

NARVICK NHOWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 9 & 16 March 2023

Bail application

Z Dumbura, for the applicant
D H Chesa, for the respondent

MUREMBA J: The applicant is facing three counts of robbery as defined in s 126 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] also known as the Criminal Law Code. The Form 242 reflects that the applicant is jointly charged with 5 other accused persons: Accused 1 - John Kamba; Accused 3 - Archford Chaitonga; Accused 4 - Chrispen Marimo; Accused 5 - Peter Kudzanayi; and Accused 6 - Tinashe Tapoma. The applicant is reflected as accused 2.

The allegations as shown on the Form 242 state that between November 2022 and 16 January 2023 the accused persons committed a spate of robberies as a syndicate throughout the country. It is averred that accused 1 and the applicant would rob the complainants of their motor vehicles and sell them to accused 3 and 4 while accused 5 and 6 would buy the electronic gadgets that were stolen during the robberies. Detectives then received information about the whereabouts of the first accused and the applicant in Harare. They swiftly reacted and managed to arrest the two who were driving a white Honda Fit registration number AFS 5249 which was suspected to have been stolen. Investigations that were done revealed that the motor vehicle was stolen in Beitbridge by means of a robbery.

In respect of the three counts that the applicant is facing the allegations are as follows. Count one was committed on 16 December 2022 at around 2230 hours in Harare. Accused 1, 4 and the applicant hired the complainant Tichaona Chiweshe who is a taxi driver to take them to Avondale from Harare Central Business District. On the way they asked the complainant to

stop and they suddenly grabbed him. One of the accused persons pointed a knife at him and threatened to kill him if he did not comply with their instructions. He was searched and USD20.00 and a cellphone were taken from him. He was eventually pushed out of the motor vehicle. The accused persons went away with the motor vehicle which was never recovered. Value stolen is USD5 000 and nothing was recovered.

Count two was committed on 23 December 2022 at around 2200 hours in Harare. Accused 1, 4 and the applicant hired Clifford Marevesa who was driving a blue Honda Fit registration number ADX1877 to take them to Hatfield from Glen Norah 3 Shops. On the way, two accused persons produced pistols and ordered the complainant to stop. They searched him and took USD180-00 and a cellphone from him. Thereafter they pushed him out of the motor vehicle and drove off in his motor vehicle. The motor vehicle was later recovered dumped a kilometre away from where the complainant had been robbed after it had developed a mechanical fault.

Count three was committed on 24 December 2022 at 2220 hours in Harare. Accused 1,4 and the applicant hired one Tawanda Makunde who was driving a silver Toyota Sienta registration number AFE9420 to take them to Mahogan road near Lochnivar Primary School from Big Apple Night Club in Harare CBD. On the way, they asked the complainant to stop whereupon they pushed him out of the motor vehicle. One of the accused persons took control of the motor vehicle and the accused persons drove off. The motor vehicle was never recovered. It is valued at USD 5300.

In his application for bail the applicant disputed that he was arrested whilst he was in the company of accused one driving a stolen motor vehicle as alleged in the Form 242. The applicant said that he was arrested after he had been implicated by one Billie Tirihamo Machingura who actually led the police to his place of residence. The applicant stated that he was arrested at his place of residence in Highfields. He said that the same Billie Tirihamo Machingura also implicated accused 4 – Chrispen Marimo, but this Chrispen Marimo has since been granted bail. The applicant averred that there is no nexus whatsoever between him and the robbery offences that he is alleged to have committed. He further said that no identification parade was conducted after his arrest and that as such no complainant identified him and linked him to the offences. The applicant said that whilst in police custody he pleaded with the police to invite the complainants for an identification parade but the police refused. Instead they

assaulted him. The applicant vehemently denied committing the offences saying that he is in custody solely because he was implicated by Billie Tirihamama Machingura. The applicant further stated that he does not know the first and fourth accused with whom he is alleged to have committed the three counts of robbery. He stated that he has an *alibi* defence to the effect that he was nowhere near the places the offences were committed. On all the dates and times the offences are alleged to have been committed, he was at his home and in bed with his wife and child. The applicant stated that it would be in the interest of justice if the investigating officer would be called to clear the air on how, when and where he was arrested.

The applicant averred that there is no risk that he will abscond trial because there is no evidence linking him to the offences. He has an *alibi* defence to the offences. He was arrested at his place of residence and he never attempted to run away during the time the police were arresting him. Billie Tirihamama Machingura who implicated him later retracted his implication of the applicant through an affidavit. However, the applicant did not attach the said affidavit to his bail application. The applicant further said that there is no risk that he will interfere with State witnesses because he does not even know them. The applicant said that he has no pending cases or previous convictions. The seriousness of the offences that he is facing alone is not enough for him to be denied bail. He averred that he deserves to be treated equally with accused 4 - Chrispen Marimo who was granted bail. He further stated that Accused 3 - Archford Chaitonga; Accused 5 - Peter Kudzanayi; and Accused 6 - Tinashe Tapoma were removed from remand for lack of evidence linking them to the offences.

Mr. *Chesa* for the State opposed the bail application. He stated in his response that the reasons why the State was opposed to bail were as follows. The applicant never challenged his placement on remand which is a veritable attestation and acceptance of the strong link between him and the allegations. The applicant was implicated by one Billie Tirihamama Machingura. The applicant never challenged being associated with this Billie Tirihamama Machingura. Mr *Chesa* averred that the applicant was arrested on 17 January 2023 and the case is complex considering that it involves trans-city investigations. He stated that this requires time for investigations to be finalized. If the applicant is prematurely released, he is likely to interfere with these investigations. The applicant is part of a well-organized crime syndicate and his role is to commit the actual robberies. The offences are serious and attract severe custodial sentences upon conviction. This is an incentive for the applicant to abscond trial. Mr *Chesa* confirmed

that Accused 3 - Archford Chaitonga; Accused 5 - Peter Kudzanayi; and Accused 6 - Tinashe Tapoma were removed from remand. He also confirmed that accused 4 – Chrispen Marimo was granted bail.

Pursuant to the applicant's request that the investigating officer be called to explain how he was arrested, Mr *Chesa* called the investigating officer Jezel Tonderai Takabinga who is stationed at Vehicle Theft Squad and led evidence from him. His evidence was as follows. The applicant was arrested after he was implicated by his co-accused Billie Tirihamama Machingura with whom he is jointly charged in a different matter which is not yet before the courts. The applicant and his accomplices were arrested in Epworth, Harare whilst they were driving a stolen motor vehicle. When the investigating officer was asked whether the applicant was not arrested at his house, he then said that he was not sure about how the applicant was arrested as he was not the arresting detail. He said that the applicant and his co-accused were operating as a syndicate. They would approach motorists seeking transport services. Upon being given transport they would then rob the complainants of their motor vehicles and dump the complainants. The investigating officer said that he is opposed to the applicant being granted bail because the applicant and his co-accused have 8 other robbery cases that they are being investigated for in Beitbridge. They have a habit of committing offences on the Zimbabwean side and then escape to the South African side. When they are on the South African side, they commit offences and then escape to the Zimbabwean side. As such there are extra territorial investigations that are going on. This is all the evidence that Mr *Chesa* led from the investigating officer.

During cross-examination the investigating officer said that other than the applicant having been implicated by Billie Tirihamama Machingura, the police did not have any other evidence against the applicant. When it was put to him that the accused was arrested at his place of residence by the police after they were led there by Billie Tirihamama Machingura, he said that the arresting detail was better placed to come and shed light on how the applicant was arrested. When he was asked whether an identification parade was done, he said that it was not done. He said that the offence in which the applicant was implicated by Billie Tirihamama Machingura is not one of the charges on the Form 242 of this matter. He said that offence is being investigated by Beitbridge Police. He said that investigations are underway in Beitbridge for the applicant and Billie Tirihamama Machingura to be charged together. So, in short, the

investigating officer said that Billie Tirihamu Machingura was not jointly charged with the applicant in the present offences. Asked why then the applicant was charged with the current offences, he said that it was because he was implicated by Billie Tirihamu Machingura. The investigating officer went on to say that he had not yet established if the applicant has previous convictions or pending cases before the courts.

During re-examination Mr *Chesa* asked the investigating officer how the applicant was arrested for the current charges if the case in which he was implicated by Billie Tirihamu Machingura is being investigated by Beitbridge police. In response he said, “*I think that he was arrested when he was together with his accomplices that are appearing on the Form 242.*” Mr *Chesa* asked him again how the applicant and his accomplices were arrested. He said that he was not sure of the circumstances and went on to say that it would need the arresting detail to come and explain. He said that the arresting detail was Detective Constable Muhonde of CID Braeside.

After the investigating officer had been excused, Mr *Chesa* submitted that he had just inquired from the applicant’s counsel whether he (the applicant’s counsel) wanted the State to call the arresting detail to which he said no. Thereafter Mr *Chesa* submitted that the applicant should not be granted bail because he is a flight risk as he is involved in extra territorial criminal activities. The applicant has 8 counts of robbery in Beitbridge and in some of the cases he is jointly charged with Billie Tirihamu Machingura.

Mr *Dumbura* submitted that the applicant should be admitted to bail because nothing links the applicant to the present charges. The investigating officer does not know how the applicant was arrested. The case that the applicant was arrested for after he was implicated by Billie Tirihamu Machingura is not before this court. It is not one of the cases on the Form 242. The applicant has no previous convictions and he has no pending cases before the courts. The police might be investigating the applicant for other cases, but the cases have not been brought before the courts.

In terms of s 50 (1) (d) of the Constitution of Zimbabwe, 2013, bail is a constitutional right to any person who is accused of having committed any offence unless there are compelling reasons for the court to deny him or her bail. What is regarded as compelling reasons for denying an accused person bail are the grounds that are stated in s 117 (2) of the CPEA. They are:

“The likelihood that the accused will abscond; the likelihood that the accused will interfere with the evidence or witnesses; the likelihood that the accused will commit further crimes; the likelihood that the proper functioning of the criminal justice system will be undermined; and in exceptional circumstances, the likelihood that public order will be disturbed or public peace or security will be undermined if the accused is released on bail.”

In respect of all other offences the onus or burden to show that there are compelling reasons for the accused to be denied bail is on the State: s 115C (2)(a) of the CPEA. However, in respect of offences specified in Part 1 of the Third schedule of the CPEA, the burden lies on the accused: s 115C (2)(a)(ii) of the CPEA. The accused must show 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. The offences of robbery that the applicant is facing fall under Part 1 of the Third Schedule because they involve the taking of motor vehicles and one of the counts even involve the use of firearms. This means that in *casu* the applicant had the burden to show that it is in the interests of justice for him to be granted bail.

The applicant decided to discharge his burden by challenging the facts alleged by the State that he is linked to the three offences that he is charged with. From the onset he made it clear in his application that he was challenging the averments made in the Form 242 that he was arrested in the company of accused one whilst driving a stolen motor vehicle. He stated that he was implicated by Billie Tiriama Machingura who had since made a retraction. He asked that the investigating officer be called to explain how he was arrested. So, when Mr *Chesa* called the investigating officer to come to court to testify, he knew what he wanted the investigating officer to testify on. Surprisingly the investigating officer had no idea about the circumstances under which the applicant was arrested. He ended up saying that the arresting detail could be called to shed light. What it shows is that the investigating officer came to court without doing his homework. He did not try to establish how the applicant was arrested. It also shows that the State counsel invited him to come to court without telling him what he was coming to testify on. It also shows that the State counsel never interviewed the investigating officer before putting him on the witness stand in order to ascertain if he knew how the applicant was arrested. In terms of s 117A (4)(b)(i) of the CPEA, in bail proceedings the court may receive evidence on oath, including hearsay evidence. This means that before coming to court the investigating officer could have ascertained from the arresting officer how the

applicant was arrested and testified on it. However, it turned out that the investigating officer did not have the required information. Putting a clueless witness on the witness stand shows lack of preparation and seriousness on the part of the State counsel. If Mr *Chesa* had done his preparations before court started, he would have called the arresting detail instead of the investigating officer.

Be that as it may, upon realizing that he had called the wrong police officer, Mr *Chesa* still could have made things right by calling the arresting detail who is privy to the circumstances under which the applicant was arrested. If the investigating officer is unable to give information on a particular point or particular points, other police officers that are privy to the information can testify. *In casu* the police officer who is tasked with the duty to investigate the cases had absolutely no idea how the applicant was arrested. He had no any other evidence linking the applicant to the offences. He said that no identification parade was conducted after the applicant was arrested meaning that none of the complainants identified the applicant as one of the persons that robbed them. Nothing was recovered from the applicant that links him to any of the offences. The investigating officer kept on saying that the applicant was implicated by one Billie Tirihamama Machingura, yet he was not able to explain why Billie Tirihamama Machingura was not jointly charged with the applicant in the present cases. He worsened things when he said that the offence for which the applicant was implicated by Billie Tirihamama Machingura is being investigated by Beitbridge police. The question that then comes to mind is: so, why and how were the present charges preferred against the applicant? With all of this it should have dawned on the State counsel that he needed to call the arresting detail to come and testify instead of asking the applicant's counsel whether or not he wanted the arresting detail called. The applicant's counsel would not have been foolish to agree to the arresting detail being called. He obviously knew that the arresting would come and explain how the applicant was arrested and why the current charges were preferred against him. Why would he agree to the calling of a police officer who was most likely to come and give potentially damaging information against his client? It is surprising that Mr *Chesa* failed to see something so glaring.

By failing to call the arresting detail, Mr *Chesa* failed to show that there is a nexus between the applicant and the offences that he is facing. Let me hasten to point out that the police are the ones that arrest accused persons on allegations that they committed criminal

offences. Therefore, they are the ones that have the onus to make credible allegations against the accused. They should show that the accused was arrested on reasonable grounds that he or she committed the offence(s). The accused is at liberty during bail proceedings to argue that the allegations made by the State do not give rise to a reasonable suspicion that the offences were committed or that he or she committed the offence(s). The accused may even lead evidence to demolish, clarify or weaken the facts alleged by the State. See *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S); *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S). In *casu* this means that the argument that Mr *Chesa* sought to make that because the applicant had not challenged his placement on remand on his initial appearance in the Magistrates Court, it means that the applicant accepted that there is a strong link between him and the allegations is meritless. Whether or not the accused person challenged his or her placement on remand, it is neither here nor there. It should be borne in mind that in the majority of cases accused persons are not legally represented on initial remand and many of them do not know about their right to challenge being placed on remand when they first appear in court. It would be an injustice to use the ignorance against them during bail proceedings. In any case, one of the most critical factors that is considered when accused persons apply for bail is the strength of the State case against the accused. There is need for the court to assess the strength of the State case: See *S v Makamba* (3) 2004 (1) ZLR 367 (S). This factor has a bearing on whether or not the accused is likely to abscond trial if granted bail. See s 117(3)(b)(v) of the CPEA. A strong State case against the accused can be an incentive to the accused to flee and not stand trial. So, the consideration of the strength of the State case allows the accused during bail proceedings to challenge the State's allegations against him. In the present case, the applicant thus managed to demolish the facts alleged by the State in the Form 242 that he was arrested in the company of accused 1 whilst driving a stolen motor vehicle. The investigating officer failed to stand by what is in the Form 242. He also failed to explain why Billie Tirihama Machingura who implicated the applicant is not jointly charged with the applicant in the present charges. The applicant thus managed to demonstrate that the State has a weak case against him.

What is also noticeable is that the applicant was arrested on 17 January 2023. However, by the 9th of March 2023 when the investigating officer came to testify in the present proceedings, he still had no iota of evidence against the applicant. This is a period of close to two months. As has already been discussed elsewhere above, he still did not know how the

applicant was arrested. This is basic information that any diligent investigating officer would have when they are called to court to testify during bail proceedings. The question is what investigations has the investigating officer been carrying out all for all this long? So far he has nothing against the applicant. Again, the applicant managed to show that the State has a weak case against him.

Despite the investigating officer not having established the nexus between the applicant and the three offences he is facing, he said that he was opposed to the applicant being granted bail because he is being investigated for another 8 counts of robbery in Beitbridge. Mr *Chesa* also stood by this submission. The applicant's counsel did not dispute that the applicant is being investigated as alleged. However, the question is; is it proper to deny the applicant bail in the present cases when there is nothing that has been adduced by the State linking him to these cases? I do not believe so because the effect of it will be to keep the applicant in custody so that he can be investigated for other offences. I do appreciate that robbery is a heinous crime that causes shock and outrage to society and it is likely that the release on bail of a person accused of having committed such an offence will make the public feel uneasy or unsafe. The public may even lose confidence in the justice delivery system. However, in the circumstances of the present case, as has been demonstrated above, the applicant challenged the State to demonstrate how he is linked to the offences and it failed to demonstrate the link. It failed to make credible allegations against the applicant which would provide grounds for refusing bail.

The court has a duty to balance the interests of justice against the right of the accused to personal freedom or liberty. It is not proper and desirable for an accused person to be kept in custody or to be denied his or her liberty on the basis of a crime where there is no evidence linking him or her to that crime when the real purpose of keeping him or her in custody is to investigate him or her for other offences. The police cannot seek to use the courts to keep a person in custody to enable them to investigate him or her for other offences when there is no evidence against that person in respect of the offences that he or she is before the courts for. There is no such ground for denying an accused person bail in s 117 (2) of the CPEA.

In the absence of evidence that links the applicant to the present offences, the applicant managed to show that the State case against him is weak. There is therefore no incentive for him to abscond trial. There is no risk that he will interfere with State witnesses as it was not shown that he even knows them. The applicant has no pending cases before the courts or

previous convictions. The applicant managed to show on a balance of probabilities that it is in the interests of justice for him to be granted bail.

The application for bail is thus granted as prayed for in the draft order.

Zimudzi and Associates, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners