

EDMORE SHOSHERA

And

ALBERT MAKETO TEMBO

And

PERCY MUKWATURI

And

TALENT IMBAYAGO

And

PANASHE MAKUVAZA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 24 & 31 MARCH 2022

Bail Application

C. Chigomere for the applicants
K. Ndlovu for the state

MAKONESE J: It is not sufficient for the state to make bold assertions that particular grounds for refusing bail exist. The assertions made by the state must be well grounded on the facts. Simply alleging that the accused may abscond, that the matter is serious, and that the accused may endanger the public or will interfere with witnesses without substantiating such allegations does not meet the threshold of compelling reasons for the denial of bail. The facts alleged in the Request for Remand Form 242 or the charge sheet must disclose a link between the accused and the alleged offence. Where several persons are detained on an initial arrest on suspicion of committing an offence, the state must provide the court with adequate information that indicates how the accused persons who are

ultimately separated from the rest and are charged are alleged to have committed the particular crime alleged and the role they played.

This is an application for bail pending trial. The application is opposed by the state.

Background facts

On 27th February 2022 and at Mbizo 4 Shopping Centre, Kwe Kwe, the Citizens Coalition for Change Party (hereinafter referred to as CCC) was holding a political rally to drum up support for their candidates in a by-election that was slated for the 26th of March 2022. Several people were in attendance. Violence broke out as suspected rubble rousers armed with stones, spears, knives, machetes, sjamboks, petrol cocktails, catapults and an assortment of weapons went on a rampage assaulting people in the assembled crowd. In the melee several persons were assaulted and sustained serious injuries. The state alleges that the applicants together with other persons still at large acted in concert and engaged in the violent attack of members of the CCC who had gathered for the rally. The state alleges that applicants acting in concert with others, damaged motor vehicles, accosted and attacked the deceased, Mbongeni Ncube with a sharp object. The victim of the stabbing died on the spot. Following investigations, the applicants were subsequently arrested at Jessy Lodge, Mbizo, Kwe Kwe. It is common cause that initially a total of 16 suspects were picked up for questioning by police detectives. Only the five applicants were eventually detained and taken to court on allegations of public violence and murder charges. The applicants deny the allegations and aver that they were wrongly implicated. Applicants seek their release on bail pending trial.

Submissions by the applicants

Applicants submit that they are entitled to their release on bail. *Mr Chigomere*, appearing for the applicants argued that the applicants are presumed innocent until proven guilty. Further it was argued that the applicants are entitled to bail pending their trial unless there are compelling reasons justifying their continued detention as provided for under section 50 (1) of the Constitution of Zimbabwe (Amend) (20), 2013. As authority for this proposition the case of *S v Kachigamba & Anor* HH-358/15 was cited wherein the learned judge had this to say;

“The section is couched in peremptory terms and is clear departure for the common law position that he who claims must prove his claim. In the ordinary run of things where someone is applying for bail he would be required to prove his claim and entitlement to bail. That position has since been reversed. Thus where a litigant applies for bail the presumption is that he is entitled to bail unless the state had proven otherwise. The section being a constitutional safeguard designed to protect the citizen’s fundamental right to justice, freedom and liberty overrides all other common law and subordinate statutory provisions to the contrary.

The effect of this section is to relieve an arrested person of the burden of proving he is entitled to bail thus shifting the burden to the state to prove that there are compelling reasons justifying the continued confinement of the detainee.”

The applicants contend that they are suitable candidates for bail as there is no risk for abscondment. Applicants aver that the gravity of the offence on its own is not a sufficient ground for denying an accused person bail pending trial. In that regard the fact that applicants are facing public violence and murder allegation does not constitute sufficient grounds for denying the applicants bail. This principle has been established in several decided cases. See: *S v Hussey* 1991 (2) ZLR 187 (S) and *Aitken & Anor v Attorney General* 1992 (1) ZLR 255.

In *State v Kuruneri* HH-111-04, the learned judge held that:

“It is because of the presumption of innocence that the courts are expected, and indeed required, to lean in favour of the liberty of the accused.”

In their defence, applicants insist that they were wrongly implicated and arrested as they were never at the scene of the offence on the alleged date. 3rd applicant states that he was arrested at Kwe Kwe General Hospital after he was attacked at Mbizo 4 Shopping Centre in Kwe Kwe. He avers that his presence at the shops had nothing to do with the rally. He was not involved in any public violence and was only arrested because he was injured when he was attacked by unknown persons leading to his admission in hospital. The 1st, 2nd, 4th and 5th applicants were arrested at a lodge in Mbizo, Kwe Kwe. Applicants aver that they were at the lodge consuming alcohol together with other patrons. The 4th and 5th applicants aver that they had been booked at the lodge for two days before the alleged offence. Applicants are at a loss as to why they were linked to the violence that occurred at the shopping centre.

As regards the allegation that the applicants, in particular 1st applicant and 2nd applicant have pending cases at Kwe Kwe and Gokwe Magistrates' Court, respectively, applicants aver that there are no pending cases. In both cases the applicants were removed from remand and the state has not pursued any further charges. The cases referred to date back to 2018 and 2019 and the state has not exhibited a willingness to prosecute these matters.

It seems to me, that where the state makes reference to pending cases an accused is facing, as a ground for opposing bail, sufficient details regarding those cases and the status of such cases must be furnished. It is unfair for an accused to be denied bail on the ground that he has previously been charged with offences that have not been prosecuted or where charges have been dropped altogether. There is no indication that any of these cases are still active.

Submissions by the state

In opposing bail *Mr K. Ndlovu* appearing for the state, submitted that the applicants are being charged with an offence specified in Part 1 of the 3rd Schedule to the Criminal Procedure and Evidence Act (Chapter 9:07). It was submitted on behalf of the state that the onus is squarely on the applicants to show that there are exceptional circumstances in their cases warranting, and objectively, justifying their release. The state contends that applicants have failed to discharge the onus to show the existence of such exceptional factors that warrant their release on bail. The state contends that applicants are not suitable candidates for bail. Further, the state alleges that applicants were identified by witnesses at the scene of the crime. *Mr K. Ndlovu*, did concede that no identification parade was held by the police where the applicants were identified as the suspects. The state cited in its opposition to bail, the case of *S v Petersen* 2008 (2) SACR 355 where the meaning of exceptional circumstances for the purposes of bail under section 60 of the South African Criminal Procedure Act 51 of 1977 which is the equivalent to section 115 (c) (2) (a) (ii) as read with section 117 (6) A of the Criminal Procedure and Evidence Act. The court in that decision indicated that the phrase connotes extraordinary, unusual or peculiar features in extent and scope, which invite and persuade the court to exercise its discretion in their favour and the interests of justice.

The Law

The law on bail in this jurisdiction is well established. The overriding principle in all bail applications is that the court must lean in favour of the applicant where the interests of justice are not compromised. The presumption of innocence is buttressed by the provisions in section 50 of the Constitution. It is trite that where there are no compelling reasons, an accused should be granted bail pending his trial. An accused facing allegations of a criminal nature must proffer a defence which is recognizable at law. The seriousness of an offence, though an important consideration in bail applications, must be taken into consideration

together with other relevant factors. In this matter, the applicants have indicated that there were arrested at a lodge where they were drinking beer. Applicants have not proffered bare denials to the allegations. They indicate that they harbor no intentions of absconding from justice. They are prepared to stand trial. In *Mpofu v & Ors* HH-88-13, in dealing with the issue of abscondment the court made the following remarks;

“Though our borders have been held to be porous our police has a proven track record of tracking and apprehending fugitives from justice as amply demonstrated in the legendary cases of Masendeke & Chidumo.”

In any event the courts have consistently indicated that stringent conditions can be imposed to allay the state’s fears of abscondment. See *MacMillan v The State* HH-11-07.

Disposition

Where the state makes assertions that particular grounds for refusing bail exist, there must be substantiated and established on the facts. It is undesirable and indeed inappropriate to allege that accused persons may abscond where grounds for such fears have not been established. The state is required to show by sufficient evidence that the interests of justice would be compromised if the applicants were admitted to bail. Even where accused persons face specified offences, as in this case, the interests of justice still require that it be shown that there are compelling reasons for the court to deny an accused person bail. The granting of bail is at the discretion of the court. The court must weigh all the factors placed before it by the applicants and the state and apply the general principles applicable in bail applications which are to lean in favour of the liberty of the applicant unless there are compelling reasons.

In the result, and in the exercise of the court’s discretion, the following order is made:

1. The application for bail be and is hereby granted in terms of the draft order.

Mutatu & Partners, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners