

TATENDA BRIT MUSHONGA
and
ALFRED MOYO
and
CONWELL SHUMBA
and
INOS JOY MIKA
and
BLESSMORE BANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 18 August 2021 and 6 September, 2021

Bail application

Mr M. Vengesai, for the applicants
Mr B.E. Mathose, for the State

ZISENGWE J: The five applicants seek to be admitted to bail following their arrest and subsequent detention on charges of contravening section 89(1) (a) of the Postal and Telecommunications Act [*Chapter 12:05*], i.e. “Willful damage to or interference with or theft of telecommunication lines and apparatus”

The allegations as set out in the Request for Remand Form, (i.e. the police Form 242) are that the 5 applicants, acting in concert, cut a sizeable length of overhead head copper cable belonging to the parastatal Telone at a place referred to as Caravan Park, Zvishavane, before loading the cable into a “Fun cargo” motor vehicle before driving away. However, according to

the State luck deserted them when they were intercepted by police detectives who had mounted a road block on the road they were using on the outskirts of Zvishavane.

It is further alleged that the applicants, however, did not heed to the police signal for them to stop but instead sped off into the darkness prompting the police officers to give chase. As fate would have it, their Fun cargo motor vehicle overturned shortly thereafter. That apparently did not in the least deter the applicants who disappeared into the night on foot having abandoned their motor vehicle.

An inspection of the motor vehicle yielded not only the copper cable but also mobile cellular phones the contents of the latter which in turn led the team of police officers to the applicants.

In the alternative, the State is preferring charges of theft (of copper cables) in contravention of s 113(1) (a) of the Criminal Law (Codification and Reform) [*Chapter 9:23*].

In their written application, the applicants all deny the charges levelled against them and contend that they are all suitable candidates to be admitted to bail. They indicate that they did not stop at the police road block because they genuinely albeit mistakenly believed that the persons who had stopped them at this point were in fact robbers. According to them what compounded matters was that the police officers were not in uniform and nothing could possibly identify them as such. They further indicate that they deserted their motor vehicle after it had veered of the road and overturned for genuine fear of their lives.

Most importantly they indicate that the motor vehicle which they were driving was actually borrowed from someone else and they were oblivious to the fact that it contained suspected stolen cables. They therefore express, in this application, a keen interest to stand their trial supposedly to clear their names and set the record straight.

They remind the court of the presumption of innocence which operates in their favour and the concomitant need to jealously protect the individual liberty of an accused pending his trial. They further exhort the court to take note of section 50(1) (d) of the Constitution which guarantees an accused's right to bail in the absence of compelling reasons justifying a denial of the same.

Although the State itemised four separate reasons for opposing this application, a careful scrutiny of the same reveals that there are basically two main reasons for such opposition namely;

- (1) the risk of abscondment
- (2) the likelihood of the applicants committing further similar offences if admitted to bail

According to the State the risk of the applicants taking flight if granted bail is predicated on the following considerations:

- (a) the relative strength of the case for the State
- (b) the seriousness of the offence particularly in light of the mandatory minimum sentence provided for under Section 89 (4) of the PTC Act. (The said section provides for a mandatory minimum sentence of 10 years' imprisonment for the offence of injuring or removing any telecommunication line belonging to or used by a telecommunication licensee unless there are no special circumstances peculiar to the case).
- (c) the fact that by failing to stop at the roadblock, the applicants evinced a clear intention to abscond

The State led evidence from the Investigating Officer Sorobhi Chishuwo of CID Zvishavane who gave a detailed account of the events which culminated in the apprehension of the applicants. For the reasons that will soon become apparent, it will not be necessary to repeat his entire evidence here suffice it to say he expressed strong reservations against the granting of bail to the applicants. He indicated that the police officers who were manning the ad hoc road block which the applicants overran were in clear police uniforms contrary to the assertions by the applicants.

After hearing evidence and arguments on the 18th of August 2021, I reserved judgment. However, before I could deliver judgment, I received a letter from the applicants' legal

practitioners informing me that the 5th applicant, Blessmore Banda, had in fact been granted bail in the same matter. That letter is dated 20 August 2021 the operative part of which reads;

“We have just been notified that the 5th applicant Blessmore Banda was admitted to bail before we filed the current bail application and he is currently out on bail. Initially we received instructions from all the applicants including the 5th applicant. However, for reasons not known to us the 5th applicant did not advise us that he was no longer in need of our legal services.

We are of the view that the above information is of paramount importance to the honourable court. We have not been favoured with the bail case number in which the 5th applicant was admitted to bail. However, he advised us this morning that he is out on bail pending their trial.

We apologise for any inconveniences caused.”

Surprised by the turn of events, I directed the Prosecutor seized with the present matter to investigate when, where and the circumstances under which the 5th applicant had been admitted to bail.

The prosecutor Mr B.E. Mathose not only confirmed that indeed the 5th applicant has since been admitted to bail but also attached a copy of the court record. That is when I observed that it was actually me who had granted him bail on 9 July, 2021 in case number B 185/21.

A perusal of that record revealed that the State had initially opposed bail but had during the course of oral arguments in court acceded to the same leading to bail being granted by consent.

The question of whether or not to grant the 5th applicant therefore falls away. The only question is whether there is any justification in drawing a distinction between him and his co-applicants. It is trite that circumstances may exist justifying such a differentiation between co-applicants. The remarks of CHINHENGO J in *The State v Samson Ruturi* HH 26-03 are apposite in this regard. He stated the following:

“... the general principle is that persons jointly charged with an offence must be treated in the same way. In practice, however, it is not often that persons jointly charged with the same offence are treated equally in every respect. One accused may have to be treated differently from another because of certain factors, either personal or related to the offence, which set him apart from the other person with whom he is jointly charged. In the case of admission to bail, one of the jointly charged person, may in the view of the court, be likely to abscond and the other not. One may be more likely to interfere with

evidence or witnesses and other not. One may be more likely to commit the same similar offences and the other not. And one may be much more closely connected to the offence and more liable to be convicted and the other not. There are some of the factors which may justify the granting of bail to the one and the denial to the other. In broad terms, therefore, factors personal to jointly charged persons may set them apart for purposes of the grant or refusal of bail.”

Indeed, uniformity in the treatment of offenders or alleged offenders is one of the foundational tenets of the rule of law. It equally accords with the Constitutional imperative of equality before the law. Any differentiation between jointly accused persons should be premised on sound and rational grounds. It should not be based on some whimsical, capricious or tenuous grounds. In the present application, I find no good reason to differentiate between the 5th applicant and the other four co-applicants. The first four applicants share many common attributes with the 5th. They are all in the same age group (18-25 years), they are all do not have previous convictions. They all reside in the Nil location of Zvishavane. They are all accused of having committed similar offences in the past although none of them were ever actually arrested for those other offences. The level of their alleged participation in the present offence is similar. I believe, therefore, that the ends of justice are best served by equally admitting the remaining four applicants to bail. Accordingly, each of the applicants 1 – 4 are hereby admitted to bail on the following terms;

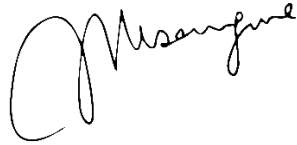
ORDER

It is ordered that:

1. Applicants 1 – 4 be and are hereby admitted to bail in the following terms –
 - (a) Each applicant to deposit bail in the sum of ZWL\$5 000.00
 - (b) The applicants to reside at the following addresses –
 - (i) 1st applicant at House No. C 12 Nil Township, Zvishavane
 - (ii) 2nd applicant at L5A Nil Township, Zvishavane
 - (iii) 3rd applicant at L5 Nil Township, Zvishavane
 - (iv) 4th applicant at L10A Township, Zvishavane
 - (c) Applicants not to interfere with State witnesses or investigations
 - (d) Each applicant to report once every Friday at Zvishavane Police Station, between 6.00 am and 6.00 pm until the matter is finalised.

2. 5th applicant to abide by the bail terms in B 185/21.

ZISENGWE J.

A handwritten signature in black ink, appearing to read 'Zisengwe', written in a cursive style.

Mugiya and Muvami Law Chambers, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners