

MARLVEN CHIRENDO  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUSITHU J  
HARARE, 10 December 2019 & 18 December 2019

### **Bail Pending Trial**

*R Mahuni*, for the applicant  
*J Mugebe*, for the respondent

MUSITHU J: On 15 November 2019, the applicant filed an application for bail pending trial as a self-actor. He faces seven counts of contravening section 131 (2) (e) of the Criminal Law (Codification and Reform) Act<sup>1</sup> (the Act), that is unlawful entry in aggravating circumstances. The allegations, as appositely captured on the request for remand, form 242, were that between January 2019 and October 2019, and at numbers 22961 Riverside Damofalls Ruwa; 9593 Chipukutu Park Ruwa; 15987 Damofalls Ruwa, the accused person in the company of other accomplices still at large entered complainants' houses through breaking doors and windows and stole various properties listed on the annexure to the form 242. The respondent opposed bail through its response filed on 26 November 2019.

The applicant filed a supplementary bail statement through his present lawyers of record on 3 December 2019. The matter was rolled over to 4 December 2019 for argument. On 4 December 2019, the matter was again rolled over to 10 December 2019 to allow the respondent to invite the investigation officer to clarify certain matters pertaining to the arrest of the applicant. The matter was argued before me on 10 October 2019, following the examination of the investigating officer under oath. In his application, which was amplified by the supplementary bail statement from his lawyers, applicant denies all the charges levelled against him and in particular count number four in which it was alleged that he was arrested at the scene of the crime. The applicant denied being arrested at the crime scene and contended that he was accosted by members

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<sup>1</sup> [Chapter 9:23]

of the public whilst walking along the road with his girlfriend. He claimed to have been apprehended by members of the public some 200 metres away from the supposed crime scene. Applicant further denied being caught in the act, or being found in possession of any stolen property as none was recovered from him.

The respondent in its written response opposed bail primarily on two grounds which are, risk of abscondment and the strength of the state case. Counsel for the respondent submitted that the applicant was facing charges of a serious nature which would motivate him to abscond if admitted to bail. Counsel further submitted that in respect of count four, the applicant was caught inside the complainant's house by members of the public who had rushed to the scene when applicant was found in the act. He had stolen a 53 inch susui plasma television and a solar battery. It was further submitted on behalf of the respondent that some of the stolen property, in particular a solar panel and an exide car battery referred to in count six, was recovered at the applicant's residence. The applicant is alleged to have led the police to recover some property in other counts that he had sold elsewhere. The particulars of this property, and the counts to which it pertained were not highlighted by counsel.

The investigating officer, one detective constable Tafadzwa Marashe of the Criminal Investigation Department, Highlands, recounted the arrest of the applicant particularly in connection with count four. In his evidence in chief, the officer told the court that the applicant was found inside the complainant's house by a student who had just returned from school. He had removed the television from its stand and placed it on a sofa. He was intercepted by the student as he was about to leave the house with the solar battery. It was when he was about to make good his escape that he was chased by members of the public and arrested. On being asked about his attitude to bail by the respondent's counsel, the investigating officer advised that he was still opposed to the admission of the applicant to bail because the applicant's accomplices were still at large and there was a likelihood of the applicant teaming up with them and committing further offences. He also feared that since the applicant was facing a serious offence attracting a custodial sentence in the event of a conviction, he was likely to abscond. Regarding the state of investigations, the officer advised that the police had finalized their investigations. He was still to check if the applicant had previous convictions although the applicant himself had owned up to a past conviction and imprisonment for sex with a minor.

Under cross examination, by applicant's counsel, the officer admitted that the applicant was not found with any property on him when he was arrested in respect of count four. He also couldn't confirm or deny that the applicant was arrested more than 200 metres away from the alleged crime scene. This contradicted the investigating officer's own version in the form 242, which was that the applicant had been arrested at the scene of the crime. The investigating officer also conceded that the inconsistency regarding the circumstances of the applicant's arrest in count four was going to be a contestable issue at the trial. On being asked whether there were any cogent reasons for denying the applicant bail, the investigating officer's response was that it would not be proper to grant bail at this stage since the police were still to recover some of the stolen property. The officer maintained that the applicant had a case to answer and it was not safe to release him on bail at this stage. Further, the accomplices whom the applicant had named in the course of their investigation were still to be arrested. There was a real likelihood of abscondment if the applicant got an opportunity to reunite with the accomplices who were still at large. Under cross examination, the officer explained that what connected the applicant to the seven other counts was cooperation with the police investigators which resulted in them making recoveries of the stolen property and identifying the complainants.

The respondent's counsel abided by the submissions already filed, and maintained that the evidence linking the applicant to the offence were recoveries made in respect of counts two, four and six. Counsel for the applicant on the other hand argued that there was nothing in respect of count two showing that some property was recovered from the applicant. In respect of count four, counsel for the applicant argued that the different versions regarding what exactly transpired on the day the applicant was arrested showed that the applicant had a plausible defence to the charges. On the other counts, he submitted that what was presented to the court was a list of stolen property which the investigating officer had failed to link to the applicant. Counsel also argued that since investigations were said to be concluded, it followed that the respondent was ready to proceed with the trial even in the absence of the accomplices that the investigating officer had alluded to. He further submitted that the officer had not advanced any cogent reasons as to why the applicant would abscond if admitted to bail.

***Analysis of the evidence and the law***

The factors that the courts are enjoined to take into account in an application of this nature are set out in section 117 of the Criminal Procedure and Evidence Act<sup>2</sup>. Section 117(1) 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 be detained in custody.”

I have already highlighted that the respondent opposed bail primarily on the risk of abscondment and the strength of the State case. Counsel for the respondent submitted that the totality of the evidence which connected the applicant to counts four and six was so strong and insurmountable, and concomitantly an inducement for the applicant to abscond. Section 117(2) (a) (ii) provides that the refusal of bail and the detention of an accused in custody shall be in the interests of justice, if it is established that the accused will not stand trial or appear to receive sentence. Furthermore, in terms of s117 (3) (b), in deciding whether a person is unlikely to stand trial or receive sentence, the factors taken into account are as follows:

- (i) The ties of the accused to the place of trial;
- (ii) The existence and location of assets held by the accused;
- (iii) The accused’s means of travel and his or her possession of or access to travel documents;
- (iv) The nature and gravity of the offence or the nature and gravity of the likely penalty thereof;
- (v) The strength of the case for the prosecution and the corresponding incentive of the accused to flee;
- (vi) The efficacy of the amount or nature of the bail and enforceability of any bail conditions;
- (vii) Any other factor which in the opinion of the court should be taken into account.

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<sup>2</sup> [Chapter 9:07]

Section 117(2) (a) (ii) needs to be read together with section 117(4) of the same Act which states that:

“(4) In considering any question in subsection (2) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely—

(a) the period for which the accused has already been in custody since his or her arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c) .....;

(d) .....;

(e) .....;

(f) Any other factor which in the opinion of the court should be taken into account”

In *Kondo & Another v The State*<sup>3</sup> CHITAPI J commented on sections 117(2) (a) (ii) and 117 (4), as follows on page 11 of his judgment.

“The factors which are listed in the above sections do not necessarily have to be proven individually but where applicable. For example an applicant who has assets that he can surrender as surety must identify them and offer them. If he does not have assets, he should state so and motivate the court that despite his not having assets there are other safeguards like say confining himself to a specific location and reporting to the police. What is crucial at the end of the day is for the applicants to leave the court in no doubt that they can be trusted to stand trial if released on bail. A perusal of their bail statement shows that the applicants dealt with some of the factors listed in ss 117 (3) and (4) in a cursory manner. For example to simply state that the applicants are of fixed abode and a family man is wholly inadequate. Questions arise as to whether they own or rent the fixed abodes, what is the size of their families, how do the applicants earn a living and whole lot of other considerations. Issues which are relevant to satisfying the court that it is in the interests of justice to admit the applicants to bail were either not dealt with or glossed over” (Underlining for emphasis).

A consideration of the investigating officer’s evidence reveals that the only count in which recoveries were made from the applicant’s residence was count 6, where police recovered a television, 5kg gas cylinder and a solar panel. In respect of count four, the form 242 states that the applicant was arrested at the crime scene committing the offence. The investigating officer maintained this position in his affidavit opposing bail. Under cross examination the officer conceded that the applicant was arrested outside the house that he is alleged to have entered

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<sup>3</sup> HH 99-17 at page 11 of the judgment.

unlawfully. The applicant did not explain why members of the public would arrest him and connect him to an offence that had occurred some 200 metres away from where he was apprehended, if his version of events is to be accepted. With regards to the property listed in count six that was allegedly recovered from his Eastview home, all the applicant could say was that he denied being caught in the act, and had no knowledge of the offence. He also denied being found in possession of any stolen property and submitted that none was recovered from him. Again, no explanation was tendered by the applicant as to why the police identified him as the person from whose residence part of the property listed in count six was recovered, pursuant to indications that he voluntarily made. The applicant's explanation is not plausible.

In the *Kondo*<sup>4</sup> judgment Chitapi J commented as follows on the need for applicants to make full disclosure as to their suitability for admission to bail:

“I have already indicated that the applicants bear the onus to satisfy the court that it would be in the interests of justice to release them on bail. Although the onus reposed on them is to be measured on a balance of probabilities, it is not discharged by mere say so or bold statements. Section 117 (6) of the Criminal Procedure & Evidence Act requires that the applicants adduce evidence as to their suitability as worthy candidates for release on bail. The applicants have averred in their bail statement that the state “failed to prove compelling reasons justifying their continued detention” and to “put flesh to its reasons for opposing bail”. On the contrary, the applicants are the ones who failed to put flesh to their petition for bail since the onus to satisfy the court that it is in the interests of justice in the circumstances to admit them to bail rested with them”

The sentiments by CHITAPI J are apposite to this matter. The applicant chose to be unforthcoming in his comments on the allegations. Having fully considered the submissions by counsel, and the evidence of the investigating officer, I do not believe that it is in the interests of justice to admit the applicant to bail at this stage. I am persuaded by the submissions on behalf of the respondent that evidence linking the applicant to counts 4 and 6 is overwhelming and was not satisfactorily controverted by the applicant in his bail statement and submissions by his counsel. It was brought to my attention that the applicant's trial at the magistrates' court has been set down for 21 January 2020, which suggests that the matter is ripe for trial.

The application for bail pending trial is accordingly dismissed.

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<sup>4</sup> HH 99-17 at page 9 of the judgment.

*Mahuni Gidiri Law Chambers*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners