PANASHE DEAN TARUBINGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 6 OCTOBER 2021 & 14 OCTOBER 2021

Application for bail pending trial

C. Nyathi, for the applicant
B. Gundani, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is charged with the counts, count one: theft of motor vehicle as defined in section 113 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23]*. It being alleged that on the 20th April 2021, applicant unlawfully took a motor vehicle belonging to the complainant. Applicant was employed at a car wash in Hillside, Bulawayo. On the 20 April 2021, he was at work at the car wash. Complainant brought and left his vehicle at the car wash for it to be cleaned and washed. Applicant was in possession of the car keys. He then drove away the car unnoticed. He was arrested in Harare on the 27 April 2021, in possession of the vehicle. He had removed the third number plate of then vehicle from the windscreen and disposed of it.

Applicant was convicted, on a plea of guilty on a charge of theft of the vehicle. He was sentenced to five years imprisonment, of which one year was suspended on the usual conditions of good conduct. On the 8th September 2021, this court reviewed and set aside applicant's conviction, and ordered a trial *de novo*. He is now custody and awaiting trial.

The applicant chose to bring his application for bail by means of a bail statement and an affidavit. He advanced his case in the bail statement on the following lines. He is twenty two years old. He has no links to outside Zimbabwe. He has no intentions of absconding. The administration of justice would not be prejudiced by his release on bail. His father undertakes to stand surety and ensure that he complies with all bail conditions. His father has deposed to an affidavit stating that he is willing to be applicant's surety if he is released on bail. He will ensure that applicant complies with his bail conditions.

In his oral submissions, Mr *Nyathi*, counsel for the applicant argued that the State case is weak against the applicant. He argued about the presumption of innocence in favour of the applicant. Applicant has a defence to the charge, in that he did not intend to deprive the owner permanently of his ownership, possession or control of the vehicle, he only intended to enjoy himself with the vehicle. He intends to plead guilty to a lesser charge of driving a motor vehicle without the consent of the owner.

It was argued that section 115C (2) (a) (ii) A of the Criminal Procedure and Evidence Act [Chapter 9:07], which shift the burden of proof to an accused charged with crimes specified in Part II of the Third Schedule is *ultra vires* the Constitution of Zimbabwe. This section provides that an accused charged with theft of a motor vehicle as defined in section 2 of the Road Traffic Act [*Chapter 13:11*] shall 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.

In its opposition to the granting of bail the State contends that applicant is a flight risk. He is charged with an offence specified in Part II of the Third Schedule to the Criminal Procedure and Evidence Act. Upon conviction he is likely to be sentenced to a long prison term. Applicant having been convicted and sentenced, he is now aware of the reality of the situation and the likely penalty he might get if he is convicted. It was contended that the State does not need to show that it has a water tight case against the applicant, what it has to show is that has a strong *prima facie* case against him.

The view I take is that the provisions that cast the burden of proof on an applicant charged with an offence listed in Part 1I of the Third Schedule have not been declared constitutionally invalid. On the principles of constitutional law such provisions are valid and enforceable provisions until such time that a competent court rules to the contrary. The procedure of declaring legislative provisions constitutional invalid is clearly set out in the Constitution. Until such time that such provisions are declared constitutionally invalid, courts of law must give full effect to them.

There is a strong *prima facie* case against the applicant. In considering whether a bail applicant will abscond, this court is entitled to take into account the nature and gravity of the offence or the nature and gravity of the likely penalty therefor and the strength of the case for

the prosecution and the corresponding incentive of the accused to flee. The vehicle was allegedly stolen in Bulawayo. He was arrested after a week in Harare and in possession of the allegedly stolen vehicle. He had tempered with the identity of the vehicle by removing and disposing of the third number plate. Applicant is facing a serious offence which on conviction attracts a lengthy term of imprisonment. He is coming for a trial *de novo* and is now aware of the likely sentence in the event of a conviction. This is an incentive to abscond. This will activate an appetite to abscond.

His father's averment that he would ensure that applicant abides by his bail conditions in inconsequential. Applicant is an adult. His father will not place him under a twenty four hour guard or surveillance. There is absolutely nothing that his father will do if applicant decides to abscond. Therefore his father's averments in support of this application are, in my view, not sufficient to tip the balance in his favour of applicant.

Where there is a cognisable indication that an accused person would evade his trial if released from custody, the bail court would be serving the interests of justice by refusing bail. The liberty of an accused person would, in such circumstances have to give-way to the proper administration of justice. See: *S v Dial and Another* 2013 (2) SACR 665 (GNP). The cumulative effect of the facts of this case constitutes a weighty indication that bail should not be granted.

Disposition

On a conspectus of the facts and all the evidence placed before court, I am of the view that it is not in the interests of justice that applicant be released on bail pending trial.

In the result, the application for bail be and is hereby dismissed and applicant shall remain in custody.

Mutatu, Masamvu & Da Silver-Gustavo Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners