

EDMORE PHIRI
and
TATENDA PHIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 3 February & 10 July, 2020

Bail Application

T. Mbwachena, for both accused applicants
Ms M. Mutumhe, for the state

MAWADZE J: On 3 February, 2020 after hearing arguments from counsel I dismissed the application for bail pending trial by the applicants. I gave my detailed reasons *ex tempore* on that day.

On 6 July 2020 Messrs Hore and Partners wrote to the Registrar requesting for written reasons for dismissing the bail application. Apparently they had not formally assumed agency and were accordingly advised by the Registrar telephonically. Messrs Mawadze (*just my name sake*) & Mujaya were counsel for the applicants during the bail hearing. On 8 July 2020 Messrs Mawadze & Mujaya renounced agency and Messrs Hore and Partners assumed agency on the same day. The record was then forwarded to me on 9 July, 2020. I now proceed to give the reasons hereunder for dismissing the bail application on 3 February, 2020.

The 34 year old 1st applicant resides at No. B 47 Torwood, Redcliff and the 29 year old 2nd applicant resides at no. R 201 Torwood, Redcliff.

Both the applicants are jointly charged for contravening section 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] which relates to murder. They both seek bail pending trial.

The allegations they are both facing relate to what may be described as gang warfares which are seemingly prevalent in the Kwekwe area.

It is alleged that on 1 January 2020 both applicants teamed up with 5 other accused persons who are at large and drove to Torwood Shopping Centre at about 1000 hrs.

At the shopping centre they met the now deceased Brilliant Dube who was drinking beer with his brothers. Apparently the applicants and their accomplices had previously had clashes with the now deceased and his brothers. It is alleged that the applicants' gang decided to confront the now deceased and his brothers violently. During that violence which erupted the now deceased was struck once on the head with an axe and several times all over the body with machetes allegedly by applicants and their accomplices. The now deceased breathed his last as he was being ferried to hospital. His death was due to the fatal injuries inflicted with the axe and machetes. According to the State this incident was witnessed by many people at the shopping centre.

The applicants admit that they were indeed in the company of the alleged accomplices on the day in question. They further state that it is their alleged accomplices who were armed with an axe, machetes and knives not themselves. They both confirm that that alleged accomplices confronted the now deceased and his brothers who fled but were pursued.

Both applicants alleged that they played no role in this gang fight but simply watched the unfolding tragic drama. They said the two gangs threw stones at each other and the deceased and his brothers fled after being overwhelmed by applicants' alleged accomplices.

The 2nd applicant said he thereafter left for his residence and did not witness what later transpired or how the now deceased was fatally attacked.

The 1st applicant said all what he witnessed was that the now deceased's gang was defeated but did not see how the now deceased was fatally injured.

Both applicants deny having a hand in the now deceased's death, let alone in participating in this gang warfare which erupted on that day.

The 1st applicant said on the following day on 2 January, 2020 he proceeded to Gweru to visit his unnamed sick cousin. He said he was away for 3 days after which he came back and was

advised that police were looking for him and the police had left their details. The 1st applicant does not explain why he did not proceed to the police thereafter but said he only handed himself to the police on 13 January, 2020.

The 2nd applicant said soon after this incident he proceeded to Kadoma/Chegutu area as he is an artisanal miner or gold panner and that he only became aware 8 days later that the police were looking for him. He said he proceeded to the police on 14 January 2020.

The applicants are adamant that they did not act in common purpose with their alleged accomplices. They allege they were unarmed unlike their colleagues. In fact both applicants said they should be taken as state witnesses rather than accused persons. The applicants dispute attempting to evade justice but that they voluntarily handed themselves to the police. They said they do not belong to any gang but unwittingly and innocently associated with their colleagues who are at large. In that vein they submitted that they are proper candidates for bail more so as the presumption of innocence operate in their favour.

On the other hand the respondent vehemently opposed this application.

The respondent stated that the applicants are facing a very serious offence and that the evidence against them is overwhelming as this incident was witnessed by many people. Further, the respondent stated that both applicants are nomadic artisanal miners (gold panners) who move from one place to another. This would make it difficult for them to be located. In any case the respondent said both applicants went under the radar soon after this incident only to resurface on 13 January, 2020. It is the respondent's contention that applicants belong to a very violent and feared gang hence they are likely to interfere with the due process and or commit further offences. The respondent fears that the applicants' due to overwhelming evidence against them are unlikely to stand trial.

As has been said before the law as regards to bail application pending trial is a well beaten path. I simply re state it simply for convenience and clarity.

The starting point is that in terms of s 50(1) (d) of the Constitution bail is a right which should be enjoyed by any person arrested. This right is only taken away if there are compelling reasons justifying the continued detention of the accused person pending trial.

What constitutes compelling reasons has not and cannot be defined with mathematical precision. Each case depends on its own facts and the court has to make a value judgment peculiar

to each case. The bottom line however is that the court should always strive to strike a balance between the liberty of an accused person and the interests of justice. Ultimately one of the main objectives is to ensure that the accused person would stand trial without compromising the interests of justice in any manner. The provisions of s 117 of the Criminal Procedure and Evidence Act [Cap 9:07] simply give useful guidelines on the factors the court may consider in dealing with whether there are compelling reasons justifying the denial of bail pending trial. They include *inter alia* the safety of the public, the propensity to commit further offences, possible interference with evidence or witnesses and the need to ensure proper administration of the criminal justice system. See also *S v Banana* 1994 (2) ZLR 271 (S); *S v Jongwe* 2002 (2) ZLR 209 (S).

It need no emphasis that the applicants are facing an inherently serious offence which invariably attracts a lengthy custodial if they are convicted. However it is trite that the seriousness of an offence alone cannot be the basis to deny an accused person bail pending trial as the presumption of innocence operates in the accused's favour. It should be considered with other factors if the scale is to tilt against the granting of bail pending trial. See *S v Hussey* 1991 (2) ZLR 187 (S).

I am inclined not to admit both applicants to bail pending trial as the evidence placed before me suggest that they are both unlikely to stand trial. They are flight risk. This finding is not mere conjecture but is borne by the conduct of the applicants soon after the incident.

Both applicants confirm that they left their respective residences soon after this incident. They were away for about 2 weeks before their arrests. While the 1st applicant said he was in Gweru visiting a sick relative, his counsel *Mr Mbwachena* said he was infact engaging in gold panning in Gweru. The 2nd applicant vanished to Chegutu area. Indeed both applicants are self-confessed nomadic gold panners. I am not satisfied that it was mere coincidence that they left their places of abode soon after this incident.

The proper administration of our criminal justice system demands that both applicants remain detained pending their trial as at now. I indeed take judicial notice of the prevalence of offenses committed by machete wielding gangs who have become a menace to the welfare and safety of the public. Indeed I take note of similar cases emanating especially from the Kwekwe area where such gangs engage in senseless and fatal brutal fights. These gangs have indeed become a menace to society and those suspected of such conduct should be deprived of their liberty pending

trial if the courts are to ensure proper administration of justice. While the applicants plead innocent association they nonetheless confirm that their colleagues were armed with axes, machetes and knives. The exact role of the applicants is food for the trial court but they were indeed at the scene of crime as per their own admission and the culprits are indeed their colleagues.

At this stage the state case is strong. The applicants have behaved in a manner in which this court believes that they are flight risk.

It is for these reasons that I dismissed the application for bail pending trial.

Mawadze and Mujaya, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners