

EVAN MAWARIRE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 11 October 2017 & 29 November 2017

Bail Ruling

**ASSESSORS: 1. I Chidyausiku
2. C Gweme**

H Nkomo, for the applicant
C Mutangadura, for the State

CHIGUMBA J: Introduction. This is an application for bail which is necessitated by the termination of bail by the operation of law after an accused has pleaded to the charge. An accused person may be re-admitted to bail, on similar or other conditions that the court may in its discretion consider. It is my view that admission to bail pending trial and to bail once trial has commenced, are inquiries what are based on different considerations, because the circumstances will have changed. The basis on which bail is opposed pre-trial are not necessarily the same as that on which it is opposed once trial commenced.

The applicant is charged with subverting a constitutional government as defined in s 22 (a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (the code), or in the alternative incitement to commit public violence as defined in s 187 (1) (a) as read with s 36 (1) (a) of the Code. Section 22 (2) (a) of the Code reads as follows:

“Any person who whether inside or outside Zimbabwe organizes, or sets up or advocates urges on suggests the organisation or setting up of, any group or body with a view to ...

- (i) overthrowing or attempting to overthrow the Government by unconstitutional Constitutional means: - - or:
- (ii) taking or attempting to take over the Government by unconstitutional means --- or
- (iii) coercing or attempting to coerce government

This offence attracts a penalty of 20 years imprisonment. In s 22 coercing means constraining, or restraining, by physical force or violence or boycott, civil disobedience or resistance to any law, passively or acting or threats to apply or apply boycott, civil disobedience and resistance to any law, passively or actively

Unconstitutional means – is defined as any process which is not a process provided for in the Constitution and the law. The alternative to the first charge is incitement to commit public violence as defined in s 187 (1) as read with s 36 (1) (a) of the Code.

Section 187 (1) (c) reads:

“Any person who, in any manner, communicates with another person:-

- (a) intending by the communication to persuade or induce the other person to commit a crime whether in terms of this Code or any other conduct.

The second charge is subverting a Constitutional Government as defined in s 22 (2) (c) of the Code which reads: (see above) or alternatively incitement to commit public violence s 187 (1) 87 (c) (a) as read with s 36 (1) (a) of the Code

Section 36 (1) (a) of the Code reads as follows:

“Any person who acting in concert with one or more other persons forcibly and to a serious extent:-

- (a) disturbs the peace, security or order of the public or any section of the public ...”. This offence attracts a penalty of a fine not exceeding level 12 or imprisonment for a period not exceeding ten years or both.

The applicant pleaded not guilty to both counts and to the alternative charges. He tendered a defence outline in which he denied the allegations contained in the State outline. His defence is that the State outline does not contain the necessary averments to establish the essential elements of the offences that he has pleaded not guilty to.

In particular he avers that there is no allegation that he set up an organisation or group in Zimbabwe or outside with a view to overthrowing the government and there is no allegation that he attempted to take over government by unconstitutional means using this group. He denies that

he attempted to coerce government and contends that the State papers are deficient for failing to allege that he indeed coerced government.

The application for admission to bail after plea was brought on applicant's behalf because s 69 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA) provides that if an accused is indicted in the High Court after having been admitted to bail, his plea to the indictment shall, unless the court otherwise directs, have the effect of terminating his bail and he shall thereafter be detained in custody until conclusion of the trial, in the same manner and in every respect as if he had not been admitted to bail. There was some debate as to the meaning of the phrase. "... unless the court otherwise directs.." with the counsel for the applicant submitting that this phrase denotes a measure of discretion on the part of the court to *meru motu* admit the accused to bail on fresh conditions or even the terminated bail conditions.

My considered view is that although bail is a right, it can only be granted on application. The exercise of discretion by the court must be triggered by an application with submissions as to the accused's personal circumstances, whether they have changed since bail pending trial was considered. The admission to bail necessitates an inquiry, which puts paid to the notion of *meru motu* consideration in the absence of submissions on the accused's circumstances, facts which a court will not have knowledge of. The applicant is 40 years old, married with 3 children, and a cleric, a pastor. It is common cause that he came back to Zimbabwe on his own volition after a brief stay in the United States of America. He was tried and convicted in the magistrate court and his conviction was overturned on appeal. He was admitted to bail pending trial by this court, and his bail conditions altered to allow him to travel to the United States of America and back which he duly did. He is faithfully adhering to his bail conditions. The question which arises before me is whether, there is anything which compels the court to find that the applicant is not a suitable candidate for admission to bail now that he has pleaded not guilty to the charges raised against him.

Section 50 of the Constitution of Zimbabwe Amendment Number 20 (2013) provides for the rights of arrested and detained person. It provides that:

"Any person who is arrested –

- (d) must be released unconditionally or on reasonable conditions, pending a charge or a trial, unless there are compelling reasons justifying their continued detention."

So bail is a constitutional right. That is our starting point. Section 50 (1) (d) has placed the onus on the State to show that there are compelling reasons justifying continued detention, where it holds that view. This reverse onus has changed the previous position where an accused person had the onus to prove suitability for admission to bail. The next question then becomes; "...are there compelling reasons? We are partially guided by s 117 of the Criminal Procedure and Evidence Act which provides as follows:

"Section 117 (1) a person in custody is entitled to be released on bail unless the court finds that it would be in the interests of justice that her/she be detained in custody. Section 117 (2) defines the interest of justice as s 117 (2) (a) (i).

'where there is a likelihood that the accused, if released on bail – will
(i) endanger the safety of the public or commit a 1st schedule offence.' "

It was submitted on behalf of the State that the applicant would endanger the safety of the public by repeating the same offence as he had done at the UZ students demonstration and more recently by a video on U-Tube about food shortages in Zimbabwe. The State relied on *AG v Phiri* 1987 (2) ZLR 33 as authority for its proposition.

On p 33 para E – G the court said that:-

"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 fulfil 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 mere possibility of the accused committing further crimes, standing alone, would not be sufficient to outweigh the accused's right not to be deprived of his freedom. However, when a bad criminal record, is added to the allegation on evidence of substance that accused committed further and similar crimes when on said the matter becomes highly persuasive and cogent. We must ask ourselves therefore, if the state placed allegations, on evidence, substance, that the applicant has a bad criminal record, and not be committed further similar crimes while on bail which would show that he has a disregard for the rule of law and contempt for the administration of justice. Where after the onus would shift to the applicant to satisfy the court that there is no likelihood of repetition if granted bail.

Evidence of substance: The applicant submitted that there was no evidence of a bad criminal record on his part except evidence that he was once fined on allegations of public violence and the conviction was subsequently set aside by the Appeal Court and that the state intends to charge him with charges similar to the ones he is facing before this court.

The court was referred to the following cases:-

- a) *Ngundu v State* HH 701-15
- b) *Republic v Maenda and Ors* 2012 Kenya Law Report 55-09
- c) *S v Tsvangirai* 2003 (1) ZLR 6570.

Sufficient in to say the evidence placed before the court on behalf of the State is not sufficient or substantive enough to justify a finding that the applicant has a bad criminal record, or that he has been convicted of similar offences. Yes we have a draft form 242 of charges which the State intends to put to the accused; similar charges. But those charges are yet to be put. It cannot amount to evidence of substance of propensity to commit similar offences. Not only is it an unproven allegations, the charges has not yet even been put to the accused.

The charge pertaining to the demonstrations at the University of Zimbabwe has been abandoned by the State. Again it cannot be used as substantive evidence of applicant's criminal conduct or propensity to commit similar offences. Section 70 of our Constitution says that accused persons have rights. One of those fundamental rights is to be presumed innocent until proven guilty s 70 (1) (a). The applicant has no previous convictions for any criminal offences. There have been aborted attempts to prosecute him by the state which have not yielded any tangible results. Why should the court be called upon to find compelling reasons to deny the admission of the applicant to bail on the basis of a submission that he has a bad criminal record; propensity to commit similar offences; when that submission does not hold any water on the evidence before the court.

The state has not successfully prosecuted or defended any conviction of the applicant for similar offences. The court has no evidence, or legal basis on which it can find that there is a compelling reason to deny the applicant his right to bail. The State has not shown that, on the evidence presented, applicant has a propensity to commit similar offences. The administration of justice would not be brought into disrepute of the applicant is admitted to bail on suitable conditions. The state's fear that accused will commit similar offences if admitted to bail can be cared by the condition prohibiting him from such conduct. He may do so at his own peril; at the risk of having his bail revoked. The applicant is found to be a suitable candidate for admission to bail after plea. Accordingly he and is hereby admitted to bail on the following conditions:-

Bail conditions

1. The bail deposit which was deposited with the clerk of court Harare Magistrates Court shall remain with the clerk of court until the court directs otherwise.
2. The applicant's passport shall remain with if want within the court directs
3. The applicant shall continue to report once every Friday between 6 am and 6 pm at Avondale Police Station until the court directs otherwise.
4. The applicant shall not commit similar or any other offences whilst he is admitted to bail.
5. The applicant shall surrender title deeds of the property known as Lot 1 of Stand 245 Que Que Township of Que Que registered in the names of Kenson Mawarire and Thamary Mawarire to the clerk of court Harare Magistrates Court. These title deeds shall remain in the custody of the court until the court directs otherwise.

Mhishi Nkomo Legal Practice, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners