Judgment No. HB 126/2002
Case No. B 160 –1/2002

KHULEKANI NCUBE

And

NGONENI MAFU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 9, 15 & 24 OCTOBER 2002

J James for the applicants
Mrs M Cheda for the respondent

Bail Application

NDOU J: This is an application for bail pending extradition to South Africa (or trial in the event the Zimbabwe Attorney General decides to prosecute the accused persons in this jurisdiction).

The salient facts of the matter are the following. On 27 December 2001, a case of armed robbery took place in South Africa at the Johannesburg International Airport. A number of male assailants, armed with AK 47 assault rifles and pistols carried out the robbery. The property stolen in this robbery comprised US$9,5million and jewellery. The total value stolen is estimated at ZAR113 million. A female security guard was shot and seriously wounded in the course of the robbery. A total of seven (excluding the applicants) alleged robbers were arrested, some of them in Zimbabwe. A picture of a well planned and well executed robbery emerges. They are already standing trial in South Africa. The applicants were allegedly implicated by those arrested and already standing trial in South Africa.

They are on the wanted list of the South African police. The South African police sought the assistance of the Zimbabwe Republic Police to locate, arrest and extradite these two. The Zimbabwe Republic Police traced the two and arrested them on 23 September 2002. The Zimbabwean police were armed with a warrant of arrest issued in South Africa in the name of Khulekani Nxobu and Sosha Ndaba Mafu. The two unsuccessfully challenged their being placed in remand. The latter issue is not before me in this application. Various issues were raised by counsel. I propose to firstly deal with the issue of whether the Attorney General can charge the applicants in this jurisdiction from the facts of this case.

1. Can the State charge the applicant for the armed robbery in this jurisdiction?

As alluded to earlier on, the offences occurred outside the jurisdiction in this court. For the state to have jurisdiction the armed robbery must have "continued" to our jurisdiction. In any event, is armed robbery a continuing offence? Robbery is not a continuing offence, theft is. See *S* v *Makhuta* 1969 (2) SA 490 (O) at 493A-B. Whatever might have been the position in Roman and Roman-Dutch, it has been decided by our courts that theft is a continuing crime – see S v A 1979 (4) SA 51 (R). On page 52F-H of the judgment GUBBAY J stated as follows:

> "The general principle adopted hitherto by Rhodesian and South African courts is that the laws of a country only to acts committed within its geographical boundaries. See Dugard South African Criminal Law and Procedure Vol 4 at 58-59; Gardiner and Lansdown South African Criminal Law and Procedure 6th Ed Vol 1 at 26 and 35. The offence of theft provides an exception in that, being an continuing offence, if stolen property is imported into the country by the thief jurisdiction over him will be assumed. See *The Queen* v *Philander Jacobs* (1876) 6 Buch 171 at 175; *The Queen* v *Herbet* 1880 Kotze' 187; *R* v *Van Rensburg* 1921 SR 1 at 2-3; *R* v *Saal and Another* 1933 CPD 13 at 16; *Cloete* v *R* 1954(1) PH H95; *R* v *Masupe and Another* 1967(3) SA 530 (R) at 531C; *S* v *Makhutla en'n arder* 1968 (2) SA

> 768(O) at 772F-G; 1969 (2) SA 490 (o) at 493C; *S* v *Mathebula and Another* 1969 (3) SA 265 (N) at 266C-D; *S* v *Muleya* 1977 (2) RLR 149 (GD) at 150E-G. None of these decisions suggest that an alternative basis for assuming jurisdiction would be where the consequences of depriving the owner of his property outside the jurisdiction was harm felt by him within the jurisdiction. The assumption of jurisdiction is based fairly and squarely on the premises that theft is a continuing offence."

It would seem to me that it is appropriation in the theft that is a continuing act. Robbery, as charged in casu, is not a continuing offence – see *S* v *Makhutla supra*; *R* v *Von Elling* (1945) AD at 245; Principles of Criminal Law – *J Burchell and J Milton* 1st Ed page 497E; Hale (1978) 68 Cr App Rep 415; Pitman's Criminal Law 1st Ed at page 150 and Criminal Law – Smith and Hogan, 6th Ed page 504. In the circumstances, at most, the state can only charge the applicants with theft of US$400 on the basis that they brought it into the jurisdiction of this court. The factual basis for bail pending trial in this jurisdiction would be the theft as opposed to the armed robbery.

2. Bail Pending Extradition

Extradition is governed by the Extradition Act [Chapter 9:08]. The Act provides for two main forms of extradition. The first concerns extradition under agreements between Zimbabwe and foreign states – see section 5(1) of the Act and Constitutional Law of Zimbabwe – Greg Linington at page 501.

The second form of extradition is that to and from designated countries – section 5(2) of the Act. The underlying principle in extradition is the return of a fugitive criminal from the country where he is found to the country he is accused of, or has been convicted of an offence. The objective of extradition is to prevent criminals from escaping justice by placing themselves beyond the jurisdiction. The background has

to be highlighted in order for one to appreciate the issues involved in this application. Coming to bail pending extradition I agree with the observations made by the late J K Magunhu in his article entitled "The Law of extradition in Zimbabwe" published in the Legal Forum, 1993 Vol 5 No. 3. At page 22 the learned writer stated:

"Bail and legal representation

The concept of state sovereignty includes the ideal that all persons who are lawfully within the geographically territory of a given state are subject to its laws. There are, of course, exceptions such as diplomats and visiting heads of state who are largely not subject to the laws of the host state. In the context of extradition the objective is that all persons, regardless of their nationality or residence status within a country are entitled to the protection of its laws and to be treated as equals in the eyes of the law. … It is in recognition of the above ideals that the Act in section 26(1) provides that a person who has been arrested for the purposes of extradition shall have the same "right" to bail as a person arrested in connection with a criminal offence committed within Zimbabwe."

It, therefore, follows that there is no material difference between the principles Governing bail pending trial and bail pending extradition. The state opposes this application and I propose to deal with each reason for such opposition.

(a) **That the applicants have dual citizenship**

I have already indicated above that according to the Act nationality of the fugitive is immaterial as it allows the Minister to enter into agreements which permit the extradition of "any person whatsoever, whether or not they are nationals of both Zimbabwe and the foreign country concerned – section 3(2)(b). The fears of the state

would be understandable if the matter did not involve South Africa. *In casu*, the arrest of the applicants is at the behest of the South African police. The question of them absconding to the country of the other nationality does not arise. Although the question of dual citizenship may be a factor in bail applications, in this case it does not count against the applicants.

(b) Applicants facing a serious offence

The offence for which extradition is sought, is very serious both in Zimbabwe and South Africa. The court can take judicial notice of this notorious fact from a reading of reported judgments of the South African courts. In this case if the applicants are convicted of armed robbery as outlined in the facts there is a real likelihood of lengthy prison terms being imposed and thus the applicants will be tempted to abscond. The inducement to abscond is real - see *S* v *Hudson* 1980 (4) SA 145 (D); *S* v *Ito* 1979 (3) SA (w) 740 and *Dumisani Ndlovu* v *State* HH 177-01 at page 4. This is a relevant factor in a bail application but on its own not a ground for refusing bail – see *State* v *Hussey* 1991 (2) ZLR187 (S) at 190 A-B; *State* v *Mambo* HH-47-92 at page 2 and *Aitken and Ano* v *The Attorney General* 1992 (1) ZLR 294 (S). The seriousness of the offence should be considered in relation to the inducement of abscondment. If there is no likelihood that this factor will induce abscondment then the court should lean in favour of and not against the liberty of the applicant.

(c) Interference with evidence

The allegation in this regard is that the applicants attempted to bribe members of the South African police with US$80 000. If these allegations are proven, then this is a clear and strong case of interference. The South African police gave details of

this allegation. The applicants, it is alleged, know the police witnesses and informants. In such a case, the possibility is real that they will interfere or temper with evidence see *S* v *Chiadza* 1988 (2) ZLR 19 (SC); *S* v *Maharaj* 1976 (3) SA 205 (C & CLD); *S* v *Maratera* SC-93-91; *S* v *Aitken and Another supra*. The other factor listed by respondent are covered by what I have outlined above.

Mr James, for the applicants criticised the piecemeal fashion in which the respondent produced its opposing documents. I agree that this is a less than ideal way of presenting evidence in court and should be discouraged. I, however, cannot refuse the respondent an opportunity to use such evidence received after the commencement of the bail application. Bail applications are *sui generis*. There is no prescribed format or procedure. It is the duty of the presiding officer, with due allowance for the circumstances of each case, to determine the way in which each party must submit its evidence. In this regard, in *S* v *Nichas* 1977 (10 SA 257 (C) DIEMONT J remarked as follows;

> "It is a notorious fact that in a majority of cases *exparte* statements are made by both the defence and by the public prosecutor who intimates what the police objections are. There are no formalities; no evidence is led, no affidavits are placed before the court and the record is so meagre that there may be little or nothing to place before the superior courts if the matter is taken on appeal. This easy-going procedure has both advantages and disadvantages."

This procedure is informed by, *inter alia*, the fact that bail applications are usually urgent applications – see also *S* v *Pienaar* 1992 (1) SACR 178 (W) and *Dumisani Ndlovu* v *State supra* at page 8.

Mr James also pointed out what the Assistant Commissioner S D Schutte, Head of Serious and Violent Crime of the South African police stated in his

correspondence to Senior Assistant Commissioner Mandizha. The relevant portion reads, "After the arrest of the two above mentioned suspects in Zimbabwe the investigating officer Captain Olivier discussed their arrests with the state advocate, who came to the conclusion that the two suspects currently arrested in Zimbabwe cannot be charged with the accused already standing trial on the Johannesburg CAS 338/12/2001 and that at this stage there is insufficient evidence against the arrested suspects to ensure a conviction. It will however be of immerse value if the fingerprints of the mentioned suspects would be made available to this office in order to test their prints against these (sic) retrieved at the relevant crime scene."

From documents before me the prints of the applicants were sent to the South African police. This resulted in the latter requesting the extradition of the applicants. Whatever their views were when they wrote the initial letter it seems that they have since changed. They now believe they have a case against the applicants. This is the context in which the above statement should be understood. Looking at the totality of the facts before me I am satisfied the applicants have not discharged the onus, on a balance of probability, that the court should exercise its discretion in favour of granting them bail. In discharging this burden the applicants, *in casu*, must show that the interests of justice will not be prejudiced, namely, that it is unlikely that they will not be available for extradition or otherwise interfere with the administration of justice – see *De Jager* v *Attorney-General*, Natal 1967 (4) 143 (D).

An attempt to bribe the South African police details indicates a real possibility of interference with evidence. Further, the seriousness of the offence point out there is a real possibility of inducement for the applicants to abscond. If convicted they are

likely to face lengthy imprisonment as firearms were used and a female security guard was seriously wounded in the course of the robbery. Applicants moved from South Africa to Zimbabwe after the offence.

On these facts, the applicants have failed to establish, on a balance of probability, that they are suitable candidates for bail and I, therefore, dismiss their applications.

James, Moyo-Majwabu & Nyoni, applicants' legal practitioners
Office of the Attorney-General, respondent's legal practitioners