

**AGGRIPA MLOYI**

**Versus**

**THE STATE**

HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO, 8 AND 11 JUNE 2020

**Bail pending trial**

*T. Tavengwa*, for the applicant  
*N. Ndlovu*, for the respondent

**DUBE-BANDA J.** This is an application for bail pending trial. Applicant is being charged with the crime of armed robbery as defined in section 126 of the Criminal Law [Codification and Reform] Act, Chapter 9:23. On the 29 April 2020, applicant appeared before the Magistrates Court, Bulawayo, whereupon he was placed on remand and detained in custody.

Since the applicant is facing a robbery charge, an offence specified in the Third Schedule, the magistrate had no jurisdiction, without the consent of the Prosecutor-General, to entertain his bail application. This is so in terms of section 116 (c) (iii) of the Criminal Procedure and Evidence Act [Chapter 6.09], (the Act) which provides that a magistrate shall not, without the personal consent of the Prosecutor-General, admit a person to bail or alter a person's conditions of bail in respect of an offence specified in the Third Schedule. He was then advised to make his bail application before this court.

The allegations from which the charge of murder arises are set out in the Police Form 242, commonly called a Request for Remand Form. It states that:-

On 16 June 2019 and at about 0200 hours, the accused person and in the company of his accomplices who are still at large went to Wholesale beef number 10A Besborough road, Belmont, Bulawayo, armed with a firearm and electric grinder. Upon arrival, he threatened guards with a firearm and gained entry into the premises through the roof. He and his accomplices grinded the safe and stole cash amounting to US\$3450.00, RTGS \$900.00, and cell phones before they went away.

According to Form 242, there is evidence linking the accused to the commission of the offence. It is alleged that he was identified through his finger prints which were uplifted from the scene of crime. Reasons for opposing bail are outlined as the following:- he is likely

to abscond due to the seriousness of the offence; the other co-accused persons are still at large and in possession of stolen property and the firearms they used are yet to be recovered; the accused person is likely to commit other crimes as he is unemployed and gets money through crime; and the accused person is facing serious allegations and if convicted he is likely to get a long prison term. This alone might act as an incentive for him to abscond if admitted to bail pending trial.

**Does section 50(1)(d) of the Constitution apply to accused who has made an initial appearance in court?**

Applicant anchors his bail application on section 50 (1) (d) of the Constitution of Zimbabwe Amendment (No. 13) Act 2013 (Constitution), as read with section 117 of the Criminal Procedure and Evidence Act (CPA Act). Section 50 (1)(d) of the Constitution 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. There has been argument between the parties as to whether section 50(1) (d) is the appropriate section to anchor a bail application in respect of an accused who has been brought to court for an initial remand.

To put the matter into perspective, it is important to deal with whole of section 50(1) of the Constitution. The section provides as follows.

50 (1) Any person who is arrested—

(a) must be informed at the time of arrest of the reason for the arrest;

(b) must be permitted, without delay—

(i) at the expense of the State, to contact their spouse or partner, or a relative or legal practitioner, or anyone else of their choice; and

(ii) at their own expense, to consult in private with a legal practitioner and a medical practitioner of their choice;

and must be informed of this right promptly;

(c) must be treated humanely and with respect for their inherent dignity;

(d) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention; and

(e) must be permitted to challenge the lawfulness of the arrest in person before a court and must be released promptly if the arrest is unlawful.

My view is that this section deals specifically with the rights of arrested and detained persons, who have not yet appeared in court on initial remand. It tells the police authorities

how such persons must be treated and upon arrest and detention. These persons must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention. This is the kind of a release that can be made at the police station. This is the kind of release that can be managed by the prosecution before an arrested person makes his first appearance in court. This release is before appearing in court for initial remand.

Section 50(1)(d) deals with arrested person, those who are still in the custody of the police. It enables such persons to seek their release before the expiry of the 48 hours or before they are taken to court for their initial appearance. Such persons may apply to court for their release, and the court can only refuse to release them from police custody if there are compelling reasons justifying their continued detention. Such an arrested person may invoke section 50 (1) (d) of the Constitution to advance his cause for release from police custody. My view is section 5(1)(e) provides the substantive right, and section 50(1)(e) provides the procedural right, it permits such a person to challenge the lawfulness of the arrest in person before a court. In fact the whole of section 50 (1) deals with pre-initial court appearance. See *Vincent Kondo and Edmore Marwizi Mapuranga v The State* HH 99-17.

In my view this section 50 (1) (d) gives an arrested and detained person, who has not appeared in court, certain rights, first, a procedural right to approach a court to determine the lawfulness of pre-initial appearance detention, second, a substantive right to have the lawfulness of the detention determined, and third, a remedy to be released when there are no compelling reasons justifying their continued detention.

I take the view that the appropriate provision that must anchor a bail application, is section 50 (4) (d) of the Constitution, as read with the relevant provisions of the CPA Act. Section 50(4)(d) of the Constitution says:-

Any person who is arrested or detained for an alleged offence has the right— (d) at the first court appearance after being arrested, to be charged or to be informed of the reason why their detention should continue, or to be released. (My emphasis).

This is the provision that deals with those persons who have made their initial court appearance. At the initial court appearance they have a right to be informed of the reason why their detention should continue, or to be released. In adjudicating whether the detention of the accused should continue or he be released, the court then can factor into the equation the

constitutional right to liberty, the right to be presumed innocent, as read with the provisions of the Criminal Procedure and Evidence Act [Chapter 6.09] relating to bail applications.

I hold the view that section 50 (1) (d) of the Constitution targets arrested persons who are in the custody of the police, who seek release prior to having been brought to court for initial appearance. Once he has been brought to court and charged, the applicable provision to anchor a bail application is section 50 (4) (d) of the Constitution, as read with the provisions of the CPA. In short, section 50(1)(d), the arrested person initiates his release either by the police authorities, or by the court. Section 50 (4) (d), is activated once an accused person makes an initial court appearance at the instance of the prosecution.

### **The 48 Hour rule and the remedy on violation**

At the commencement of initial remand proceedings before the magistrate's court, the applicant argued that he was entitled to immediate release by operation of section 50(3) of the Constitution. He argued that he was over-detained by the police. The basis being that he was arrested on the 27<sup>th</sup> April 2020 at 0600 hours, and taken to court for initial remand on the 29 April 2020 at 1500 hours. This is a total of 57 hours in police custody. Section 50(2) of the Constitution says:-

(2) Any person who is arrested or detained—

(a) for the purpose of bringing him or her before a court; or

(b) for an alleged offence;

and who is not released must be brought before a court as soon as possible and in any event not later than forty-eight hours after the arrest took place or the detention began, as the case may be, whether or not the period ends on a Saturday, Sunday or public holiday.

This provision being held to be peremptory, .its object is to ensure the prompt exhibition of the arrested person before a magistrate or other judicial officer so as to prevent the detention of a person *incommunicado* which is itself an affront to our constitutionalism, democracy and respect for basic human rights'. Further, it has been held that the 48hour rule is...one of the most important reassuring avenues for the practical realisation of the protection and promotion of the basic human right to freedom of movement guaranteed to individuals by the Zimbabwean Constitution.

The 48-hour requirement is undoubtedly an important constitutional right accorded to arrested persons, which should be guarded jealously. It must act as a flashing red light in the minds

of the officers processing suspects for onward transmission to court. This is the vigilance with which we must guard this fundamental right to appear in court within 48 hours after being arrested.

The right of an arrested person to be placed promptly under judicial authority of a court, with 48 hours being the outer limit, determines the lawful duration of detention in the hands of the police. This period is calculated from the moment of arrest. After the expiry of this period the detention becomes unconstitutional. A positive obligation is thus imposed on the detaining authority to bring an arrestee before court within that period.

The object of the constitutional provision was aptly stated by Parker J in the Namibian case of *Sheehama v Minister of Safety and Security* 2011 (1) NR 294 (HC) at para 5 as follows:

One must not lose sight of the fact that the object of Art 11(3) of the Namibian Constitution is to ensure the prompt exhibition of the person of an arrested and detained individual before a magistrate or other judicial officer so as to prevent the detention of a person incommunicado which is itself an affront to our constitutionalism, democracy and respect for basic human rights. It is also an assurance to the magistrate or other judicial officer that the arrested and detained person is, for instance, alive and has not been subjected to any form of torture or to cruel, inhuman or degrading treatment while in the hands of those who have detained him or her; treatment that is outlawed by Art 8(2) of the Namibian Constitution. The 48-hour rule is therefore one of the most important reassuring avenues for the practical realisation of the protection and promotion of the basic human right to freedom of movement guaranteed to individuals by the Namibian Constitution.

We must guard against laxity and aspire to setting very high standards for compliance with constitutional rights, especially those having a bearing on the liberty of individuals. This is an ideal that we must thrive for, this is an ideal that we must achieve. There is no doubt that this applicant was over detained by nine hours. What happened to the applicant is unlawful. Is an affront to our constitutional order. It must be frowned upon. It must be condemned. It is wrong. The police authorities must be trained until it becomes second nature to them, not to keep arrested persons for more than 48 hours without a court appearance or judicial authority. This is not negotiable.

What is the remedy of an arrested person who has been detained for a period exceeding 48 hours without a court appearance or judicial authority? First, while still in police detention? Section 50 (3) of the Constitution provides that:

Any person who is not brought to court within the forty-eight hour period referred to in subsection (2) must be released immediately unless their detention has earlier been extended by a competent court. (My emphasis).

This constitutional provision speaks to a person who is still in the custody of the police, who has not been brought to court. While still in police custody beyond the 48 hour limit, he is

entitled to seek immediate release. The police must release him. The Constitution demands no less. In the event the police do not release him and continue holding him unlawfully, he can invoke section 50 (5) (e) and motivate a court to order his release from unlawful detention. Section 50(5) (e) of the Constitution provides that:

Any person who is detained, including a sentenced prisoner, has the right— (e) to challenge the lawfulness of their detention in person before a court and, if the detention is unlawful, to be released promptly. (My emphasis).

I hold the view that such a person has a procedural and substantive right, while still in police detention to apply to court for immediate release. If the court is satisfied that he has been detained for a period in excess of 48 hours and is still in such detention, to order his immediate release. With such a person, there is absolutely no difficulty, he must be released immediately unless their detention has earlier been extended by a competent court.

The second question is, what is the remedy of such a person after he has been taken to court for initial remand? The applicant has appeared in court on an initial remand and remanded in custody. The State concedes that applicant was over detained, i.e. beyond the 48 hour limit. At his initial remand proceedings, he complained to the court *a quo*, he made the point very strongly, that he was detained in violation of section 50(2) of the Constitution. He asked the court to order his immediate release. The court *a quo* declined to release applicant. It reasoned that section 50(3) of the Constitution is not applicable to persons who have appeared in court for initial remand. He turned to this court. He strongly asked this court to order his immediate release. The State concedes, it submits that:

In my view, section 50(3) applies to an over detained suspect who has been brought to court after the expiry of 48 hours. The court can only proceed and remand him when it is satisfied that the arrest and detention is was lawful. Where it is illegal, by reason of failure to comply with the 48 hour rule, he must be unconditionally released as contemplated in section 50(3) of the Constitution.

In *casu*, applicant was over detained. The court *a quo* remanded him in custody despite its finding that he indeed had been over detained. It is submitted that the court *a quo* may have, with respect misdirected itself when it held and found that section 50(3) of the Constitution, did not apply to the applicant's case. Applicant by virtue of his over detention, is entitled to his immediate release.

What is the name of such a release? Such a release cannot be bail. Bail is in terms of the CPA. Can a court order a release and direct the prosecution to proceed by way of a summons? My

thinking is that whether the State proceeds by way of a summons, is a prerogative of the State. To me, a court would be overstepping its constitutional mandate, if it orders the State to proceed by way of summons. This would be a text book case of judicial overreach.

I take the view that section 50(3) of the Constitution covers persons who have not yet appeared in court on an initial remand, a person who has not been brought to court. Once such a person has been brought to court, a different set of rules apply. I do not agree with the view that, on initial appearance once a court finds that the accused person was detained for a period exceeding 48 hours, it must order his immediate release. Such kind of release is not sanctioned by the law. This is no licence for the investigating authorities to hold suspects beyond the 48 hour limit. It is no licence to laxity.

Once such a person has been brought to court for initial appearance and charged, the ball game changes. Even if the court were to be satisfied that he has been detained for a period exceeding 48 hours, prior to being brought to court, it cannot and should not order his release. Once an accused has appeared before court and has been charged, there is no other release to talk about, at that stage, except release on the basis that there is no reasonable suspicion to place him on remand or release on bail. See *S v Mbele* 1996 SACR 212 (W) 225e-f.

However, this does not mean that the arrested person, who has been detained beyond the 48 hour limit remains without a remedy. His remedy must be located elsewhere, but not in the criminal proceedings. It may be located in civil law. According to *Steyler N Constitutional Criminal Procedure* (Lexis Nexis Butterworths Durban) 130, it is said when an accused is unconstitutionally detained by the police the common law remedy of *habeas corpus* or the *interdictum de homine libero exhibendo*, would secure immediate release. After the event, the usual delictual remedy of unlawful detention would be available. I agree.

Section 50(8) of the Constitution says an arrest or detention which contravenes this section, or in which the conditions set out in this section are not met, is illegal. It proceeds in section 50 (9) and says, any person who has been illegally arrested or detained is entitled to compensation from the person responsible for the arrest or detention. See *Minister of Safety and Security v Kabotana* 2014(2) NR 305 (SC), *Iyambo v Minister of Safety and Security* 2013(2) NR 562 (HC).

I have been referred to decisions in this jurisdiction and the region, which make the point that once the police violate the 48 hour rule, on initial appearance, an accused is entitled to his or her release. See *Madondo and Another v The State* HH 512-15, *Sheehama v Minister of Safety and Security* 2011 (1) NR 294 (HC). With respect, I hold a difference view. Therefore, the relief

sought by the applicant, i.e. to be released on the basis that the police held him in custody for a period exceeding 48 hours, cannot be acceded to. It has no basis in law and is refused.

As alluded earlier in this judgment, the State concedes that the applicant should be released solely on the grounds that he was detained beyond the 48 hour limit, before he was taken to court for an initial remand. The court is not bound by such concession. In this case, I find that the concession was not properly made, it is accordingly rejected.

**Is section 115C (2)(a) (i) of the CPA Act constitutionally invalid?**

Applicant seeks an order that section 115C (2)(a) (i) of the CPA Act is constitutionally invalid. The basis being that it places the *onus* on the accused person, charged with an offence specified in Part I of the Third Schedule, of showing that it is in the interests of justice for him or her to be released on bail.

The *onus* of proof refers to the duty that is cast upon a litigant to adduce evidence that is sufficient to persuade a court, at the end of the hearing, that the claim or defence, as the case may be should succeed. In *Pillay v Krishna* 1946 AD 946 at 952-3 the court said the word “*onus*” refers to the duty cast on a particular litigant, in order to be successful, of satisfying the court that it is entitled to succeed on its claim or defence. The *onus* may only be discharged by placing before court persuasive evidential material to prove the claim or defence. In a bail hearing, whichever party bears the *onus* must place before court sufficient evidence to prove its case.

The section that is under attack is section 115C (2)(a) (ii) of the CPA Act, it provides as follows:

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) (ii) the accused person 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.

The first observation I make is that in the main, the *onus* in a bail application is on the shoulders of the State. The provision under siege is a *provisio*. I take the view that



before the accused is saddled with the *onus* of showing that it is in the interest of justice that he be released on bail, the State must first put the accused within the ambit of the *proviso*. It must tell the court that the accused is facing a Part 1 of the Third Schedule offence, and lay the basis for the opposition for the admission of the accused to bail. Upon the court being satisfied that indeed the accused is facing a Part 1 of the Third Schedule offence, and that a basis for has been laid for the opposition of his admission of the accused to bail, can the accused be called upon to discharge the *onus*.

Furthermore, a court hearing a bail application in which the *onus* is on the accused, has a discretion, in terms of section 115C (2)(a)(ii) of the CPA Act, in relation to any specific allegation made by the prosecution, to require the State to bear the *onus* in respect of such allegation. This mitigates the impact of the *onus* put on the accused.

Further, I make the observation that section 69 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (Constitution) guarantees every accused person the right to a fair trial. In my view, this means that the entire process of bringing an accused person to trial and the trial itself needs to be tested against the standard of a fair trial. I accept that in a bail application, an accused is entitled to a fair trial. The limitation clause, section 86 (3) of the Constitution provides that no law may limit the following rights enshrined in this Chapter, and no person may violate them— (e) the right to a fair trial. Therefore, the right to a fair trial during bail proceedings cannot be limited.

I take the view that asking an accused who is facing a Part 1 of the Third Schedule offence to discharge an *onus*, does not amount to a limitation and /or violation of the accused's right to a fair trial. I hold this view because, first, the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences, and may for that reason be detained in custody. Second is that, notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions. Third, no matter where the *onus* sits, the grant or refusal of bail is a judicial function. Placing the *onus* on the accused should not affect the bail inquiry. The court does not play a passive role. See *S v Dlamini* 1999 (2) SACR 51 (CC).

Placing *onus* on the accused means he or she must commence with evidence, however, the court is not relieved of its inquisitorial duty. What the accused loses really is the benefit of doubt, which he would get if the *onus* was on the State, and no more. When the Canadian Supreme Court dealt with the reverse onus provision, it asked whether there was “just cause” for placing the *onus* on the accused. Just cause entailed two criteria, first, was the exception to the usual *onus* narrowly circumscribed, and second, was it necessary to promote the bail system? In answering both questions in the affirmative, the matter was resolved without referring to the limitation clause. See *R v Morales* (1992) 77 CCC (3d) 91 (SCC) 106. In *casu*, placing the *onus* on the accused of showing that it is in the interests of justice that he be released on bail, is justified because of the seriousness of the offences listed in part 1 of the Third Schedule, the inducement to evade justice or temper with evidence is the most compelling, and the further commission of offences of the same kind has the most devastating effect.

The underlying policy is plain, although societal interests may demand that persons suspected of having committed crimes forfeit their personal freedom pending the determination of their guilt, such deprivation is subject to judicial supervision and control. Moreover, in exercising such oversight in regard to bail, the court is expressly not to act as a passive umpire. Even where the prosecution concedes bail, the court must still make up its own mind. Where the prosecution opposes bail, still the court must make up its mind.

Although a bail hearing is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. Again there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt, that is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance. The interests of justice require a court to make a value judgment.

Clearly the legislative intention is to curtail, but not to forestall bail for suspects in very serious cases. Such person have to show that it is in the interests of justice that they be admitted to bail pending trial. I do not accept that section 115C (2)(a) (ii) of the CPA Act, whether it is viewed

in the light of section 50(1) (d) or 50 (4) (d), is constitutionally invalid. It meets the constitutional muster.

### **Is the applicant a good candidate for bail?**

Finally, what remains to be considered is whether applicant has discharged the onus of showing that it is in the interests of justice that he be released on bail? Without limiting the factors which the court will have regard to, it will consider the factors set out in s 117 (2) of the CPA Act, which read as follows:

#### **“117 Entitlement to bail**

(2) The refusal to grant bail and the detention of an accused 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;

First, the applicant has placed evidence before court. He contends that he is not a flight risk. He is of fixed abode. According to the applicant, for the last six months preceding his arrest, the officers of the Criminal Investigation Department (CID) frequently visited him at his residential address to make enquiries on the allegations he is currently facing. He was visited eight times and at odd hours by the police. He would also be asked to visit the police station, where he would be asked questions concerning the allegations. He submits that, notwithstanding the investigations, he did not flee. According to him, he fully co-operated with the police, and will continue doing so, even after admission to bail.

It is alleged that applicant was identified through his finger prints which were uplifted from the scene of the crime. He refutes that his finger prints were uplifted from the scene of crime. He says he was never at the scene of crime. He is of the view that these allegations are fabricated. According to applicant, one Robson Chatikobo, was charged with the crime of attempted murder, arising from the same facts alleged in applicant's case. He placed before court, Form 242 in respect of the said Chatikobo. The facts are substantially the same as those in applicant's case. The monies allegedly stolen are the same. Everything is the same. The State

accepts that charges against Chatikobo have been withdrawn before plea. The state has placed before court, documentary proof to show that the charges against the said Chatikobo, were withdrawn on the 23<sup>rd</sup> January 2002.

The allegations against the appellants are serious. However, the seriousness of the charges standing alone is no basis of refusing to admit a person to bail. I do not agree that he is a flight risk. There is evidence before this court that he has been aware of these charges and has been co-operating with the police. This evidence remains uncontradicted, and I have no reason, at this stage, to disbelieve him.

If there is evidence that the accused is not a good candidate for bail, let such evidence be placed before court in order for a just decision to be made in accordance with the law. In the absence thereof, the court will have to rule on the basis of what is available before it.

Refusing a person admission to bail is a serious matter. It is a serious inroad into the right to liberty. It must be taken serious, because it is serious. If the prosecution makes a concession, the court is not bound by such concession, but must give it due consideration. It is the prosecution that has got the docket to the investigations. It is the prosecution that communicates with the investigating authorities. The court cannot run in circles looking for evidence to show that the accused is not a good candidate for admission to bail. That is not the role of the court.

The prosecution concedes that applicant has discharged the *onus* of showing that it is in the interests of justice that he be released on bail pending trial. I take the view that, on the facts of this case, the concession has been properly taken and I accept it. In conclusion, I find that it is in the interests of justice to release applicant on bail pending trial.

### **Disposition**

In conclusion, applicant has discharged the onus of showing that it is in the interests of justice that he be released on bail. In the result, applicant is admitted to bail on the following conditions:

1. That he pays the sum of ZW\$1000.00 to the Registrar of the High Court of Zimbabwe, Bulawayo.
2. That he surrenders his passport to the Registrar of the High Court of Zimbabwe, Bulawayo.

3. That he is ordered to report twice a week, on Mondays and Fridays at Bulawayo Central Police (C.I.D. Homicide), until this matter is finalised.
4. That he does not interfere with state witnesses.
5. That he resides at house number 3302 Nkulumane, Bulawayo, until the finalisation of this matter.

*Mutuso, Taruvinga & Mhiribidi*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners