Judgment No. HB 57/2003
Case No. HCB 243/2002

JOHN RAPHAEL MASUKU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 11 AND 17 APRIL 2003

J James for the applicant
S Musonah for the respondent

Bail Application

NDOU J: The applicant is currently facing 19 counts of theft of motor vehicles and one count of robbery of a motor vehicle. The trial commenced before us in October 2002. The applicant had prior the commencement of this trial, been in pre-trial incarceration and the facts and the circumstances appear in HB 32/2001, HH 79/2002 and SC-59-02. We have heard evidence from a number of witnesses since the commencement of the trial. One can confidently say we have gone past the half way mark of this trial. The applicant applies for bail pending the completion of the trial. The state opposes this application on the basis, first, that the applicant will abscond, and second, that the applicant will interfere with evidence or witnesses. The three judgments referred to above were handed down before the trial had commenced. This time around we have heard a lot of witnesses. I am, therefore, in a unique position to consider whether, at this stage the interests of justice demand that I admit the applicant to bail. In short, the circumstances have changed since the previous application (and subsequent appeal to the Supreme Court). I am, therefore at liberty to consider this bail application.

It is trite that in such applications the court has to strike a balance between the

interests of the society (i.e. the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused person (who pending the outcome of his trial, is presumed to be innocent) – see *Ndlovu* v *S* HH-177-01; *Attorney-General, Zimbabwe* v *Phiri* 1988 (2) SA 696 (ZHC); *R* v *McCarthy* 1906 TS and *S* v *Mhlawuli & Ano* 1963 (3) SA 795 (C) at 796B. Although these cases were dealing with bail applications before the commencement of trial, the principles are of equal application even in cases of this nature where the trial has commenced but the matter is pending finalisation. The onus is, therefore, upon the applicant to prove on a balance of probability that the court should, in light of the evidence led thus far, exercise its discretion in favour of granting him bail. In discharging this burden, the applicant must show that the interests of justice will not be prejudiced. He has to show that it is likely that he will stand trial or that he will not interfere with the administration of justice – see *De Jager* v *Attorney-General, Natal* 1967 (4) SA 143 (D) and section 116(7) of the Criminal Procedure and Evidence Act [Chapter 9:07].

The main thrust of the application is based on the quality of the evidence led by state so far. First, it is contended that the evidence led thus far is circumstantial. Second, a number of apparent discrepancies were pointed out from the totality of the evidence. It is beyond dispute that there are obvious discrepancies is some of the witnesses' testimony led in some of the counts. Equally, there are other witnesses where no obvious discrepancies exist. At this stage all I can say is that some of the discrepancies pointed out appear to be material whilst others appear to be immaterial. It is trite that the assessment of the credibility of the witnesses is the province of the trial court. *In casu*, this would include the gentlemen assessors. It is, therefore, not

feasible for me to make a finding on the demeanour of the witnesses and in consequence thereof grant bail to the applicant. To do so would amount to assessment of the evidence piece-meal. The evidence has to be evaluated in its proper perspective. I, however, agree that the strength of prosecution case (and the probability of conviction) is a factor in such applications – see *S* v *Lulame* 1976 (2) SA 204 (N) and *S* v *Hartman* 1968 (1) SA 278 (T) at 281.

At most, what we have so far is that in some counts the state case is not sustainable. In other counts, depending on our assessment of the evidence, the case may be sustainable. Although evidence led so far does not directly incriminate applicant, there seems to counts where the doctrine of recent possession may be relevant.

I agree that the prosecution had problems in securing witnesses and at some stages this occasioned postponements. In this regard I would once more emphasise that those representing the state should always bear in mind that criminal justice begins at the corridors of the offices of the Attorney-General. While the officers in Attorney-General must consult investigating officers, they should however, jealously guard their independence. They should act fairly to the police and to accused persons. Although the case had a less than ideal start we appear to have eventually covered a lot of ground. Looking at the totality of the evidence led so far and what I have said above there is a cognisable indication that it is not in the interests of justice to admit the applicant to bail at this stage.

In the result the application is dismissed.

James, Moyo-Majwabu & Nyoni applicant's legal practitioners
Attorney-general's Office respondent's legal practitioners