

ARCHFORD MHENDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 16 March 2023

Application for bail pending trial

Applicant in absentia
Mr *D H Chesa*, for the respondent.

MANYANGADZE J: This is an application for bail pending trial in which I ordered that the matter be struck off the roll as it was improperly before the court. This order was made *in absentia* as the applicant, who is in custody and is a self-actor, was not brought from remand prison. In a handwritten request for reasons for judgment, the applicant stated the following:

“I, Arhford Mhende, should have appeared before Judge MANYANGADZE, on 16/03/23 Court B, but could not because I am imprisoned in Marondera and they could not transport me for trial. In my absence the Judge said my bail application could be heard on (*sic*) lower court. I kindly ask for a written judgment from the Judge so that I can apply to a lower Court. The Marondera Magistrates’ Court said I should bring written proof that a lower court can grant me bail. With the proof I can then apply for bail pending trial.”

The applicant is on remand at the Marondera Magistrates’ Court, on a charge of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The allegations, as outlined in the request for remand form, are that on 9 February 2023, the applicant, in the company of four accomplices who are still at large, broke into the complainant’s residence at Chinyani village, Goromonzi. They allegedly broke the bedroom window and threatened the complainant and his wife with a knife, iron bar and bolt cutter. By means of these threats, they managed to take cash, cellphones and some grocery items. Some of the goods were taken from a tuckshop which the complainant operates at his residence.

It is alleged the applicant was arrested after he was positively identified by the complainant. The circumstances of the arrest are not detailed in the request for remand form.

In paragraphs 2 – 3 of its response to the application, the State avers that the application is improperly before the court. This so in that the circumstances in which the robbery was

committed do not place it under the schedule of offences in respect of which the Magistrates' Court's power to grant bail is excluded.

The Third Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Schedule) specifies the offences in respect of which a Magistrates' Court's power to admit accused persons to bail is excluded or qualified. Paragraph 3 of the Schedule specifies robbery and reads as follows:

“Robbery, involving—

- (a) the use by the accused or any co-perpetrators or participants of a firearm; or
- (b) the infliction of grievous bodily harm by the accused or any co-perpetrators or participants; or
- (c) the taking of a motor vehicle as defined in s 2 of the Road Traffic Act [*Chapter 13:11*].”

It is clear that the circumstances of the robbery *in casu* do not fit into the circumstances set out in para 3 of the Schedule. That being the case, the Magistrates' Court can entertain the accused's bail application.

It is significant to note the comments in para 4 of the State's response, wherein is stated:

“While this court has jurisdiction to hear the application, it amounts to the usurpation of the lower court's powers by the superior court. Further, it is suggestive of some forum shopping on the part of the applicant which should not be countenanced.”

Indeed, this court has the jurisdiction to deal with a bail application in respect of any offence. This is clear from a reading of s 116 (a)(b) of the Criminal Procedure and Evidence Act. It provides as follows:

“Subject to this section and ss 32 and 34, a person may, upon an application made in terms of section 117A, be admitted to bail or have his or her conditions of bail altered—

- (a) in respect of any offence, by a judge at any time after he or she has appeared in court on a charge and before sentence is imposed;
- (b) in respect of any offence, except an offence specified in the Third Schedule, by a magistrate within whose area of jurisdiction the accused is in custody at any time after he or she has appeared in court on a charge and before sentence is imposed:

Provided that, with the personal consent of the Prosecutor-General, a magistrate may admit a person to bail or alter a person's conditions of bail in respect of any offence;”

Paragraph (a) of the above- cited provision grants a judge of the High Court power to grant bail, in the first instance, for any offence. That includes offences not listed in the Schedule, in respect of which a magistrate may also grant bail.

However, it is undesirable for the High Court to sit, in the first instance, as a bail court for all offences. It will be inundated and cluttered with such applications, almost turning it into

a remand court. As pointed out in para (4) of the State's response, *supra*, the concurrent exercise of power to grant bail in the first instance for any offence by both the High Court and the Magistrates' Court may also have the unfortunate consequence of encouraging forum shopping by bail applicants.

In respect of offences outside the Schedule, it is best that the current practice be maintained, where applications for bail in the first instance are made in the Magistrates' Court. Anyone aggrieved by that court's decision is at liberty to approach the High Court on appeal. It is only in exceptional circumstances that an applicant may be allowed to approach the High Court in the first instance in respect of offences not listed in the Schedule. In this regard, I share the sentiments expressed by MUREMBA J in the case of *Felix Biri v The State* HH 772/22.. The learned judge stated, at pp 2-3 of the cyclostyled judgment:

“Ms. Mupini was correct in submitting that the Magistrates Court has jurisdiction to grant bail in offences of Public Violence. This is because generally, a magistrate may grant bail in respect of all crimes except those which are specified in the Third Schedule of the Criminal Procedure and Evidence Act [Chapter 9:07] (CPEA). In relation to such offences specified in the Third Schedule, a magistrate may only grant bail if the Prosecutor General has personally consented to the magistrate granting bail or hearing an application for bail for such an offence. See s 116 (b) of the CPEA. Admittedly Public violence is not listed in the Third Schedule and as such the Magistrates Court has jurisdiction to hear an application for bail by an applicant charged with public violence. What was incorrect is the submission by Ms. *Mupini* that an applicant facing a charge of public violence can only approach this court (the High Court) on an appeal basis. I say this because our criminal justice system does not provide for a category of offences where power to admit to bail is restricted to the Magistrates Court only. In terms of s 171 (1) (a) of the Constitution of Zimbabwe “The High Court has original jurisdiction over all criminal matters throughout Zimbabwe. S 23 of the High Court Act also provides that “*subject to this Act and any other law, the High Court shall have full original criminal jurisdiction over all persons and over all matters in Zimbabwe.*” What this means is that the High court can deal with any criminal offence, third schedule and non-third schedule offences, as a court of first instance in respect of bail applications. Section 116 (a) of the CPEA puts this position beyond doubt. It reads:

“116 Power to admit to bail

Subject to this section and sections 32 and 34, a person may, upon an application made in terms of section 117A, be admitted to bail or have his or her conditions of bail altered –

- (a) In respect of any time after he or she has appeared in court on a charge and before sentence is imposed.”

When the High Court deals with a bail application as a court of first instance, its decision is appealable to the Supreme Court. See s 121 (2) (a) of the CPEA. It should however be noted that in practice the High Court deals with bail applications in respect of offences that are specified in the Third Schedule of the CPEA which offences include murder, treason, rape, aggravated indecent assault, and robbery. This is done purely for the practical reason of not overburdening The High Court with applications which ordinarily fall within the jurisdiction of the Magistrates' Court. There are only 5 High Court stations in this country *viz*, Harare; Bulawayo; Masvingo; Mutare and Chinhoyi. If accused persons facing non – third schedule offences were to apply for bail in the High Court, the 5 High court stations would obviously

not cope with the workload. This is more so in view of the fact that in terms of s 121 (2) (b) of the CPEA all appeals against decisions on bail by magistrates are made to the High court. The general practice therefore is to discourage accused persons facing charges other than those listed in the Third Schedule from applying for bail in the High Court. It is only in exceptional circumstance that the High Court accepts to deal with bail applications for offences other than those listed in the Third Schedule. The person applying for bail therefore needs to give justifiable reason (s) for approaching the High Court instead of making his or her bail application in the Magistrates Court.

In casu it was averred in the applicant's bail statement that the applicant elected to approach this court for bail application because during his first court appearance at Harare Magistrates Court, several individuals wearing ZANU PF party regalia were milling in the courtyard threatening to burndown the courthouse if the applicant was granted bail. Ms *Mupini* made no submissions to dispute this and I decided that the applicant had proffered a justifiable reason for approaching this court."

The legislature, in its wisdom, found it proper to schedule specific offences in respect of which only the High Court may grant bail in the first instance. The Magistrates' Court can grant bail for any of the offences outside the Schedule. This of course is subject to the proviso to para (b) of s 116, where bail may be granted by a magistrate even in respect of offences listed in the Schedule with the consent of the Prosecutor-General. It will certainly defeat the purpose of these legislative provisions and render the bail system chaotic if anyone is at liberty to approach any court for any offence. In the instant case, as already indicated, the circumstances surrounding the commission of the offence do not place it within the ambit of para (3) of the Schedule. What this means is that the Magistrates' Court has jurisdiction to deal with the applicant's request to be admitted to bail. As to whether or not such a request will be granted, it is a matter within the discretion of the magistrate who will be seized with the application, who shall of course be guided by the principles governing such applications.

In the circumstances, the proper course of action is to order that the application before this court be struck off the roll.

In the result, it is ordered that:

The application for bail pending trial be and is hereby struck off the roll

National Prosecuting Authority, legal practitioners for the respondent.