COLLEN CHIPETU

versus

STATE

HIGH COURT OF ZIMBABWE

MAFUSIRE J

MASVINGO, 3, 7 & 14 February 2017

**Application for bail pending trial**

Mr *C. Ndhlovu*, for the applicant

Mr *B.E. Mathose,* for the respondent

MAFUSIRE J: The applicant was arrested for theft of a motor vehicle. He was remanded in custody. He applied for bail pending trial. The respondent, the State, opposed the application.

The applicant was an ex-policeman. He was vague about his exact date of discharge, being content to allege that it was in 2016. The State said he impersonated a policeman and committed the offence. The date of the offence was 6 December 2016. The State said by that date he had since been discharged from the police force.

The allegations were that on that date the applicant, clad in police uniform, purported to hire the complainant, the driver of a golden coloured Toyota Funcargo motor vehicle, to ferry his children from some school along the Gutu – Roy Road in Masvingo. He convinced the complainant to drive via Gutu Police Station purportedly to officially knock-off duty. On approaching the police camp he persuaded the complainant to allow him to take over driving to facilitate easy entry at the gate. At the entrance he asked the complainant to handover a cellphone to some other policeman inside the station whilst he waited for him in the car. The complainant obliged. When he came back, the applicant had vanished with the car. The complainant reported the matter to the police.

At first the police had no clue who could have done it. They had no leads. But how they ended up tracing the stolen vehicle to the applicant was an impressive piece of detective work.

The police started with the cellphone. It was a Samsung type. The investigating officer, Detective Constable Zachariah Chikwena [“***Constable Chikwena***”] was called to give evidence against the bail application. Among other things, he explained that the cellphone would have captured the essential details of every *sim* card [subscriber identity module] that would have been inserted in it. The police enlisted the help of one of the mobile telephone service providers, Econet Wireless. They used its eco-cash mobile money transfer facility and inserted a *sim* card to activate the phone. Information about all the *sim* cards previously used popped up. The details showing included the caller number [outgoing] and the called number [incoming]; the dates, times and geographical locations of the calls; and whether the calls had been voice calls or short message services [*sms*].

A log sheet was compiled. Two numbers were predominant. Both were traced to an address in Tynwald South, Harare. The one turned out to be that of the applicant. The other belonged to a female person.

Tynwald South, Harare, was the police’s next port of call, one and half months after the vehicle had been reported stolen.

The police arrived when the applicant and his wife were just about to drive off. They were in the stolen vehicle. The applicant was arrested. The police recovered parts of the police uniform. The applicant said he had sold the other parts to someone whom he named. The police traced the buyer and accounted for the rest of the missing items.

The applicant claimed he had bought the vehicle from one Freeman Manyika [“***Freeman***”] of Ngundu, Masvingo. That was the next port of call for the police.

Freemen denied ever selling the applicant the vehicle. He was a car dealer. He had several cars on display. One had been a golden coloured Toyota Funcargo. It had been a non-runner. Freeman told the police the applicant had once visited him, clad in police uniform, and had expressed a strong interest in the body of that vehicle. Trusting him as a member of the police force, Freeman had released the registration book to the applicant who had promised to come back later. But he never did.

Constable Chikwena said that when they arrested the applicant and recovered the stolen vehicle, it had false number plates. It turned out that they belonged to Freeman’s Funcargo. Freeman’s car dealership was unguarded. He denied he had ever given the applicant the number plates. He had not even been aware that they were missing until the day the police visited him. Constable Chikwena said the applicant admitted he had plucked them off Freeman’s stationary Funcargo, fixed them onto the stolen vehicle and had thrown away the originals.

The State vehemently opposed bail. It argued, among other things, that its case against the applicant was very strong and that the evidence was overwhelming. As such, the likelihood of a conviction was very high. In addition, the applicant was facing several other charges. These included robbery and another one of theft of a motor vehicle which had been committed in very similar circumstances. The complainant in the latter matter had successfully picked the applicant at a regular identification parade.

The State argued that if convicted, the accused was unlikely to escape a custodial sentence. His situation was exacerbated by the fact that he was an ex-policeman who continuously abused his former status. Therefore, there was a strong inducement for him to abscond.

The applicant completely denied that he had stolen the vehicle. He denied that he was the character in the complainant’s story. He denied that he had ever impersonated a policeman. He stuck to his story that he had bought the alleged stolen vehicle from Freeman. Probably Freeman himself was the thief.

The applicant challenged the telephone records. He said they were not authentic because there was nothing to show that they had been from Econet Wireless. For example, they were not on letter-head. Furthermore, there was no date-stamp.

On the other offences, the applicant denied he had been involved. He argued, among other things, that he had not been placed on remand in respect of any of them despite the time lapse. That showed the police could not link him to them. The police were bent on fixing him. Their plan was that once he got out on bail, they would pounce with fresh charges, one after the other.

The law relating to bail is well settled. There is really nothing new to add. The fundamental aspects are re-stated merely as a route to the final decision.

Bail is a right. By it any person arrested on suspicion of having committed a crime secures his liberty and continues to enjoy his freedom. This is enshrined in s 50 of the Constitution. Section 70 is a restatement of the common law. It says an accused person is presumed innocent until proved guilty.

However, the same Constitution empowers the court to deny bail in appropriate circumstances. Thus, in every bail case, the task is to try and strike a balance between the interests of the accused and the interests of justice: see *Attorney-General v Phiri*[[1]](#footnote-2) and *S v Biti*[[2]](#footnote-3).

Sometimes it is not easy to reach this equilibrium. On the one hand, until proved guilty, a person arrested for any crime is still entitled to his freedom. On the other hand, that person must be tried. If he is found guilty, it is in the interests of justice that he be punished and rehabilitated. A trial, being the process by which his guilt or innocence is determined, usually takes time to start or finish. This is due to a number of factors. So the accused should not be prejudiced by the delays. If there is an assurance that he will stand trial he should be freed on bail. If there is no such assurance he must stay inside.

Guidelines have been formulated by both case law and legislation to try and help the courts reach this state of equilibrium in any given case. Each case depends on its own set of facts. Some guidelines assume greater importance in some cases than do others in other cases.

The legislature, in sub-section [2] of s 117 of the Criminal Procedure and Evidence Act, *Cap 9:23*, has laid down a number of such guidelines. The consideration whether or not the accused will stand his trial is elaborated on in subsection [3]. In considering whether, if released on bail, there is a likelihood that an accused will not stand trial, the court is directed to take a number of factors into account. They include the nature of the offence or the nature and gravity of the likely penalty. They also include the strength of the case for the prosecution and the corresponding incentive on the accused to flee.

The legislature did not pretend to have listed all the possible guidelines that may be relevant in any given case. It was left to the courts to develop them further. The court is enjoined to take into account any other factor which, in its opinion it considers should be taken into account. Taking a cue from this, the courts have said no single factor is considered in isolation. For example, the nature of the offence, the strength of the State case and the gravity of the likely penalty, are all very important. But none of them is decisive or conclusive by itself: see *Fletcher Dulini Ncube v State*[[3]](#footnote-4).

In this case I have considered that the State case is very strong. I am mindful that this bail application is not the process by which the applicant’s guilt or innocence is being determined. But there is no denial that the evidence gathered by the police so far is very strong. According to the State, the complainant was deceived by a thief who stole his motor vehicle. The thief unwittingly left a cellphone that provided a valuable lead back to him. The stolen vehicle was recovered in his possession. His explanation for his possession, namely that he had bought it from someone else, was investigated. It was a wild goose chase. I am conscious that these allegations by the State are not yet proof of any sort. Among other things, witnesses like Freeman are still to testify and be cross-examined. The applicant himself is yet to testify. But these facts are an important consideration.

I have considered another factor which is of relative importance in this matter. In *S v Nyengera*[[4]](#footnote-5) MAKONESE J said, at p 3 of the unreported judgment:

“While an application for bail is not a trial on the merits of the case itself, an Applicant must and should take the court into [his] confidence by at least raising some plausible defence on the charge.”

I agree with that approach. Where the State has laid out a robust case against an accused person, the heads naturally turn to him for a response. The ball is now in his court. So if the accused’s reply is incoherent or is implausible or is just a bare denial, the court is excused if it concludes that the State case is strong. That has been the position in this case. But there is more.

In *Phiri’s* case above, REYNOLDS J said, at p 38C – D:

“I would accept that the mere possibility of the accused committing further crimes, standing alone, would not be of sufficient cogency to outweigh the accused’s right not to be deprived his freedom. But when to a bad criminal record is added the allegation, on evidence of substance, that the accused committed further and similar crimes while on bail, the matter, in my judgment passes beyond the limits of mere relevance, and becomes highly persuasive and cogent.”

*In casu*, part of the State case was that the accused was facing other charges. One was robbery. The other was theft of a motor vehicle, allegedly committed in similar circumstances. Constable Chikwena said two other charges, namely relating to impersonation and to driving a motor vehicle without a driver’s licence, had been combined under one docket with the current matter. The matters would be dealt with under one trial.

To the State’s allegations of further offences, the applicant’s response has just been a bare denial. His argument was that he has not been placed on remand in respect of them despite the passage of time.

Admittedly, in *Phiri* the court was addressing a slightly different situation, namely the possibility of the accused committing further offences whilst out on bail. However, it is my considered view that what the court said therein is relevant in a case like this. The State has gone beyond the mere sketching out of further offences by the applicant. It called the investigating officer to provide the flesh to the skeleton. Among other things, the applicant was positively identified by the complainant in the other theft case. Mr *Ndhlovu’s* cross-examination on this aspect, as on many others, hit a brick wall. The point was soon abandoned. Of course this was not the trial. At the actual trial Counsel might well be more elaborate. The applicant might even be represented by someone else. Nonetheless, all these circumstances are taken into consideration in a bail application.

The applicant was an ex-policeman. The State case was that he was abusing his former status and the paraphernalia that he had not surrendered on discharge. The applicant said he had surrendered it. But Constable Chikwena said part of it had been recovered on him. He had sold the other part to someone whom he named. This had also been eventually recovered from that individual. The major point is, if convicted the applicant is unlikely to escape a jail term. He is likely to go in for a long stretch. For theft, s 113 of the Criminal Law [Codification and Reform] Act, *Cap 9:23*, prescribes a penalty of a fine not exceeding level fourteen [$5 000], the highest level, or imprisonment for a period not exceeding twenty-five years, or both. Plainly, the Legislature was trying to say theft is a very serious offence. This is a relevant consideration. A lengthy custodial sentence is generally viewed as an inducement to abscond.

The applicant came across as one who was a very itinerant person. Places traversed in this offence alone included Mupandawana – Gutu, Harare and Ngundu. These are places some of which have great distances between them. In addition, it was common cause that the applicant had been to South Africa. He downplayed the visit to a single, once-off travel. The State portrayed it as some considerable stay. Whatever the case, it had been his right to travel. However, the point about this was that the applicant was not an unsophisticated hermit. Constable Chikwena said at one time the applicant had claimed he could easily procure travel documents without being present in person. As a matter of fact, the applicant did have a passport. Constable Chikwena said they had failed to recover it. The applicant said he was willing to surrender it as part of the bail conditions if his application was granted.

At p 40 in *Phiri’s* case, the learned judge said:

“In the absence of exceptional circumstances, I believe that it would be irresponsible and mischievous for a judicial officer to allow bail to a person who has given every indication that he is an incorrigible and unrepentant criminal.”

Admittedly, cases such as *Phiri, Biti* and *Fletcher Dulini Ncube*, *supra*, and several others on the point, were decided before the advent of the Constitution in 2013. So they should be treated with caution.

Section 50[1][d] of the 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. In my recent judgments in *S v Nemaringa & Anor*[[5]](#footnote-6) and *Shava v S*[[6]](#footnote-7), I demonstrated that the Constitution purposefully made bail a right of an accused person the breach of which carries adverse consequences on all concerned, including judicial officers, unless there is a law protecting them in the *bona fide* discharge of their duties. The new s 115C of the Criminal Procedure and Evidence Act[[7]](#footnote-8) purports to thrust on the accused the onus to prove compelling reasons for admission to bail in respect of certain offences. But in those two cases, I held that this is manifestly in conflict with the Constitution and that the onus remained on the State.

In this case I am satisfied that the State has discharged the onerous burden on it to show that compelling reasons exist to deny the applicant bail. Apart from the seriousness of the offence and the strength of the case against the applicant, the improbability of the accused’s explanation and the several other factors against him that I have explored above, are such that it would be “… *irresponsible and mischievous* …” to release the accused on bail.

In the premises, the application for bail pending trial is hereby dismissed.

14 February 2017



*Ndhlovu & Hwacha*, legal practitioners for the applicants

*National Prosecuting Authority*, legal practitioners for the respondent

1. 1987 [2] ZLR 33 [HC] [↑](#footnote-ref-2)
2. 2002 [2] ZLR 115 [H] [↑](#footnote-ref-3)
3. SC 126-01 [↑](#footnote-ref-4)
4. HB 7-15 [↑](#footnote-ref-5)
5. HMA 3-16 [↑](#footnote-ref-6)
6. HMA 8-16 [↑](#footnote-ref-7)
7. It came into operation from 17 June 2016 [↑](#footnote-ref-8)