NYAMUTATA MOREBLESSING ANESU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 27 June 2018 & 18 July, 2018

Bail Pending Trial

Applicant in person
A. Muziwi, for the respondent

CHITAPI J: The applicant applies for bail pending trial on allegations of committing 4 counts of robbery and one count of attempted robbery as defined in s 126 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] between the period 19 April, 2018 and 14 May, 2018. The applicant, a 28 year old female adult is a resident of Epworth, Harare. In the 4 counts of robbery charged, the applicant allegedly committed the robberies acting in concert with two accomplices namely Thulani Ndlovu and Last Sithole who are residents of Epworth as well. The robberies which were committed using the same *modus operandi* around Harare and Chitungwiza involved robbing complainants of their motor vehicles by use of threats and violence. In count 5 where the applicant is co-charged with the same two accomplices, the complaint successfully resisted being robbed of her money and other property. In two of the counts, the applicant was the one who would take to the steering wheel of the vehicle following the robberies and in the other two counts she would be an active participant.

The state vehemently opposed bail on the main basis that there was overwhelming evidence against the applicant in that she was heavily linked to the offence. In particular the applicant was alleged to have been the one who jumped into the driver's seat and drove away the motor vehicles in 2 of the counts following the robbery of the complainants of their vehicles. The applicant was

arrested whilst driving one of the vehicles. The police alleged that the applicant made indications leading to the recovery of one of the vehicles, subject of one of the robberies.

In her application, the applicant averred that bail is a right in terms of the new constitution. She surmised that the seriousness of the offence was not a bar to the admission of an applicant to bail. She quoted the case *S* v *Tsvangirai* (no citation given) and gave it as an example in which Tsvangirai who faced a treason charge which the applicant perceived as more serious than the charges she is facing was admitted to bail. There is no gainsaying that the grant or denial of bail is not informed solely by the seriousness of the offence. A serious offence however invariably attracts a stiffer or heavier sentence compared to a less serious offence. The prospects of a heavy penalty is viewed as a factor more likely to induce in the accused an incentive to abscond to avoid such sentence if convicted. The fact of the offence being a serious one is therefore, taken together with other relevant considerations, a factor of great impact in considering whether or not compelling reasons to deny the applicant bail have been established.

The applicant denied that she was arrested whilst driving the motor vehicles an alleged by the state counsel in his response which was supported by an affidavit sworn to by the investigating officer. She averred that she had recently acquired a driver's licence in September 2017 and did not have any experience to "drive off at a vehicle high jacking" (to use her words). She also denied that she had recently been released from prison under the presidential amnesty as alleged by the state. She challenged the state counsel to provide proof of the fact that she was a beneficiary of the presidential amnesty of March, 2018. The applicant submitted that she operated a flea market, was a mother to two minor children and did not have any pending cases. She offered to abide by the most stringent bail conditions which the court considered proper to impose.

Since the applicant was a self-actor, I exercised the court's duty to assist an unrepresented applicant to ensure that such applicant is not prejudiced through a lack of ability to properly present his or her case. I also considered that it was necessary to have the issue of previous convictions properly ventilated because the state alleged that the applicant had been freed on presidential amnesty meaning that she had a previous conviction. Since the offences which she is facing were committed in May, 2018, if in fact she had been freed on amnesty in March, 2018, it would mean that she allegedly committed the present offences hardly two months after benefitting from the amnesty. An applicant in a bail application is compelled in terms of s 117 A (5) of the Criminal

Procedure and Evidence Act, [*Chapter 9:07*] to disclose previous convictions and pending cases. A willful failure to do so grounds an offence in terms of s 117A (8) punishable with a fine of up to level 7 or imprisonment of up to 2 years or both. The offence is equally committed where the applicant supplies false information in regards to previous convictions and pending cases. In terms of s 117 (2) (d) of the same enactment, the judge or court presiding over a bail application is required to take into account *inter alia*, whether or not the applicant supplied false information on arrest or during bail proceedings.

In *casu,* if the applicant was being untruthful to deny that she was a beneficiary of the Presidential Amnesty, which fact would mean that she had a previous conviction(s), it meant that she fell foul of s 117 A (5). It also meant that the court would be required in terms of s 117 (2) (d) to take into account that the applicant had supplied a false denial that she had previous conviction. Obviously, an adverse inference would have to be drawn against her being a proper candidate for release on bail given her untruthfulness considered together with other relevant factors. An adverse inference can only be properly drawn where the court is considering proven facts. I therefore directed the State counsel to provide proof of the applicant's release on presidential amnesty and postponed the hearing.

At the resumed hearing, State counsel Mr *Muziwi* capitulated on the issue of the applicant's alleged release on Presidential Amnesty. He submitted that the police had supplied wrong information on the remand from 242 when they endorsed on the form that the applicant and her accomplices were beneficiaries of the recent Presidential Amnesty. The court expressed its disquietude at such despicable and abhorrent conduct by the police in endorsing untruthful information on the request for remand form. The conduct of the police in this regard was detestable because the false information was intended to portray the applicant as an incorrigible criminal or repeat offender who is given to crime and would if released on bail be likely to commit further offences. Police are exhorted not to mislead the court because courts justifiably end up not taking the word of a policeman for objective fact and this can result in dangerous criminal suspects being released on bail because the courts will have a negative perception of the professionalism of the police. The court therefore accepted that the applicant did not mislead it when she denied that she was a beneficiary of the recent Presidential Amnesty of March, 2018.

Mr *Muziwi* whilst conceding as above however tendered a certificate of previous convictions showing that under case R684/14, the applicant and two accomplices one with whom she is jointly charged in the 5 counts the subject of this bail application was on 12 September 2014 convicted on 3 counts of robbery by the regional magistrate at Harare. She was sentenced to 7 years imprisonment on each count making a total of 21 years imprisonment. 5 years of the 21 years were suspended for 5 years on conditions of good behaviour. The applicant admitted the previous convictions. The court enquired of the applicant as to why she did not disclose that she had previous convictions. In response, the applicant stated that she inadvertently omitted to include the disclosure in her final application but had included it in the draft which she first prepared. She stated further that the state was trying to use her previous convictions as an unjustifiable reason to have the court deny her bail. I did not find the applicant's explanation that she mistakenly omitted to disclose her previous conviction to be truthful. I say so because such a disclosure is not only a peremptory requirement but is a fact which any applicant who has previously been convicted by a court cannot forget. In my view, the non-disclosure was intended to portray the applicant as a person whose past was crime free and in the process use the deception to persuade the court or judge to favourably determine the bail application in the applicant's favour.

Mr *Muziwi* requested the court to summarily invoke the provision of s 117 A (8) of the Criminal Procedure & Evidence Act and find the applicant guilty of a willful non-disclosure of previous convictions contrary to the requirements of s 117 (5). Mr *Muziwi* submitted that a clear message should be sent to bail applicants that it is a serious offence to fail to disclose previous convictions and pending cases. For her part and in response, the applicant stated that she was sorry for the omission.

I have carefully considered the state's request that the applicant be summarily tried for contravening of s 171 A(5) as read with s 117 A(8) of the Criminal Procedure & Evidence Act. A failure to disclose previous convictions and pending cases leads to an inference that the applicant is dishonest. The failure also shows that the applicant will have failed to take the court into his confidence. The applicant's sincerity in making the undertakings which he or she makes in support of his or her admission to bail is brought into question by reason of the non-disclosure. See *Julius Dansab* v *State* CC (SA) 38/2009. The temptation to summarily deal with and punish an applicant who has failed to disclose previous convictions or pending cases looms large especially as in this

case wherein the applicant's explanation for non-disclosure does not stand scrutiny. The court must however, be wary of the correct procedures to follow in dealing with the non disclosure offence as aforesaid.

In my reading of the sections, s 117 A (5) imposes a duty or obligation on an applicant applying for bail to disclose pending cases and previous convictions. Section 117 A (8) creates the offence of wilful non-disclosure by the applicant of pending cases and previous convictions. The latter section provides for a penalty upon conviction. There is nothing in the sections to support that the court can summarily convict and sentence the applicant who has failed to comply with the provisions of s 117 A (5). The bail court is entitled to consider the non-disclosure adversely against the applicant in making its determination whether or not to grant the applicant bail. Beyond that, it is the prerogative of the State to prefer a case of a contravention of s 117 A(5) and prosecute it separately. The bail court judgment making a finding of non-disclosure acts as an indicator that a crime warranting investigation and prosecution may have been committed.

In bail applications, the court takes into account whatever information is placed before it and forms an opinion on such information. A bail determination is in fact a value judgment. A contravention of s 117 (A) (5) creates a specific offence to be tried, with the State being saddled with the normal onus to prove the alleged wilful non-disclosure beyond a reasonable doubt. The bail court should not be turned into a trial court to determine the issue of wilful non-disclosure and thereafter to use its judgment in the trial in the bail application. In practice there are very limited circumstances in which a court seized with a criminal matter will deal summarily with distinct crimes arising in ongoing proceedings. Examples which come to the fore when a court can suspend the hearing before it to summarily determine an ancillary criminal crime and revert back to the main matter would be where there has been committed a contempt of court in *facie curiae* see *S* v *Machona* (2006) ZWHC 41. The determination of the admissibility at trial of confessions and statements made by the accused in terms of s 256 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] when a trial within a trial is held separately from the main trial does not constitute the trial of a separate distinct crime arising during the conduct of trial but is just an example of an instance when a trial court can stay the main trial, engage in another trial, give a ruling thereon and apply its ruling in determining issues in the main trial. I therefore refuse to exercise summary jurisdiction for the alleged contravention of s 117 A (5) as read with s 117 A (8) of the Criminal

Procedure & Evidence Act as requested by the State. It is up to the State to initiate a separate prosecution if so advised or even add the charge at the applicant's trial as an additional charge.

Reverting to the bail application before me, the applicant is not a good candidate for bail. She faces the same offences as the ones for which she served jail time before being released by presidential amnesty in 2016. The offences are very serious and attract severe sentences as evidenced by the previous sentences totalling 21 years imprisonment imposed upon the applicant on her conviction. The fact that the applicant is allegedly strongly linked to the committed serious offences presents the applicant as a threat to public safety.

I am mindful that the applicant is a woman. Ordinarily female suspects because of their links with their families and children are normally considered as unlikely to abscond if admitted to bail. Every case however depends on its facts. Where the facts as in this case reveal that the female accused (applicant) has shown tendencies that she is given to serious crime, then the court will be justified to treat the applicant as an unsuitable candidate for bail. The applicant *in casu* falls into the class of persons whose admission to bail has a real potential to bring the administration of justice into disrepute.

There are thus compelling reasons to deny the applicant bail and it is so ordered. The application by the state for the court to summarily deal with the applicant for a contravention of s 117 A (5) as read with s 117 A (8) of the Criminal Procedure and Evidence Act is non suited for procedural irregularity.

National Prosecuting Authority, respondent's legal practitioners