HB 55-16
HCB 10-16

FELODY MUNSAKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 19 AND 25 FEBRUARY 2016

Bail Application

B. Masamvu for the applicant
T. Hove for the respondent

MATHONSI J: The opposition to this bail application graphical demonstrates how officers prosecuting on behalf of the prosecutor general either by design or lack of understanding, have remained rooted in the past without embracing the new constitutional order when it comes to the issue of bail. It also shows why, what has been roundly referred to as the re-alignment of laws to the new constitution, should be prioritized in the interest of the smooth administration of justice and good order.

This applicant for bail was arrested on 20 January 2016 by Nyamandlovu police who preferred charges of rape against him. He was only taken to court for initial remand on 31 January 2016, eleven days after his arrest. It is not apparent from the papers whether authority for his detention beyond the requisite 48 hours was obtained. Ordinarily such extension would be for 96 hours before the accused person is brought to court.

The allegations against him as appear on the Request for Remand Form 242 are that:

> "On 20 January 2016 at stand 13 Goliths village Nyamandlovu, the accused had sexual intercourse with the complainant twice without her consent and threatened to assault her if she tells anyone. The accused got into the complainant's bedroom hut whilst she was asleep, closed her mouth and pinned her down and --- had sexual intercourse with her twice."

Upon his initial appearance on these allegations the applicant was remanded in custody. He has approached this court seeking his admission to bail pending trial. He states that he is a mere suspect who is presumed innocent until proven guilty. Whatever evidence has been lined up against him, it is yet to be tested at the trial. He is therefore entitled to his liberty especially

as he is of fixed abode, has no travel documents, has a good defence to the charges and as such he is not a flight risk.

The application is opposed by the state on essentially three grounds namely that the applicant is likely to abscond; he is likely to endanger the safety of members of the public and is likely to interfere with witnesses. In formulating his opposition Mr *Hove* who appeared for the state relied on the provisions of section 117 (2) and (3) of the Criminal Procedure and Evidence Act [Chapter 9:07]. Therein lies the problem because those provisions cannot be said to be still part of our law. They have been relegated to the annuls of history.

Section 117 provides:

"(1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.

2. The refusal to grant bail and the detention of an accused person in custody shall be in the interests of justice where one or more of the following grounds are established:

(a) where there is a likelihood that the accused, if he or she were released on bail will –

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or

(b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security."

Subsection (3) of s117 deals with factors to be taken into account by the court when considering whether the grounds set out in subsection (2) exist.

It is apparent from a reading of the foregoing provisions that the onus was on the applicant for bail to satisfy the court that he or she is a good candidate for bail. He had to show that the interests of justice would not be prejudiced by his release on bail. In terms of section 117 A (1) an accused person who is in custody could apply for bail at anytime to a judge or magistrate, whether verbally or in writing. In such bail application he or she would be compelled

to inform the court of any previous convictions any pending charges against him and whether he had been released on bail in respect of those charges.

The lawgiver has now made the admission of arrested persons to bail a constitutional right. This is by virtue of section 50 (1) (d) of the Constitution of Zimbabwe which reads:

> "Any person who is arrested must be released unconditionally or on reasonable conditions pending a charge or trial unless there are compelling reasons justifying their continued detention."

The primary rule of statutory interpretation is that words of a statute must be given their grammatical signification in trying to ascertain the intention of the law maker. It is only if the literal sense when so applied defeats the legislative intendment, that a deviation from the ordinary meaning is permitted: *S* v *Nottingham Estates (Pvt) Ltd* 1995 (1) ZLR 253 (S) 256 E; *Ebrahim* v *Min of the Interior* 1977 (1) SA 665 (A) 678 A –C; *Birch* v *Klein Karoo Agricultural Co-operative Ltd* 1993 (3) SA 403 (A) 411 E –G.

It follows therefore that by constitutional enactment, an arrested person is entitled as of right to be released either unconditionally or on reasonable conditions pending a charge or trial. It is only where it is shown that there are compelling reasons justifying that person's continued detention that an arrested person can be denied bail. A constitutional provision can never be more clearer.

All that an arrested person is required to do is to apply for bail. The onus of showing the existence of compelling reasons for continued detention cannot possibly be his because he desires his release on bail. Therefore section 50 (1) (d) of the constitution has shifted the onus of proof to the state to establish the existence of compelling reasons why the arrested person should remain in detention.

The constitution has rendered dysfunctional the provisions of section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07]. Its elaborate requirements for the admission of an arrested person to bail cannot remain part of our law to the extent that they are in consistent with section 50 (1) of the constitution. Whether laws have been re-aligned to the constitution or not is immaterial, those that are at variance with the constitution are no longer part of our law and are, to the extent of their inconsistency, invalid.

It means that where bail is being opposed without reference to compelling reasons for an arrested person's continued detention there is no basis for opposition. The respondent appears caught in a time warp where it continues, with nolstagia, to cling onto the grounds for denial of bail contained in a provision that has long been rendered ineffectual.

As pointed out in *S* v *Khumalo* HB 243/15, the state cannot deny a person a fundamental right to admission to bail without satisfying the requirement for denial of bail as set out by the constitution. It is time that the state seriously applied its mind before venturing to oppose bail because to say that the applicant for bail will abscond, will endanger the public and will interfere with witnesses remain unsubstantiated allegations which do not meet the threshold of compelling reasons set by the constitution. For instance, nothing has been placed before me pointing to any possibility of abscondment or interference.

The applicant resides in Binga. He allegedly raped a person in Nyamandlovu and there is nothing to suggest that he will interfere with any witness. I am therefore satisfied that the applicant is entitled to his release on bail.

Accordingly it is ordered, that

1. The applicant is hereby admitted to bail on the following conditions; that
   (a) he deposits a sum of $100-00 to the registrar of the High Court Bulawayo.
   (b) he resides at Mayanda Village, Binga.
   (c) he reports once a week on Fridays at Tinde Police Station between the hours of 0600 and 1800 until the matter is finalized.
   (d) he does not interfere with state witnesses.

Dube-Tachiona and Tsvangirai, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners