NOREST TRINITY KUFA
and
THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 16 MARCH 2022 & 5 May 2022

Bail Application

E Mavuto with R Maposa, for the applicant
T Mukuze, for the respondent

MUTEVEDZI J: On 16 March 2022, the applicant applied for bail pending trial before me. I considered the application and after seeking oral clarifications from both the applicant's and the state's counsels I dismissed the application. My reasons were *ex tempore* and appeared on the result slip. They were that:

1. The firearm used in the commission of the offence was recovered from the applicant's place of residence
2. The applicant's involvement with one Edwin Muchagwa was more than innocent and revealed her participation in the alleged commission of the offence and as such she was a danger to society
3. She was a flight risk

On 20 April 2022, the legal practitioners for the applicant through the registrar of this court requested me to furnish my full reasons for that decision. The letter of request made it appear like it was not the applicant who required the reasons but the judge of appeal who is seized with the appeal. I proceed to provide the reasons below.

I wish to point out from the outset that the practice where legal practitioners proceed to note appeals against decisions of judges without obtaining the judge's full reasons for the decision is disconcerting. This is especially so where the legal practitioner then alleges that no reasons were given. There is no debate that bail applications are urgent applications. Rule 93(1) of the High Court Rules, 2021 (hereinafter "The Rules") provides as follows:

> ***93. Urgency of bail applications and appeals***
> (1) The registrar shall ensure that every application or appeal referred to in this Part is set down for hearing with the utmost urgency …

In view of that provision which requires courts to treat bail applications with urgency, judges do not have the luxury to defer their rulings on such applications to enable them to write detailed reasons. The practice when dealing with bail applications in the High Court just like any other urgent application is that the judge hearing the application determines it on the basis of the written submissions by the applicant and the Prosecutor General in terms of r 90(4), (5) and (6) of the Rules. The oral arguments which may be made at the hearing are discretionary. They cannot therefore be regarded as solely constituting the record of proceedings. They are supplementary. Thereafter the judge makes up his/her mind to either grant or refuse to grant the application. The judge's *ex tempore* reasons for the decision are usually indicated on the result slip. That fabled document is invariably completed by every judge in every case without exception. It forms part of the judge's record of proceedings. Unlike the judge's notebook, it is a public document which a litigant can demand to be availed to him/her. A litigant must therefore always turn to that part of the record to be informed of the outcome of their application. Legal practitioners cannot purport to be ignorant of the procedure of requesting for reasons from a judge when even unrepresented litigants more often than not resort to it. To allege that the court did not give reasons where such are clearly provided for, albeit in an abridged form, in the court's record of the outcome of the case is being disingenuous. Whilst it is not in dispute that an appeal must be directed towards an order and not merely the reasoning of a court it is equally sacrosanct that the reasoning of the trial court is the only way through which an appellate court is put in a position to determine the appeal by assessing whether the court *a quo* would have made an error, as alleged by an appellant. See the cases of *(i) Chidyausiku* v *Nyakabambo* 1987 (2) 119 (S) and *(ii) Fox & Carney (Pvt) Ltd v Sibindi* **1989 (2) ZLR 173 (S)** for these propositions. In my view, it becomes illogical for a litigant to appeal against a court's decision in the absence of reasons for that decision in circumstances where he/she has the obligation to request for the court's full reasons.

Background and the legal position

The applicant, a woman aged 39 years was arrested and brought before the Magistrates' Court facing 3 different counts of robbery in aggravated circumstances in contravention of s126 of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]*. Because the offences fell into the ambit of schedule 3 of the Criminal Procedure and Evidence Act *[Chapter 9:07]* (the Code) i.e. offences in respect of which a magistrate's power to admit persons to bail is excluded or qualified the applicant was advised to seek her release on bail in the High Court. As already indicated, she made her application before me on 16 March 2022. The state did not oppose the

application. In ordinary cases, where the state had not opposed bail such as in this case, the matter was likely to have ended at that point. As will be illustrated below hers was not an ordinary case. My decision to refuse to grant the applicant bail despite the state's non-opposition is supported by statute. S117 (5) of the Code provides that:

> "Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interests of justice as contemplated in subsection (4)."

My reading of that provision is that the interests of justice are a consideration that a court cannot leave to the whims of a party to the proceedings. The law reposes an obligation on the court to make an assessment of the issues at hand and determine whether the personal interests of an accused person are outweighed by the interests of justice. An applicant, particularly where he or she faces a Third Schedule offence must therefore never regard a concession to his/her application by prosecution as a ticket which he/she can simply wave at the court for his/her admission to bail.

The applicant's argument was that the Constitution of Zimbabwe, 2013 (the Constitution) in s50 (1) (d) conferred the right to bail with constitutional status. That section provides that:

> **50 Rights of arrested and detained persons**
> (1) Any person who is arrested—
> (*a*)…
> (*b*)…
> (*c*) …
> (*d*) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention;

On the strength of that Constitutional provision, the applicant referred the court to the case of *Mike Kachigamba and Marko Makamba* v *The State* HH358/15 in which BHUNU J (as he then was) commended on the import of s50(1)(d) and said at p.2.

> "The effect of that section is to relieve an arrested person of the burden of proving that he is entitled to bail thus shifting the burden to the State to prove that there are compelling reasons justifying the continued confinement of the detainee."

The applicant's understanding was therefore that in all bail applications it is the state which bears the onus to prove the existence of compelling reasons justifying the continued detention of an accused. That reasoning was equally emphasized in *S* v *Munsaka* HB 55/16. The compelling reasons envisaged by s50 (1) (d) are defined in s115C (1) of the Code. The correctness of the interpretation of the import of s50 (1) (d) by the High Court in the *Mike Kachigamba* case is unfortunately not without debate. In the case of *Vincent Kondo and*

Edmore Marwizi Mapuranga v *The State* HH 99/17 CHITAPI J took issue with the conclusion in *Mike Kachigamba and Anor* v *The State* (supra) at p.2 of the cyclostyled judgment. He concluded that:

> "I must confess that I do not read s 50 (1) of the constitution as referring to an accused who has appeared before a court following his arrest. Section 50 (1) (d) should in my reasoning be read outside the whole ambit of s 50 (1) (a-e). In my view s 50 (1) (d) must be read as referring to an arrested person who is yet to appear before the court on a charge or for his trial. I however leave it open for further ventilation because the interpretation to be placed on the section was not argued fully before me. It would however appear that the person who has been arrested in terms of s 50 (1) or detained because there are compelling reasons to detain him or her must in terms of s 50 (2) of the Constitution be brought to court before the expiry of 48 hours from the time of his arrest otherwise in the absence of a further detention having been extended or sanctioned by an appropriate or competent court, the person must be released unconditionally. I do not read s 50 (1) (d) as being specific to bail applied for in court. On the contrary I read it as aimed at the arresting authority. It does not therefore appear to me that s 50 (1) (d) has altered the law with regards the question of bail because in my interpretation, the section was aimed at an arresting authority which then resolves to detain the arrested person pending putting a charge to such person or bringing the arrested person to court for trial."

I agree largely with the court's reasoning in *Vincent Kondo (supra*). But just like in that case, I am hamstrung to make any definitive findings on the issue because of lack of full argument on the matter. The recurrence with which the argument is made in bail applications demands that the question be exhaustively argued to enable this court in one way or another to fully pronounce itself on the import of that provision. The situation is not made any more enviable by the usual acceptance without protest by prosecutors, of that argument. I am left with no choice but to also leave the subject open for debate in appropriate cases in future. The need for a resolution of that question of law however appears less compelling in the instant case because the issues can be resolved without recourse to that.

What the applicant in this case however appears to completely miss is the point that the above principles barely apply in cases where an applicant is charged with an offence falling under Part I of the Third Schedule to the Code. S115 C (2) (a) (ii) of the Code provides 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) …
>
> (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 …" (emphasis is mine)

The applicant in this case faces charges of robbery involving the use of a firearm and theft of motor vehicles. Those offences fall squarely into the category where the applicant bears the onus to prove, on a balance of probabilities that it is in the interests of justice for her to be admitted to bail. Even without losing sight of s 50(1)(d) of the Constitution there can be very little debate if any at all that s115C(2)(a)(ii) of the Code creates a reverse onus from the ordinary position which is understood to mean that all what the accused person is expected to do is simply apply for bail and sit back. That position only relates to all other offences except those prescribed in the Third Schedule to the Code.

In addition, the fact that a right is provided for in the Constitution does not by itself make the right an absolute one. The Constitution is replete with examples of rights which can be derogated from. The Code prescribes that an accused can be denied bail where there are compelling reasons to do so. That prescription is an indication that the right to bail, whichever way one sees it, can be taken away in appropriate cases. The dicta in *Re Munhumeso & Ors* 1994 ZLR 49 (S) whilst advocating for a strict and narrow construction of derogations from constitutional rights, still illustrates that there is no rule which stipulates that all constitutional rights are non-derogable. The Supreme Court held that:

> "…derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide, construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise."

If there was any doubt to this proposition section 86 of the Constitution removes any such doubt. It provides that:

> **"86 Limitation of rights and freedoms**
> (1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
> (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—
> (*a*) the nature of the right or freedom concerned;
> (*b*) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
> (*c*) the nature and extent of the limitation;
> (*d*) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;"

Clearly therefore even if it were to be accepted that s50 (1) (d) applies to persons who appear before the courts in bail applications it has not been shown that s115 C (2) (a) (ii) of the Code is not a law of general application. It has also not been argued by the applicant that such

law which appears to limit the right to bail is unfair, unreasonable, unnecessary and unjustifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors. Unless and until it has been properly impugned, it remains the law.

Section 60 (ii) of the South African Criminal Procedure Act 51 of 1977, is in *pari materia* to our s115 C (2) (a) (ii). It also places a reverse onus on an applicant in bail proceedings where he/she faces a Sixth Schedule offence to convince the court that it is in the interests of justice that he/she be so admitted to bail. In *S* v *Dlamini* 1999 (2) SACR 51 (CC) quoted with approval by this court in *Vincent Kondo* (*supra*) the South African Constitutional Court had occasion to discuss the issue of whether placing that reverse burden on an applicant was unconstitutional. It held that it was in the public interest that persons charged with offences of such a serious nature should be detained pending trial. On that basis they are required to illustrate the existence of extraordinary circumstances why they should be released on bail.

In this case therefore, the burden lies squarely on the shoulders of the applicant. She was mistaken to argue that the state had not advanced any compelling reasons justifying her continued detention. The law does not require the state to allege any such reasons where an applicant faces a Third Schedule offence. The issue was put beyond disputation in *S v Ndou* HB 103/17, where this court held in relation to offences in the Third Schedule that:

> "… it is not correct in this particular case for the applicants to state that the burden of showing the existence of compelling reasons why they should not be admitted to bail lies on the prosecution. Quite to the contrary the new regime dealing with consideration of a bail application pending trial places the burden upon the applicants to show that, not only is it in the interests of justice for them to be released on bail but also that there are exceptional circumstances which in the interests of justice permit their release on bail pending trial."

Application of the law to the facts

Having made the above conclusions the question which arises is whether the applicant has a made a case for her admission to bail. Her explanation of the charges appears to be a cock and bull story. It is certainly implausible. As indicated, together with her accomplices, she faces three separate counts of robbery involving the use of a firearm and theft of motor vehicles. At the end of the hearing I concluded that the applicant's transactions with Edwin Muchagwa were too numerous to make the applicant an innocent participant. To illustrate the point, I catalogue the applicant's links to the offences in question.

1. The motor vehicle stolen from the complainant Rejoice Muduapela in the Norton robbery was recovered from the applicant at her house in Glendale. The applicant alleges that the car was recovered from Edwin Muchagwa with her help. The police say it was at her house and that she had been given the vehicle as payment for her role in the commission of the crime. The onus was on her to provide evidence that the car was not recovered from her place. She did not do so.
2. The motor vehicle, a Mercedes Benz which was stolen from the complainant in the Ruwa robbery was recovered from her residence in her possession. She does not deny that. She alleged that she had bought the vehicle from Edwin Muchagwa without knowing that the car was stolen. She further alleges that she could not have participated in that robbery because she was pregnant at the time.
3. In the third count, the firearm which was used to commit the robbery was recovered from the applicant's place of residence. The applicant does not deny that. She only gave the explanation that the firearm was not a real firearm but a pellet gun. Unfortunately, for purposes of whether a firearm was used in a robbery the fact that the gun was not a real gun is immaterial and cannot be a defence to the charge.
4. The only explanation that the applicant gave on how she knew Edwin Muchagwa was that he had at one time assisted her in hiring a maid. She then sought to convince the court that it was that maid who used to take the pellet gun from the house and give it to Muchagwa to use for the robberies. She clearly did not want to take the court into her confidence in relation to her relationship with Muchagwa. She did not want the court to know for how much she had bought the car from Muchagwa. She did not confide in the court on what date that transaction had taken place. She equally did not think it prudent for the court to know if anybody had witnessed her purchase of the vehicle from Muchagwa.
5. The applicant was at liberty to call the alleged maid to testify and confirm that Edwin Muchagwa had assisted her in seeking employment at the applicant's place. She chose not to do that.
6. She alleges in her papers that she came to know that Muchagwa and his accomplices were into crime. She however omitted to tell the court why she had not reported them to the police and only waited to give police leads after she had been arrested.

Given the above discrepancies the allegation by the applicant that the state case is weak is preposterous. There are numerous pieces of evidence which directly link her to the commission of the three offences. If anything, the evidence available shows that the state case is very strong against her. If she presents such defences at her trial, she is in danger of facing certain conviction. Her innocent explanation of the evidence which links her to the commission of the offence is at best incredible and at worst very damning on her.

The above issues indicate the applicant's active participation in the commission of the robberies. This court is allowed to take judicial notice of the insecurities and the dangers which the general public finds itself in as a result of the unprecedented spate of violent crime being witnessed in the country at the moment. Even more alarming is that more and more women are alleged to be taking part in the commission of violent crimes. See CRB Nos B2507/21, B2502/21 and B2424/21 among others. The court is equally allowed to make reference to its own records and notes with concern that on a daily basis, it deals with many cases of armed robberies. For that proposition see the case of *Central Africa Building Society v Twin Wire Agencies (Pvt) Ltd* HB 5/04. Further, s117 of the Code prescribes the grounds to which a court must look when refusing to grant bail to an applicant. It provides as follows:

> " **117 Entitlement to bail**
> (1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.
> (2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—
> (*a*) where there is a likelihood that the accused, if he or she were released on bail, will—
> (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
> (ii) not stand his or her trial or appear to receive sentence; or
> (iii) …
> (iv) …
> or
> (*b*) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.
> (3) In considering whether the ground referred to in—
> (*a*) subsection (2)(*a*)(i) has been established, the court shall, where applicable, take into account the following factors, namely—
> (i) the degree of violence towards others implicit in the charge against the accused;
> (ii) any threat of violence which the accused may have made to any person;
> (iii) …
> (iv) … "

Clearly one of the grounds which a court must consider to determine whether it is in the interests of justice that an applicant be admitted to bail is the danger which the person poses

to society and whether there is likelihood that his/her release on bail will undermine public peace and security. Those issues are decided by taking into account the degree of violence towards others which is implicit in the charges against the accused. In *casu*, the applicant and her accomplices caused untold suffering to their victims. They inflicted unmitigated violence on all the complainants. In the Norton robbery, they are alleged to have pointed a firearm at the complainant, they grabbed her by the neck and force marched her into her yard whilst demanding the keys to her car before ransacking her house and driving away her car. The trauma must have been unbearable. In the Ruwa robbery, the applicant and her accomplices are alleged to have also manhandled the complainant. They again force marched him into his house, bound his hands and legs before looting the complainant's property. They stole his Mercedes Benz vehicle and drove away in it. In the third count similar violence was perpetrated on the complainant. They tied him and his entire family before proceeding to ransack the house. They, in similar fashion, took various items before driving away in complainant's vehicle.

Given the heinous acts described above, it would be irresponsible for this court not to find that the degree of violence implicit in the conduct of the applicant and her accomplices was barbaric. Her release on bail will with certainty disturb public security.

I have also found as a fact that the evidence against the applicant is not only strong but also very direct. That coupled with the certainty of a sentence of substantial imprisonment upon conviction is likely to induce the applicant to abscond her trial.

Disposition

The applicant's biggest undoing in this application was her failure to appreciate that the onus to show that it was in the interests of justice for her to be admitted to bail was on her. In the final analysis she failed to convince me, on a balance of probabilities that it was in the interests of justice that she be admitted to bail pending trial. Accordingly, the application is dismissed.

Maposa and Ndomene Legal Practitioners, Applicant's Legal Practitioners
National Prosecuting Authority, Respondent's Legal Practitioners