ROY LESLIE BENNETT

versus

THE STATE

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE, 16 September 2009

**Bail Application**

*H. Nkomo*, for the applicant

*M. Mugabe*, for the respondent

HUNGWE J: The applicant seeks admission to bail pending his trial in this court on Monday 19 October 2009 at Mutare.

Prior to 14 October 2009 the applicant was on bail pending trial on charges of contravening s 10(1)a the Public Order and Security Act [*Cap 11:12*] (‘POSA’), that is possessing weaponry for insurgency, banditry, sabotage or terrorism and another count of contravening s 6 of the same Act.

Section 6 of POSA relates to incitement to commit acts accompanied by the use of weaponry referred to above.

The applicant states in his statement made in terms of the Rules that he has, since being admitted to bail, complied with his bail conditions, as set out in the order of the Supreme Court dated 10 March 2009 and that that the interests of justice will not be prejudiced by his being granted bail.

Section 13(1) of the Constitution of the Republic of Zimbabwe (‘the Constitution’) guarantees every Zimbabwean the right to liberty.

That right may only be denied to citizen in those circumstances set out in subs (2) of s 13. Generally, these are circumstances such as where there is reasonable suspicion of having committed a criminal offence or where such liberty is lost in terms of due process.

Section 18(1) of the Constitution entitles every citizen the right to protection of the law. Subsection 18(3) further provides that an accused person is presumed innocent until proven guilty by a court of law.

Invoking these two sections a court before which an application for bail is made therefore may be entitled to consider the respective strength or weaknesses of both the State case and the applicant’s defence to a charge to order to decide whether there will in fact be prejudice to the interests of justice should an application for bail be granted.

The stronger the case against an accused person, the higher the risk for conviction, the stronger the desire to avoid trial. Conversely, the weaker the case against the applicant for bail, the brighter the prospects of an acquittal, the less motivation to avoid a trial.

Whilst the court is however not entitled to make any pronouncement on the guilty or otherwise of an applicant to bail, it is proper to consider the strength of the allegations as they appear on the indictment papers and throw that strength into the basket of whether or not to grant bail.

Further this court at this point in time is also entitled to ask whether there has been any previous conduct by the applicant as would provide any basis for the fear that the accused will not stand his trial.

Mr *Nkomo*, in his opening remarks corrected the title appearing on his papers.

Even so I find it appropriate to consider the point raised in respect of the effect of indictment proceedings on bail since this is relevant to similar applications in future.

Indictment proceedings on themselves do not terminate an accused’s bail conditions. It is the process of indictment before the Magistrate Court in terms of s 66 of the Criminal Procedure & Evidence Act (“the Act”) which requires that an accused who has been indicted for trial in the High Court be committed to prison where he shall be detained till he is brought before the High Court for trial for the offence specified on the warrant for committal or till admitted to bail or liberated in the course of the law. (Section 66(2)).

Section 66(3) to (12) set out, in peremptory terms, what the clerk of court in the Magistrates Court is required to do to trigger the trial of the accused. The role of the Attorney-General is also set out in s (7).

Subsection (8) sets out what the accused is required to do to ensure that the Attorney General and the Court are forewarned of the defence he will raise at trial.

Subsection 9,10 and 11 up to 12 set out the respective roles of the Magistrate, the Attorney-General as well as the legal practitioner appearing for an accused and what they are required to do ensure that a fair trial of the accused kicks off on an appointed day in the High Court.

There is nothing throughout s 66 that expressly terminates bail. In practice however the commuted of an accused to prison in terms of this section effectively deprives him of his liberty.

Generally the practice of these courts has been that where the accused is legally represented, a fresh application for bail is made – the High Court before the commencement of trial and the Attorney-General does not oppose such applications unless there is good and sufficient cause to do so. Unrepresented accused persons suffered the brunt of this *lacuna* in the Act in that they are, as a matter of course, committed to prison. If their trial does not commence on the appointed day, they find themselves in legal limbo in that they would not be appearing on the fortnightly remand court nor would they have a chance to present their applications before the High Court in person, regularly.

This area of the Act needs to be revisited so that the prisoner’s right to liberty is preserved despite indictment.

It is only when the accused pleads to an indictment that his bail terminates. (Section 167).

Between the period of indictment and the day of recording of his plea when the trial proper what then is the position of his right to liberty?

It seems to me that this is the question which I am being asked to answer in this case.

As I said indictment does not terminate bail. It is that procedural step a pleading to the indictment which has the effect of terminating bail. This interpretation is clear from the wording of s 169.

The second ground upon which the State opposed this application is that the fact that the applicant has been indicted for trial constitutes changed circumstances. As such, because he faces very serious charges which may, if convicted result in his being sentenced to death, he is now a flight of risk. He is therefore not a proper candidate for bail.

The State treads on very weak ground indeed. It is trite that the mere fact that an applicant for bail faces serious charges, on its own, is no basis for denying him bail as long as the applicant can demonstrate that there is no basis for the fear that he will not stand his trial.

In my view the applicant stands to lose more by avoiding his trial than by standing trial. This, in my view, could be one of the several grounds upon which this court has previously judged him to be a proper candidate for bail.

He has not spoiled his previous standing in this court as a good candidate for bail. He is in my respectful view entitled to the order he seeks.

In effect the bail conditions granted him by the Supreme Court should persist notwithstanding his indictment.

It is so ordered:

1. The bail granted to the applicant by the Supreme Court on 11 March, 2009 in Case No. SC 45/09 be and is hereby reinstated.
2. The applicant be and is hereby admitted to the same terms and conditions obtaining as at the 14th October, 2009 which is the day he was committed to prison.
3. The Officer in Charge Mutare Prison that has the applicant in its custody be and is hereby ordered to release the applicant upon service of this order.

*Mtetwa & Nyambirai*, applicant’s legal practitioner

*Attorney-General’s Officer*, respondent’s Counsel