Case No. HCB 110/08
Xref HC 1760/08

ARNEL TAMUKA CHINYOKA

AND

CLYDE MICHAEL CHIMEDZA

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BULAWAYO 7 JULY 2008 AND 24 JULY 2008

Mr M Nzarayapenga for the applicants
Mr W Mabaudhi for the respondent

Bail pending trial

CHEDA J: This is an application for bail pending trial.

At the beginning of June 2008, the applicants were arrested for contravening section 6(1) of the Copper Control Act [Chapter 14:06 as read with section 189 (1) (a) of the Criminal Law Codification and Reform Act [Chapter 9:23].

The brief and relevant facts are that, the two were arrested for trying to sell 2,238 tonnes of copper. Their luck ran out when their prospective buyers turned to be police officers acting on a tip-off. They were arraigned before a magistrate, whereupon, they applied for bail but their application was dismissed on the basis that they were likely to abscond.

It is on the basis of that dismissal that they now make this application. The following are their basis for this application:-

1) that they believe that they are innocent and therefore have a good chance of being acquitted.

2. that they are holders of Zimbabwean passports.

3. that they are family men.
4. have fixed abode.
5. that they own immovable properties in Bulawayo and,
6. that they are prepared to be placed under any such conditions the court may deem fit.

7. that their healthy will greatly depreciate because of lack of food and resources in prison which may result in them not being fit to stand trial.

On the other hand, the respondent has argued that they are not proper candidates for bail for the following reasons: -

1) that they are likely to abscond due to the gravity of the offence and the type of sentence they are likely to get in the event of a conviction, and

2) that evidence against them is very strong.

In an application for bail the cardinal principle is that the accused is presumed innocent until his guilt has been established by due process of the law. This stands to reason therefore, that he has a right to liberty.

The main reason for a suspect to be held in custody prior to trial is to ensure that he stands trial. If there is real likelihood that he may not stand trial, then, he should be denied that right in order to safeguard the proper administration of justice. I am fortified by the remarks by NDOU J in the celebrated case of *S v Dube* HB 9/03 (cyclostyled judgment) where he stated: -

> "… in applications for bail pending trial the presumption of innocence is in favour of the applicants. The primary question for consideration is whether the applicant will stand trial or abscond and the court has to strike a balance between the interest of society (the Applicant should stand trial and there should be no interference with the administration of justice) and liberty of the Applicant (who pending the outcome of this trial is presumed to be innocent). The onus is on the Applicant to prove on a balance of probability that the court should exercise its discretion in his favour of granting him bail. It is justice demand to that an accused person stand his trial and if there is any cognisable indications that the Applicant will not do so if released on bail, the court should deny him bail."

In the present case applicants are men of means as they own immovable properties in Bulawayo. They are holders of valid travel documents. They were arrested while driving a South African registered BMW X5. They are

therefore, according to Zimbabwean standards fairly wealthy.

In addition, they have expressed discomfort in being kept in prison where according to them the food and general welfare is below their accustomed standard of living.

The question then is, are they likely to stand trial if released on bail?
In the determination of this question, I must consider the circumstances surrounding the commission of this offence and their views not only of the offence but indeed all other factors that may or may not induce them to avail themselves for trial.
Applicants fell into a trap by attempting to sell copper to plain clothes police officers. This on its own strengthens the state's case against them.
They have assets in Zimbabwe, but are also connected in South Africa as they were driving a top of the range South African registered motor vehicle. They also hold valid passports.
The question of the possibility of abscondment takes a centre stage in these proceedings. In as much as they have assets in Zimbabwe, there is one factor which is fundamental to this matter being that they have already expressed dissatisfaction about their welfare in prison.
Their discomfort is well grounded because they are used to opulence outside prison. The fact that they want to be released without further delay, is in my view the most important and driving incentive for them to abscond in order to escape the possibility of them being returned to a place they consider not suitable for people like themselves.

(1) A suspect who makes it clear that he is uncomfortable with his possible next accommodation in the face of overwhelming evidence against him is likely to abscond. A suspect faced with such an eventuality is no doubt unlikely to avail himself for his final day in court where the possibility of a prison term is more real than imagination in view of the seriousness of the offence.

(2) The above factor together with the evidence against them is enough impetus to cause them to abscond.

This, to me is one of those cases where justice demands that applicants should not be accorded a chance for a possible escape thereby frustrating the proper administration of justice.

I therefore agree with the respondent that applicants are therefore not proper

candidates for bail.

The application is dismissed.

Dube-Banda, Nzarayapenga and partners, appellants' legal practitioners
Attorney General's office, respondent's legal practitioners