

ISHMAEL SIBANDA
And
JUSTIN ZIJENA
And
JOSPHAT MAKUVA
And
PIRAISHE MANDENDE
And
PETER TZIRI
And
TRUST NDLOVU
And
JUSTICE ZHOU
And
COLLIMORE KUDAKWASHE
And
SABELO MOYO

Versus

THE STATE

HIGH COURT OF ZIMBABWE
NDUNA J
BULAWAYO, 15 NOVEMBER 2024

Appeal: Bail pending trial

Mr T Vhiki and Mr T Nyapfundi for the appellants
Ms C Mabhena for the state

NDUNA J: It is a requirement for the law that all persons facing criminal charges are tried whilst they will be coming from home. However, in some cases a person charged with an offence may have to remain in custody till the day the court pronounces its verdict or its sentence. That is an exception to the general rule. In this case the appellants were arrested and appeared at Bulawayo Magistrates Court facing stock theft charges wherein their prayer for bail was refused by the court. They proceeded to approach this court challenging that decision to refuse them bail.

The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the

reasons that in its view should persuade the court to deny the accused person bail, including the following:

- a) That the accused person is likely to fail to attend court proceedings; or
- b) That the accused person is likely to commit, or abet the commission of, a serious offence; or
- c) That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
- d) That the accused person is likely to endanger the safety of victims, individuals or the public; or
- e) That the accused person is likely to interfere with witnesses or evidence; or
- f) That the accused person is likely to endanger national security; or
- g) That it is in the public interest to detain the accused person in custody.”

It is trite that an accused person is presumed innocent until proven guilty and therefore, such a person’s liberty should not be deprived of over flimsy reasons. The deprivation of liberty should be as a result of cogent reasons and in accordance to the principles known in law. The prosecution to succeed in persuading the court on it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others..., at least some facts must be placed before the court otherwise it is asking the court to speculate.

Every accused person shall be presumed innocent (section 70 (1) of the Constitution). This is the primary rationale for the requirement of the Constitution that an arrested person has the right to be released on bail. The presumption of innocence dictates that accused persons should be released on bail whenever possible.

Every accused person has the right to liberty. As a general rule, therefore, every accused person should not be detained, but should be released subject to his/her guarantee to appear for trial. Pretrial detention should therefore be a measure of last resort, and the criminal justice institutions should make every reasonable effort to avoid pretrial detention.

On the one hand, police officers and judicial officers should endeavour to preserve the liberty of an accused person, who is presumed to be innocent and should be allowed to keep the fabric

of his or her life intact by, for example, maintaining employment and family and community ties. Preserving the liberty of an accused person also permits him or her to take an active part in the planning of his or her defence. On the other hand, the State has a duty to prosecute those who commit crimes, which may entail qualifying the individual right to liberty. The State has a duty to ensure public safety between the time of arrest and trial of accused persons, and a duty to protect the integrity of the criminal justice system. This means that where there is convincing evidence that an accused person may undermine the integrity of the criminal justice system, by, for example, intimidating witnesses or interfering with the evidence, then a need arises to either deny such a person bail, or set stringent bail terms. Equally, where there is convincing evidence that the accused person will endanger a particular individual (for example, victims of the crime) or the public at large, or even commit a serious crime, it also becomes necessary to subject an accused person to pretrial detention. The interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons. It is therefore important for police officers and judicial officers to appreciate that the public have an interest in the effective prosecution of offences.

In appreciating the need to balance the rights of accused persons with the interests of justice, the Constitution states that an accused person can only be denied bail where the court establishes that there are compelling reasons not to be released. That is, while the Constitution stipulates that every accused person is presumptively entitled to bail, it permits the denial of bail where the prosecution presents convincing evidence to justify such denial. In denying an accused person bail, it must therefore be demonstrated with convincing evidence that his or her release will present risks, and that such risks cannot be managed, even with the attachment of appropriate conditions.

The foregoing is meant to protect the criminal justice system.

Now coming to the current case before the court, the accused were denied bail for principally one reason;

The following were the grounds of appeal noted by the applicants;

- a) The court a quo erred and misdirected itself in denying the Appellants bail upon concluding that the State case was ex-facie strong where it is apparent that the evidence adduced by the State failed to prove a strong prima facie case against all the Appellants.

- b) The court quo erred and grossly misdirected itself by concluding that the risk of interference was unavoidable on Appellants 1, 3-8 because they reside in the same area with state witnesses where there is no evidence that they interfered or showed inclination to interfere with state witnesses especially when the court failed to consider imposition of stringent bail conditions to allay the state fears.
- c) The court a quo erred and misdirected itself by failing to consider the principle of '*expressio unius est exclusio alterus*' in favour of Appellant 2 and 9 when it specifically concluded that the risk of interference with state witnesses on Appellants 1, 3 -8 was unavoidable
- d) The Court a quo erred and misdirected itself in denying bail to the all the Appellants on the basis that the villagers may resort to self-help thereby making a decision on a wrong principle of law.
- e) The court a quo erred and misdirected itself by completely disregarding the evidence presented before it which evidence clearly showed that there were no compelling reasons for denying all the Appellants bail and that the state case was manifestly weak therefore there was no risk of absconding.

What they are simply saying is that the court aquo made an erroneous decision in denying the applicants bail who are entitled to the bail. In respect of appellant on s 2 and 7, the state does not oppose their admission to bail. This is so because the state is opposed to the granting of bail on the basis that there will be upheaval in the community whose cattle were allegedly stolen. These persons stay in accused 1, 3, 4,5, 6 and 8's area. It is for this reason that the bail was being opposed by the state.

Clearly the mere fact that the accused persons stay with the complainants is not a strong reason upon which bail can be opposed. There is no evidence which was placed before the court aquo that there was an upheaval so to speak.

The five herd of cattle involved here has persons who are claiming them to belong to them. There is no meaningful basis to have them being regarded as having been stolen. The other allegations are from hides which has been recovered at the first appellant's home. The first appellant still maintains that these are his which he had bought and cleared with the police. There is an element of truth in what he says about the cattle.

This is a case which does not seem to very strong to warrant the denial of the bail to the accused persons. To simply suggest that there are angry villagers in their area is not enough.

The accused persons should have been granted bail pending trial in this matter. They are accordingly admitted to bail as follows;

1. Each of the 8 applicants are admitted to bail on the following conditions:
 - a) Each to deposit USD200 with the Registrar's office
 - b) Each to reside as follows till the matter is finalised,
 - i. Accused 1 at Mvurachena "C" Village, Fort Rixon,
 - ii. Accused 2 at No. 879 Mandava Zvishavane
 - iii. Accused 3 at Tatenda Village, Lambamai Fort Rixon
 - iv. Accused 4 at Lambamai Village, Fort Rixon
 - v. Accused 5 at Gwaamanyanga Village, Fort Rixon
 - vi. Accused 6 at Mkiweni Village "A" Lamabamai Village, Fort Rixon
 - vii. Accused 7 at Mvurachena "C" Village, Lambamai , Fort Rixon.
 - viii. Accused 8 at Mvurachena "C" Village, Lambamai, Fort Rixon
 - ix. Accused 9 at Mxotshwa Village Wedza Zvishavane
 - c) 2nd and 9th Appellants to report at Zvishavane Police Station once every month on a Friday between 8am and 4pm until the matter is finalised.
 - d) Appellant 1, 3-8 to report at Lambamai Police Base once every month on the last Friday between the 8am and 4pm until the matter is finalized
 - e) That such first reporting date shall be the 29th November 2024
 - f) Not to interfere with state witnesses.

Nduna J.....

Macharaga Law Chambers, applicants' legal practitioners
The National Prosecuting Authority, respondent's legal practitioners