SHEPHERED SAMANENJI MHIZHA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BEREJ
HARARE, 22 May and 23 May 2009

Bail Pending Trial

C. Tafireyi, for applicant
C. Mutangadura, for respondent

BERE J: On 9 May 2008 the applicant was arrested on two allegations of contravening s 4(2) of the Five Arms Act, contravening s 4(4) of the same Act[1], and three counts of contravening s 126 of the Criminal Law (Codification and Reform Act)[2], what is commonly referred as armed robbery.

Although the applicant was arrested on 9 May 2008, it was not until the 19th of the same month that he was brought to the Harare magistrates court for initial remand.

It is common cause that when the applicant was arrested in connection with the current offences he had been on bail pending appeal in respect of two offences of armed robbery.

Because of the nature of the offences allegedly committed by the applicant, he was forced to apply for bail pending trial to the High Court. That initial application was not successful. It was then followed by numerous subsequent applications which were also unsuccessful.

The instant application is being brought in terms of s 116(1) proviso (ii) of the Criminal Procedure And Evidence Act [*Cap 9:07*].

The proviso under which this application has been brought reads as follows:-

> (ii) where an application in terms of s 117A is determined by a judge or magistrate a further application in terms of s 117A

[1] Chapter 10:09
[2] Chapter 9:23

> may only be made, ……. if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after the determination"

In mounting this application applicant has alleged basically two changed circumstances since his last effort to regain his liberty in December of 2008. Applicant alleged that six weeks have elapsed from the last time he made similar unsuccessful application in this court and that cumulatively it is now almost a year after his remand in prison and that on its own constitutes change in circumstances since investigations have been completed. The completion of investigations means that there are no longer fears that the applicant will interfere with police investigations, so the argument went.

It was also the applicant's contention that the State case is no longer as strong as it had been anticipated. This view, according to the applicant's counsel stems from the fact that whereas initially the applicant was being charged with three counts of robbery and one of possession of fire arms and ammunition, the robbery allegations have since been dropped.

It was argued by the applicant's counsel that the dramatic dropping of all the charges of armed robbery and the coincidence of only police officers as witnesses in the two remaining charges of fire arms and possession of ammunition has further weakened the State case to the extent that the applicant must be granted bail pending trial as all these development tend to lend credence to the applicant's stance that these allegations were concocted by the investigating officers in their desperate attempt to cover up their brutal shooting and maiming of the applicant at the time of his arrest.

In opposing the application filed the State has raised two main grounds. Firstly it was contended on behalf of the State that the crime of possessing a firearm on its own was a serious charge premised (according to the prosecution) upon cogent and admissable facts.

Secondly, it was argued that by allegedly committing the current offence whilst on bail pending appeal on almost similar allegations, the applicant had demonstrated a propensity to commit similar offences and therefore was not a suitable candidate for bail pending trial.

THE APPLICANT'S ALLEGED PROPENSITY TO COMMIT SIMILAR OFFENCES

It is common cause that the applicant allegedly committed these offences whilst on bail pending appeal in respect of two convictions of armed robbery.

Bail pending appeal is granted after the court seized with the matter is satisfied that the applicant has prospects of success in the pending appeal and that the risk of abscondment is highly unlikely given the circumstances of the applicant. These considerations are cumulatively looked at but I am satisfied that the balance must tilt heavily in favour of there being prospects of success in the appeal itself. See the case of *State v Williams*[3].

This must weigh heavily in favour of the applicant in this case because his conviction must not be looked at in a vacuum as chances are that he might succeed in his appeal. If this happens then the aspect of previous convictions is weakened.

Secondly, the circumstances under which the instant cases were allegedly committed by the applicant are highly suspicious.

It is quite curious to note that when the accused was initially brought to court for initial remand the form 242 was silent on the brutal shooting of the applicant at the time of his arrest and the circumstances under which he was arrested. Scanty and highly suspicious summary was given in the form of evidence linking the accused to the alleged commission of the offence.

Thirdly, it will be noted that the offences of possession of firearms and ammunition were alleged to have occurred at a place called Pennywise at Bonmarche, Eastlea Shopping Centre, Harare at 0930 hours. I take it this place is a public place and that the offences including the shooting of the

[3] 1980 ZLR 466

applicant by the police officers happened in broad day light. It is equally curious that the police did not record evidence from any possible independent witnesses who witnessed the shooting, arrest and the alleged subsequent search and recovery of the firearms and ammunition from the applicant. Only the three officers who arrested the accused person are given as State witnesses.

When the court sought clarification from the State counsel, the State counsel aggressively retorted that the police officers are professionals and were not obliged to record independent evidence as their (police officers) evidence would suffice. I am certain the approach adopted by the prosecution is extremely dangerous in the delivery of criminal justice system in this country. Police officers are not little gods who are infallible and they must always be encouraged to carry out balanced and objective investigations and this case clearly shows there was no such investigation.

In my view, it is certainly a misconception of the law to say such allegations are based on "cogent and admissible facts".

At the risk of being accused of prejudging the outcome of the trial of this matter, there is no doubt in my mind that the allegations might prove to be extremely difficult to prove particularly given the determination by the investigating officer to comourflage the serious assault on the applicant through his scanty form 242 document.

If my rudimentary assessment of the evidence to be tendered at trial is anything to go by (which I am certain it is) then, the alleged propensity to commit similar offences on the part of the applicant is further weakened to the extent that it must not obstruct him from being granted bail pending trial.

THE ALLEGED SERIOUSNESS OF THE OFFENCE OF POSSESSION OF FIREARMS AND AMMUNITION

There can be no denial that such an offence is serious but this must be looked at in the light of what I have already endeavoured to highlight and in particular the applicant's contention that all these allegations were

manufactured against him by the arresting details in an effort to cover up their gruesome shooting of him.

That the applicant was brutally shot at, at the time of his arrest is not in doubt. The uncontroverted submissions made by defence counsel in the court *a quo* was as follows:

> "Accused was in police custody for 10 days. At the time of his arrest he was shot on both legs and arms. He was taken to a secluded area in Mazoe.....
> He has problems in passing stool. The doctor who released him said he needed "specialized" medical attention. He was taken to Mbare and later Rhodesville police. This is clear brutality from CID Homicide. May the matter be investigated and the prison officer give him urgent medical attention".

The learned magistrate who heard the submissions remarked and concluded as follows:-

> "State to investigate complaint and accused to be given medical attention at prison".

It is significant to note that these serious allegations on the part of CID homicide section were not controverted or challenged by the prosecution at the time they were raised.

In the light of the shoddy investigations carried out by the police officers in this matter, the applicant has alleged that all these allegations against him were concocted in order to cover up the brutality on him by the arresting details. In my view it is not using minimum force to pump several bullets in a man's body in order to arrest him.

If this is so, then the seriousness of the allegations against the accused person are further put to doubt.

In any event, assuming the prosecution is able to establish the offences of possession of both firearms and ammunition, there is a provision for a fine and I do not read such penalty to be such that it would warrant abscondment by the applicant.

The prosecution has not commented on the sudden withdrawal of the robbery charges. One can only speculate and or assume that these

allegations were raised in an effort to cloud issues in order to complicate applicant's application for bail pending trial.

In any case, if nothing has been established in so far as these offences are concerned for the past 12 months, it remains wishful thinking that anything tangible can be achieved now.

CONCLUSION

I am more than satisfied that the applicant has made a strong case warranting him to be granted bail pending trial on changed circumstances.

Bail is granted in terms of the attached draft.

Mushangwe & Company, applicant's legal practitioners
Attorney General's Office, respondent's legal practitioners