CEPHAS MAKARIPE

Versus

THE STATE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 17 April 2023
Written reasons provided on 28 April 2023

Bail Application

D. B Hwacha, for the applicant
B. E Mathose, for the respondent

ZISENGWE J: The following are the reasons informing the *ex-tempore* judgment delivered on 17 April 2023 dismissing applicant's application for bail pending trial. They (reasons) are being provided at the request of the applicants.

The theft of motor vehicles in South Africa and their subsequent smuggling through illegal or undesignated crossing points into Zimbabwe (or other countries neighbouring South Africa) is regrettably a recurrent phenomenon. It is a cause for grave concern. As this case undoubtedly shows, it is an offence that usually involves criminal syndicates who work in concert not only to steal vehicles, mainly expensive luxury vehicles but also to facilitate their smuggling across frontiers and their subsequent irregular registration in the destination countries.

The applicant is a Zimbabwean national who sought to be admitted to bail following his arrest on charges of theft of a motor vehicle or alternatively smuggling (of the vehicle) in contravention of section 182 of the Customs and Exercise Act, *[Chapter 23:02]*.

The brief facts of the matter which are for the most part common cause are these at least undisputed are these:

On 30March 2023 at a place identified as Castlegate Mall, Pretoria, in South Africa a Toyota Prado VXL 4x4 motor vehicle belonging to one Carpenter Kling Kenneth Kare literally vanished from the parking lot. It had been stolen. Barely three days later, on the 3rd of April 2023 to be exact at a toll plaza along Beitbridge Masvingo Highway the applicant was found in possession of the said motor vehicle. Interestingly at that stage the motor vehicle had already been registered with Zimbabwe's Central Vehicle Registry (CVR) with its ownerships reflecting as Cross-Country Containers (Private) Limited.

Upon being questioned by the police, the applicant's explanation was that he had received the motor vehicle from a South African national whom he only identified as Jeff for purposes of driving it into Zimbabwe. The exact destination thereof within Zimbabwe is however contested. This is become whereas according to Detective Constable. Kainos Mahoko who testified in this bail application the accused informed him that he had been tasked by Jeff to transport the motor vehicle to Chirundu, the applicant in the statement submitted in support of this application averred that he had been hired to drive the motor vehicle to a garage in Harare.

Be that as it may, the applicant averred that he was a suitable candidate for bail not least because he is firmly fixed to this jurisdiction and harbour no intention whatsoever to abscond. His personal circumstances which he set out in the bail statement can be summarised as follows. He is 40 years old, married and has 4 children all of whom are minors. He is employed as a driver/assistant mechanic with an outfit going by the name Quad garage operating in the Mabelregin area of Harare.

Applicant reminded the court that bail is now a constitutionally guaranteed right which can only be withheld upon proof of the existence of compelling reason, which according to him are absent in *casu*.

In this regard, the applicant averred that the case against him is tenuous. He claims that apart from him having been found in possession of the stolen property, there was no *nexus* between him and theft or smuggling charges.

The application was sternly opposed by the State whose opposition was predicated primally on the risk abscondment. It was averred in this regard that the case for the State is strong and a conviction on the evidence was likely to ensure. Further according to the State, the offence is an inherently …….. which invariably attracts a lengthy custodial sentence.

In support of its contention of the relative strength of its case, the State as earlier state led evidence from the Investigating officer of this case Dt Constable Kainos Mahoko, a precis of whose evidence as follows:

That the accused was arrested at a tollgate situate at the 145km peg along the Beitbridge - Masvingo road. Upon interviewing the applicant same revealed to him that he had taken over the motor vehicle at a place called the old Nuli Primary School near a place called Chitulipamwe. Further according to him the applicant revealed that the person from which he had received the motor vehicle, Jeff, was a South African who had hired him to drive it to Chirundu where he would hand it over to a person whose identity was yet to be disclosed to him. At that stage the motor vehicle had already been affixed with Zimbabwe number plates.

The theft of the motor vehicle in South Africa and its smuggling into Zimbabwe was unearthed upon contacting interpol and the South Africa authorities. According to the witness the applicant claims to have received the motor vehicle with the Zimbabwe number plates affixed thereto.

He pointed out that the vehicle identification number (chasis number) was not tempered with. His investigations however revealed that the motor vehicle had been smuggled into Zimbabwe through an illegal entry point along the Limpopo River. Significantly, he indicated that his investigation revealed that applicant was involved not just in the smuggling of the motor vehicle into Zimbabwe but also on its theft in Pretoria. He testified in this regard that he had credible witness who could testified to that effect. He was however imprecated to divulge their identity at this delicate stage of the investigation fearing applicant's interference with the same.

He would stead fastly maintain under cross examination that the fact that applicant was found in possession of the stolen motor vehicle was sufficient *nexus* linking him to the commission of the offence.

Ultimately, he stated that he was opposed to the risk of abscondment in light of the strength of the case against him coupled with the seriousness of the charges and the likely sentence to he imposed. He also objected to the granting of bail in the basis of the risk of applicant interfering with witness and/or investigations.

It is trite that an application for bail is benchmarked against the Constitution touchstone setout in section 50 (1) (d) which essentially provides that bail is a right unless there are compelling reasons, of which the onus to prove the same has with the State, justifying its refusal.

Section 117 of the Criminal Procedure and Evidence Act *[Chapter 9:07]* ("the CPEA") breathes life to the above Constitutional provision and sets out in subsection (2) thereof the broad grounds upon which bail may be refused. I take the liberty to paraphrase these. They are:

(i) likehood that accused if granted bail will endanger the safety of the public or a section thereof or will commit serious offence (set out in the Fist Schedule).

(ii) likehood of abscondment

(iii) likehood to interfere with witness and/or investigations

(iv) likehood to undermine a Jeopardise the due administration of justice

The factors to be taken into account in determining the likehood of abscondment are set out in section 117 (3) (b) of the CPEA and are the following:

(i) the lies of the accused to the place of trial;

(ii) the existence and location of assets held by the accused;

(iii) the accused's means of travel and his or her possession of or access to travel documents

(iv) the nature and grants of the offence or the nature and grants of the likely …… herefore;

(v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee;

(vi) any other factors which on the opinion of the court should be taken into accounts

Cases abound on the proper consideration of the risk of abscondment as a ground for opposing bail in *State v Jongwe 2002 (2) ZLR 209 (S)*, the late Chief Justice CHIDYAUSIKU CJ referred to the case of *Aitken &Anor v Attorney General 1992 (1)*

ZLR 249 (S) where GUBBAY CY at 254 D-G set out how the court should assess the risk of abscondment where the following was said:

"<u>The risk of abscondment</u>
In judging this risk the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the characters of the charges and the penalties which in all probability would be imposed if convicted; the strength of the State case; the ability to flee to a foreign country and the absence of extradition facilities; the past response to being released; and the assurance given that it is intended to stand trial. It is quite clear from the above remarks that the critical factors in the above approach are the nature of the charges and the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weakness of the State case."

In the present matter it can hardly be disputed that the theft of a motor vehicle particularly whose worth and value is substantial (its value was given as R 1.2million) is a very seriousness offence thus when coupled with the offence's transnational character makes it a very serious offence. It is an offence which almost…… attracts a lengthy custodial sentence upon ……

It is however the strength of the State case that is bitterly disputed. According to *Mr Hwacha* for the applicant, the fact of applicant's possession of the motor vehicle counts for little. When posed the question on the adequacy of applicant's possession of the motor vehicle in the circumstances, and particularly in light of chances of the probabilities of the authorities getting rid of this faceless and "surnameless" South Africa called Jeff, his response was that the inquiry is not about self but about the applicant!!

With repeat what probably eluded counsel was the im-pact of the same in recent possession. I alluded to the same in *ex tempore* judgement which I delivered dismissing the application. Although this doctrine has its origin in the common law of has since found its way into the Criminal Law (Codification and Reform) Act, *[Chapter 9:23]*. The Act provides in section as follows;

"123 Recent possession of stolen property
(1) Subject to subsection (2), where a person is found in possession of property that has recently been stolen and the circumstances of the person's possession are such that he or she may reasonably be expected to give an explanation for his or her possession, a count may infer that the person is guilty of either theft of the

property or stock, or of receiving it knowing it to have been stolen, whenever crime is more appropriate on the evidence, if the person

(a) cannot explain his or her possession; or

(b) gives an explanation of his or her possession which is false or unreasonable

(2) A court shall not draw the inference referred to in subsection (1) unless the circumstances of the person possession of the property are such that, in the absence of an explanation from him or her, the only reasonable inference is that he or she is guilty of theft stock theft or receiving stolen property knowing it to have been stolen, as the case may be."

I briefly pause here to observe that the common law principle of theft being a continuinig offence has been incorporated into the Criminal Law Code and is provided from section 121thereof. In particular subsection 2 (a) provides that regardless of whether a thief remains in possession of the property he or she has stolen –

(a) he or she may be tried for the theft or stock theft by any court within whose area of jurisdiction he or she possessed the stolen property, even if he or she originally stock the property outside the court's area of jurisdiction or outside Zimbabwe; and

(b) ……

In my *ex tempore* judgment I pointed out that the evidence was heavily stacked against the applicant. He was found in possession of a motor vehicle which three days earlier had been stolen in South Africa. The number plates of the motor vehicle had been changed and replaced with Zimbabwean plates designedly to conceal its true origins and identity. Further in this regard, a search with CVR revealed that the motor vehicle was falsely registered in Zimbabwe giving the impression that the offence was carefully planned and executed presumably in carhoots with criminal elements within CVR. How else would we explain that a motor vehicle stolen in South Africa three days earlier had already found and assumed a Zimbabwean identity before its arrival in Zimbabwe. I say this because the investigating officer testified that his investigation revealed that the motor vehicle had just entered Zimbabwe via an illegal crossing point along the Limpopo river.

Not only does the applicants recent possession of the Toyota Prado motor vehicle lead to a strong inference of him having stolen it, but also his explanation of such possession flippant,

noncommittal an lustre. He failed to give the surname of. His Jeff who supposedly handed over the motor vehicle to him.

Further, he never received any documentation from Jeff to authenticate his …….. or innocent possession of the motor vehicle. He further did not enquire from the mysterious Jeff as to where he obtained the motor vehicle from in circumstances where he would have been reasonably expected to have demanded such information.

As if that is not enough, Jeff's instruction to him keep changing, whereas to the police upon his arrest he indicated that he had been instructed by Jeff to drive the motor vehicle to Chirundu a border town with Zimbabwe's northern neighbour, Zambia, where he was supposed to hand it out to some yet unidentified person. Yet in this application he claim that he was requires by Jeff to deliver it to a particular garage in Harare.

Fifth, this mysterious Jeff has now apparently vanished into the thin South African our and the number remains unreachable. All this casts serious doubt not only of the truthfulness of his explanation but also of the very existence of this Jeff. He seems to be a figment of applicant's imagination.

I repeat here for purposes of emphasis that section 123 of the Criminal Law Code demands at the very least a reasonable explanation from an accused for being found in possession of stolen property way recently stolen. Applicants' explanation even at this early stage rings false. As things currently stand therefore, I found the State case against applicant to be stout. Consequently, I found that States apprehension of the applicant's abscondment will founded. It was chiefly on that basis that I dismissed his application for bail having been satisfied that the State had presented compelling reasons justifying the refusal bail as contemplated in section 50 (1) (d) of the Constitution.

Additionally, though I expressed the view that the State's apprehension of applicant interfering with witness as testified by the investigating officer was well founded. This is an offence involving a trans frontier dimension. It was daring, brazen, carefully planned and expertly executed. But for the vigilance of the officer at the tollgate where applicant was arrested, this offence would in all probability never have been unravelled. The investigating officer declined to reveal the identities of the witness who according to him are able to tie the

applicant to the theft of the motor vehicle in Pretoria South Africa. His refusal to do so was based on the apprehension of applicant interfering with those very witness.

It was for the foregoing that I dismissed the application for bail pending trial.

Ndlovu & Hwacha, applicants' legal practitioner
National Prosecuting Authority, respondent's legal practitioner