CRB 244/02

THE STATE
versus
MORGAN TSVANGIRAI
and
WELSHMAN NCUBE
and
RENSON GASELA

HIGH COURT OF ZIMBABWE
GARWE JP
HARARE: 2, 3 and 9 June 2003

APPLICATION FOR THE VARIATION OF BAIL CONDITIONS

Mr *B Patel*, for the State
Advocate *G Bizos S.C.,* for the Defence

GARWE JP: The three accuseds in this matter have been undergoing trial on a charge of treason before this court. Following their arrest in the year 2002, bail was granted by consent in the sum of $3million in respect of the first accused and $1million in respect of the second and third accuseds. By consent it was further ordered that they were to report to the Police and to surrender their travel documents. Although the reporting conditions were altered after their indictment for trial in this Court, the accuseds have remained on the same conditions since then.

The current application is for the variation of their bail conditions in terms of section 126 of the Criminal Code. There is no suggestion that the accuseds have breached any of the conditions previously set. What the State seeks is the inclusion of two additional conditions. These are:

(a) that each accused shall refrain from inciting the public to engage in unlawful activities and illegal demonstrations, and

(b) that each accused shall refrain from making inflammatory statements likely to lead to public disorder.

In seeking these additional conditions the State relies on an

affidavit by the Minister of Home Affairs, Kembo Mohadi. In the affidavit the Minister says the accused have since January 2003 been advocating and urging the public to engage in mass action and unlawful demonstrations to oust, through unconstitutional means, the President and government from power. In particular the Minister says they have encouraged the masses to revolt through illegal demonstrations, by organizing, arranging press conferences and flighting advertisements vilifying and demonizing the Head of State and Government and by promoting acts of hostility towards the government. By way of example the Minister has drawn attention to the mass action organized in March this year which resulted in numerous acts of violence, banditry and damage to property. The alteration of the bail conditions in the present application is intended to ensure that the accused are barred from inciting the public to engage in unlawful activities and illegal demonstrations and making inflammatory statements likely to lead to public disorder until such time as their trial is completed.

In their opposing affidavits, the three accuseds deny that they have encouraged the masses to revolt against the government. They admit calling for peaceful demonstrations as part of the democratic process to force the President to discuss with the MDC the crisis facing the country. They deny that any damage that may have ensued following stay-aways organized by the Movement for Democratic Change (the "MDC") was occasioned by members of their party. They all claim that the present application has been brought about to stifle their political activities.

As already noted the present application is based not on a breach of the bail conditions currently in place but rather on activities by the accuseds which occurred after the grant of bail and which the State says are unlawful and border on treason. The State advised that although the accused could have been charged in respect of these activities, the decision was taken not to do so as the impression would have been created that they were being victimized or that their rights were being violated. To this date no charges have been formally preferred in respect of these allegations against any of the accuseds. However, it is on the basis of these same activities that the State is applying to have

additional conditions included on their current bail.

In order to do justice to this application, one must have regard to the relevant provisions in the Criminal Procedure and Evidence Act. The relevant sections are 116, 118 and 126. Section 116(1) provides that a person may be admitted to bail or have his conditions of bail altered in respect of any offence at any time after he has appeared in court on a charge and before sentence is imposed. Subsection 7 provides that in cases where the judge or magistrate has power to admit the accused person to bail, he may refuse to admit such person to bail if he considers it likely that if such person were admitted to bail he would:

(a) not stand trial i.e. abscond
(b) interfere with the evidence against him or
(c) commit an offence.

The subsection makes it clear that a judge or magistrate may refuse to admit an accused person to bail for any other reason which to him seems good and sufficient. Subsection 3 of section 118 provides a list of the conditions that may be added to the recognizance in those cases where the application for bail is granted. These include the surrender of travel documents, reporting to the police, prohibition against communication with any witness, places where the accused is forbidden to go and, most importantly, any other matter relating to the accused's conduct. Section 126 allows a judge or magistrate, if he is of the opinion that it is necessary or advisable in the interests of justice that the conditions of a recognizance should be altered or added to, to so alter or add.

The issue that arises is: what is the purpose of bail and specifically is there any correlation between the offence of which the accused is charged and conditions added to the recognizance? The grant of bail has been defined in the *South African Criminal Law and Procedure*, Volume V by Landsdown and Campbell as:-

> "the entering into of a contract for the setting at liberty of an accused person who is in custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, for his appearance at the place and on the date and at the time appointed for his trial or to which the proceedings relating to

> the offence in respect of which the accused is released on bail are adjourned." (at page 311).

It is clear that for bail to be granted with or without conditions, criminal proceedings must actually have been incepted. For this reason a court has no power to grant bail to a person who anticipates arrest - see *Trope v Attorney-General* 1925 TPD 175. It is also clear from the provisions of section 116(1)(a) of the Criminal Code that bail is granted in respect of an offence after the accused has appeared in court.

It is clear from what I have said above that the grant of bail is a consequence of the arrest and remand of an accused person on a specific charge. The nature of the offence charged and other relevant considerations are factors to be taken into account in determining the grant or refusal of bail and where such bail is granted the conditions to be attached to the recognizance. The point to be made is that any conditions attached to a recognizance must have some bearing to the offence of which the accused is charged.

The position is clear that in granting bail the court may add to the recognizance any of the conditions provided for in subsection 3 of section 118 as well as any other matter or condition relating to the accused's conduct that the court considers necessary. Those conditions must, however, have a bearing on the offence of which the accused is charged and in particular the need:

(1) to secure his attendance
(2) to ensure that he does not interfere with the evidence and
(3) to ensure that he does not commit further offences whilst awaiting trial.

My considered view is that section 126 of the Criminal Code must be interpreted in this light. That section specifically provides that:

> "Any judge or magistrate *who has granted bail to a person in terms of this part* may, if he is of the opinion that it is necessary or advisable in the interests of justice, that the conditions of a recognizance entered into by that person should be altered or added to or that that person should be committed to prison, order that the said conditions be altered or added to...." (the emphasis is mine).

Bail granted in terms of part IX must, as already noted, relate to a

specific charge. If bail is granted the conditions added to the recognizance cannot refer to some other allegation that the accused person may possibly face in future and in respect of which he has not been charged. There may be good reasons why the conditions of a recognizance may need to be altered or added to. For example, there may be need to increase the number of times that the accused reports to the police. There may be need to add conditions that he should not go to certain places or speak to certain persons. There are many other examples that one could think of. Whatever conditions are added to or altered, these must relate to the offence in respect of which the accused is charged before the court.

The present case is however different. There is no suggestion that the accuseds have breached any of their conditions as would justify the alteration of their current bail conditions. The application is predicated on activities that have taken place during the course of this year but in respect of which no charges have been preferred by the State. The State during submissions told the court that the activities complained of are unlawful. As a corollary the accused could therefore have been charged with various offences arising out of these activities. However, this has not been done. What the State seeks however is the addition of conditions to their recognizance to control these activities.

The activities forming the basis of the present application may well form the basis of separate charges. If that is the case the State should prefer appropriate charges in respect of these activities. When the accuseds are brought to court the question of bail and in particular the conditions to be added to any recognizance can then be considered. At that stage issues such as whether there is evidence to justify placing the accuseds on remand and if so whether bail should be granted would also be considered.
The court would have to determine what conditions, if any, should be added to the recognizance. The court can only do so at that stage, but not before. One may give an example. An accused person facing a charge of theft is granted bail on the usual conditions. Thereafter suspicion arises that he is involved in money laundering which is an offence under the Serious Offences (Confiscation of Profits Act, [*Chapter 9:17*]). However no formal charge is preferred against the accused. Should the prosecution in these circumstances be entitled to approach the court and seek the alteration of bail conditions on the basis that the accused is suspected, but without being formally charged, of being involved in money laundering activities? My view is that the State is not and should not be entitled to do so. The State should, if there is *prima facie* evidence, charge the accused under the Act. Once that is done the question of bail and the conditions that should attach to such bail would arise. In considering bail in these circumstances the court

would necessarily take into account the fact that the accused is already on remand on a charge of theft. That would be a relevant consideration in determining whether bail should be granted on the new allegation and if so the conditions to be added to such bail. I will give a further example. An accused person is facing a charge of theft of motor vehicle. Halfway through the trial the prosecution approaches the court to have his bail cancelled on the basis that he is suspected of committing a further similar offence. However, at that stage no formal charges are preferred against the accused. Would the court cancel his bail on that basis? I think not, unless a proper factual basis is provided for such cancellation. Such a factual basis is normally provided when an accused person appears in court on initial remand.

It seems to me that the correct procedure in the two examples just given would be for the State to prefer charges after which the accused's entitlement to bail or otherwise would then be considered in the light of a number of factors. These would include the fact that he is currently facing a similar offence, that he may commit similar offences, that he may abscond, etc.

Different considerations would of course apply if, having been placed on remand on a further charge the court dealing with the original charge is asked to review the bail conditions previously granted in respect of that charge. That court would be entitled to take into account that the accused is now on remand on another criminal charge in determining whether or not he should remain on bail on the original charge.

The accuseds in this case have not been charged in part with the offences arising from the conduct complained of. I am satisfied that the procedure followed in the instant case is improper and irregular.

There is a further matter which calls for comment. It is clear from the submissions made by the State that the intention in seeking the alteration is to prevent the accuseds from conducting themselves unlawfully. I am not persuaded that the State can seek to do so through conditions added to bail. In effect what the condition would be saying is that the accused should not act unlawfully. This is superfluous and in my view unnecessary. Such a condition would be stating the obvious. As remarked by VAN JYL AJP in *S v Budlender and another* 1978 (1) S.A 264, it is not a condition which can be said to induce an accused to stand trial or to prevent the occurrence of or persistence in unlawful conduct. The judge in my view correctly summarized the position when

he said:

> "In fact all it says is that the appellant must not act unlawfully. The law says that and there is no need to say it again. And if he does act unlawfully, and is arrested on that account, he will lose his freedom. And if he has lost his freedom and wants to regain it, he will have to ask for bail again. And then, of course, that application will be judged in the light of the new offence and in the light of the offence on which he is still awaiting trial. These are circumstances that can be dealt with if and when they occur. Certainly not now" (at page 271).

I do not believe I can put it any more elegantly. The conduct that is envisaged in section 118(3) of the Criminal Code is conduct that would ensure that the attendance of an accused person is secured, that there is no interference with the prosecution evidence and that he does not commit similar offences whilst on bail. It is unprecedented for a court to add as a condition of bail that the accused should not commit theft, or commit a similar offence or any other offence for that matter. The consequences that befall a person in the event he commits other offences whilst on remand on other offences go without saying. The person will be charged and his entitlement or otherwise to bail would have to be considered in the light of the new charge.

My remarks should not be interpreted to mean that in considering bail a court should not concern itself with an accused person's future criminal conduct pending the conclusion of the trial. That is not the position. Indeed in granting bail one of the considerations is the future conduct of the accused. For this reason where it is clear that the accused may commit further offences bail may justifiably be refused. However a court cannot in these circumstances impose as one of the conditions that the accused shall not commit a criminal offence. A court seeks to control future criminal conduct through the imposition of appropriate conditions such as for example that the accused should report to the police or that he should not visit certain places.

I am satisfied that the State has followed the wrong procedure in the instant case. The State may well have a case for wanting some conditions to be imposed. In the light of the conclusion I have reached there is no need for me to make a finding in this regard. If the correct procedure had been followed the necessity for some conditions to be

attached to any recognizance would certainly have had to be considered. But that is not the position.

In view of the above conclusion, there is no need for me to consider the other submissions made during this application.

The application must therefore be dismissed.

Attorney-General's Office, legal practitioners for the State
Atherstone & Cook, legal practitioners for the Accused