

GATHRY CHIRENZERO
versus
THE STATE

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 22 January 2018 & 16 February 2018

Bail application

J Ndomene, for the applicant
E Makoto, for the respondent

PHIRI J: This was an application which was in fact an appeal against refusal to grant bail.

The appellant made his bail application in the Magistrates Court and was facing the following allegations;

COUNT 1

Possession of offensive weapons at public gathering as defined in s 43 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

COUNT 2

Impersonating a public official as defined in s 179 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

COUNT 3

Forgery as defined in s 137 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

THE ALLEGATIONS

These allegations were amplified in the Request for Remand Form (FORM 242) and more particularly in the annexure to this form and it was alleged that;

“ANNEXURE TO ZRP FORM 242

On 4 December 2017, there was an inauguration ceremony at the Zimbabwe State House Where cabinet ministers were being sworn in by His Excellency President Emmerson Dambudzo Mnangagwa.

Accused person was spotted near at the Zimbabwe State House near the podium controlling movements of people masquerading as security agent. It was later established that accused produced a fake CIO identity card at the security check point to gain entry into the Zimbabwe State House inauguration venue.

On 6 December 2017 at 0900 hours, there was a ceremony for renaming King George VI (KGV) Barracks to Josiah Magama Tongogara Barracks, Harare. The occasion was officiated by His Excellency President Emmerson Dambadzo Mnangagwa. The ceremony was attended by other senior Government officials, Service Chiefs and Zimbabwe National Army (ZNA) Command, among others.

On the same date (06/12/17) at around 1100 hours, the accused in the company of his two unidentified accomplices proceeded to Josiah Magama Tongogara Barracks, Harare whilst driving his BMW X5 motor vehicle registration number ADI 3317, blue in colour.

Upon arrival the accused approached the Zimbabwe Defence Intelligence personnel manning the main gate, where he identified himself and his accomplices as Central Intelligence Organisation (CIO) Close Security Unit (CSU) Officer who had been deployed to beef up security to the President.

The accused produced a fake CIO identity card, bearing his names. As a result, the accused and his accomplices were allowed entry into Josiah Magama Tongogara Barracks. They proceeded to the Hall where celebrations for the renaming of the Barracks were in progress.

Whilst at the venue, the accused roamed around and positioned himself near the podium, where the President was addressing gathering. He was intercepted by alert Military Personnel who inquired of his presence.

The accused responded that he was a member of the CIO and he produced the fake identity card. The Military Personnel verified with known CSU Personnel who were on deployment whether the accused was a CIO operative.

The other two unidentified accomplices upon realizing that accused person was being quizzed, they sneaked out of the venue and vanished.

It was then established that the accused was not a CIO Operative. The accused was searched and was found in possession of a .38 Special Amadeo Rossi S.A. Revolver, serial number AA 757095, loaded with 3 live rounds and 2 spent cartridges. Accused also had in his possession fake Zimbabwe Anti-Corruption Identity Card inscribed 'Government of Zimbabwe Executive Director Anti-Corruption,' which claimed to have obtained from CIO and a fake metal Drivers Licence serial number 75600AM issued in his names."

INVESTIGATING OFFICER'S AFFIDAVIT

Also annexed to the Request for Remand Form was an affidavit deposed by the Investigating Officer, Detective Assistant Inspector Masimba Maputa, who opposed the granting of bail on the following grounds:

- “(i) Accused’s two accomplices are at large and his release on bail might further dampen their arrest.
- (ii) Police need to check whether the recovered revolver was not used in the commission of other serious crimes since there are two spent cartridges in the revolver chamber so

if he is released on bail he might conceal the evidence. Police also need to trace the origins of the recovered fake identity cards so if released on bail his likely to conceal the source.

- (iii) Accused is likely to join his accomplices on the run if he is released on bail and continue to commit offences of similar nature and compromise security of senior government officials, taking into consideration that accused was spotted on 4 December 2017 at Zimbabwe State House after gaining entry in unclear circumstances and on 6 December 2017 at Josiah Magama Tongogara.
- (iv) Evidence against accused person is overwhelming and as such his chances of being convicted are very high and if he is convicted he is likely to be sentenced to jail term, so this might induce him to abscond if granted bail.
- (v) Accused might have used the recovered .38 special revolver in serious crimes so we need to check with Ballistics for outstanding scenes in which the same firearm might have been used.”

In the Request for Remand Form it was also indicated that the evidence linking the appellant to the commission of the offence was as follows;

- “1. Accused was also in possession of a .38 special Amadeo Rossi S.A. Revolver with two spent cartridges and three .38 SP live rounds at the crime scene.
- 2. Accused was found in possession of a fake Central Intelligence Organization identity card bearing his name at the crime scene.
- 3. Accused was found in possession of a fake government of Zimbabwe Anti-Corruption identity card bearing his names at the crime scene.
- 4. Accused was found in possession of a fake Zimbabwe Drivers Licence bearing his names.”

REFUSAL OF BAIL IN THE COURT A QUO

In denying the appellant bail the learned magistrate observed that he considered all the submissions and arguments made by both the state and the accused’s defence counsel and found that the appellant was an unsuitable candidate for bail.

He also reasoned that the fact that appellant possessed the alleged fake documents worked against him. There was no guarantee that if appellant was released on bail he was unlikely to escape.

The learned magistrate also noted that appellant was on a warrant of arrest in another case (record Number 12330/16).

The learned magistrate had also reasoned that whilst bail is a constitutional right the court has to balance the interests of justice whether indeed it was appropriate that the appellant be admitted to bail.

APPELLANT'S SUBMISSION ON APPEAL

Appellant noted an appeal against the court *a quo*'s refusal to grant the appellant bail. Firstly the appellant made the point that the court *a quo* fatally erred in dismissing appellant's submissions as regards over detention in terms of s 50 of the Constitution.

Secondly appellant's contention was that the court *a quo* erred in respect of averments contained in para(s) 3 to 9 of his grounds of appeal.

Notably that appellant was a flight risk, had a dangerous weapon in a public place, had fake Central Intelligence (C.I.O.), Anti-Corruption Commission Identity Cards and a fake Driver's licence.

Lastly appellant contended that stringent bail conditions would suffice in securing the state's interest.

At the hearing of the appeal it was reiterated and contended, on behalf of the appellant, that it was the duty of the state to secure evidence from the military as well as the police on the issue of over detention. (emphasis is mine)

It was also submitted that the court *a quo* erred in denying appellants bail on the pretext that his conduct in having a fake "C.I.O." Identity Card could see him in getting alternative travel documents.

In this regard appellant submitted that such a finding amounted to "a conviction which is irregular at this stage"

In para 6 of his grounds of appeal the appellant submitted he was duly issued with a "C.I.O." Identity Card but this --- "was not controverted by the very C.I.O. Leadership and therefore his submission remained valid and unchallenged (emphasis is mine).

Firstly the appellant contented that the court *a quo* erred in failing to delve into whether stringent bail conditions could not suffice and secure the state's interests.

THREAT TO THE LIFE OF THE PRESIDENT

At the appeal hearing the appellant submitted that the state should have produced evidence that there was a threat to the life of the President of the Republic of Zimbabwe.

STATE'S RESPONSE

It was submitted on behalf of the respondent that the court *a quo* cannot be faulted in its decision to deny the appellant bail.

The respondent argued that there was nothing before the court *a quo* to show that appellant had been over detained by the military. The respondent submitted that the court *a quo* was satisfied with the credibility of the investigating officer and further submitted that “such credibility findings are hardly interfered with by the appeal court. Respondents maintained that there was nothing, in the court record (see pages 19 to 23 of the record) to show that the applicant had been over detained by the Military.

It was further submitted, on behalf of the respondents that the court *a quo* cannot be faulted in finding that, indeed there were compelling reasons justifying the denial of bail.

Respondents maintained that such evidence against the appellant is overwhelming considering that he was found in possession of the firearm and forged documents. It was maintained that if these factors were taken cumulatively the appellant is likely to be incentivized to flee the jurisdiction of the court. The respondents cited the cases of *State v Chiadzwa* 1988 (2) ZLR 19 (5) and *State v Hussey* 1991 (2) ZLR 187 (5).

The respondents also submitted that it is trite, that in determining an appeal, such as the present one, the court should be guided by the contents of the appeal record. The respondents referred to the case of *State v Ruturi* HH 23/03 in this regard.

Court’s analysis of submissions made by both the appellant and the respondents.

It is the considered position of this court that the interests of justice and the integrity of the justice delivery system will be best served by the appellant being not admitted to bail.

Most important is the aspect relating to the submission that the alleged offences are very serious especially the security aspects posed to the life of the State President.

Appellant was not candid with the court when this court probed what duties specifically the appellant was carrying out at State House, near the podium, where the State President was, when cabinet ministers were being sworn?

Appellant was equally not candid with the court as to. What duties exactly he was carrying out at King George VI (KGVI) Barracks at a ceremony which was similarly being officiated by the State President and why he had positioned himself near the podium?

In a bail application the onus is on the applicant to place before the court factors which persuade the court to admit him to bail. An application for bail is not a trial per se. it was misplaced for the appellant to submit that the court *a quo*’s finding on the possibility of appellant being a flight risk “amounted to a conviction”.

The mere explanation that appellant was “engaged as an informer is also not a good enough or reasonable an explanation. It is the finding of this court that this is a classic case where there are compelling reasons justifying the continual detention of the appellant. See s 50 (1) (d) of the Constitution of Zimbabwe Amendment (No 20) Act 2013.

This court has also considered that it is in the interests of justice in terms of s 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] that exceptional circumstances do exist showing that the release of the accused is likely to disturb public order or security. This court holds that there was no misdirection on the part of the court *a quo* in denying the appellant bail.

Accordingly the appeal against refusal to grant bail is hereby dismissed.

Malosa & Ndomene legal practitioners, applicant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners