

MISCHECK SHAMU
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 8 March 2021 & 30 March 2021

Bail Application

**Mr K. Mabvuure, for both applicant
Mr E Mbavarira, for the respondent**

ZISENGWE J: This is applicant’s third attempt at being admitted to bail following two previous failed applications. He brings this application in terms of section 116 (c) proviso (ii) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] (“the CPEA”) which entitles one who has been unsuccessful in previous bail applications to institute a fresh one, the latter which however must be based “new facts” which were hitherto not placed before the court in such previous application(s) or those which have since arisen in the intervening period.

The said section reads:

116 Power to admit to bail

Subject to this section and subsection 32 and 34, a person may, upon an application made in terms of Section 117 (A), be admitted to bail or have his or her conditions of bail altered –

- a) ...
- b) ...
- c)

Provided that

- i)

ii) *Where an application in terms of this section is determined by a judge or magistrate, a further application in terms of S117 A may only be made, whether to the judge or magistrate, if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen as been discovered after that determination*

iii)

The background

What is revealed by a perusal of the Police form 242 (the Request for Remand Form) as well as the other papers filed by the parties in connection with this application is the sadly all too familiar scenario of violent clashes between rival “gangs” of young men. The instant one pitted the group consisting of the applicant and six other men in his company on the one hand and the deceased and his brothers on the other. This was at around 1 am on New years day 2020. It was in the course of this deadly confrontation that applicant allegedly struck the deceased on the head with an axe. It is also alleged that the deceased was further struck with machetes all over the body and succumbed to the injuries thereby inflicted.

The first bail application

The applicant brought his first bail application in March 2020 under case number B62/20. In that application the state successfully argued *inter-alia* that the applicant was a serious flight risk as evidenced by his flight from Kwekwe where this incident occurred to Chinhoyi where he would only be apprehended in February 2020 following an anonymous "tip – off" to the police by a member of the public. It was also brought to the attention of the court by the state that when he was so apprehended applicant was using an assumed or fictitious name designedly to evade detection and arrest.

Further, the state in that application successfully argued convinced the court of the existence of compelling reasons justifying the denial of bail in that the case against the applicant was strong given that he was positively identified by persons who witnessed him committing the offence. This fact coupled with the seriousness of the offence and likely sentence to be imposed upon conviction gave rise to a well-grounded apprehension of him taking flight to avoid facing the consequences of his conduct.

The second application

The applicant brought his second application in October 2020 under case number B 266/20. In that application the state filed its response opposing the application indicating as it did that although investigations in that case had since been concluded, the applicant had failed to set forth any meaningful changed circumstances or new facts warranting a revisit of his bail application, let alone his release on bail. That application was still-born as it was withdrawn by the applicant on the day it was set to be heard in court.

The current application

In the present applicant relies on three basic grounds which as far as he is concerned amount to new facts as contemplated under section 116 (c) proviso (ii) of the CPEA namely:

- a) That investigations have since been concluded (a far cry from March 2020 when they were still in their infancy) thus obviating the fears of him interfering with the same.
- b) That his co-accused persons who hitherto were yet to be accounted for have since been apprehended and placed on remand
- c) That four of his co-accused persons have since been granted bail on a second attempt after they initially failed to get bail and therefore that he deserves to be treated in a similar fashion.

The state however remains steadfast in its stance resisting the application. It reiterates its position that the risk of applicant absconding remains high given that he evinced such an intention by his flight Chinhoyi in the wake of the incident coupled with the seriousness of the offence in question, the likely sentence to be imposed upon conviction and the strength of the case against him.

Regarding the applicant's quest to be treated in a similar manner to his co-accused who have since been released on bail, the state points out that the applicant's circumstances are materially different from those of the former not least being the fact that the evidence against him (i.e. applicant) is significant firmer than those of his co-accused justifying a differentiation in their treatment.

It has not escaped my attention that as far as the risk of abscondment is concerned, the applicant has merely repeated the very same averments he brought in the first application. As a matter of fact, paragraph 7 of the present application is a replica of a similarly numbered paragraph in that first application. In it he denies any wrong doing in the events leading to the demise of the

deceased. He indicates now as he did then that it was in fact the deceased and those in his company who were the aggressors and were hell-bent on viciously attacking him and his friends without any provocation whatsoever. It is his version that he was at the receiving end of deceased's aggression who attacked him with an axe, inflicting injuries on him in the process. He further claims that he fled when the clash between the two warring groups flared up and got extremely violent.

It however suffices for current purposes to observe that those facts are neither new in the sense of them not having been placed before the court which entertained the first application nor can they be said to have arisen or have been discovered since then. Those were the very facts upon a consideration of which the court rejected his application for bail. This much is borne from a perusal of the papers filed in B 62/20. I therefore cannot purport to upstage the factual findings of that court in this regard and arrive at a contrary conclusion. It was clear that that set of facts was placed before me not merely to give context or background to the application but as a substantive ground for the application itself. A second or subsequent application for bail based on new facts does not present *carte blanche* an opportunity to an applicant to revisit the same facts in the hope of a different outcome.

Regarding the reasons advanced for applicant's relocation to Chinhoyi the applicant finds himself in an unenviable "catch 22" situation. He claims in this application that his flight thereto was occasioned by the desire to save his family supposedly from deceased's marauding friends who were baying for his blood and not necessarily to escape facing justice. This begs the question whether these facts were placed before the judge who dealt with the first application. If they were, then they inevitably suffer the same fate as the preceding point precisely for the same reason.

If, however they were not, the legitimate question of the motive behind withholding them in light of their importance or centrality in relation to the issue of abscondment arises. His failure to spontaneously provide that explanation would be astonishing lending credence in the context of the current application to the conclusion that they nothing more than an afterthought and must accordingly be rejected.

This ultimately leaves only the two outstanding questions for considering namely the completion of police investigations in the interim (and the attendant diminution of the risk of his interference therewith) and secondly the question of uniformity in the treatment of bail applicants. In so doing the court remains mindful of the main principles germane to bail applications, which

for brevity I shall not repeat all here suffice to say that in terms of section 50 (1) (d) of the Constitution an accused is entitled to bail (with or without conditions) unless there are compelling reasons justifying denial of the same. Secondly, that at this stage the presumption of innocence operates in the applicant's favour and therefore a court should lean more in favour of the liberty of the accused if that can be done without jeopardising the due administration of justice. Related to the latter is the principle that the consideration of bail involves striking that balance between the liberty of the individual and the due administration of justice (*S v Ndlovu* 2001(2) ZLR 261 (H); *S v Mwonzora & Ors* HH-72-11).

Completion of police investigations

The state while confirming that investigations have indeed since been finalised and conceding that the risk of applicant interfering with same has significantly diminished nonetheless argued that such completion does not *ipso facto* lead to the release of applicant on bail. It was contended in this regard that there are other considerations which still militate against applicants release on bail. not least the risk of accused's absconding which remains of grave concern.

Uniformity

On the strength of *S v Lotriet & Another* 2001 (2) ZLR 225 as quoted with approval in *S v Dhlamini* HH 57/2009 the applicant argues that he deserves to be treated in a similar fashion as his co-accused persons who have been admitted to bail. In that case the following was stated by Blackie J (as he then was) at page 229

"Notwithstanding the significance of the other factors in this case, the applicants are entitled bail. They are so entitled because of two principles of fundamental importance: The right of individual 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. On the papers before me, neither of these principles appears to have been adequately considered and both have been inadequately observed."

It can hardly be controverted that persons who find themselves in identical or similar circumstances should be dealt with uniformly. This accords not only with common sense and justice but constitutes one of the tenets of the rule of law. Further, equality before the law as a fundamental right is captured in section 56 (1) of the Constitution which provides as follows:

56. Equality and non-discrimination

(1) All persons are equal before the law and have the right to equal protection of the law.

That said, it is however equally indisputable that situations may indeed arise which justify the differential treatment of individuals who are jointly charged in a particular criminal case. Such differentiation should be based on the equal application of certain objective criteria either pertaining to the individual's personal circumstances (such as his health, age, whether or not he has previous convictions, pending matters, whether he is out on bail in respect of other similar cases and so forth) or it may be based on circumstances related to the commission of the offence. The latter may relate to the level of his alleged participation in the commission of the offence as well as his conduct in the wake of thereof particularly the question of whether or not he or she exhibited an intention to abscond.

I respectfully associate myself with the sentiments of CHINHENGO J (as he then was) in *S v Samson Ruturi* HH 26-30 where at page 9 of the cyclostyled Judgement the following was stated:

"Thus stated, the general principle is that persons jointly charged with an offence must be treated 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 him part from the other person with whom he is jointly charged. In the case of admission to bail on 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 so 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."

In my view equal treatment does not necessarily imply similar outcomes, equal treatment to my mind means being subjected to the same objective criteria in the resolution of the matter as opposed to being subjected to whimsical or capricious considerations. It is not uncommon therefore that the equal treatment of persons (in the sense of being subjected to the same criteria) whose circumstances are different would yield different outcomes.

In the present matter the state contends that the distinction drawn, as far as bail is concerned, between applicant and his co-accused is justified chiefly on two grounds. Firstly, out that whereas his the latter remained within the vicinity of the city of Kwekwe where the tragic incident took place, the applicant on the other hand fled Chinhoyi. Secondly, that the case against

applicant is significantly stronger relative to that of his co-accused more particularly in that he was actually seen striking the deceased with an axe.

It was spiritedly argued that the relative strength of the case against each accused *vis-à-vis* the rest should be reserved exclusively for the main trial where issues attending to the same can be properly ventilated and determined. This argument cannot be sustained. As alluded to earlier, it is incumbent upon a court seized with a bail application to make a preliminary finding on the strength of the prosecution case against a particular accused. This is a finding which when coupled with related considerations such as the seriousness of the offence and the likely sentence to be imposed, will enable the court may properly formulate an opinion as to whether such the apprehension on the part of the state of applicant absconding are justified or not, (see section 117 (3) (b) (v) of the CPEA, see also *Aitken and Another v Attorney General* 1992 (1) ZLR 249 (S), *S v Jongwe* 2002 (2) ZLR 209 (S). The proposition that this court should defer the issue of the respective involvement of the individual co-accused to the trial court is therefore untenable.

In any event, the thrust in a bail application and that of the main trial are different. Whereas in the former, the court is required to formulate on the available facts, an impression of the relative strength (in prospect) of the case for the state, in the latter instance, the stakes are much higher; the court is required to decide on whether or not the state has proven its case beyond reasonable doubt. Not only are the respective thresholds different, but also the evidentiary materials that fall for consideration are different. For instance, hearsay evidence (subject to certain qualifications) which would otherwise be inadmissible in the main trial is accepted in a bail application. Further unlike in the main trial the adduction of oral evidence in a bail application is optional. All that is being said therefore is that the court is as of now obliged in the context of this application to make a preliminary finding of the relative strength of the case for the state against the applicant (and cannot defer the same to the main trial) which in turn might justify a differentiation in the outcome of the applicant relative to that of his co-accused persons.

In a word therefore, I find that there is merit in the state's contention that applicant's circumstances are distinguishable from those of his co-accused in so far as the commission of the offence is concerned. This is derived from the submission by the state that it has its disposal as part of its arsenal against the applicant, statements from potential state witnesses (identified as Honest Dube, Sivangai Mzizi and Cloud Mamvura) who actually saw him (i.e. applicant) striking

the deceased with an axe on the head. The corollary being that a conviction is highly likely to ensue. On the other hand, the state basically indicated that the evidence against his co-accused persons with whom he wants to be equated is relatively weak.

Similarly, there is justification in having regard to the conduct of each of the accused in the immediate aftermath of the tragic incident. Accused's flight to Chinhoyi and thereafter adopting a new fictitious name (undoubtedly calculated at concealing his true identity) significantly differs from the conduct of his co-accused persons who remained within Kwekwe and its environs.

Cumulatively therefore, the applicant still poses a real flight risk and on the available information there appears to be justification in treating applicant differently from his co-accused persons.

In the final analysis, whereas the applicant did present new facts which have since arisen in the intervening period between the first bail application and the current one the state has nonetheless demonstrated that compelling reasons still exist justifying the refusal of bail.

The application for bail based on new facts is hereby dismissed.

*Makonese, Mataka and Chambati; Applicants legal practitioners
National Prosecuting Authority; Respondent's legal practitioners*