

BRIGHTEN NKOMO

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 1 DECEMBER 2010 AND 9 DECEMBER 2010

Mr M. Ncube for applicant
Mr T. Hove for respondent

Bail Application

CHEDA J: This is an application for bail.

Applicant is being charged with armed robbery that allegedly occurred on the 13th February 2009 at the 60km peg along Beitbridge-Masvingo Highway . It is alleged that with the use of violence he induced the complainant to part with his property being:

- (1) 1100 Nokia mobile phone
- (2) motorolla C157 phone
- (3) net one sim card, and
- (4) cash amounting to R14 600.

Respondent has opposed this application on the ground that he is likely to abscond and relied on the provisions of section 117 (3) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07]. Under the said section the following factors have to be considered in the determination of bail:

- (i) the ties of the accused to the place of trial
- (ii) the accused's means of travel and his/her possession of or access to travel documents
- (iii) the nature and gravity of the likely penalty therefore.

To buttress this, Mr Hove for respondent has argued that applicant resides and works in South Africa and has been there for the past 12 years. In addition, thereto, he is a holder of a valid passport. Above all he is facing a serious charge.

Applicant on the other hand has argued that he is innocent of the charge being levelled against him in that he has never used the Beitbridge –Masvingo road on all the occasions he visited Zimbabwe. He further pointed out, two major discrepancies in the whole matter in that: Firstly, the state outline refer to a VW Jelta, red in colour yet the complainant refers to a VW Golf red in colour. The question is what is the exact car applicant was allegedly using. These are distinctively two different makers of motor vehicles except for the colour. Therefore, there is, a material discrepancy in this description.

Secondly he contends that the identity parade which was conducted was not properly carried out as he was brought to the charge office barefooted and was asked to put on his shoes in the presence of the complainant, a procedure which is unusual as it exposed him to the complainant who no doubt regarded him as the accused and therefore proceeded to identify him as such.

These allegations and arguments were not controverted by Mr Hove who stated that he had been unable to verify them with the investigating officer. He did not even ask for indulgence to verify them. If it is true that the identification parade was conducted in the

manner described, it is, but, a mockery of justice. It should be noted that an identification parade is a procedure where a complainant or witness should independently identify the suspect or the wrong doer without being given a clue which is designed to expedite police investigations. I am not saying that it was the case in casu, but, my emphasis is that identification parades should be conducted in a manner that exclude the possibility of any suspicion of bias or unfairness. Where an identification of a suspect has been made easier by a police officer's conduct, conscious or otherwise, our courts should be ready to condemn such proceedings without more. In casu, what occurred in this case can not pass the test of an identification parade. There should be fairness in the process, where fairness is absent the possibility of bias can not be excluded, see *R v Masemang* 1950 (2) SA 488 (A.D) and *R v Y and another* 1959 (2) SA 116.

Great care should be employed when identifying a suspect. In *S v Ndhlovu and Others* 1985 (2) ZLR 261 (SC) GUBBAY JA (as he then was at 263 G stated:

“Confidence and sincerity are not enough. The possibility of a mistake occurring in the identification, especially where the witness has not known the person previously, demands that the great circumspection should be employed.”

Probative value of personal identification at a parade conducted in a manner which does not guarantee fairness required by the standard form of procedure for such proceedings carries less weight as it would have been calculated to prejudice applicant, see *R v Masemang (supra)*.

The other factor relied on by respondent is that applicant is likely to abscond as he is a South African resident. While this may be a possibility the question of abscondment should be

looked at very carefully as it can result in a suspect failing to attend court which can no doubt frustrate the otherwise proper administration of justice.

Where a suspect is facing a serious charge, which upon conviction is likely to be sentenced to a lengthy prison term, the temptation to abscond is quite high. This is the general approach, see *S v Nichas* 1977 (1) SA 257 (C). This, however, does not mean that bail should not be granted in a serious case, see *R v Mtatsala and another* 1948 (2) SA 585. The seriousness of the charge must be taken into account with regards to other factors. The strength or weakness of the state case is one such factor. Where the state case is weak, bail should be considered, as failure to do so will be prejudicial to the accused. In casu as already pointed out the identification parade is alleged to have been irregular. If this is proved to be true, that will dent the state case. Therefore, if it is correct, the possibility of applicant absconding to avoid trial is remote as he will be eager to clear his name. In an application for bail applicant must prove on a balance of probabilities that there are facts rendering it unlikely that he will abscond or otherwise interfere with the proper administration of justice, see *Leibman v Attorney General* 1950 (1) to 607. The factors to be considered in the determination of bail where a question of abscondment arises were in succinctly dealt with in *Aitken and another v Attorney General* 1992 (1) ZLR 249, quoted with approval in *S v Jongwe* 2002 (2) ZLR 209 (H) at page 215 B-D where CHIDYAUSIKU CJ stated:

- “b That in judging the risk that an accused person would abscond the court should be guided by the following factors:
- (i) the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction;
 - (ii) the apparent strength or weaknesses of the State case;
 - (iii) the accused’s ability to reach another country and the absence of

- extradition facilities from the other countries;
- (iv) the accused's previous behaviour;
- (v) the credibility of the accused's own assurance of his intention and motivation to remain and stand trial;
- d That the risk of interference with investigation if alleged must be well founded and not based on unsubstantiated allegation and suspicion."

Applicant's averments that he has never used the Beitbridge-Masvingo road and that the identification parade was irregular which has not been controverted render, the state's case weak, thereby eliminating the incentive for him to abscond from the court's jurisdiction.

Applicant is a Zimbabwean based in South Africa, has a good and responsible job. In addition to this, applicant voluntarily went to the police station to seek clarification as to why his car had been embargoed; this to me is not the behaviour of a guilty mind. This factor can not be ignored, see *S v Jongwe* (supra).

It is a fact that there exists an extradition order between Zimbabwe and South Africa which make it possible to bring applicant back to the country should he decides to abscond.

I am, therefore, of the view that, applicant has made a good case for himself for bail and accordingly the following order is made:-

Order

Applicant be and is hereby granted bail on the following conditions that:

- (i) he deposits US\$200-00 with the office of the Registrar, High Court, Bulawayo.
- (ii) he surrenders his travel documents with the Registrar's Office, High Court, Bulawayo.
- (iii) he reports three times a week on Mondays, Wednesday and Fridays at Zimbabwe Republic Police, Nkulumane, Bulawayo between the hours of 6am and 6pm.

- (iv) he resides at house number 108 Nkulumane, Bulawayo until the trial is finalised.
- (v) he does not interfere with state witnesses, and
- (vi) he surrenders the Title Deed of house number 1378 Mbizo Township, Kwekwe, being Title Deed number 1546/87 to the office of the Registrar, High Court, Bulawayo.

Cheda and partners, applicant's legal practitioners
Criminal Division, Attorney General's office, respondent's legal practitioners