OWEN KUCHATA
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 26 June 2020 and 24 July 2020

Bail Ruling

Applicant in person
T. Kasema, for respondent

FOROMA J: Applicant was jointly charged with treason as defined in s 20 (1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] together with 3 other namely:

(i) Borman Ngwenya
(ii) Silas Pfupa and
(iii) Solomon Makumbe.

The trial commenced but stalled because his co-accused made a constitutional court challenge of their being treated as the applicant's accomplices as they allegedly claimed that they were involved in the capacity of traps i.e. to say they seemingly participated as accomplices when in truth and in reality they were gathering evidence that applicant was indeed committing treason.

The Constitutional Court challenge is still pending and because the High Court stayed trial pending the determination of the Constitutional issue trial will not continue until the said challenge is determined by the Constitutional Court.

In his application for bail applicant claims that he has never applied for bail to the High Court. Under paragraph 1 of Part C of the application the following question is asked on what grounds do you say the judge should admit you to bail? In response applicant replied as follows: the matter has taken too long to be finalised and that he had also benefited from the Amnesty Clemency Order of 2020.

Although the applicant did not rely on the fact that his co-accused had been granted bail, he in fact raised this in argument at the hearing seeking that he be treated equally.

The State opposed this application quite vehemently.

The onus in this matter is on the applicant to prove that there are exceptional circumstances that exist which in the interests of justice permit his release on bail see s 115 C (2)(a)(ii) B of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The section reads as follows:

> "(2)(a) where an accused person who is in custody in respect of an offence applies to be admitted to bail before a court has convicted him or her of the offence …..
>
> (ii) the accused person shall, if the offence in question is one specified in
>
> B Part 11 of the Third Schedule bear the burden of showing on a balance of probabilities that exceptional circumstances exist which in the interests of justice permit his or her release on bail". (the underlining is mine).

Treason is an offence specified in Part 11 of the Third Schedule thus it is clear that *in casu* the onus is on the applicant to show the existence of exceptional circumstances justifying applicant's release on bail.

In his argument as indicated herein above the applicant submitted that the time it has taken the matter to be finalised has been inordinately long and that his colleagues had been released on bail.

The shift of onus to an applicant in cases of the gravity of those under Part 11 of the Third Schedule to the Criminal Procedure and Evidence Act is a clear demonstration of the legislature's intention that ordinarily accused persons charged there under ordinarily should be detained pending finalisation of the trial unless exceptional circumstances are proven justifying release on bail. It is clear that the legislature deliberately shifted the onus to prove compelling reasons justifying refusal of bail from the State and imposed the onus to justify release on bail by proof on a balance of probabilities of exceptional circumstances when one is facing Third Schedule Part 11 offences.

The court agrees that the applicant is facing an inherently serious offence which attracts a death penalty on conviction which sentence is a sufficient incentive for the applicant to abscond. As to whether overwhelming evidence exists proving that the accused will be convicted of the offence this court as a bail court cannot express a view apart from noting that the State believes its case to be very strong. However the provisions of s 115 C of the Criminal Procedure & Evidence Act under which the onus of justifying release on bail has been shifted to applicant in a bail application provides an exception to the authority of *S* v *Hussey* 1991 (2) ZLR 187 and the line of authorities establishing that the seriousness of the

offence on its own cannot be a proper reason for denying an applicant bail. This is clear from the fact that the onus to prove compelling reasons for refusal of bail in the cases where such ratio was established was on the State. On introduction of s 115 C the threshold for the shift of the incidence of onus is reached by reference to the seriousness of the offence only in that once the offence charged is one under Third Schedule Part 11 of the Criminal Procedure & Evidence Act the shift becomes automatic without the additional need to demonstrate the existence of overwhelming evidence against the applicant. While it is not disputed that applicant's co-accused were granted bail there are proper reasons for him to be treated differently from them by reason of their defence which may not be said to be demonstrably false.

The court is not satisfied that applicant has discharged the onus on him to prove on a balance of probabilities that exceptional circumstances exist which show that it is in the interest of justice that he be granted bail. The reasons applicant put forward do not constitute exceptional circumstances at all. What constitutes exceptional circumstances are reasons so compelling in their nature they are out of the ordinary. The delay in finalising trial though apparently in ordinate *in casu* is not anything that can be blamed on the State. For that reason it is not a special circumstance in terms of the law.

Accordingly the application for bail is dismissed.

National Prosecuting Authority, respondent's legal practitioners