

MORRIS NDOU  
and  
DAVID MASHAVA  
**versus**  
THE STATE

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 21 APRIL 2017 AND 27 APRIL 2017

*A Zvongouya* for the applicants  
*T Hove* for the respondent

**MATHONSI J:** The two applicants were intercepted by the police on 29 March 2017 at about 1600 hours along the Zvishavane-Mbalabala road while driving a South African registered Toyota Prado motor vehicle registration number CY 67121. The said motor vehicle belongs to Latib Abdul Dawood of Lindeni in South Africa. It was reported stolen at Lindeni Police station in that country. In addition, the motor vehicle in question was smuggled through the Zimbabwe-South Africa border.

They were charged with two counts, namely theft of a motor vehicle in contravention of s113 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and smuggling in contravention of s182 (1)(a) of the Customs and Excise Act [Chapter 23:02] after they failed to give a satisfactory explanation of how they came to be in possession of a motor vehicle reportedly stolen in South Africa. The two appeared before a magistrate at Zvishavane on 31 March 2017 and were routinely remanded in custody to 13 April 2017.

They have made this application for bail pending trial submitting in the main that the legislature has now made the admission of an arrested person to bail a constitutional right by virtue of the provisions of s50 (1) of the Constitution of Zimbabwe which section, they argue, has shifted the onus of proof to the state to establish the existence of compelling reasons why they should remain in detention. They argue further that s 50 (1) of the constitution has rendered the provisions of s117 of the Criminal Procedure and Evidence Act [Chapter 9:07] dysfunctional. I shall return to that later in this judgment.

The applicants state in their bail statement that they are of fixed abode residing, as they do, at house number 950 Dulibadzimu Township Beitbridge and Chapuche village, Chief Chitamu Beitbridge respectively. They have no intention to abscond or evade justice. They co-operated with the police at the time of their arrest and therefore are good candidates for bail.

In addition, they are aged 35 years and 28 years, respectively, married and each have four children to their credit. As permanent residents of Zimbabwe they will not interfere with witnesses in South Africa. Regarding the alleged offence, the applicants submit that the state case is weak given that “there are no sufficient facts” linking them to the commission of the offence. The second applicant is employed as a driver by the first applicant who was hired (by an unnamed person) to take the motor vehicle in question from Beitbridge to Harare for a fee of R3000-00. He in turn instructed the second applicant to drive the vehicle. The application is silent firstly as to who hired them and secondly as to why they were not proceeding to Harare at the time of their arrest but along Zvishavane-Mbalabala road.

In *S v Munsaka* HB 55-16 (as yet unreported) I made the point that the provisions of s117 of the Criminal Procedure and Evidence Act [Chapter 9:07] dealing with the grounds for refusal of bail pending trial could not be said to be still part of our law in light of the new constitution s 50 (1)(d) of which provides that 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. I reasoned in that judgment, while interpreting s 50 (1)(d) of the constitution, that it has shifted the onus of proof to the state to establish the existence of compelling reasons why the arrested person should remain in detention.

I went on to pronounce that:

“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 inconsistent with s 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.”

That judgment was delivered on 25 February 2016. I still stand by its jurisprudence to the extent of statutory interpretation. However, since it was delivered the legislature has moved

quickly to introduce a new s115C of the Criminal Procedure and Evidence Act [Chapter 9:07] specifically to depart from the interpretation given to s 50 (1) (d) of the constitution in *S v Munsaka, supra*, in respect of certain specified offences.

The new s115C introduced by the Criminal Procedure and Evidence Amendment Act No 2 of 2016 which came into effect on 10 June 2016 provides:

“115C Compelling reasons for denying bail and burden of proof in bail proceedings

1. In any application, petition, motion, appeal, review or other proceeding before a court in which the grant or denial of bail or the legality of the grant or denial is in issue, the grounds specified in section 117 (2), being grounds upon which a court may find that it is in the interests of justice that an accused should be detained in custody until he or she is dealt with in accordance with the law, are to be considered as compelling reasons for the denial of bail by the court.
2. Where an accused person who is in custody in respect of an offence applies to be admitted to bail—
  - a. before a court has convicted him or her of the offence—
    - (i) the prosecution shall bear the burden of showing, on a balance of probabilities, that there are compelling reasons justifying his or her continued detention, unless the offence in question is one specified in the Third Schedule;
    - (ii) the accused shall, if the offence in question is one specified in—
      - A. Part I of the Third Schedule, bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail, unless the court determines that, in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden;
      - B. Part II of the Third Schedule, bear the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail;
  - b. after he or she has been convicted of the offence, he or she shall bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail.”

The net effect of that legislative intervention since *S v Munsaka* was decided in inserting s115C has been to qualify the constitutional imperative that an arrested person is automatically entitled to bail unless the state can show the existence of compelling reasons for that person’s continued detention. To begin with, the grounds for refusal of bail set out in s 117 (2) have resurrected, so to speak. Where they exist they are to be considered as compelling reasons for the denial of bail by the court.

In other words, just like before the new constitution, it is a compelling reason to refuse bail where there is a likelihood that if the accused person is released on bail he or she will endanger the safety of the public or any person or will commit an offence referred to in the First Schedule; will not stand trial or appear to receive sentence; will interfere with witnesses or conceal evidence and/or will undermine or jeopardise the administration of justice.

However, while in its original form, s117 had placed the burden of proving entitlement to bail squarely on the accused person generally, the new provisions maintain the requirement of compelling reasons set out in s 50 (1) (d) of the constitution but go on to apportion the burden of showing their existence or otherwise on both the prosecution and the arrested person depending on the nature of the offence charged.

Where an accused person has applied for bail pending trial the prosecution bears the burden of proving the existence of compelling reasons for denial of bail in all cases except where the offence charged is one specified in the Third Schedule. In other words, in respect of certain cases of murder and rape or aggravated indecent assault; certain cases of robbery; assault or indecent assault of a child under the age of 16 years; certain cases of kidnapping or unlawful detention; repeat offenders in respect of offences set out in Part II etc, the person seeking admission to bail is still required to bear the burden of showing, on a balance of probabilities, that it is in the interests of justice that he or she be released on bail pending trial. In respect of those offences set out in Part II of the Third Schedule the accused person must still show the existence of exceptional circumstances warranting his or her release on bail pending trial. After conviction the onus is again on the convicted person to show that it is in the interest of justice that he or she be released on bail.

The question of whether these new provisions are in sync with the new constitutional order is not before me at the moment. Suffice it to say that they appear to have taken the legal position back to where it was before the introduction of s 50 (1) (d) of the constitution in respect of most serious offences including theft of motor vehicle as defined in s 2 of the Road Traffic Act [Chapter 13:11] in which event the accused person must show the existence of exceptional circumstances.

The foregoing discussion demonstrates that it is not correct in this particular case for the applicants to state that the burden of showing the existence of compelling reasons why they should not be admitted to bail lies on the prosecution. Quite to the contrary the new regime dealing with consideration of a bail application pending trial places the burden upon the applicants to show that, not only is it in the interests of justice for them to be released on bail but also that there are exceptional circumstances which in the interests of justice permit their release on bail pending trial.

In their application the two applicants have not put this court into their confidence on all material aspects of the case. While not denying that they were found in possession of a motor vehicle stolen in neighbouring South Africa, they have not bothered to give a meaningful explanation of how they came to be in possession of it. They say they were hired to drive it to Harare but surprisingly do not bother to disclose the name of the person who hired them, where they were hired and under what circumstances. They do not bother to explain how and by whom the motor vehicle was smuggled into Zimbabwe. Indeed if their mandate was to drive the motor vehicle from Beitbridge, where they reside, to Harare, what is it that they were doing heading South away from the direction of Harare which is North, at the time of their arrest. All that this shows is that the state case against the applicants is very strong which usually acts as an irresistible catalyst for abscondment.

In addition, this is a cross-border offence the theft of the motor vehicle having occurred in South Africa and the crime straddling the border as an ongoing one including the smuggling aspect. It is true that the presumption of innocence weighs in their favour but so is the burden to show that it is in the interests of justice that they be released in the circumstances.

*Mr Zvongouya* for the applicant submitted facts which are not contained in the bail statement after I had queried why the applicants had not taken the court into confidence on the identity of the hirer. He stated that they were hired by unknown people in Beitbridge who paid them on the spot and directed them to drive the vehicle behind them as they drove in another vehicle. They did not bother to find out the particulars of the hirer but still took custody of the vehicle. At a roadblock just outside Zvishavane, the hirer sped off without stopping at the roadblock leaving the applicants at the mercy of the police. With respect, if that is the defence

the applicants will take to trial, they are in serious trouble. I can only say that it underscores the strength of the state case.

To my mind it would be the height of irresponsibility to admit the applicants to bail at this early stage having regard to the fact that they were arrested less than three weeks ago for an offence committed in another country wherein there is a reasonable possibility that they may have crossed the border illegally with their booty. That on its own suggests ability to escape from this jurisdiction. Above all, cross border investigations may not be as easy as those conducted within the country. As such the police need more time to wrap up the case. I am not persuaded that the applicants are good candidates for bail.

In the result the application is hereby dismissed.

*Dube and Associates*, applicants' legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners