

CALVIN PHIRI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 28 JULY 2022 & 4 AUGUST 2022

Application for bail pending trial

B. Mandire with J.B. Maphosa for the applicant
Ms. Mabhena with Ms. N. Katurura for the respondent

DUBE-BANDA J:

Introduction

1. This is an application for bail pending trial. The applicant is charged with the crime of kidnapping as defined in section 93(1) (a) of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 13th July 2022 the applicant with his accomplices who are still at large hatched a plan and connived to kidnap five Indian nationals (victims) who were on their way from Bulawayo to Beitbridge. He took the kidnapped victims to his house and started a tele-communication with their relative who was in South Africa demanding payment for their release. He subsequently crossed with them to Messina in South Africa. It is alleged further that he claims to have handed them over to their relative in Messina.
2. In the alternative the applicant is charged with the crime of assisting any person to enter, remain in, or depart from Zimbabwe without valid travel documents in contravention of section 36 of the Immigration Act [Chapter 4:02].

The facts

3. In support of his bail application the applicant filed a bail statement and an affidavit of evidence. He contends that he resides at Stand number 7977 Dulibadzimu, Beitbridge. He is 32 years old, married with adult children. He is self-employed and operates two tuck shops in Beitbridge. He has no previous convictions.

4. The applicant put his version before court *via* a detailed affidavit. He dealt with the merits of this case. The net effect of the applicant's defence is that on the 13th July 2022 he assisted the five Indian nationals who had been victims of robbery and kidnapping to cross the border from Zimbabwe to South Africa. They all had valid travel documents. He showed them the Immigration offices at the Beitbridge border post. He gave them transport to Messina, South Africa. In Messina he called one Mohammed the agent of the victims to pay him for the expenses he incurred in assisting them but he refused to pay. He was not demanding a ransom. He was paid by the husband of one of the Indian nationals.
5. In addition the applicant filed affidavits deposed by two of the victims. The affidavits were sworn-in in South Africa. The deponents aver that the applicant is innocent and in fact helped them from the kidnappers and plead that he is an innocent person and that no action must be taken against him.
6. The applicant further contends that if released on bail he will not abscond. He will in turn attend trial to clear his name. In fact he avers that the police contacted him through his mobile phone and invited him to the police station. He went to the police station and was advised of the allegations he was facing. He was released and warned to report at the police station the following day. The following day he reported at the police station as warned and was taken to court and placed on remand. He was remanded in custody. He disputes the contention that if released on bail he will interfere with police investigations or witnesses.
7. This application is opposed. It is contended that it is not in the interests of justice that applicant be released on bail. He is a flight risk. In support of the opposition the respondent filed two affidavits, the first deposed to by the investigating officer (I.O) and the second by one Innocent Chimbwa (Chimbwa).
8. According to Chimbwa the victims were in his company and one Trymore Ncube at the time they were kidnapped. The kidnapping took place at approximately 0400 hours a kilometre after Malala Toll Gate en-route to Beitbridge. He did not identify the kidnappers. At around 0500 hours he phoned one Mohammed and told him about the kidnapping of his relatives. After about thirty minutes Mohammed phoned back and

gave him mobile phone number 0778881650 and indicated that the number was used by the kidnappers. Mohammed said the kidnappers were demanding money for the release of the five victims. Chimbwa called the number and was answered by the applicant who said he was given the victims by some people. He met the applicant who said he wanted payment of USD2000. 00 per person as reimbursement for the amount he paid to get the victims from the 'boys'. Mohammed later advised Chimbwa to make a police report.

9. In his affidavit the I.O. avers that the preliminary investigations revealed that the applicant is the registered owner of the mobile number 0778881650. This is the number that was used to call the relatives of the victims demanding payment for their release. The applicant was arrested and interviewed. He denied committing the offence and indicated that he was given the victims by one Senzangakona Hoko a.k.a. Freeman for the purposes of assisting them to go to South Africa. Freeman was picked up and denied being complicit in this crime. The investigations have established that the victims had safely travelled to South Africa and reunited with their families. Interpol has been engaged to check whether the victims can be found in South Africa and also to obtain statements from them. The I.O. opposes the release of the applicant on bail on the grounds that the investigations are underway, the applicant is a flight risk and that he may interfere with the witnesses as he is in constant communication with the relatives of the victims.

The submissions

10. The applicant submits that it is in the interests of justice for him to be released on bail pending trial. The applicant contends that the State case is very weak. He contends further that if released on bail he will not abscond. He is of fixed abode. He has neither family ties outside Beitbridge nor business interest outside Zimbabwe. He co-operated with the police. He would want to attend trial and clear his name. He submits that if released on bail he will not interfere with investigations nor the witnesses. It is contended that the witnesses are non-existent, even if they are existent conditions may be imposed to allay fears of interference. It is submitted that none of the alleged victims made a police report. It is contended further that there is no risk that if the applicant is released on bail will commit further offences.

11. The net effect of the respondent's submission is that the State has a strong *prima facie* case and upon conviction the applicant may in terms of section 93(1) be sentenced to life imprisonment if it is found that the offence was committed in aggravating circumstances and this will induce him abscond.

The legal principles

12. The applicant is charged with an offence referred to in Part 1 of the Third Schedule and the court has to order that he be detained in custody until he is dealt with in accordance with the law, unless the applicant, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release. This is what section 117 (6) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07] envisages. It then follows that the bar for granting bail in the crime of kidnapping is lifted a bit higher by the legislature. The *onus* is thus on the applicant to establish on a balance of probabilities the existence of exceptional circumstances, which, in the interests of justice call for his release on bail. This is what the applicant has to contend with in this application.
13. A general overview of the jurisprudence in this jurisdiction and in the region shows that the courts have refrained from formulating a definition of exceptional circumstances which is a concept that is rather elastic and simply incapable of definition. However, decided case law shows that an applicant for bail is required to show some circumstances which are unusual or different to warrant his release. In *S v Petersen* 2008 (2) SACR 355 (C) para 55 the Court held that exceptional is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. In determining whether exceptional circumstances have been established the court will consider any other relevant factors emanating from the facts of the case.

14. The general principles on bail were set out in *S v Smith and Another* 1969(4) SA 175 at 177E-178A as follows:

The general principles governing the grant of bail are that, in exercising the statutory decision conferred upon it, the Court must be governed by the foundational principles which is to uphold the interests of justice; the Court will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby.

15. These principles have been formulated and expressed in varying fashion, but basically the court's task is to balance the reasonable requirements of the State in its interest in the prosecution of alleged offenders with the requirements of our law as to the liberty of the subject.
16. It is on the basis of these legal principles that this bail application must be viewed and considered.

The application of the law to the facts

17. In terms of section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07] the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where there is a likelihood that the accused will abscond. In considering whether there is a likelihood that the accused will abscond the court may consider amongst others the nature and gravity of the offence or the nature and gravity of the likely penalty and the strength of the case for the prosecution and the corresponding incentive of the accused to flee.
18. In *casu* I accept that the applicant contacted Mohammed and demanded payment for the release of the victims. This is so because the mobile number 0778881650 was used to call Mohammed demanding payment for the release of the victims. The mobile number belongs to the applicant. Mohammed gave the number to Chimbwa who called the number and eventually spoke and met with the applicant who said he wanted payment of USD2000. 00 per person as reimbursement for the amount he paid to get the victims from the 'boys'. The

applicant in his version says when he arrived in Messina he called Mohammed and asked for the expenses he had incurred in assisting the victims. Mohammed refused to pay. He does not say what those expenses were which he had incurred. He does not say the amount of money he asked from Mohammed. He does not say what his interest was in this matter. According to Chimbwa he was asking for USD2000.00 per victim. Cut to the bone the applicant demanded payment from the Mohammed. The victims were forcibly taken from Chimbwa, and my view is that the applicant did not hand them over to Chimbwa because he wanted payment.

19. On the facts of this case the State has a strong *prima facie* case against the applicant. The respondent contends that if admitted to bail the applicant will abscond. Per *contra* the applicant contends that he literally handed himself over to the police, therefore he will not abscond. In our law the presumption of innocence operates in favour of the applicant even where it is said that there is a strong *prima facie* case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing to allow him bail. On the facts of this case I am persuaded by the contention that if released on bail the applicant will abscond. The respondent contends that while before arrest it would not have occurred to the applicant how serious the allegations are, his perception would be different after arrest. I agree. The main charge he is facing is very serious and which upon conviction he is very likely to be sentenced to a lengthy term of imprisonment. The temptation for the applicant to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002. Applicant has experienced prison life, *albeit* as a trial awaiting prisoner and now has awoken to the reality of the charge he is facing and its seriousness.

20. In terms of the law the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where there is a likelihood that the accused if released on bail will attempt to influence or intimidate witnesses or to conceal or destroy evidence. In considering whether this ground has been established the court may consider amongst others the following factors; whether the accused is familiar with any witness or the evidence; whether any witness has made a statement; whether the investigation is completed; and any other factor which in the opinion of the court should be taken into account. Before it can be said that there is any likelihood of justice being frustrated through an attempt to influence or intimidate witnesses or

to conceal or destroy evidence, there should be some evidence or some indication which touches the applicant personally in regard to such a likelihood.

21. In this case according to his own version the applicant reported at the police station on the 18th July 2022 and was warned to report at the same station the following day i.e. 19 July 2022. He was placed on remand on the 19 July 2022 and was remanded in custody. The victims signed the affidavits on 18 July 2022 at 19:37. The affidavits are identical word for word. They were both signed at 19:07. One can even be forgiven to suggest that they were authored by the same person. On these facts it cannot be gainsaid that the applicant contacted the victims after leaving the police station on the 18th July 2022. I say so because in his affidavit he says he has the mobile number of the husband of one of the victims and his legal practitioners said the affidavits were brought to their office by the husband of one of the victims.
22. Furthermore it is on the 18th July 2022 that he became aware that he was being charged with the crime of kidnapping. The victims say in their affidavits that “Mr Phiri did not kidnap us. He help (*sic*) us reunite with our family. Piz (*sic*) do not give him any problem. He is a good person. Calvin Phiri help (*sic*) us. He is innocent person.” It is clear that he contacted the victims and told them that he was being charged with the crime of kidnapping. I say so because there is no way the victims would have known on the 18th July 2022 at 19:37 that the applicant was being charged with the crime of kidnapping if he had not contacted them and advised them so.
23. He contacted the victims who are in South Africa. The police have not recorded statements from the victims nor from Mohammed. In Form 242 it is said the applicant is in constant communication with Mohammed and the victims. I agree. I take the view that if applicant is released on bail he will very likely contact the victims and thus interfere with witnesses and police investigations. The investigation have not been completed and the applicant turns up with affidavits from the witnesses. This speak a serious intent to interfere with witnesses and police investigations. I cannot think of any bail condition or conditions that can allay the fear of the likelihood of interference. On these facts releasing the applicant on bail would be tantamount to giving him permission to interfere with witnesses and stall police investigations.

The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

24. I do not find the evidence presented by the applicant, including his personal circumstances in this matter, to be weighty so as to minimize the danger that his release would prejudice the interests of justice. I am unable to conclude that the applicant adduced evidence which showed that the State's case against him was non-existent or weak as submitted by counsel. I am not persuaded that the interests of justice permit the release of the applicant on bail. The applicant failed to establish that exceptional circumstances exist which in the interests of justice permit his release.

25. The applicant is facing very serious allegation of kidnapping five persons including a six year old girl. On the facts of this case the presumption of innocence, the personal circumstances of the applicant and the fact that he handed himself over to the police recede to the remote background. Taking all the evidence into consideration and weighing that State's evidence against the applicants' defence together with the submissions made by counsel, I hold the view that the administration of justice will be prejudiced if the applicant is released on bail pending trial.

26. On a conspectus of the facts and all the evidence placed before court, I am of the view that it is not in the interests of justice that applicants be released on bail pending trial.

In the result, I order as follows:

The application for bail be and is hereby dismissed and applicant shall remain in custody.