THE STATE
versus
ARNOLD KWARIRA
and
CAIN GAMABARA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 12, 13 December 2023 & 17 January 2024

Application for bail pending trial

M Manhamo, for the State
Kavhumbura, for the applicants

MUTEVEDZI J: As will be seen below, the applicants were arrested at different times. They equally appeared for remand procedures in the Magistrates court separately. They however face the same charges. I heard their applications for bail separately and dismissed them. I gave my reasons *ex tempore*. On 8 January 2024, their counsel Mr *Kavhumbura* requested through the registrar of this court that I avail my full written reasons for those decisions in order for him to properly advise his clients. I decided to issue a compound judgment because as already stated the applicants are jointly charged with the same crime and are represented by the same legal practitioner. The court sincerely hopes that after going through this judgment counsel will, as threatened in his letter properly advise the applicants, that among other things it was him who misled them on the law. Below I proffer the requested reasons.

The applicants in the company of several others allegedly, attacked and robbed the complainant in a criminal enterprise that appeared to have been carefully planed and executed with military precision. The facts of what happened is detailed on the request for remand form. They apparently went unchallenged at that stage. I summarise them in the following terms:

On 2 February 2021 around 1900 hours, the applicants driving in a silver Mazda Altenza car bearing registration numbers AFB 2234 teamed up with their colleagues Gift Moffat, Costa Basiyawo and two others whose names are not mentioned in the papers whom

they picked up in Harare city centre. They went to a Chicken Inn food outlet at a location called Pomona. There, they parked their car. All of them except Gift Moffat who was the driver disembarked and proceeded to the complainant's house. They were heavily armed. Two of them carried unidentified pistols whilst the others had catapults- a weapon whose danger is usually underestimated presumably because it is homemade yet it can be lethal. Described loosely, it is made up of a forked stick with an elastic band tied to two projecting v-shaped pieces of wood. If fired by an expert with the right projectile inserted it can cause very serious injuries if it doesn't kill. When they got to the complainant's house the assailants scaled the perimeter fence. They startled a security guard whom they immediately subdued. They got inside the house where they manhandled the complainant and five of his colleagues all of whom are of Chinese nationality. The robbers tied the Chinese's hands with electrical cables, heavily assaulted them before demanding and confiscating 600 grams of gold, three i-phone cellphones, one Huawei cellphone, one gold chain and cash amounting to USD $10 000.

The police allege in the papers that this incident happened on 2 February 2021. The second applicant Cain Gambara went on the run and was only arrested on 6 November 2023 more than two years later. He was connected to the robbery through the first applicant who was also on the run for a significant period and was only arrested on 14 January 2023. The police therefore opposed their admission to bail on the basis that they are was clearly a flight risk and that they are a danger to society. In addition, they alleged that at the time of his arrest the first applicant was on a warrant of arrest which had been issued under CRB No. 3984/19 on 19 April 2019 by a provincial magistrate at Harare. He also has another case pending investigation by Highlands police on Cr No. 100/01/23 which relates to being found in possession of articles for criminal use. Further one of the applicants' accomplices called Brian Mubaiwa was granted bail on the same charges but absconded.

In their applications both applicants obviously through their counsel started from the very erroneous premises that the onus in their applications was on prosecution to show compelling reasons why they must not be admitted to bail. I cannot be certain where the legal practitioner got that law from. I equally do not comprehend how many times or how loudly it has to be said that an astute legal practitioner is one who keeps abreast of the law and legal developments. This court has in a long list of authorities and as recent as in the case of *Ellatone Bonongwe* v *The State* HH 655/23 emphasised that bail law is not a one size fits all affair. There is a huge difference in the procedure adopted when one makes an application for

bail in instances where the crime preferred is listed in the third schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Criminal Procedure & Evidence Act) and those relating to all other offences. In *Ellatone Bonongwe* (supra) I put it thus:

> "Further s 117(1) of the Criminal Procedure & Evidence Act accords every arrested and detained person a general right to be admitted to bail except where the court makes a finding that it is in the interests of justice that bail be refused. That clearly shows that the onus is firmly on prosecution to prove the existence of the compelling reasons. But there are instances where that onus is reversed. The law permits the reversal of that onus. I am heartened that counsel for the applicant in this case was well aware of that requirement and did not seek to parrot the oft-made statement that bail is a constitutional right which appears to have been understood to mean that every person who stands before a court accused of crime should simply repeat that statement and walk home. For completeness I wish to state that s 115 C(2)(a)(ii) of the Code places the onus on an accused person to show on a balance of probabilities, that it is in the interests of justice that he/she be admitted to bail. It says:
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> > (ii) the accused person shall, if the offence in question is one specified in—
> > A. Part I of the Third Schedule, bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail, unless the court determines that, in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden;
> > B. Part II 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;
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> The above provision means exactly that. Until it is challenged and expunged from our statute books every accused charged with a third schedule offence will be required to show, on a balance of probabilities that it is in the interests of justice that he/she be admitted to bail. What that entails is that an applicant to bail is required to adduce evidence to prove the averments he/she makes in his/her application. In matters where the prosecution bears the burden all that an accused needs to do is state for instance that he is not likely to abscond and leave the state to illustrate why they say he will do so. An applicant who simply makes bald assertions as if he has no onus to discharge does himself/herself a big disservice."

It will be a sad day in the profession if it became the norm that legal practitioners do not read judgments which come out of the superior courts. Sad because those judgments are law. In fact I am forced to restate the obvious to make this point clearer in the minds of legal practitioners who seem not to appreciate or are averse to court pronouncements. No matter how brilliant a legal practitioner perceives his/her argument to be, it is not law until it is accepted as such by the court. The purpose of legal argument is to persuade the court to see the law from the litigant's standpoint and certify that view. That position stems from the irrefutable fact that only the courts and no other institution or person, are charged with the duty to interpret statutes. The rhetoric about bail applications churned out on social media is not law and has no place in the courts. The law is what the courts say it is and not what litigants propose. Our legal system is designed in such a way that it has in-built checks and

balances to accommodate the potentiality of error in judicial decisions. As a result it provides mechanisms for the review of and appeal against court decisions where a legal practitioner or a litigant is not satisfied with the correctness of a court's decision. Counsel referred me to the case of *S* v *Munsaka* 2016(1) ZLR 427 (H) for the proposition that it is the state which must show compelling reasons why an accused must not be admitted to bail. In that case, this court held that the erstwhile position where the onus was on the accused to show on a balance of probabilities why it was in the interests of justice that he should be freed on bail was no longer applicable. That case was in my view correctly decided. It could only have been logical at the time. What counsel seemed not to appreciate however is that *Munsaka* was decided on **25 February 2016**. Section 115C (2) (ii) of the Criminal Procedure & Evidence Act that I reproduced above was introduced by Act 2 of 2016 which became law on **1 July 2016**. Needless to state *Munsaka* was therefore decided before the enactment of s 115 C(2) (ii). If it had become law, it must follow that Parliament intervened in and repudiated the effect of the court's holding in *Munsaka*. That case cannot therefore be used as a basis of placing the onus in third schedule bail applications on prosecution when the law squarely puts the burden on an applicant for bail. It is such fine detail that matters in law. As such, the findings of this court as stated in *Ellatone Bonongwe* v *The State* (supra) in relation to the onus of proof in bail applications involving the so-named third schedule offences stand. It becomes futile for a legal practitioner to ignore those findings and bury his/her head in the sand in the hope that the unpalatable position of the law will change without more. What is clear in this case is that the legal practitioner either does not read court judgments or if he does, he simply ignores them and persists with what he thinks is the law. As a result he threw his clients' applications into jeopardy before saying anything more. He did not as their legal mind understand what was required of them. He failed to appreciate that the applicants bore the onus to prove on a balance of probabilities that it is in the interests of justice that they be admitted to bail. As a result he glossed over a lot of issues in the vain hope that it was the prosecutor who needed to provide compelling reasons why the applicants should be denied bail.

In his opinion, the prosecutor also strangely advised that he was not opposing the applications principally because the accomplice who had implicated the applicants had been removed from remand. I will deal with the question of removal from remand later in the judgment. At this stage it is important that I make it clear that the prosecutor's consent to the

grant of an application for bail is not decisive. S117 (5) of the Criminal Procedure & Evidence Act supports that conclusion. It states that:

> "(5) Notwithstanding the fact that the prosecution does not oppose the granting of bail the court has a duty to weigh up the personal interests of the accused against the interests of justice as contemplated in subsection (4)."

An applicant for bail in third schedule offences particularly must not place blind reliance on the prosecutor's consent because that consent does not absolve him/her of the responsibility to show the court, on a balance of probabilities that it is in the interests of justice that he/she be admitted to bail. The applicants in this case must have been hoodwinked by the prosecutor's non-opposition to their applications and regarded their requests for bail as a formality. They were wrong.

When s 115 C(2)(a)(ii) of the Criminal Procedure & Evidence Act was enacted imposing the reverse onus on applicants, the legislature was well aware of the principle that an accused person is presumed innocent until proven guilty. The presumption of innocence cannot therefore be an applicant's major basis in an application for bail. It is fully admitted that both the applicants in this case are very much innocent until a competent court convicts them. In the same breadth, the concept of reasonable suspicion is a similarly revered principle of our criminal law. The applicants do not deny that there is reasonable suspicion that they committed a ghastly robbery which must have left the victims terrified and horror-stricken. The criminal justice system including the bail system is not built solely for the benefit of those accused of crime. It is meant to equally protect the victims of crime and society generally. The factors which a court must take into consideration when determining whether or not to grant an applicant bail vindicate my conclusions. For instance Section 117(3)(a) directs judicial officers to consider the possibility of an accused endangering the safety of the public or any person thereof. In that consideration, the presumption of innocence must be juxtaposed against the danger that the accused poses to society. The court is enjoined to examine the extent of violence deducible from the charge itself. It follows that the nature of the crime with which an accused is charged may be damning before anything is said. Robbery particularly that which is allegedly committed in aggravating circumstances is a crime circumscribed with ultra-violence. I have already said judging by the stated and accepted facts in this case, the applicants planned the robbery with military detail. They employed an assault- all policy against anyone whom they came across at the complainant's premises and whom they thought was a hurdle in their criminal enterprise. I refer to accepted facts because

they appear not to have been disputed at any stage. I restate it once more that accused persons who appear before the magistrate's court and do not challenge the facts on which they are placed on remand have no right to challenge the same in a bail application. My understanding is that some legal practitioners deliberately skip to do so in the hope that getting bail for their clients would be a quicker and tidier option. That goes down as legal ingenuity but it can only be employed in circumstances which do not explode in the accused's face during the application for bail. In this instance, if it was the strategy then it was ill-conceived. The first applicant was arrested and appeared in court at the beginning of 2023 whilst the second one was arrested and appeared in court in November 2023. They had all the time they wanted to challenge the facts. They did not take the opportunity. They did not dispute that the reasonable suspicion that they attacked the complainant and his family or friends with the unmitigated violence described in the papers. Some of the applicants' accomplices are still at large. One was removed from remand and the other is on an outstanding warrant of arrest. There is every possibility that given their predisposition to violence they may regroup with those accomplices already out of custody to perpetrate further violence and endanger society.

Counsel also emphasised the point that his clients were simply implicated by their accomplices one of who was removed from remand. I hasten to point that removal from remand is a procedure which, contrary to popular perception, does not speak to the innocence of an accused person. It is simply an acknowledgement by the courts that prosecution has taken too long to set the accused's case for trial. The court then seeks to mitigate the disruption that is caused to an accused's life by continuously being on remand without trial. It does so by refusing to grant the state's requests for the accused to continue presenting himself in court pending the commencement of his trial. On many occasions, accused persons who had previously been removed from remand are summonsed to court for their trials after which they get convicted and sentenced or get acquitted. It is therefore incorrect to suggest that an application for bail must be granted because an applicant's co-accused was removed from remand because that process has nothing to do with the weakness of the state's case. In this case, what appears to have happened is that the accomplice who was removed from remand was arrested soon after the commission of the crime. As highlighted already the applicants herein were arrested two years later. Mr *Kavhumbura* just indicated that their accomplice was removed from remand without disclosing to the court the reasons thereof. It is possible that he was so removed because the police were yet to arrest the applicants who are alleged to have jointly committed the offence with the accused who was removed from remand. I

therefore refuse to accede to the persuasion that the state's case is weak because of the removal of the applicants' accomplice from remand. In the same vein, it could be argued that if it the state case was as weak as alleged there would have been no reason why one of the accomplices would have absconded court.

Both applicants admit that they were connected to this offence through their accomplice called Gift Moffat. He was arrested earlier than them. They were well acquainted to him and must have known about his arrest. They knew the police were looking for them but never bothered to present themselves to the police and clear their names. They waited for the police to hunt them down and arrest them two years after the robbery. By that they exhibited their untrustworthiness in relation to standing their trial. An accused who evades police interrogation after being suspected of committing an offence severely diminishes the court's confidence that if he is granted bail he will return to stand his trial. Both applicants fall into that category. The risk of them absconding the jurisdiction of the courts is a real one.

The first applicant, Arnold Kwarira's case is worse. He has a long history of brushes with the law. He was in court in 2019 on CRB number 3984/19. At one time he absconded court. In para 22 of his application, he openly admitted defaulting court but sought to explain that he was later removed from remand. I do not think that helps him in any way. What would have been more appropriate was for the applicant to give the court a full explanation of why he defaulted court and how he returned to court. He had the obligation to advise the court whether he voluntarily returned to stand trial or he was arrested by the police. How the case ended is not critical. The issue is whether he can be trusted to return to stand his trial. I doubt that he can. If Arnold Kwarira is the saint that he is portrayed to be, then he is an extremely unfortunate individual. In addition to the current robbery charges, the police are also investigating him under Highlands Police Cr 100/01/23 on a charge of having been found in possession of implements to commit criminal offences. In relation to the second applicant, Cain Gambara, the police allege that he is a member of a larger group of gangsters which include the first applicant. At the time that the first applicant absconded court the two and their fugitive colleagues were in constant communication. These allegations were not refuted at remand and stand unchallenged. If they are unscathed, it follows that the two's cases cannot be looked at in isolation. Rather, they must be viewed as one. To me all those are signs that the applicants have worrying integrity issues. They are likely to abscond and are likely to commit further offences if admitted to bail.

It was for the above reasons that I considered it prudent to dismiss as I did both applicants' applications fro bail pending trial.

Kavhumbura Law Chambers, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners