GRASSMO MARE

Versus

THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 29 APRIL 2020 & 11 MAY 2020

Bail appeal pending trial

V. J. Mpofu, for the appellants
B. Maphosa, for the respondent

DUBE-BANDA J: This is a bail application pending trial. Applicant is jointly charged with one *Nyarai Magaya* and *Frederick Topia* with one count of theft as defined in section 113 of the Criminal Law [Codification and Reform] Act Chapter 9:23, and one count of Money Laundering as defined in section 81 (1) of the Money Laundering and Proceeds of Crime Act [Chapter 9:24].

The extensive detail in Form 242 renders it unnecessary to repeat in this judgment the detailed allegations contained therein. In brief, the allegations are these: -in respect of the count of theft, it alleged that the applicant, acting in common purpose with the two co-accused persons, stole ZW$500 000.00 from the complainant. In relation to the count of money laundering, it is alleged that the applicant, again acting in common purpose with his co-accused persons, converted the ZW$500 000.00 to US$20 210 00, for the sole purpose of concealing the illicit origin of the funds.

The two applicant's co-accused *Nyarai Magaya* and *Frederick Topia* have since been admitted to bail pending trial. The bail application in respect of this applicant is opposed. The opposition is anchored on two grounds: - the first being that the State has a strong *prima facie* case against the applicant, and as such, it is alleged that there are real fears that this will induce him to abscond. The second being that he is a flight risk, as he has been on the run since the matter was reported to the police on the 30 November 2019, until his arrests on the 26 March 2020.

I take the view that the allegation that the case against the applicant is *prima facie* strong, cannot, standing alone cause applicant to be refused bail. I say so because his co-accused, facing the same allegations with him, have been admitted to bail. The general principle is that persons who are jointly charged must be treated in the same manner, unless there are cogent reasons justifying deferential treatment of one from the other. See *S v Lotriet and Another* 2001 (2) ZLR 225 (H). Respondent argues that applicant deserves deferential treatment from his co-accused on the grounds that he is a flight risk. This is the sole allegation which distinguishes the position of the applicant from that of his co-accused.

Bail is a constitutional right. This right is subject to limitations provided for in the Constitution and the Criminal Procedure and Evidence Act[Chapter 9:07] (the Act). As a constitutional right, its enjoyment can only be limited if compelling reasons are established.

Section 115 (C) (2) (a) of the Act casts the *onus* on a balance of probabilities upon the State to show the existence of compelling reasons for pre-conviction detention of an incarcerated person in respect of offences other than those specified in the Third Schedule. Simply stated, for bail to be denied to an accused who has not been convicted in respect of any offence other than a Third Schedule offence, the State bears the onus to justify such detention by showing compelling reasons which warrant the detention. The State does so on a balance of probabilities.

In section 117(2) of the Act the legislature elaborately set out situations in which the right to bail could be forfeited. The section provides that:-

> "(1) subject to this section and section 32 a person … shall be released on bail unless the court finds that it is in the interests of justice that he or she be detained in custody.
> (2) the refusal to grant bail and detention of an accused person in custody shall be in the interest of justice where one or more of the following grounds are established:
> (a) where there is likelihood that the accused if he or she is released on bail will –
> (i) *endanger the safety of the public or any particular person or will commit an offence in the first schedule; or*
> *(ii) not stand his or her trial or appear to receive sentence; or*
> *(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
> *(iv) undermine or jeopardize the objectives or proper functioning of the criminal justice system including the bail system; 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 and security …"

Section 115 (C) (1) of the Act says in any application, petition, motion, appeal, review or other proceeding before a court in which the grantor denial of bail or the legality of the

grant or denial of bail is in issue, the grounds specified in section 117(2) of the Act, being grounds upon which a court may find that it is in the interests of justice that an accused should be detained in custody until he or she is dealt with in accordance with the law, are to be considered as compelling reasons for the denial of bail by a court.

In attempting to showthat there exists compelling reasons to refuse to admit the applicant to bail, the State filed an affidavit of the investigating officer,one Detective Sergeant *Lloyd Gumbo* of CID Commercial Crimes Division, Southern Region, Bulawayo. The basis for opposing the application is that the State has a strong *prima facie* case against the applicant, and as such it is alleged that there are real fears that this will induce him to abscond. Secondly, that he is a flight risk, as he has been on the run since the matter was reported to the police on the 30 November 2019, until his arrest on the 26 March 2020. The suggestion is that once admitted to bail he will not be motivated to stand trial but will instead abscond. As alluded to *supra*, this application onlyturns on the second ground – the risk of abscondment.

According to the investigating officer the applicant is a flight risk. This is premised on the fact that since the commission of the offence he has been on the run, and at one point he was believed to be in South Africa. He was finally arrested in the Central Business District of Bulawayo on the 26 March 2020. It is contended that after the commission of the offence on the 30 November 2019, applicant relocated from his then residential address, i.e. No. 9 St. Helens Road, Parklands, Bulawayo. The affidavit of *Rutendo Ngorima* which is before court confirms that applicant no longer resides at No. 9 St. Helens, Parklands. It is contended that his mobile phone became unreachable and was always off-line.

The investigating officer says upon arrest applicant gave his residential address as Flat No. 6 Vasilla Court, 2nd Street/G. Silundika Road, Bulawayo. On the 24 April 2020, when applicant was in custody, the investigating officer proceeded to Flat No. 6 Vasilla Court to verify whether indeed applicant was residing at that address. He was informed that applicant relocated from the Flat in early March 2020. One *Naledi Boiketlo Dube*, a resident of Flat No. 6 Vasilla Court, deposed to an affidavit which is before court. She indicated that applicant moved out of the Flat in early March 2020. Therefore, at the time of arrest, on the 26 March 2020, he was no longer resident at the Flat.

There is evidence that applicant once made a written bail application at the Bulawayo

Magistrate's Court, in that application the investigating officer says house No. 11515 Nkulumane, Bulawayo, was provided as applicant's residential address. The investigating officer says he proceeded to that address, and was informed that no such person answering to the name of the applicant was ever resident thereat. The affidavit of *Candy Phiri* which is before court makes this averment. In his submissions, *Mr Mpofu*, for the applicant, made the point that the correct number given in the Magistrates' Court application is No. 13515 Nkulumane 12, not No. 11515 Nkulumane. No. 13515 Nkulumane 12 is said to be a house belonging to the applicant's aunt. I accept the explanation given by Mr *Mpofu.*

Mr Mpofu, submitted that the bail application in the magistrates' court was withdrawn. The State did not take issue with the alleged withdrawal of that application, and no further reference shall be made to that application.

The investigating officer contends that it is against this background that he forms the opinion that applicant is of no fixed abode. That once admitted to bail, he may abscond and it would be difficult to re-locate him.

Mr Mpofu, made the point that he discussed the contents of the investigating officer's affidavit with the applicant. No affidavit was filed to controvert the investigating officer's version. In the result, the allegations made against the applicant by the investigating officer remain uncontradicted, and I have no basis or reason to disbelieve him.

The granting of bail to a suspect calls for a delicate balance between the liberty of the accused who has the presumption of innocence operating in his favour and the interests of society which demands that an accused should be able to stand trial or avail himself for trial when he is so required. It is a balancing act.

In *S v Jongwe* 2002(2) ZLR 209(S) at 215 B – C the Supreme Court stated as follows on judging the risk of abscondment;"--- in judging the risk that an accused person would abscond the court should be guided by the following factors:- the nature of the charge and the severity of the punishment likely to be imposed;the apparent strength or weaknesses of the state case;the accused's ability to reach another country and the absence of extradition facilities from the other countries; the accused's previous behaviour;the credibility of the accused's own assurance of his intention and motivation to remain and stand trial."See also *Aitken and Another v Attorney General* 1992(1) ZLR 249 at 254 D-G.

Where there is the slightest indication that applicant's release on bail might prejudice

the interest of justice the court must not opt for that route. In The *Attorney-General* v *Aitken and Another* 1992 (1) ZLR 249 @ 253C the court noted *inter alia* as follows:"… The ends of justice would not be served if there were some cognizable indications that the accused would not abide by the conditions of the bail recognisance."

In this application which was filed on the 23rd April 2020, applicant provides No. 9 St. Helens Road, Parklands, Bulawayo as his residential address. There is undisputed evidence before court, which shows that he moved out of that house at the end of October 2019. The affidavit of *Rutendo Ngorima* makes this point clear, and it is not challenged. I take the view that applicant, by still providing No. 9 St. Helens Road, Parklands, as his residential address intends to mislead this court.

On being arrested, he gives the police Flat No. 6 Vasilla Court, 2nd Street / G. Silundika Road, Bulawayo, as his residential address. He was arrested on the 26 March 2020. There is evidence before court that he moved out of thatFlat in early March 2020. The affidavit of *Naledi Boiketlo Dube* makes this averment very clear. This evidence is not challenged. At the time his arrest, he no doubt knew that he had moved out of the Flat, but proceeded to inform the police that he was residing thereat. My view is that he intended to mislead.

In the bail statement applicant says he is prepared to stay at his homestead and to report once a week to Z. R. P.Central Police Station until the matter is finalised. In the draft order filed with this application, he says "applicant shall reside at his homestead until the matter is finalized." My understating is that a homestead is found in the farming areas and communal areas. In fact the internet dictionary defines a homestead as"a house, especially a farmhouse, and outbuildings" In this jurisdiction a homestead is generally associated with communal areas. Therefore, there is no homestead in Bulawayo where he can reside pending the finalisation of this matter. In any event, such homestead is not even identified.

Again even if I have *erred* that a homestead is found in the farming areas and communal areas, even if the homestead applicant is referring to is in Bulawayo, it has not been identified. A court hearing a bail application cannot order an accused to reside at an unknown homestead. It is important for him to clearly identify with precision the homestead where he intends to reside, so that when he absconds, the police will have a starting point in looking for him.

Again in the draft order, he says he proposes to report "once a week to Zimbabwe Republic Police, Central." There is neither a Z.R.P. Central Police Station nor Zimbabwe Republic Police, Central in Bulawayo. I take judicial notice of the fact that in Bulawayo there is Bulawayo Central Police Station. If this is the station applicant is referring to, why not identify it with precision. The court cannot order an accused to report in a vaguely identified police station. The police investigating team, must know without doubt where applicant is reporting.

Applicant proposes to reside at a homestead that is not identified. To report at a police station that is not identified. It is trite that a draft order is what it is, a draft order. A court is not bound to grant an order as presented in the draft.However, in the circumstances of this case,particularly that he has not provided an authentic residential address, I take the view that applicant is deliberately being vague. I find that this vagueness is deliberate and calculated to mislead.

During argument, *Mr Mpofu* contended that this court can order that applicant resides at No. 13515 Nkulumane 12, which is said to be the house belonging to the applicant's aunt. Counsel, as an afterthought and in the proverbial eleventh hour, asked for permission to get an affidavit from the aunt, this request was refused.

The circumstances of this application suggests that applicant is not being candid with this court. No explanation was given about what has happened to where he resides, his own residential address, wherever it might be, because he does not stay with the aunt. In this application he provides No. 9 St. Helens Road, Parklands, Bulawayo as his residential address. He does not say he resides at No. 13515 Nkulumane 12, Bulawayo. No explanation was given as to why an affidavit from the aunt was not taken timeously. The name of the aunt was not given. Acceding to such arequest would have been tantamount to a licence to "say go and get an affidavit from anyone." A court cannot permit an action that is likely to undermine the interests of justice.

No explanation was given as to why applicant did not file an affidavit meeting the sting of the opposition, particularly the affidavit of the investigating officer. I take full cognisance that this is a matter that involves the liberty of the applicant, notwithstanding that, I take the view that a party cannot be permitted to tailor-make his case as the proceedings unfold. It is for these reasons that I declined the request to stand down the

matter for the purposes of getting an affidavit from that aunt, whosoever she might be.

Where there is the slightest indication that applicant's release on bail might prejudice the interest of justice the court must not opt for that route. There is an allegation by the investigating officer that applicant evaded arrest from the 29 November 2019 to 26 March 2020. In his bail statement applicant denies that he evaded arrest. He says he was arrested in town as he was going about his daily business. He contends that he is employed on a commission and this necessitates that he travels around the country to sell merchandise. I accept that the applicant bears no *onus* in this case, however, once an allegation is made in Form 242 that he evaded arrest, he had to explain where he was from the 29 November 2019 to 26 march 2020. It is inadequate to merely say he was traveling around the country. There is an allegation that he knew that the police were looking for him, he says nothing about this. This allegation of evading arrests standing alone, carries little weight, however viewed within the total factual matrix of this matter, it starts to carry weight. In particular applicant's failure to be candid about where he resides. A litigant cannot come to court seeking to be admitted to bail, and still conceal his place of abode, and expect the court to accede to such a request.

Mr *Mpofu* kept recycling one argument, that the State case is weak against the applicant. I take note that applicant's bail statement covers four pages, made up of seventeen paragraphs, only paragraph 5 deals with the answer to the allegations. It says:-

> he denies the allegations outlined as false. It is quite clear from the outline of the case that the ecocash line that was used for this crime did not belong to the applicant. He was not involved in the crime at all.

It became clear during argument that applicant is missing the sting of the State case, it is not that the ecocash line that was used to facilitate the commission of the crime is registered in his name. The State case is anchored on common purpose, and the role allegedly played by the applicant is clearly spelled out and defined. I accept, on the basis of the papers before me, that the State case against the applicant cannot be described as weak. However, as pointed out *supra,* on this fact alone, I would not have refused applicant bail. What erodes and eventually diminishes applicant's prospects of being admitted to bail, is his refusal to tell the court where he actually resides. Not these false addresses he is peddling around.

I have dealt with the evidence emanating from the affidavits of the investigating officer, *Rutendo Ngorima* and *Naledi Boiketlo Dube*, and that such evidence was not contradicted. I have also dealt with applicant's failure to explain, why it is said he shall reside

at his aunt's address and why no affidavit was obtained from the aunt timeously. All this does not mean that the applicant has an *onus* to discharge. The *onus* remains firmly on the shoulders of the State. I accept that he choose not to place evidence before court. It is his constitutional entitlement. Yet his exercise of that right does not suspend the operation of ordinary rational processes. The choicenot toplace evidence before court in the face of evidence suggestive of a real likelihood to abscond and not stand trial must in an appropriate case lead to consequences. It is clearly inadequate for counsel to merely hazard possibilities and speculations from the bar. It serves no useful purpose. Therefore, in the absence of contradicting evidence, I accept the evidence of investigating officer, *Rutendo Ngorima* and *Naledi Boiketlo Dube.*

In consideration of the facts and submissions in support and against the granting of bail, viewed individually and holistically, this court is of the view that releasing Mr *Grassmo Mare*on bail for the reasons advanced would offend the rule of law and would make amockery of the criminal justice system. He is a flight risk. He evaded arrest for a long time, now he is evasive and not candid with his residential address. Releasing him on bail at this stage, will be to give him permit to abscond and not stand his trial. This is a court of law, it cannot be seen to be aiding an individual to evade justice.

The State argues that applicant deserves deferential treatment from his co-accused, who have been admitted to bail. I agree. I am satisfied that there are indeed compelling reasons to decline to admit the applicant to bail at this stage.

Disposition

In light of the foregoing, I come to the conclusion that the applicant is not a good candidate for bail. Accordingly, the application is dismissed.

V. J.Mpofu & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners