SOLOMON MADZORE
and
TARUVINGA LOVEMORE MAGAYA
versus
THE STATE

HGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 20 October 2011

Bail Application Ruling

G. Mtisi, for the applicant
E. Nyazamba, for the respondent

MWAYERA J: The criminal hallmark that accused is presumed innocent till proven guilty is buttressed in the wording of s 117 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. The notion is that courts should always grant bail pending trial where possible and should lean in favour of the liberty of the accused provided the interest of justice will not be prejudiced. The court is thus required to expeditiously fulfil its function of safe guarding the liberty of the individual while at the same time protecting the interests of justice. The central question in applications for bail pending trial is whether the accused will stand or evade trial. The court has to balance societal needs that is that the applicant stands trial and non interference with administration of justice on the one hand and the liberty of the appellant on the other hand.

From submissions filed of record and oral submissions by both counsel it is apparent that the two applicants are facing murder charges as defined in s 47 of the Criminal Law Codification and Reform Act [*Cap 9:23*]. It is alleged that the accused together with others some of whom have already been arrested were requested by the police to disperse their gathering since their gathering was not deemed sanctioned. The accused together with the others started shouting at the police, throwing stones, empty bottles, steel frame and other missiles at uniformed officers as a result of which one inspector Petros Mutedza was struck and pronounced dead upon arrival at the hospital.

The two appellants are applying for bail pending trial and the state is opposed to the application. I must hasten to mention that some of the accused who are facing the same charges were indeed granted bail by the High Court while others were not granted bail.

Whereas it is important to treat jointly charged accused persons equally or uniformly sight should not be lost of the fact that individual circumstances of each applicant come to play when the court seeks to balance the individual liberty and interest of justice. This is the reason why some of the applicants on the same charge were granted bail while the others were denied bail that is on the case CRB B632/11. The factors to be juxtaposed to the two applicants circumstances are fairly settled as clearly outlined in s 117(1) and (2) of the Criminal and Evidence Act [*Cap 9:07*]. The applicant shall be entitled to bail unless it is established that:-

1. There is a likelihood that the accused, if he or she were released on bail will do or cause any of the following:

1. Endanger the safety of the public or any particular person or will commit an offence referred to in first schedule or
2. Not stand his or her trial or appear to receive sentence or
3. Attempt to influence or intimidate witnesses or to conceal or destroy evidence
4. Undermine or jeopardise the objectives or proper functioning of the criminal justice system including the bail system or
5. Likelihood that the release of accused will disturb the public order or undermine public peace or security.

It should be noted that it is not necessary to prove all of the above cited facts. When one or more of the facts mentioned in s 117(2) is or are established against the applicant then his detention will be in the interest of justice. The applicant has to show on a balance of probabilities why it is in the interest of justice that he or she be granted bail. It is fairly settled in our law from plethora of case law (some of which has been cited by both Mr *Mtisi* and Mr *Nyazamba*) that in judging the risk that an accused person would abscond and thus prejudice interest of justice the court is guided by some of these conditions namely :-

1. The apparent strength of the case
2. The nature of the charge and the severity of the punishment likely to be imposed on the accused in the event of a conviction.
3. The accused's previous behaviour
4. The credibility of the accused's own assurance of his intentions and motivation to remain and stand trial.
5. The accused's mobility to reach other country and absence of extradition facilities from the other countries.

6. The risk of interference with investigation if released. (This must be well founded and not based on unsubstantial allegation and suspicion).

In *casu i*t is my well considered view that in seeking to strike a balance between the interest of justice and the liberty of the applicants some of the above cited factors are to be applied in respect of each of the applicants. I propose to deal with the nature of the charge and likely penalty first. It cannot be disputed both applicants are facing serious allegations which would, in the event of conviction call for lengthy imprisonment term.

The strength of the state case as given on paper cannot be viewed as bald allegation in respect of the two applicants. The affidavit by the investigating officer alluded to by defence actually spelt out that there were more people than those specifically mentioned as can be deduced from the use of the words "amongst other" in para 7 of affidavit of inspector Clever Ntini. In fact the first applicant's name is mentioned. The defence of alibi raised was investigated and there is nothing to show that the first applicant was at the clinic with one Charity Moyo per the doctor's note attached to the applicant's documents. It just confirms Charity Moyo's attendance. The second applicant was also said to have been identified in the group and he raised a defence that he was at work. From submissions on record it is questionable he was indeed at work. Without necessarily going into trial issues there appears to be a strong case faced by the two applicants.

Now turning to the issue of the applicant's mobility and access to cross the border. The first applicant is a holder of a valid passport and it is not in dispute he is well travelled across the border. The State's allegation that the first applicant is flight risk is well founded and in fact his diverse movements out seem to fortify the State's assertion that he was evading the police and only got picked up when he was at home thinking the storm had weathered down. The first applicant has capacity to travel and it would not be far-fetched to conclude that judging by the "diverse movements" quoting Mr *Mtisi*'s words he has foreign contacts who with or without passport he goes to. The second applicant on the other hand has not been given to having a passport and being a frequent traveller across the borders. He has not been demonstrated as flight risk even though it took over a month from the alleged commission of the offence for the police to apprehend him.

This brings us to the point of previous conduct of the applicants. The first applicant went in and out of the country and did not surrender self to police despite the fact that police are said to have gone to his place on several occasions and if the person at his house was his wife then one wonders why information was not relayed. Further the first applicant in his

application p 3 outlines he was aware police were arresting MDC-T youth leadership for murder. He is a NATIONAL YOUTH LEADER, the question is why then did he choose to go on errands outside the country instead of surrender self to police. In fact the application p 3 shows he was aware the police were after him but ignored or evaded. As regards the second applicant there is no information that he went out of the country and no information of attempts by the police to locate him at his residence or if they did at least they should have mentioned whom they saw.

One cannot therefore safely impute evasion of the police as, as the case with the first applicant. As earlier mentioned not all factors outlined in s 117 need to be proved for an applicant to be detained pending trial.

From the analysis outlined it is clear the first applicant Solomon Madzore is facing serious allegation of murder which in the event of a conviction would call for a lengthy prison term. That coupled with the strength of the case against him can act as an inducement for him to abscond. When the likelihood of abscondment is read in conjunction with the first applicant's ability to travel coupled with the evasion of police it becomes quite evident that granting him bail would jeopardise the objectives or proper functioning of the criminal justice system including the bail system. The circumstances of the first applicant are such that he is not likely to avail himself for trial since he is flight risk. Accordingly upon weighing the interest of justice on one hand and the individual liberty on the other the first applicant Solomon Madzore is not a suitable candidate for bail and the application is dismissed.

The second applicant Taruvinga Lovemore Magaya is facing serious allegation of which if proved will call for a lengthy prison term. This factor and he strength of the state case on its own cannot justify denial of bail to the second applicant. Moreso when one considers that the second applicant Taruvinga Lovemore Magaya has not been given to touches or conducts outside or across the border. He is not given the travelling and his capacity to travel is limited. Having said he is not flight risk it follows he is likely to avail himself for prosecution of the matter, given he is a man of fixed abode and a Zimbabwean who at the material time the police were looking for him has not been shown to have been out of the country. Although it took time for the police to arrest him the fact that there is no mention that the police looked and left a word for him at his house and work place can be viewed in his favour. His circumstances viewed in conjunction with the notion of being presumed innocent till proven guilty portrays him as a suitable candidate for bail. The court feels by being available for prosecution of the matter the interest of justice will have been

fulfilled while at the same time the liberty of the applicant would have been guaranteed. In the premises the applicant 2 Taruvinga Lovemore Magaya is granted bail on the following conditions:-

1. The second applicant Taruvinga Lovemore Magaya is to deposit US$500-00 with Clerk of Court, Harare Magistrate Court Rotten Row as bail money.
2. The applicant shall reside at Number 918 Kambuzuma Section 3 Harare until the cases is finalised.
3. The applicant shall report once a week at Harare Central Law and Order C.I.D. every Monday anytime between 6.00 am and 6.00 pm until the case is finalised.
4. The second applicant shall not interfere with, threaten or intimidate State witnesses until the case is finalised.

Musendekwa-Mtisi, applicant's legal practitioners