

SIKHANYISO NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 4 AND 7 APRIL 2022

Bail Application – Appeal Against Refusal of bail

T. Tashaya, for the applicant

Ms N. Ngwenya, for the respondent

MAKONESE J: The applicant is a self-employed taxi driver. On 12th March 2022 he was arraigned before a Magistrate at Bulawayo facing one count of theft as defined in section 113 (1) (a) (b) of the Criminal Law (Codification & Reform) Act (Chapter 9:23). The applicant denies the allegations. On his initial appearance in the Magistrates Court applicant was denied bail pending trial on the ground that he had a previous conviction. This is an application against the refusal of bail. The application was opposed by the state.

Background Facts

On 23rd January 2022 and at around 1400 hours the complainant parked his motor vehicle, a Silver Mazda Atteza along Robert Mugabe Street between 10th and 11th Avenues. The state alleges that the applicant in the company of two accomplices still at large, one

Shingai and Mthokozisi broke into complainant's motor vehicle and stole one HP Laptop, two Apple Mac Book Laptops, one Samsung S2 Tablet and a handbag containing identity documents belonging to the complainant. The applicant drove away with the stolen loot in a BMW 1 series motor vehicle. A passerby captured the registration number of the applicant's vehicle. Police investigations led to the arrest of the applicant. Applicant denies any involvement in the theft and indicates that on the day of the commission of the offence the BMW motor vehicle was being used by someone else.

SUBMISSIONS BY THE APPLICANT

The applicant filed a detailed bail statement arguing that the reason for the denial of bail by the Magistrate was erroneous. Applicant contends that the ruling of the court *a quo* was flawed and constituted a misdirection on the law. In particular applicant contends that the court *a quo* erred in denying the applicant bail solely on the ground that he has a previous conviction without any evidence at all from the state that applicant has a propensity to commit other offences whilst on bail. It was established that applicant was convicted on 11th April 2019 on a charge of theft. He was sentenced to perform Community Service. Applicant religiously performed Community Service and never defaulted. In 2021 applicant was charged with theft. On one of the remands, a warrant of arrest was issued. Applicant approached the court on his own, a default enquiry was conducted and the warrant of arrest was duly cancelled. His bail was reinstated. Applicant has been placed off remand and therefore there is no pending case against him.

Applicant avers that the mere fact that he was once convicted of a criminal offence in 2019, about four years ago does not lead to the conclusion that he has a propensity of committing other offences. Applicant avers that he has a plausible defence to the charge

which he raised at the bail hearing in the court *a quo*. Applicant points out that the finding by the court *a quo* that his past conduct shows that he is always before the court on matters involving dishonesty and therefore not entitled to bail was a misdirection. This finding by the court *a quo* it is argued, cuts across the principle of the presumption of innocence, which operates in favour of the applicant.

Applicant contends that he does not harbour any intention to flee or not stand trial as he was not present when the offence was committed. On the day in question, applicant was not using a BMW motor vehicle and was going on about his business with his taxi. Applicant submits that he is of fixed abode and stays with his wife and child. Applicant believes in his innocence and will stand trial. *Mr Tashaya*, appearing for the applicant contended that the state did not provide compelling reasons why applicant should not be admitted to bail pending his trial.

SUBMISSIONS BY THE RESPONDENT

The state filed a brief response to the application against the refusal of bail. The state submits that the court *a quo* did not err in making a finding that the applicant was not a suitable candidate for bail. The state argued that the court *a quo* did not deny bail solely on the ground that applicant had a previous conviction without further evidence from the state proving that applicant had a propensity to commit offences whilst on bail. It is the state's submission that the court *a quo* took into account that applicant had a previous conviction in 2019 and had a warrant of arrest issued against him in 2021 involving theft from a motor vehicle. The state contends that the fact that the offence applicant was facing in 2021 is similar to the allegations in the present case indicates that he has a propensity to commit offences of similar nature. In oral submissions, *Ms Ngwenya* appearing for the state did

concede that the warrant of arrest issued in 2021 had been cancelled. The state concedes that there are currently no pending cases against the applicant. This factor is of critical significance in the determination of this application.

DETERMINATION BY THE COURT A QUO

The court *a quo* reasoned as follows:

“It is common cause that the accused has a previous conviction for the year 2019. If this court takes it that the warrant of arrest was cancelled for the 2021 case, it follows that the matter is pending. In 2022 he is back in court on fresh allegations surely the accused has become a regular visitor in this court on similar allegations and this court cannot ignore that there is a likelihood that if the accused is admitted to bail pending trial, in 2023 he will visit the court again, if not before the year end.”

It is clear that the learned Magistrate in the court *a quo* came to a wrong conclusion that the 2021 case was still pending after the cancellation of the warrant. The applicant points out that he was placed off remand and that at present there are no pending cases against him. The applicant’s previous conviction is for 2019. Applicant served Community Service as directed by the court. The court *a quo* came to a wrong conclusion that if granted bail pending trial, he might commit a similar offence because of the previous conviction. In fact the learned Magistrate in the court *a quo* came to a conclusion not supported by the evidence in finding that if admitted to bail the applicant would be back in court on similar charges in 2023, if not before the year end. The finding by the court is not only presumptuous but clearly speculative. The finding is not grounded on any evidence presented by the state.

Despite the fact that the applicant presented a plausible defence to the allegations as required by the law, the court *a quo* casually dismissed that issue by stating that:

“... The accused attempted to raise a plausible defence but this could not ward off the fact that every time the accused is before the court it is on an element of dishonesty.(sic)”

This finding by the court is hard to follow. Once an accused appears in court on a criminal charge the onus rests on the state to prove its case beyond reasonable doubt. The accused bears no onus to prove his innocence. It is trite that in bail applications the accused is required to proffer a plausible defence and nothing more. The applicant in this matter informed the court that on the day of the alleged offence the BMW motor vehicle allegedly used by the suspects was being used by someone else. He denied any involvement in the theft. In any event these are purely matters for the trial. The conclusions reached by the court *a quo* cut across the presumption of innocence which operates in favour of the applicant in an application for bail pending trial.

DETERMINATION BY THIS COURT ON THE LAW

The mere fact that an accused has been previously convicted of an offence does not mean that he is deemed to have a propensity of committing other offences. In this regard, the 2019 conviction, can hardly lead to the conclusion that if granted bail applicant would commit other offences. Such a position of the law would be absurd and untenable, as every person with a previous conviction would be presumed guilty and not entitled to his liberty pending trial if he appears in court on fresh charges. Section 117 (3) (a) (iv) and (v) of the Criminal Procedure & Evidence Act (Chapter 9:07) provides as follows:

“3. In considering whether the ground referred to in –

(a) subsection (2) (a) (i) has been established, the court shall, where applicable, take into account the following factors; namely –

.....

(iv) any disposition of the accused to commit offences referred to in the First Schedule as evidence from his or her first conduct;

(v) any evidence that the accused previously committed an offence referred to in the First Schedule while released on bail.”

In the matter, before me, no evidence was presented by the state, in the court *a quo*, indicating that applicant committed any offence whilst on bail specifically, and the law requires that it be a Third Schedule offence. The previous conviction relates to a conviction in 2019. Applicant did not commit any Third Schedule offence whilst on bail. Section 117 (3) (d) (iii) of the Criminal Procedure & Evidence Act deals with a situation where the applicant had previously failed to comply with bail conditions. No evidence was placed before the court *a quo* to show that applicant once failed to comply with bail conditions. In that regard, the court *a quo* erred in concluding that applicant had a propensity to commit other offences. Applicant was not shown to have committed any offences whilst on bail as inferred by the court *a quo*.

The court *a quo* placed reliance on the case of *Attorney General v Phiri* 1987 (2) ZLR 33 (S). In that case the court expressed the view that in the absence of exceptional circumstances, it would be irresponsible and mischievous for a judicial officer to allow bail to a person who has given every indication that he is an incorrigible and unrepentant criminal. It is clear that the applicant in this matter has not been shown to be an unrepentant criminal. The applicant in this matter was not shown to have committed any offences whilst on bail.

The learned Magistrate in the court *a quo* was indeed aware that requirement for an accused to show the existence of exceptional circumstances, to be granted bail pending trial would be at variance with the provisions of section 50 (1) (d) of the Constitution (Amend No. 20), 2013 which provides in peremptory terms that:-

“1. Every person who is arrested –

.....

.....

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

This court has established in a long line of cases, that an accused is entitled to bail pending trial unless the state establishes that there are compelling reasons for his continued detention. See: *S v Munsaka* HB 53-10.

The primary considerations in applications for bail pending trial have been well settled in our law. The fundamental principle governing the court’s approach in bail applications is that of upholding the interests of justice. This requires the court as expeditiously as possible, to fulfil its function of safeguarding the liberty of the individual, at the same time protecting the administration of justice. In *S v Makamba* SC 30-04 the court set out these primary considerations applicable in bail applications as follows:

1. whether the applicant will stand trial.
2. whether the applicant will interfere with investigations or tamper with the prosecution witness.

3. whether the applicant will commit offences whilst on bail.
4. other considerations the court may deem good and sufficient.

See also: *S v Chiadzwa* 1988 (2) ZLR 19 (SC).

CONCLUSION

In an application for refusal of bail, the court must examine all the facts placed before the court *a quo* and the conclusions of law and fact arrived at by the court *a quo*. In this matter the learned Magistrate refused bail on the ground that applicant had a previous conviction and that because of his propensity to commit offences, he was not suitable candidate for bail. No evidence was placed before the court to indicate that the applicant had committed any criminal offence whilst on bail. The mere fact that applicant had a previous conviction does not lead to a conclusion that he has the propensity to commit other offences. The court *a quo* erred and misdirected itself when it referred to the applicant as a frequent visitor to the courts. The court made a speculative finding that if granted bail applicant would be back in court in 2023 on similar allegations. The decision of the court *a quo* must therefore, be vacated.

I am satisfied that the applicant is a suitable candidate for bail.

Accordingly, the following order is made:

Applicant be and is hereby admitted to bail on the following conditions:-

1. Applicant is hereby admitted to bail in the sum of RTGS \$20 000 to be deposited with the Registrar of the High Court, Bulawayo.

2. Applicant be and is hereby ordered not to interfere with witnesses and or investigations.
3. Applicant is ordered to reside at Stand Number 33404 Entumbane, Bulawayo.
4. Applicant is ordered to report at Entumbane Police Station once per week on Fridays between the hours of 06:00 am and 06:00 pm.

Sengweni Legal Practice, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners