

LINOS MANYUCHWA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 3 NOVEMBER 2021 & 11 NOVEMBER 2021

Bail pending trial

P. Ngulube, for the applicant
K.M. Guveya, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is being charged with the crime of contravening section 38(1) (a) (b) of the Railways Act [Chapter 13:09]. It being alleged that on the 12th July 2021, applicant with two accomplices connived and proceeded to Insiza Railway Siding, Fortrixon, thereat dug and cut signal copper cables underneath the railway line. The application is opposed.

The applicant chose to bring his application for bail by means of a bail statement in terms of Part XV of the High Court Rules, 2021. He contends that he is of fixed abode, did not resist arrest and he has no travel documents. He denies the allegations and contends that he did not in any way try to destroy or steal copper cables. He and his two colleagues were traveling through the area on their way to pan for gold. Applicant contends that the area is a gold panning area and some group of panners are armed, so they ran away from the railway security personnel who they thought were an armed group of panners. He contends that he has a defence to the charge and the state case against him is weak and hopeless.

Applicant argues that his two accomplices have been released on bail pending trial. Therefore the doctrine of equal protection by the law and equal treatment must apply to him and that he be released on bail like his accomplices. It submitted that the circumstances of his arrest are the same with those of his accomplices who have been released on bail. It is said the reasons for opposing bail are

weak. It is contended that there are no compelling reasons to decline to release him on bail pending trial.

Respondent filed heads of argument in support of its opposition to this application. It contends that applicant is a flight risk, he is facing a serious charge and the likely penalty upon conviction would be a lengthy term of imprisonment. It is contended that the state has a strong case against the applicant. He was arrested at the scene of crime. At the point of arrest he was militant and determined to fight armed Railways security guards, who eventually apprehended him. To subdue him the security guards had to shoot him. It is submitted that no stringent bail conditions could allay the respondent's well-grounded fear that applicant is a flight risk. Applicant's trial date has been set-down for the 10 November 2021. It is argued that applicant's case is different of that of his two accomplices, therefore this court may refuse to release him on bail notwithstanding that his accomplices have been admitted to bail.

The high watermark of this application is that applicant's accomplices have been admitted to bail pending trial. In *S v Rururi* HH 26-03, the court said:

The question of equal treatment of persons jointly charged with a criminal offence whether in respect of bail or sentence, is one which in general terms, can always be answered with the words "of course they should be treated in the same manner". By so saying, one is really saying that if there is no basis for differentiating the treatment accorded to persons jointly charged with an offence then they should be treated in like manner, whether in respect of bail, sentence or any other ground. Further support for the proposition appears in *Peter Raymond Lotriet and Patricia Ann Mitchell v The State* HH 164/2001 where BLACKIE J considered the principle of equal treatment and stated the following at p 6:

Notwithstanding the significance of the other factors in this case, the applicants are entitled to bail. They are so entitled because of two principles of fundamental importance: the right of the individual to liberty and the perception that justice is evenly administered. It is vital that in the administration of justice there does not appear any form of discrimination, particularly in a matter where the liberty of a person is involved.

Thus stated, the general principle is that persons jointly charged with an offence must be treated in the same way. In practice however it is not often that persons jointly charged with

the same offence are treated equally in every respect. One accused may have to be treated differently from another because of certain factors, either personal or related to the offence, which set him apart from the other person with whom he is jointly charged. In the case of admission to bail, one of jointly charged persons may, in the view of the court, be likely to abscond and the other not. One may be more likely to interfere with evidence or witnesses and the other not. One may be more likely to commit the same or similar offences and the other not. And one may be much more closely connected to the offence and more liable to be convicted and the other not. These are some of the factors which may justify the granting of bail to the one and its denial to the other. In broad terms, therefore, factors personal to jointly charged persons may set them apart for purposes of the grant or refusal of bail. The question in every case would however be a factual one - whether their circumstances are equal or the same.

The general principle is that the courts should always grant bail where possible and should lean in favour of liberty of the applicant provided that the interests of justice will not be prejudiced. In *casu*, there is a basis of distinguishing applicant from his two accomplices. There is a strong *prima facie* case as against applicant, he was arrested at the scene of crime, and then implicated the other two accomplices. In the event of a conviction, unless the court finds special circumstances peculiar to the case he will be sentenced to imprisonment for a period of not less than five years or not more than ten years. This by any standard is a lengthy prison term, which may induce him to abscond and not stand trial. Where there is strong evidence linking the applicant for bail with the commission of the offence and it is likely that upon conviction the applicant will be sentenced to a lengthy term of incarceration, the risk of abscondment is high. See: *S v Jongwe* 2002 (2) ZLR 209(S). Further at the point of arrest he was militant and tried to fight his way to freedom, until the security personal had to subdue him by shooting at him.

The present inquiry involves striking a balance between the liberty of the individual and the administration of justice. I am apprehensive that if granted bail the applicant will not stand trial. This is particularly so considering that this application has come rather late in the day when a trial date has already been set. It may well be that realizing that the day of reckoning is close, the applicant wants to evade justice. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

Disposition

On a conspectus of the facts and all the evidence placed before court, I am of the view that it is not in the interests of justice that applicant be released on bail pending trial.

In the result, this bail application is and hereby dismissed.

Sengweni Legal Practitioners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners