (2) of the Constitution be brought to court before the expiry of 48 hours from the time of his arrest otherwise in the absence of a further detention having been extended or sanctioned by an appropriate or competent court, the person must be released unconditionally. I do not read s 50 (1) (d) as being specific to bail applied for in court. On the contrary I read it as aimed at the arresting authority. It does not therefore appear to me that s 50 (1) (d) has altered the law with regards the question of bail because in my interpretation, the section was aimed at an arresting authority which then resolves to detain the arrested person pending putting a charge to such person or bringing the arrested person to court for trial. Section 32 of the Criminal Procedure and Evidence Act in my view clearly show that arrests and putting of a charge is a

police function. Police who arrest and detain a suspect must charge the suspect and bring the suspect to court within 48 hours.

Section 117 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] provides as follows:

“117 Entitlement to bail

- (1) Subject to this section and section 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 or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she be detained in custody.”

In my judgment, bail has always been an entitlement subject of course to certain exceptions as set out in s 117. Section 50 (1) (d) of the Constitution if it must be read as encompassing the granting of bail by the court has not revolutionalized the above position because it was always the state which had to justify the pre-trial incarceration of an accused once he had appeared before the court. If s 50 (1) (d) can be said to have revolutionalized the treatment of accused persons, it did so by requiring that an arresting authority or the police should only detain an accused before bringing him or her to court if there are compelling reasons to justify the detention.

The words “compelling reasons” do not feature in ss 32, 116, 117 (6) or 123 of the Criminal Procedure and Evidence Act. These sections and others less directly relevant are concerned with bail. The legislature in the face of the provisions of s 50 (1) (d) of the Constitution and I would say faced with the uncertainty surrounding its interpretation and the court’s pronouncements decided in its wisdom to introduce s 115 C to the Criminal Procedure and Evidence Act. The section was introduced by s 28 of the Criminal Procedure and Evidence Amendment Act No. 2 of 2016 which was promulgated or gazetted on 10 June, 2016. The full content of the section reads as follows:

“115 C Compelling reasons for denying bail and burden of proof in bail proceedings

- (1) in any application, petition, motion, appeal, review or other proceeding before a court in which the grant or denial of bail or the legality of the grant or denial is in issue, the grounds specified in section 117 (2), being grounds upon which a court may find that it is in the interests of justice that an accused should be detained in custody until he or she is dealt with in accordance with the law, are to be considered as compelling reasons for the denial of bail by a court.
- (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;
- (b) after he or she has been convicted of the offence, he or she shall 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.”

Whilst s 50 (1) (d) of the Constitution refers to an arrested person, s 115 C of the Criminal Procedure & Evidence Act extends the concept of ‘compelling reasons’ to bail applications made before a court by a detained person.

For purposes of this application, the new provision in s 115 C (2) (ii) (A) is instructive. The applicants *in casu* bear the burden on a balance of probabilities to show that it is in the interests of justice that they are released on bail. The applicants face Part 1, Third Schedule offences. The court can however rule that in respect of any matter arising for determination in the bail application, the burden of proof should fall on the prosecution. I will therefore not deal with the issue of proof of compelling reasons as introduced by s 115 C to bail applications in cases where the offences do not fall under Parts I and II of Third Schedule in which case the provisions of s 115 C (i) and 2 (a) (i) come into play. In such cases the burden to justify continued detention or demonstrate the existence of compelling reasons to deny bail is placed on the prosecution.

The casting of an onus on an applicant applying for bail in respect of Third Schedule offences to satisfy the court that it is in the interests of justice to admit such applicant to bail pending trial would if one were to adopt the reasoning of BHUNU J in the *Kachigamba and Another (supra)* case appear to fall foul of s 50 (1) (d) of the Constitution. I have already commented *obiter* on how I interpret the section. Although to my knowledge our Supreme and Constitutional Courts have not yet dealt with the constitutionality of casting the burden of proof on an applicant to justify his admission to bail pending trial, as provided for in s 115 C (2) (a) (ii) of the Criminal Procedure and Evidence Act, the South African Constitutional Court interpreting

a similar provision of the South Africa Criminal Procedure Act 51 of 1977 being s 60 (ii) thereof ruled that it was in the public interest that persons charged with offences of such a serious nature as specified in Schedule 6 to the South African Act aforesaid should be detained pending trial, hence the need for them to demonstrate exceptional circumstances why they should be released on bail see *S v Dlamini* 1999 (2) SACR 51 (CC). I am persuaded that the ruling by the South African Constitutional Court is jurisprudentially sound. The applicants *in casu* need to satisfy the court that it is in the interests of justice that they be admitted to bail pending their trial.

It is necessary therefore to set out the provisions of s 117 (6) of the Criminal Procedure and Evidence as it deals with bail applications relating to Third Schedule Offences. Section 117 reads as follows;

“(6) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in—

(a) Part I of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice permit his or her release;

(b) Part II of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that the interests of justice permit his or her release.”

It will be noted that s 117 (6) of the Criminal Procedure & Evidence provides that the applicant charged with a Part 1, Third Schedule offence must satisfy the judge by evidence that there are exceptional circumstances which in the interests of justice justify his or her release on bail. Section 117 (6) provides that it applies notwithstanding any provisions of the Criminal Procedure and Evidence Act. I do not propose to dwell on the apparent differences in wordings between s 117 (6) in its use of the words “exceptional circumstances” in relation to Part 1, Third Schedule offences yet s 115 C (2) (a) (ii) (A) omits the words and simply requires that the applicant shows that it is in the interest of justice that such applicant be admitted to bail. I do not find it necessary to dwell on whether or not the two sections can be reconciled because ultimately whether one uses the words exceptional circumstances or not, the crux of the matter is that it must be demonstrated to be in the interest of justice that bail is granted to the applicant and

additionally the applicant bears the onus on a balance of probabilities to satisfy the court that it is in the interests of justice that bail be granted.

The applicants in this case did not provide any evidence to demonstrate that it is in the interests of justice that they be admitted to bail. For example they simply stated that they are of fixed abode and are not a flight risk. Evidence means connotes the placing facts before the court which indicate that what is being alleged is true. If a person for example said that he owns a car, that is not evidence. If he produces the car and documents showing that the car is his, that is evidence. The applicants could also have deposed to sworn dispositions of their assertions in order that the court may attach weight to them. It is to be observed that where the State bears the onus of satisfying the court that bail be granted or where it seeks to demonstrate compelling reasons, it invariably produces an affidavit by the investigating officer. The reason for this is because sworn testimony or evidence carries more weight than unsworn statements. I will proceed in my determination of the application on the basis that the applicants elected to simply make statements in support of their bail application despite the provisions of s 117 (6) (a) of the Criminal Procedure & Evidence which require that the applicant charged with a Part 1 Third Schedule offence should adduce evidence to motivate his application and satisfy the court or judge of the existence of such circumstances exceptional or otherwise as permit his release on bail in the interests of justice.

The allegations against the applicant are as set out in the request for remand form attached to their bail application. They are seven accused in all. The present applicants appeared before the magistrate court on 14 November, 2016 as accused 1 and 7 respectively. The allegations against them were that during the relevant period, they committed armed robberies in and around the Harare metropolitan area. They were alleged to have stolen various items which included dressed chickens, 24 volt batteries and phone recharge cards. Police allegedly recovered a fire-arm with live ammunition from them. The police also recovered two motor vehicles which the gang was using as gate away cars.

The State counsel in opposing bail attached to his response an affidavit deposed to by the investigating officer. He linked the first applicant to the offences on the basis that the first applicant led police on indications which resulted in the recovery of a safe which had been stolen during an armed break-in committed at Zaoga Church in Waterfalls, Harare. The safe had been

abandoned in a bush in Waterfalls and its contents of US\$9 550-00 ransacked. The first applicant was alleged to have led the police to the recovery of a pick-up truck which had been used during an armed robbery committed at Kirkman Service station on 25 October, 2016 where the robbers had disabled the security guard, stole his phone and broke into the Kiosk where they stole several grocery items. The vehicle had been captured on the closed circuit television. The first applicant was also alleged to have led the police to the recovery of 10 dressed chickens and a 24 volt battery. The property was recovered from his house and had been stolen during an armed robbery at Mhangura Farming Abattoir in Harare. The first applicant was alleged to have fitted the battery onto his pick-up truck. He also allegedly led the police to the recovery of another 24 volt battery where he had sold it. Complainants in the armed robberies set out above positively identified their property upon its recovery on the first applicants' indications.

With respect to the second applicant, he allegedly led police to the recovery of a Honda vehicle which was also being used in the robberies. The investigating officer also listed a number of armed robbery cases in Harare and Rushinga in which the applicants and their accomplices were said to be the accused persons awaiting trial. The investigating officer also deposed to the fact that police had recovered a fire arm on the indications of the applicants and their accomplices. Investigations were still in progress to establish if the fire-arm matched any outstanding scenes or cases. The investigating officer also deposed that investigations were still in their infancy and efforts to recover property still outstanding were in progress. In his view, the evidence against the applicants and his gang was very strong and the chances of conviction were high. The attendant sentences would act as an inducement on the applicants to abscond. Police were still on the hunt for co-accused persons who had not yet been arrested.

I have already indicated that the applicants bear the onus to satisfy the court that it would be in the interests of justice to release them on bail. Although the onus reposed on them is to be measured on a balance of probabilities, it is not discharged by mere say so or bold statements. Section 117 (6) of the Criminal Procedure & Evidence Act requires that the applicants adduce evidence as to their suitability as worthy candidates for release on bail. The applicants have averred in their bail statement that the state "failed to prove compelling reasons justifying their continued detention" and to "put flesh to its reasons for opposing bail". On the contrary, the applicants are the ones who failed to put flesh to their petition for bail since the onus to satisfy

the court that it is in the interests of justice in the circumstances to admit them to bail rested with them.

The applicants' counsel despite having been served with the State's response which incorporated evidence from the investigating officer in the form of an affidavit did not consider it necessary to cause the applicants to respond thereto in similar fashion, that is by affidavit. Whilst it is not a rule that in every bail application where the State has introduced evidence of the investigating officer by affidavit, the applicant should respond by affidavit, it is in my view and judgment necessary or advisable to do so because of the provisions of s 117 (6) of Criminal Procedure & Evidence Act. The same would be the case with respect to Part II, Third Schedule offences. Bail applications relating to Parts I and II of the Third Schedule offences are not a walk in the path and the court is required to be satisfied by the applicant applying for bail who must adduce evidence that it is in the interests of justice that such applicant be released on bail.

Without limiting the factors which the court will have regard to, it will consider the factors set out in s 117 (2) as further elucidated in s 117 (3) and (4) of the Criminal Procedure & Evidence. For the avoidance of doubt, ss 117 (2), (3) and (4) read as follows:

“117 Entitlement to bail

- (2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—
- (a) where there is a likelihood that the accused, if he or she were released on bail, will—
- (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
 - (ii) not stand his or her trial or appear to receive sentence; or
 - (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
 - (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system;
- or
- (b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.
- (3) In considering whether the ground referred to in—
- (a) subsection (2)(a)(i) has been established, the court shall, where applicable, take into account the following factors, namely—
- (i) the degree of violence towards others implicit in the charge against the accused;
 - (ii) any threat of violence which the accused may have made to any person;
 - (iii) the resentment the accused is alleged to harbour against any person;
 - (iv) any disposition of the accused to commit offences referred to in the First Schedule, as evident from his or her past conduct;
 - (v) any evidence that the accused previously committed an offence referred to in the First Schedule while released on bail;
 - (vi) any other factor which in the opinion of the court should be taken into account;

- (b) subsection (2)(a)(ii) has been established, the court shall take into account—
- (i) the ties of the accused to the place of trial;
 - (ii) the existence and location of assets held by the accused;
 - (iii) the accused's means of travel and his or her possession of or access to travel documents;
 - (iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor;
 - (v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee;
 - (vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
 - (vii) any other factor which in the opinion of the court should be taken into account;
- (c) subsection (2)(a)(iii) has been established, the court shall take into account—
- (i) whether the accused is familiar with any witness or the evidence;
 - (ii) whether any witness has made a statement;
 - (iii) whether the investigation is completed;
 - (iv) the accused's relationship with any witness and the extent to which the witness may be influenced by the accused;
 - (v) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
 - (vi) the ease with which any evidence can be concealed or destroyed;
 - (vii) any other factor which in the opinion of the court should be taken into account;
- (d) subsection (2)(a)(iv) has been established, the court shall take into account—
- (i) whether the accused supplied false information at arrest or during bail proceedings;
 - (ii) whether the accused is in custody on another charge or is released on licence in terms of the Prisons Act [*Chapter 7:11*];
 - (iii) any previous failure by the accused to comply with bail conditions;
 - (iv) any other factor which in the opinion of the court should be taken into account;
- (e) subsection (2)(b) has been established, the court shall, where applicable, take into account the following factors, namely—
- (i) whether the nature of the offence and the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
 - (ii) whether the shock or outrage of the community where the offence was committed might lead to public disorder if the accused is released;
 - (iii) whether the safety of the accused might be jeopardised by his or her release;
 - (iv) whether the sense of peace and security among members of the public will be undermined or jeopardised by the release of the accused;
 - (v) whether the release of the accused will undermine or jeopardise the public confidence in the criminal justice system;
 - (vi) any other factor which in the opinion of the court should be taken into account.
- (4) In considering any question in subsection (2) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely—
- (a) the period for which the accused has already been in custody since his or her arrest;

- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- (d) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (e) the state of health of the accused;
- (f) any other factor which in the opinion of the court should be taken into account."

The factors which are listed in the above sections do not necessarily have to be proven individually but where applicable. For example an applicant who has assets that he can surrender as surety must identify them and offer them. If he does not have assets, he should state so and motivate the court that despite his not having assets there are other safeguards like say confining himself to a specific location and reporting to the police. What is crucial at the end of the day is for the applicants to leave the court in no doubt that they can be trusted to stand trial if released on bail. A perusal of their bail statement shows that the applicants dealt with some of the factors listed in ss 117 (3) and (4) in a cursory manner. For example to simply state that the applicants are of fixed abode and a family man is wholly inadequate. Questions arise as to whether they own or rent the fixed abodes, what is the size of their families, how do the applicants earn a living and whole lot of other considerations. Issues which are relevant to satisfying the court that it is in the interests of justice to admit the applicants to bail were either not dealt with or glossed over.

I was therefore satisfied that the applicants had failed to discharge the onus to demonstrate on a balance of probabilities that it was in the interests of justice to admit them to bail. It is up to them appraise themselves with the law and what is required of them to satisfy the court that they are proper candidates for bail. Their applications for bail as indicated at the beginning of these reasons for judgment failed and were dismissed.

Madotsa & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners