MIRIRAI CHABHENGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUCHAWA & DEMBURE JJ
HARARE, 8 & 15 August 2024

Bail Application

T Mubhemi, for the applicant
T Mutimusakwa, for the respondent

DEMBURE J: On 8 August 2024 the court dismissed the applicant's application for bail pending trial. The applicant has requested for the written reasons for our decision. These are they.

The applicant approached this court with an application for bail pending trial. He sought an order that he granted bail on all the charges subject to the following conditions:

a) that he deposits the sum of US$100.00 with the Clerk of Court Bindura Magistrates Court;
b) that he resides at 111 Woodbrook, Bindura,
c) that he shall not interfere with state witnesses until the matter is finalized;
d) that he surrenders his passport to the Clerk of Court Bindura Magistrates Court and;
e) that he shall report once every fortnight on Fridays between 6 am and 6 pm at Chiwaridzo Police Station until the matter is heard and finalized.

The brief facts of the matter are that the applicant was arraigned before the Bindura Magistrates Court on 22 July 2024 being charged with one count of unlawful detention as defined in s 93(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (*"the Criminal Code"*)*;* two counts of contempt of court as defined in terms of s 182 of the Criminal Code and one count of assault as defined in terms of s 89(1)(a) of the Criminal Code. On the charge of unlawful detention, it is alleged that on 18 July 2024 he unlawfully deprived Xu Yang, Simbarashe Makosa and Simbarashe Magamu of their freedom of bodily movement by

locking them inside Timsite premises using a new set of chains and locks to ensure that they do not leave the premises. It is alleged that he assaulted Xu Yang with the lock and chains to enforce the complainants' continued unlawful detention and prevent them from unlocking the gate. On the two counts of contempt of court, it is alleged that on 13 and 15 July 2024 the applicant willfully impaired the authority of the Bindura Magistrates Court which had issued an order prohibiting him from entering Timsite Enterprises, Barrasie Farm, Bindura and Timsite mining claims. As for the charge of assault, it is alleged that on 18 July 2024 the applicant and at Timsite premises, Bindura internationally and unlawfully assaulted Edmore Tapera with an iron bar once on the right wrist and the left armpits.

Through his legal practitioners, the applicant filed his bail statement in which he stated that he is a person of fixed abode, that all his interests are in Zimbabwe including his family and that he will stand trial if admitted to bail. Mr *Mubhemi*, for the applicant, submitted that the applicant is a proper candidate for bail pending trial as he is presumed innocent until proven guilty. He submitted that there are no compelling reasons for him to be in custody pending trial and that he must be released on bail. He also submitted that the applicant denies the charges including the two counts of contempt of court, which remain only allegations since he has not yet been tried and convicted. The presumption of innocence must, therefore, be applied. He disputed the state's position from the Investigating Officer's *("the IO")* one Enes Gomba's affidavit that there is a likelihood of him interfering with police investigations or witnesses. He further denied that the applicant has become a menace as alleged or that he threatened police officers. While Mr *Mubhemi* admitted that there were pending criminal and civil cases involving the complainants and the applicant, he argued that that on its own cannot be a good ground to deny him bail. The applicant denied having anything to do with one Minglel Cheng who is said to be a fugitive from justice.

Mr *Mubhemi* further submitted that the applicant cannot choose the court to try him and that there is no substance in the claims that he has threatened police officers. That there is no record of him ever resisting arrest. The risk of abscondment can be cured by stringent bail conditions and he has volunteered to surrender his passport. He has two pending criminal cases at Harare Magistrates Court and has availed himself for those cases without any default. He, therefore, submitted that there are no compelling reasons to deny him bail pending trial.

On the other hand, *T Mutimusakwa,* for the state, maintained the state's opposition to the application for bail pending trial. She submitted that the applicant has failed to obey court orders and it has not been shown how he will obey the court order even if granted bail. That

there is need to maintain public confidence in the criminal justice system by keeping persons of such violent disposition as the applicant from the society. She also submitted that the applicant has shown that he has no regard for the administration of justice and has a propensity to commit similar offences as he already is facing other criminal charges pending at the Harare Magistrates Court. The state further adopted the IO's affidavit and maintained that the applicant has become a menace at ZRP police station in Bindura where he has threatened police offices and even judicial offices at Bindura Magistrates Court. She submitted that this is the reason why the other pending criminal cases against him have been brought to be handled at the Harare Magistrates Court. The law cannot, therefore, place faith in people who threaten law officers. She further submitted that the trial for the applicant has been set for 19 August 2024. The state prayed for the dismissal of the application for bail as it was not in the interests of justice for the applicant to be admitted to bail pending trial.

The law on bail is settled in our jurisdiction. The starting point is always s 50(1)(d) of the Constitution of Zimbabwe, 2013 which provides that any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention. Arising from this provision is that the state bears the burden to prove on a balance of probabilities that there are compelling reasons for the accused to remain in custody. The onus shifts to the accused person when he or she is facing a third schedule offence under Part I in terms of s 115C(2)(a) of the Criminal Procedure and Evidence Act.

Further, s 117(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides one or more of the following grounds as compelling reasons for the court to deny an accused bail pending trial:

(i) where there is a likelihood that if released on bail, an accused person would endanger the safety of the public or any particular person or that he would commit an offence referred to in the first schedule;

(ii) where there is a likelihood that the accused person will not stand his or her trial or appear to receive sentence;

(iii) where there is a likelihood that the accused person will attempt to influence or intimidate witnesses or to conceal or destroy evidence;

(iv) where there is a likelihood that the accused person will undermine or jeopardise the objectives Of proper functioning of the criminal justice system, including the bail system; and

(v) in exceptional circumstances where there is a likelihood that the release of the accused person will result in the disturbance of public peace or security.

It is also trite that the granting of bail involves an exercise of discretion by this court. See *Madzokere & Ors* v *S* SC 8/12.

In this case, the applicant is facing serious charges of unlawful detention among others which have a possibility of a lengthy sentence of imprisonment, if the applicant is convicted. There is also overwhelming evidence against him as we will show. However, it is important to observe that it is a principle of the law on bail that the seriousness of the crime the accused is charged with and the strength of the state case are on their own not enough to justify a refusal to grant bail. See *Madzokere & Ors supra*; *S* v *Hussey* 1991(2) ZLR 187 (S). The likelihood of a severe sentence upon conviction is a factor which can, however, induce an accused person to abscond. See *S* v *Jongwe* 2002 (2) ZLR 209 (S).

We found that the applicant's defence to the charges was not plausible. While the law does not require him to prove his innocence he must have placed before the court in his bail statement a reasonably probable defence. See *Tshuma* v *State* HB 130/22. The absence of such plausible defence may be a factor which makes the risk of abscondment very high. The applicant admitted in the bail statement that he locked the gate while the complainants were inside the premises but claimed it was not wilfully done to cause harm but that he simply wanted the police to come and attend to the commotion. The applicant showed an unaccepted behaviour of taking the law into his own hands and subjecting other human beings to detention without lawful authority. He ought to have contacted the police first to intervene and not lock up the premises as he did. The unlawful detention could only be stopped upon his arrest by the police.

While he denied assaulting the complainants, the circumstances of the commission of the offences show that the state has a strong *prima facie* case against him as he admitted to locking up the complainants and that there were fights which erupted between his workers and the complainants. He was identified by the eye witnesses committing the offence which makes his defence far-fetched and not reasonably probable. As for the charge of contempt of court, he simply made a bare denial. There is evidence that he defied an existing court order. He did not dispute the existence of the court order prohibiting him from entering the premises in question. While the contempt of court is a matter to be enquired into on trial by the trial court, we are satisfied that the state has a strong *prima facie* case on those charges too. That suffices

for the purposes of this application. In the circumstances, there are high risks of him absconding as he faces a likely long term of imprisonment if convicted. The interests of justice will be jeopardised if he is released on bail.

The applicant, as shown from the evidence of the IO has threatened police officers in the execution of their duties. He is, therefore, likely to interfere with the state witnesses. Even though investigations have been completed, the state witnesses who include the attending police details have not yet testified. The law cannot trust such an individual with liberty in the circumstances where he has threatened police officers. That makes even the complainants more vulnerable. While he denied threatening the police officials, we believed the IO's testimony as it was also taken under oath as opposed to some bare denials submitted by the applicant's counsel from the bar. The applicant did not file any affidavit on the point but relied on the submissions by his counsel. It is trite that the legal counsel for the applicant cannot lead evidence from the bar. We, therefore, accept the state position as was decided in *Shambira* v *The State* HB 04/10 that:

> "Anyone, who has the nerve to take such a bold step to interfere with the maintenance of law and order in the manner described above should not be granted liberty as this will defeat the course of justice.
>
> Any person who unlawfully interferes with the Police, prison officers, public prosecutors, judiciary officers or any other officer charged with the proper administration of justice should be deprived of his liberty pending trial."

The court was enjoined to weigh up the interests of the administration of justice and his individual liberty. In *Attorney General* v *Phiri* 1987 (2) ZLR 33 the court made the proposition that:

> "The fundamental principle governing the court's approach to the granting of bail is that of upholding the interests of justice. This requires the court, as expeditiously as possible, to fulfill its function of safeguarding the liberty of the individual, while at the same time protecting the administration of justice and the reasonable requirements of the State. The mere possibility of the accused committing further crimes, standing alone, would not be sufficient to outweigh the accuser's right not to be deprived of his freedom."

In light of the threats to the police officers and that the applicant has other pending criminal cases, we believe there is also a risk of interference with the state witnesses. It is also common cause that the trial date has already been furnished to the applicant for 19 August 2024. The question that arises then is whether this is a case where the fact that the trial has been set down may be taken into account in considering where the interest of justice lies. In *S v Chiadzwa* 1988 (2) ZLR 19 (S), the court stated:

> "In my view, it is not proper to refuse bail just because the court has set down the date of hearing of the case. It does not seem to me that that approach safeguards the liberty of the accused., who must decide whether to attend his trial when out on bail or to remain in custody for reasons beyond his means control. In the instant case the 19th September 1988 was far away. There may be exceptional cases when the date set down for trial is a few days away and the releasing of the accused would create transport or accommodation problems for him. This reason alone is not good enough. There must be other reasons which, when coupled with a fixed date, compel the court to refuse bail."

The court must weigh the interests of justice against the right of the accused to his freedom and in particular the prejudice that he will suffer if bail is refused. The prejudice against the accused is mitigated in that he will not have to wait too long to stand trial and be exonerated if the state fails to prove its case against him. The fact that the trial date is just a week and some days away and that there will not be much prejudice for the applicant to wait for his trial while in custody coupled with the fact that the applicant is facing a serious offence and that there is a strong *prima facie* case against him, and if convicted is likely to be sentenced to a prison term might incentivise him to abscond trial.

It was also our finding that releasing the applicant on bail at this stage will likely endanger the safety of the complainants. The complainants and the applicant as submitted by Mr *Mubhemi* have been fighting over the ownership of mining claims at the site in question and there is even a pending civil dispute before this court under Case No. HCH885/24. There is need to protect the state witnesses. While the applicant is still presumed innocent, that is not taken away by his continued detention as it is in the interests of justice that he remains in custody pending trial.

Given our findings that there is a high risk of abscondment and that the applicant is likely to interfere with state witnesses given his threats to the police officers involved and the way he even treated the complainants, showing a total disregard for the law, we did not agree that the applicant was a proper candidate for bail pending trial. There were compelling reasons to deny him bail as highlighted above.

In the result, we made an order dismissing the application for bail pending trial for lack of merit.

DEMBURE J:……

MUCHAWA J:agrees……

Chimwamurombe Legal Practice, applicant's legal practitioners.
National Prosecuting Authority, respondent's legal practitioners.