

BVUMAI KAVARO
and
STEWART KASEKE
and
AARON MASHAVA
and
MOSES MUCHINI
and
ACTION ZUNZANYIKA
and
HONEST GUHU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 29 November 2016; 2, 20 & 28 December 2016

Application for bail pending trial

Mr A. *Mugiya*, for the applicants
Ms S. *Bhusvumani*, for the State

MAFUSIRE J: This was an application for bail pending trial. The facts were poorly presented. Despite several sittings; despite several supplements to the bail statement and despite several supplements to the bail response, it remained unclear what exactly had transpired. Only after some blow by blow account in less formal proceedings in Chambers did I finally grasp what had transpired before and after the applicants' arrest.

To the police the applicants were a syndicate of poachers. They had allegedly committed various offences in terms of the Parks & Wildlife Act, *Cap 20:14* [*“the Parks Act”*]. The offences were alleged to have been committed in 2015 and 2016. The police arrested the applicants twice: on 16 October 2016 and 17 November 2016.

The major cause for the confusion in the narrative was that the applicants were brought to court on the 2016 allegations first instead of, logically, the 2015 allegations. Only after I had ordered their release from custody, on 15 November 2016, for over detention in respect of the 2016 allegations, and before anyone else, perhaps other than the police, knew about any other allegations, did the police, on 17 November 2016, re-arrest them for the 2015 allegations.

Mr *Mugiya*, for the applicants, charged that the second arrest was a malicious stratagem to defeat the order for the applicants' release. For the State, Ms *Bhusvumani* denied anything of the sort. Her explanation was that when the applicants were initially arrested on 16 October 2016 and brought to court thereafter, the police had not yet linked them to the 2015 offences. These were still under probe. It was the arrest for the 2016 offences that had unravelled the missing piece to the jigsaw puzzle that the 2015 offences were. They were a jigsaw puzzle because in March 2015 and June 2015 one and three elephants respectively had been slaughtered in Gonarezhou National Parks [*"Gonarezhou"*]. Spent rifle cartridges had been recovered from the scenes and sent for forensic ballistics examination. The ballistics report matched them to a .375 Whitworth rifle. But at that time the police could not trace the culprit or culprits.

That is the synopsis. Now the details.

The applicants, aged between 31 years and 46 years, come from different parts of the country, namely Sanyati, Gokwe, Mutare and Karoi. This detail assumed some degree of importance. It shall soon emerge why.

The police say the applicants' arrest on 16 October 2016 followed a tip off that they were carrying elephant tusks from Gonarezhou to Chiredzi. The police and National Parks officials mounted a road block at some bridge, a few kilometres from Gonarezhou. When the applicants' Mercedes Benz motor vehicle was searched, two pairs of elephant tusks and a .375 Whitworth rifle with a silencer were recovered from the boot.

The police arrested the applicants and charged them with three counts: unlawful possession of elephant tusks without a permit; unlawful possession of a dangerous weapon and unlawful possession of a silence device for a firearm, the first two in contravention of the Parks Act, and the last one in contravention of the Firearms Act, *Cap 10:09*.

The police are said to have severely assaulted the applicants before bringing them to court. But they were one hour late. The stipulated period in terms of the Constitution is forty eight hours. At their first remand, the applicants did not raise the issue of the over detention. They did on their next remand. The magistrate accepted that they had been over detained. However, he declined to order their immediate release. His reasoning was that he could not review an order by a fellow magistrate who had by then already ordered the applicants' remand in custody.

However, in spite of the State's argument at that stage that it was now all water under the bridge and that all that the applicants could now do was to sue for damages, the magistrate suggested that a superior court could order their release. When the matter came before me on 15 November 2016, both the State and the Defence were *ad idem* that the applicants were entitled to their immediate release because of the over detention. I granted the order of release by consent.

As the prison officials were processing the applicants' release on 17 November 2016, the police pounced. The applicants never got out. The investigating officer [*"the IO"*] has explained by affidavit that after the .375 Whitworth rifle had been recovered from the applicants on the day of their first arrest, it was sent for a forensic ballistics examination. The examination, among other things, matched the rifle to the 2015 spent cartridges. The IO says she called for the 2015 ballistics reports. She only received them on 17 November 2016, the day the applicants were scheduled to be released. She quickly arranged for their re-arrest. She denied any malice or intention to frustrate the order of release.

The new charges preferred against the applicants were split into two counts of, "*hunt[ing] wildlife in a National Park*". The allegations were that the applicants had unlawfully entered Gonarezhou and killed one elephant in March 2015; and three elephants in June 2015. The link between these offences and the applicants was the spent cartridges allegedly recovered at the scenes and the .375 Whitworth rifle allegedly recovered from the applicants on the day of their first arrest.

That was the background that was not coming out clearly each time the applicants filed their case for bail and their Counsel appeared to argue it. It was equally not coming out from the State's responses or its Counsel's submissions.

The applicants' bail application was short on facts material to the issues for consideration but long on the condemnation of the police and on the legal arguments. After two sittings and full argument by both sides I remained none the wiser. I suggested that supplementary submissions be filed so that I could be fully apprised of the circumstances surrounding the applicants' arrest so as to make me understand what exactly had taken place.

In court, both counsel readily obliged, Mr *Mugiya* even conceding that those issues had not been fully canvassed before on account of the fact that attention had been wholly focused on the need to have the applicants freed by reason of the over detention. However, in his written supplement, Mr *Mugiya* first posted a bitter complaint on how my "*directive*" for

supplementary submissions was seriously prejudicial to the applicants as they were allegedly being forced to fully disclose an arrest which the court itself had subsequently ruled illegal and which had led to the applicants' immediate release.

Up to now I am still at loss as to what Counsel meant. Among other things, I just did not have the facts on which to make a ruling on the bail application. Furthermore, the release of the applicants, which was by consent, was not on the basis that their arrest had been illegal. It had been on the basis that their detention beyond the stipulated forty eight hours had violated the Constitution.

Be that as it may, the applicants' case for bail pending trial was this. The State's case was said to be nonsensical. Other than the rifle, there was nothing else linking the applicants to the new [but old] offences.

The applicants were most equivocal on the police allegations that two elephant tusks and a firearm with a silencer had been recovered from their vehicle. In their first bail statement, and without addressing that particular allegation directly, they said the State's allegations were fabrications designed to frustrate their release from prison. The first supplement to the bail statement, other than referring to the original statement, did not take the matter any further. It was only in the subsequent and third supplement, and after two hearings, that the applicants eventually narrated in some detail the manner of their arrest at the bridge near Gonarezhou and the sustained assault on them by the police.

On the crucial aspect regarding the alleged recovery of the incriminating evidence on them, the third bail supplement had this to say:

- “7. All the accused persons protested their innocence and advised the police that there [*sic*] were on their way for [*sic*] a funeral but the police did not take heed of their defense rather what infuriated the police was that non [*sic*] of the accused persons resided in Masvingo Province hence they were on a poaching mission.
8. Accused persons were never advised of the offence which they had been arrested for, they were forced to make some indications under assaults the same with warned and cautioned statements which were recorder under similar circumstances [*sic*]. Accused persons were only informed of the allegations they were facing at court, they were surprised to learn that the police are claiming to have recovered 2 pairs of tasks [*sic*], a rifle with a silencer and live rounds.”

The reference to the applicants getting arrested whilst on their way to, or from, a funeral, was meant to rebut the State's persistent allegation and strong insinuation that their presence

in a province in which they were not ordinarily resident or originally indigenous to could only be explained by them being members of a poaching syndicate that had been on one of its several poaching forays into Gonarezhou. It was alleged that applicants 2, 4 and 6 were married in the same family and that they had been burying their mother-in-law. Nothing was said about applicants 1, 3 and 5.

Of the other factors relevant to an application for bail pending trial, the applicants referred to s 50 of the Constitution and argued that there were no compelling reasons warranting their continued incarceration since the law presumed them innocent till proven guilty. They were said to be family men; some with two wives each; all of them with children; with fixed places of abode; in possession of some livestock; and none of them with any travel documents or any ties outside the country.

The law on bail pending trial is now well settled. There is a slightly new dispensation brought about by the new Constitution in May 2013. Section 50[1][d] of that Constitution says that any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention. It is now a fundamental human right and freedom that an accused person be charged or tried out of custody. That he or she may remain incarcerated until the charge or trial is rather the exception. There ought to be some compelling reasons justifying it. This, in my view, is an exceptionally high burden.

In terms of s 117[2] of the Criminal Procedure and Evidence Act, Cap 9:23 [*“the CP & E Act”*], the grounds upon which a court may deny bail are the likelihood that if released on bail:

- 1 the accused will endanger the safety of the public, or of any particular person; or;
- 2 the accused will commit an offence referred to in the First Schedule [i.e. an offence at common law other than bigamy, compounding, contempt of court, etc., or a statutory offence the minimum penalty for which exceeds six months without the option of a fine, and any conspiracy, incitement, attempt or being an accessory after the fact, to commit those crimes]; or
- 3 the accused will not stand his or her trial or appear for his sentence; or
- 4 the accused will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

- 5 the accused will undermine or jeopardise the proper functioning of the criminal justice system, including the bail system; or
- 6 in exceptional circumstances, there is a likelihood that the release of the accused will disturb the public order or will undermine public peace or security.

The recent amendment to the C P & E Act has, in s 115C[2][a][ii]B, purported to cast the onus of proving exceptional circumstances on the accused. However, in *Shava v State*¹ I ruled that the onus remained on the State and that that amendment was *ultra vires* the Constitution. I said the emphasis of the Constitution is on the right of accused persons to personal liberty. Among other things, one should not be deprived of one's liberty without just cause [s 49[1][b]]. Once arrested and not released, a person is entitled to be brought to court within forty-eight hours or else he or she must be released immediately, unless a competent court has authorised his or her continued detention [s 50[2]]. It does not matter that the forty-eight hours may lapse on a Saturday, Sunday or a public holiday.

I also said in that case that probably to underscore the importance of the right to personal liberty, parts of s 50 empower anybody to bring an application for a *habeas corpus* in respect of someone who, among other things, is being detained illegally, so that they may be released or brought before the court for the lawfulness of their detention to be justified. To cap it all, any person who has been illegally arrested is entitled to compensation from whosoever might have been responsible, except if there is a law that has been passed to protect judicial officers or other public officers acting reasonably and in good faith.

In considering whether, if released on bail, there is a likelihood that an accused will not stand trial, s 117[3][b] of the CP & E Act directs the court to take the following factors 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 or access to travel documents;
- [iv] the nature of the offence or the nature and gravity of the likely penalty;
- [v] the strength of the case for the prosecution and the corresponding incentive of the accused to flee;

¹ HMA 08-16

- [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;

These factors are considered conjunctively, not disjunctively. Each case depends on its own set of facts. Some of these considerations may be quite relevant in some cases but irrelevant in others. Some may assume greater importance than others.

Section 117[3][a] of the CP & E Act says that in considering, among other things, whether the accused will commit a First Schedule offence, the court shall take into account, among other things, any disposition of the accused to commit a First Schedule offence as evident from his past conduct.

The issue of the nature of the case, the gravity of the likely penalty, the relative strength of the case for the prosecution and the corresponding incentive of the accused to flee, are factors that help the court to gauge the pull or the inducement to abscond. The general premise is that the stronger the State's case is, the greater the likelihood of absconding, and *vice versa*: see *Fletcher Dulini Ncube v State*² and *S v Nyengera*³. Of course, by itself this factor is not decisive: see *S v Biti*⁴.

In this matter the bail factor that has assumed great importance is the nature of the offences the applicants are facing. Mr *Mugiya* conceded that the offences are serious. On conviction they may attract lengthy prison terms.

The other factor that has assumed great importance is the strength of the State case against the applicants. Mr *Mugiya* expressed shock that the circumstances of the allegations could ever lead any person to link the applicants to the alleged crimes. He found it nonsensical that the police could go so far as to link all six appellants to the slaughter of the four elephants in 2015 just because they claimed to have found a single rifle in the applicants' possession. He charged it was not specified who allegedly did what.

However, with all due respect to Counsel, it was not just the rifle that the police say they found in the applicants' possession. The police allege they also found the applicants in possession of four elephant tusks and live rounds in the rifle. Forensic evidence they intend to

² SC 126-01

³ HB 7-15

⁴ 2002 [1] ZLR 115

produce will show that the rifle had been fired. It will also show that the rifle and the live rounds matched the spent cartridges the subject of the 2015 outstanding forensic ballistics reports. Those outstanding crime reports related to the slaughter of the four elephants in March 2015 and June 2015.

This is quite a devastating link. On the face of it, it seems perilous for the applicants. Of course, at this stage they remain mere allegations. The applicants are innocent of any charges until proved guilty. But in considering whether or not there are compelling reasons to deny or grant bail, such allegations are quite relevant.

The applicants are not being called to prove their innocence. There has never been any such onus on an accused person. But what they say in rebuttal to the allegations is also taken into consideration.

The applicants' rebuttal of the allegations against them has been most feeble at best. It had to take several sittings and several bail statements for them to simply deny unequivocally that they were ever found in possession of elephant tusks and a firearm that was being linked to the slaughter of the elephants in Gonarezhou.

At worst for the applicants, the totality of what was said by them, both in writing and through oral submissions by Counsel, coupled with what the State has consistently alleged, has left me accepting that the case against them is strong and that the State's allegations are far from being nonsensical. Therefore, the risk of them absconding is objectively greater than their promise to stand trial if released on bail.

Every citizen enjoys the right to freedom of movement. They can be in any part of the country which is not a restricted area and need not explain their presence there. So ordinarily, that none of the applicants comes from the Province of Masvingo where the alleged crimes were committed would not amount to anything if looked at in isolation. Further, if the appellants say they were going to or coming from a funeral, that, ordinarily, should be the end of the matter.

However, in this particular case the applicants' freedom of movement is being interrogated against some cogent evidence of poaching. Their explanation for their presence in the vicinity of the crime is half-backed, almost an after-thought. It only came out after several promptings by the court. Even then, the explanation accounts for only half their number. Absolutely nothing is said about the other half. In my view, more was called for from the applicants, especially where the State has persistently said their presence in that part of the

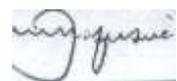
country at that point in time could only be explained in terms of the crimes preferred against them.

Mr *Mugiya* argued that the court should not link the allegations forming the new charges to their arrest for the old charges because I had since ordered their release in respect of the old charges. I do not see how this can be avoided or why the link should not be made.

The magistrate court made a finding that the accused seemed to have been assaulted. It ordered an investigation. The applicants successfully made out a case for over detention in respect of the old charges. I ordered their immediate release. It was not an acquittal. Any police officer who unlawfully assaults an accused person under arrest is a very bad apple and needs to be disciplined. But until the results of the investigations are out, one cannot say much at this stage. But all that happened in relation to the first charges against the applicants, does not, in my view, prevent the State from making the link that it has made against the applicants in relation to the new charges.

Bail is about striking a balance between the interests of the accused and the proper administration of justice. In the present matter, I consider that the proper administration of justice will be compromised if the applicants are released on bail. Given the serious nature of the allegations and the weight of the evidence against them, I consider that they are a flight risk. Therefore, the application for bail pending trial is hereby dismissed.

28 December 2016



Mugiya, Macharaga Law Chambers, legal practitioners for the applicants
National Prosecuting Authority, legal practitioners for the State