SHELTON MAPINGIRE
versus
THE STATE

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE, 30 December 2024 & 2 January 2025

Bail Application

B. Mabundu, for the applicant
T. Makiya, for the respondent

[1] DEMBURE J: This is an application for bail pending trial. The applicant seeks an order that he be admitted to bail pending trial on the conditions that he deposits US$100.00 with the Clerk of Court, Magistrates Court, Harare; resides at number 61 Chiremba Road, Cranborne, Harare until the matter is finalized; does not interfere with state witnesses or investigations; surrenders his passport to the Clerk of Court, Magistrates Court, Harare and reports once every Friday between the hours of 6 am and 6 pm at Braeside Police Station.

FACTUAL BACKGROUND

[2] On 17 October 2024, the applicant was arraigned before the Magistrates Court facing the offence of robbery as defined in terms of s 126(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] *("the Criminal Code").* The allegations captured in Form 242 are that the applicant together with Kennedy Mbundire, Owen Muteeri (whose surname is also recorded as Mutera), Tedious Desmond Munyaradzi Mhungira and other three accomplices still at large agreed to commit robbery. It is further alleged that acting in common purpose on 9 December 2023 they produced an unidentified pistol and manhandled Chisakaitwa Mushanduri and Tinotenda Kruvert Chidawu who were guarding some premises, tied them with shoelaces and took their cellphones a Vivo Y54 and Samsung M33. They held the said security guards hostage, entered the workshop and took a CCTV DVR.

[3] It is further alleged that the applicant and his alleged accomplices went to stand 234 Delpot Road, Sunway City, Epworth, where Owen Muteeri, the first accused was

employed as a guard. They are alleged to have jumped over the durawall at said premises, broke into the complainant's offices and gained entry. While inside, they ground the safe and stole cash amounting to US$238,000.00 which they shared among themselves.

[4] It is common cause that one of the applicants' co-accused Owen Muteeri, accused number 1, was granted bail pending trial by this court.

[5] The applicant filed a bail statement in support of his application through his legal practitioners of record. The respondent opposed this application and filed its response together with the affidavit of the Investigating Officer *("the IO"),* Isau Matsvimbo.

APPLICANT'S SUBMISSIONS

[6] Mr *Mabundu,* for the applicant, submitted that he would by and large abide by the submissions in the applicant's bail statement. He argued that a reading of the state response showed that the state is opposing bail on the basis that the applicant will abscond and not stand trial. However, there is an address where the applicant will reside, number 61 Chiremba Road, Cranborne, Harare. This address is both his residential and employment address. The applicant resides where he is employed. He is employed as a gardener and has been so employed since 2015.

[7] It was further submitted that the employer's address and contact details were provided in the application. Counsel submitted that the applicant was arrested at his place of employment. He was arrested after he gave his address to the police where there they could find him. There has been an allegation that the applicant was on the run but the applicant was never on the run. It was also submitted that he never changed his place of residence, place of work or cell number as alleged. The cell number that was supplied to the police when they visited his rural home is the same cell number the police used to contact him. If he indeed wanted to abscond, he could have done so. There was no reason for him to do so. He supplied his address to the police and they arrested him there.

[8] Mr *Mabundu* also submitted that the state said that there were communications between him and the accomplices but the only communication he had was with his brother Ignitious Mugoni and the communications had nothing to do with the offence but brotherhood communications. The only reason he was arrested was simply because he was a brother to one of the accused. Counsel stated that the applicant told the police

that his brother was in South Africa. Apart from the communication, there is no other communication with any of the accused persons. If there was any other WhatsApp conversation, the IO should have provided that to the court. It was further argued that the applicant being a poor gardener has no assets and the means to leave this jurisdiction.

[9] Counsel also submitted that another accused person, Owen Mateeri, was granted bail on 15 January 2024 by MUNGWARI J under Case No. HCHCR8124/24 wherein he was ordered to pay US$150.00; reside at the given address; report to the police once every Friday and not interfere with state witnesses. In terms of Form 242, the state alleged that the said first accused led the police to the recovery of US$2700.00 and that he was employed where the offence was committed. These facts do not apply to the applicant. He was simply arrested for being the brother of one of the alleged robbers. Counsel prayed that bail be granted in terms of the draft order.

RESPONDENT'S SUBMISSIONS

[10] *Per contra, T Makiya,* for the respondent, submitted that the state by and large abided by the submissions filed of record. According to the IO, the applicant was contacted by the police to come for questioning but he did not turn up. This was in December 2023. The police visited his rural home in Mahusekwa in March 2024 where the IO got his cellphone number and his wife and relatives did not know where the applicant was residing. It was further submitted that the applicant escaped arrest by means of changing the mobile lines he was using so that the police could not get hold of him. One of his accomplices, his young brother, Ignitious Mugoni, is in South Africa and there are fears that if granted bail he will escape from this jurisdiction and join his brother in South Africa.

[11] Counsel also submitted that at the time the applicant was arrested he was not employed at the address given. He was arrested on his way to Msasa where he alleged that he was employed as a welder. She argued that at least an affidavit from the alleged employer was required to confirm that he was employed as a gardener and that he could still reside at the alleged employer's address. He did not provide any other address or his home address outside that of his alleged employer. It was also argued that indeed Owen Muteeri his co-accused was granted bail but there are facts differentiating the two. The applicant was on the run and disappeared when contacted to come to the police.

APPLICANT'S SUBMISSIONS IN REPLY

[12] Mr *Mabundu*, in reply, submitted that the state has not provided any new submissions. In para 4 of the IO's affidavit, he did not make any reference to contacting the applicant in December 2023 but only mentioned that he obtained the applicant's contact number in March 2024. There is no mention as to when he contacted the applicant for questioning. He deliberately omitted those details as he was aware that no such contacts were made. It was also submitted that subject to the production of the affidavit from his employer as to whether he is still welcome to reside at the given address the applicant has to be admitted to bail in terms of the draft order.

[13] I, however, raised an issue that Mr *Mabundu* did not make any application for leave to file any supplementary bail statement or further document or affidavit to confirm the applicant's address. Counsel then said that the court should allow the applicant to file an affidavit from his employer. I highlighted that counsel ought to have taken the initiative to make such an application before he closed his submissions in reply. The law is clear that an application to file a supplementary statement or any further document or affidavit must be made at the appropriate stage and not when the parties have made their final submissions on the matter. Such leave is, in any case, not there for the mere asking. The court has the power in terms of rule 94(3) of the High Court Rules, 2021 to authorize any departure from any provisions of the rules or give directions as to procedure in respect of filing of additional documents or affidavits. The power in terms of the said rules may only be exercised if the court is satisfied that it is in the interests of justice to do so or if it is just and expedient to do so. The court has the discretion which must be exercised judiciously. From the applicant's counsel's submissions, it was clear that he did not consider it necessary to file any further document or affidavit from the alleged employer and left the issue for the court to decide on its own if such evidence is required, which stance was improper. Accordingly, the court could only proceed to determine the application based on the papers and the evidence placed before it.

THE LAW

[14] The law on bail applications is well settled. Firstly, s 50(1)(d) of the Constitution of Zimbabwe, 2013 is imperative 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. This court shall refuse to grant bail if one or more of the grounds set out in s 117(2) of the Criminal Procedure & Evidence Act [*Chapter 9:07*] *("the CP&E Act")* are established. The court may, therefore, find compelling reasons for denying the applicant bail if one or more of the following grounds are established;

(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,

(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.

[15] The other pertinent provision where the offence is a Third Schedule offence is s 115C(2)(a) of the CP & E Act which states that:

> "(2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail —
> (a) before a court has convicted him or her of the offence—
> (i) the prosecution shall bear the burden of showing, on a balance of probabilities, that there are compelling reasons justifying his or her continued detention, unless the offence in question is one specified in the Third Schedule;
> (ii) the accused person shall, if the offence in question is one specified in— A. Part I of the Third Schedule, bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail, unless the court determines that, in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden;
> B. Part II of the Third Schedule, bear the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail…"

[16] There have been different views on the issue of the burden of proof arising from the provisions of s 115C(2)(a) of the CP & E Act for third schedule offences provided under Part I in view of s 50(1)(d) of the Constitution. It has been held that the provisions of s 50(1) of the constitution impose on the state the onus to prove on a balance of

probabilities the existence of compelling reasons for the accused's continued detention pending trial. In *S v Munsaka* HB 55/16 MATHONSI J (as he then was) opined that whether or not that law has been realigned to the constitution is immaterial, any provisions of the law that are at variance with the constitution are no longer part of our law and are to the extent of their inconsistency invalid. On the other hand, other decisions of this court have held that the law permits the reversal of the onus of proof in cases of Third Schedule offences listed under Part I in the CP & Act and until this has been challenged and expunged from our statute books every accused charged with a third schedule offence will be required to show, on a balance of probabilities that it is in the interests of justice that he be admitted to bail. See *S v Bonongwe* HH655/23. In a later case to that of *Munsaka supra* of *S v Zenda* HB 101/17 MATHONSI J (as he then was) had the following to say on the burden of proof in respect of offences falling under Part I of the third schedule:

> "The accused person only bears the burden in respect of offences specified in Parts I and II of the Third Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*]"

[17] Due to the presumption of constitutionality, this court will not get into the debate on whether the provisions of s 115C (2)(a) are consistent with the Constitution. There has been no constitutional challenge before me nor are there full arguments on the issue though the applicant's legal practitioners made such an argument in passing in the bail statement. What is before me is simply an application for bail pending trial. The provisions of s 115C(2)(a) remain part of our statute books and the decisions above show that the burden of proof is on the accused person if he is charged with a third schedule offence. This court, however, must at the end of the day balance the interests of the administration of justice of seeing that the applicants stand trial and the applicant's right to liberty weighing up the factors set out in s 117(2) of the CP & E Act. The issue is whether or not the applicant is a proper candidate to be granted bail pending trial.

THE ANALYSIS AND DETERMINATION

[18] In determining the issue of whether or not the applicant is a proper candidate for bail the court must treat accused persons similarly to their co-accused who would have been granted bail unless there are compelling reasons for not doing so. See *S v Lotriet &*

Another 2001 (2) ZLR 225 which was also quoted with approval in *S v Dhlamini* HH 57/2009.

[19] The applicant faces a serious offence of robbery committed in aggravating circumstances with the possibility of receiving a lengthy period of imprisonment, if he is convicted. He is of course presumed innocent until proven guilty. The likelihood of a lengthy sentence of imprisonment is a factor that can induce a person to abscond. The court is, however, aware that the seriousness of the offence alone is not a good ground to deny the accused person bail: See *S v Hussey* 1991 (2) ZLR 187 (S). In *casu*, this court is of the view that there is a reasonable possibility that the applicant will abscond. This view is arrived at looking at the serious offence he is facing with the possibility of a lengthy prison term, if convicted, coupled with the conduct of the applicant in this case and his failure to show the court that he is employed as a gardener at number 61 Chiremba Road he alleged is his place of residence and that it was possible he could still reside there if granted bail. The applicant made bald assertions on the critical aspect of whether he is of fixed abode.

[20] The respondent placed evidence before the court on the issue by filing an affidavit from the IO. The IO deposed to an affidavit giving evidence as to the circumstances surrounding the arrest of the applicant. The IO testified that the applicant was contacted to present himself to the police over these allegations but he did not turn up. The applicant did not confirm that he surrendered himself to the police. It is also the IO's evidence that at the time of the applicant's arrest, he alleged that he was working as a welder in Msasa and not as a gardener where he alleged had always been at the given Cranborne address. The issue of his employment address or whether he is a person of fixed abode was put in issue by the respondent through the IO's affidavit yet the applicant did not see it fit to give evidence confirming that he was indeed employed as a gardener and that the alleged employer would still accept him to reside at his house pending trial. He did not give any evidence on that issue.

[21] The applicant ought to have filed an affidavit confirming his place of residence to dispel the state's fears and discharge the onus upon him to show that he was of fixed abode. The IO also revealed that when he visited the applicant's rural home his wife and relatives did not know where he was residing. Given that evidence, it could not simply be challenged by making bald assertions but would require substantiation. The claim

by the applicant that he is of a fixed abode given the state's challenge on his actual place of residence or that being put in issue, remained an unsubstantiated assertion. It is trite that bald assertions are insufficient to prove one's case. I, accordingly, associate myself with what was expressed in *Delta Beverages (Pvt) Ltd* v *Murandu* SC 38/15 where the court stated that:

> "I take the time to point out that parties are expected to argue their cases so as to persuade the court to see merit, if any, in the arguments advanced by them. They are not expected to make bald, unsubstantiated averments and leave it to the court to make of them what it can."

[22] The above legal position was also reaffirmed in *Sibanda v Yambukai Holdings (Pvt) Ltd & Anor* HH 84/17 where CHITAPI J observed that:

> "The celebrated rule of evidence that he who alleges must prove should always guide practitioners and parties when drafting court pleadings and preparing for court unless the matter at play is one in which an exception to the rule has been provided for as in the case of presumptions…
> It follows therefore that where a party makes bald assertions not backed by evidence and the same are denied by the party against whom they are made, such bald allegations cannot pass as having been proved on a balance of probabilities. A party averring a fact should present evidence of that fact which has a probative value. See generally *Zimbank Ltd* v *Ndlovu* SC 61/2004."

[23] Besides failing to rebut the respondent's case that he was not of fixed abode, the applicant also failed to show that he was not on the run. He did not dispute that the police visited his rural home in search of him. While he denied that he was not on the run there was nothing placed before the court to show that he was always at the alleged place of employment and that he was available to assist the police with further investigations. Mr *Mabundu* conceded that evidence from the alleged employer confirming his employment, that he was always at the given address and that the alleged employer would welcome him to stay even after the arrest pending trial, was critical to dispel the state fears. However, he did not seek to lead such evidence at the appropriate time. In my view, he downplayed the importance of such critical evidence as he even closed his submissions without seeking the court's indulgence to file an affidavit from the alleged employer. The risk of abscondment in these circumstances coupled with the serious charges he is facing is reasonably probable.

[24] It is trite that a bail applicant who is charged with a Part 1 Third Schedule offence must adduce evidence. In *casu*, the applicant, therefore, had the onus of showing, on a balance of probabilities, that it is in the interests of justice for him to be released on

bail. In the case of *Van Brooker v Mudhanda & Another and Pierce v Mudhanda & Another* SC 5/18, it was held thus:

> "When one speaks of the need to discharge an onus, it immediately becomes clear that there is an evidentiary burden that must be met. There is no suggestion that such burden as required to be met was met by documents filed of record. There were no affidavits placed before the court *a quo*."

[25] With reference specifically to applications of this nature the court in *S v Gutu* HB 99/22, made the legal position clear that:

> "The standard of proof required from the applicant to establish that it is in the interests of justice that he be released on bail is on a balance of probabilities. Such burden cannot be discharged by mere submissions contained in a bail statement. Applicant must adduce evidence. The evidence must show that exceptional circumstances exist which in the interests of justice permit his release on bail pending trial." [My emphasis]

The court in the case of *S v Bonongwe* HH 655/23, restated the same law on bail applications as follows:

> "What that entails is that an applicant to bail is required to adduce evidence to prove the averments he/she makes in his/her application…An applicant who simply makes bald assertions as if he has no onus to discharge does himself/herself a big disservice."

The applicant, in this case, did not give any evidence to show that indeed he is a person of fixed abode, that he was not contacted by the police to present himself over the allegations and that he was not on the run as alleged by the state. His counsel could not lead evidence from the bar. The applicant, therefore, could not discharge the onus in the circumstances by only making bald assertions in the bail statement filed by his legal practitioners.

[26] I am also not satisfied that the applicant also gave a plausible defence to the charge. Mr *Mabundu* argued that the applicant was arrested simply because he is the brother of one of the accused Ignitious Mugoni who is in South Africa. It is trite that the law does not require the applicant to prove his innocence but to place before the court a reasonably probable defence. See *S v Tshuma* HB 130/22.Thus, MAKONESE J in *S v Regiment* HB 194/22 had this to say about the need to show a plausible defence:

> "In an application of this nature, it is of paramount importance that when an applicant is seeking to be admitted to bail pending trial, a reasonably probable defence be placed before the court in applicant's bail statement. A probable defence at law is one that is reasonably probable to any ordinary man of right-thinking person. See; *Tshuma* v *State* HB 130/22. A defence must not be far-fetched and unbelievable. See also *S* v *Ndlovu* 2001(2) ZLR 26."

[27] In *casu*, the applicant alleged that the communications he had with his young brother were simply based on brotherhood and nothing else. Surely no sane police officer would arrest him for such honest communications. Even the lower court on his initial remand may not have placed him on remand simply because there are brotherly communications. The applicant was placed on remand because there was reasonable suspicion that he committed the offence. There is no evidence that he challenged his placement on remand. Further, the IO's affidavit alluded to screenshots sent from the applicant's cellphone found in one of his co-accused Kelly Chinaka's cellphone when she was arrested. It was also alleged by the IO that the applicant was also alerted that the police were looking for him by the said Ignitious Mugoni. The applicant did not comment on the alleged screenshots shared except to simply claim that his communications were merely between brothers. The respondent in my view, established a strong connection between him and the commission of the offence and that he did not avail himself to the police when he was aware that he was wanted. The applicant was linked to the crime by the conversations he allegedly had with the alleged accomplices. The alleged accomplices are also said to have implicated him and that was buttressed by the communications the police discovered. The absence of a plausible defence in this case further supports the likelihood of him absconding trial.

[28] In light of the above, the risk of abscondment by the applicant is very high and cannot be allayed by the reporting conditions or any other conditions which have been submitted by the applicant including the quantum of the bail deposit offered.

[29] The law on equal treatment of co-accused is settled: accused persons jointly charged with the same offence must be similarly treated. CHINHENGO J (as he then was) in *S v Ruturi* HH 26/03 at p 9 of the cyclostyled judgment stated that:

> "Thus stated, the general principle is that persons jointly charged with an offence must be treated the same way. In practice however, it is not often that persons jointly charged with the same offence are treated equally in every respect. One accused may have to be treated differently from another because of certain factors, either personal or related to the offence, which him part from the other person with whom he is jointly charged. In the case of admission to bail on jointly charged persons may in the view of the court, be likely to abscond and the other not. One may be more likely to interfere with evidence or witnesses and the other not. One may be more likely so commit the same or similar offences and the other not. And one may be much more closely connected to the offence and more liable to be convicted and the other not. <u>These are some of the factors which may justify the granting of bail to the one and its denial to the other</u>. In

> broad terms, therefore, factors personal to jointly charged persons may set them apart for purposes of the grant or refusal of bail." [My emphasis]

On the same legal position, in *S v Shamu* HMA 18/21 at p.6 the court had this to say:

> "In my view equal treatment does not necessarily imply similar outcomes, equal treatment to my mind means being subjected to the same objective criteria in the resolution of the matter as opposed to being subjected to whimsical or capricious considerations. It is not uncommon therefore that the equal treatment of persons (in the sense of being subjected to the same criteria) whose circumstances are different would yield different outcomes."

[31] In this case, while it is common cause that Owen Mateeri, the applicant's co-accused was granted bail, I do not agree that his circumstances are the same as those of the accused who was granted bail. The said Owen was granted bail as early as January 2024 and there is no indication that he evaded his arrest as the applicant did in this case. The applicant was only arrested on 15 October 2024 after the police made several attempts to reach him including visiting his rural home looking for him. He did not present himself to the police despite that in March 2024 the police had reached out to his relatives that he was on the wanted list. Further, the IO confirmed that he was contacted and requested to come to the police station to answer the charges but he did not turn up. He was eventually arrested on his way to Msasa where he allegedly was working as a welder. The IO also highlighted how he changed his cellphone numbers to avoid being tracked by the police detectives. He failed to show evidence that indeed he was employed as a gardener at the alleged number 61 Chiremba Road and that he had always been at the stated address. All these facts show that the applicant should be treated differently from the one granted bail. The respondent's fears that he may escape this jurisdiction and join his young brother, his co-accused Ignitious Mugoni in South Africa are well-founded. The court cannot treat him equally as the other co-accused granted bail given these circumstances.

[32] It is trite that the court is required to weigh up the interests of the administration of justice and the applicant's individual liberty. In *Attorney General* v *Phiri* 1987 (2) ZLR 33 the court made the following remarks:

> "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 applicant is presumed innocent until proven guilty but balancing the protection of the administration of justice and his individual liberty this is not a case in which the applicant may be released on bail and be expected to stand trial out of custody. The applicant is a flight risk given the reasons above.

DISPOSITION

[33] There are compelling reasons for the applicant to remain in custody pending trial. I agree with the state's position that he is not a suitable candidate for bail pending trial. The applicant failed to discharge the onus on a balance of probabilities that it is in the interests of justice that he be admitted to bail. No exceptional circumstances have been established that permit his release.

[34] In the result, it is ordered that:

The application for bail pending trial be and is hereby dismissed.

DEMBURE J: …….

Mabundu & Ndlovu Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners