

**NKATHAZO NDLOVU**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
CHIWESHE J  
BULAWAYO 23 JANUARY 2003

*G Nyoni* for the applicant  
*Mrs M Cheda* for the respondent

Bail Application

**CHIWESHE J:** The applicant appeared before the magistrate at Bulawayo facing charges of armed robbery. It was alleged that on 10 October 2002 the applicant supplied information to six other co-accused persons as to how they could rob the complainant of his property. The applicant was an employee of the complainant. They then proceeded at gunpoint to rob the complainant of a motor vehicle, household goods and clothes. The property is valued at \$11 million of which property to the value of \$7 million has been recovered. The applicant sought to be granted bail pending trial. The magistrate dismissed the application.

He now appeals against the magistrate's decision on the grounds that the learned magistrate should not have relied on the grounds stated by the investigating officer in dismissing the bail application. In particular the applicant avers that the investigating officer admitted that the applicant did not directly participate in the armed robbery, that no weapon was found on him, that no property was found at his residence, that the applicant never attempted to run away, that applicant was at the time of the armed robbery at Belmont where the complainant was, that he has no travel documents and that he has neither previous convictions nor pending cases. The

applicant further alleges that the prosecutor had agreed to bail but that the magistrate had insisted on hearing the investigating officer instead. However, there is nothing in the record in support of that contention. At one stage the applicant was arrested, questioned and detained for five days. He was released and re-arrested at his residence after two weeks. This fact is common cause.

Specifically the applicant alleges that the magistrate misdirected herself when she indicated that the state opposed bail and maintains that the prosecutor a Mr Masendu had been agreeable to bail upon certain conditions. As already observed the record does not bear testimony to that assertion. The applicant also suggests that in fact the state had indicated an intention to remove him from remand as they did not seem to have any evidence against him. Again this is not borne out by the record of the proceedings. On the contrary the record shows that bail was vigorously opposed. Further the applicant contends that it was unreasonable on the part of the magistrate to entertain fears that the applicant may abscond or interfere with witnesses when there is no evidence of prior conduct particularly during the period between the first arrest and the present arrest when he had been released for two weeks. He did not abscond nor is there evidence of interference with witnesses. The investigating officer agrees the applicant had been so released but sought to qualify his statement by saying that during the first arrest the applicant had only been questioned but not charged. As such his motive to abscond at that time would have been minimal. Presumably the applicant was questioned concerning the present charges. If so he would have known that he was a possible suspect and if he had wished to abscond he would have done so. He did not. That is a fact that is definitely in the applicant's favour. Further the evidence so far against the applicant does not present a formidable case to answer. Further the applicant has no previous convictions. He is aged 22 and gainfully

employed. Taking these factors together the probabilities tend to point to the fact that the applicant is more likely to stand trial than abscond. He had the opportunity to abscond but did not. He had a similar opportunity to interfere with the investigations. There is no evidence to suggest that he did so. While there may be factors militating against the granting of bail such as were observed by the magistrate, I am inclined to the view that the magistrate over weighed these factors at the expense of those factors favourable to the applicant's cause. That to me constitutes a misdirection. I am fortified in this view by the fact that in an application such as the present it is the practice of the courts to exercise their discretion as far as possible in favour of the liberty of the applicant whose guilt is yet to be proved. In this case the probabilities are clearly in the applicant's favour. Any concerns that the state may have can be addressed by way of appropriate bail conditions.

For these reasons the appeal succeeds. Accordingly, it is ordered that the applicant be and is hereby admitted to bail upon the following conditions:

- (a) that he deposits the sum of \$50 000,00 with the Assistant Registrar of this honourable court.
- (b) That pending finalisation of this matter he resides at 109 Edenfield Road, Matsheumhlophe, Bulawayo.
- (c) That he reports at Bulawayo Central Police Station twice per week, that is to say once on Mondays and once on Fridays between 6am and 6pm.
- (d) That he does not interfere with state witnesses; and
- (e) That he surrenders his travel documents, if any, to the Assistant Registrar of this honourable court.

*Majoko & Majoko* applicant's legal practitioners  
*Attorney-General's Office* respondent's legal practitioners