Judgment No. HB 9/2003
Case No. HCB 217-8/2002

FARAI DUBE

And

DINGANI MLOTSHWA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 24 DECEMBER & 23 JANUARY 2003

T Hara for the applicants
Mrs I M Nyoni for the respondent

Bail Application

NDOU J: I dismissed the application on 24 December 2002 and undertook to give reasons later. These are the reasons.

The applicants are jointly charged with theft of a motor vehicle. The allegations are that on 21 November 2002 between 1900hours and 2100 hours the vehicle forming subject matter of the charge, a Mazda B2200 pick-up, was parked at the Emakhandeni Suburb, Bulawayo for the night. The vehicle was parked at premises known as Emakhandeni Overnight Car Park. The allegations against the applicants are that they stole the vehicle acting in cahoots with one Casper Ndlovu. After the theft, the latter drove a stolen car whilst the first applicant, Farai drove the get away vehicle with second applicant as a passenger in the latter vehicle. The three drove to Harare and handed the vehicle to one Zedic Cherera. The stolen vehicle was not recovered and Zedic is still at large.

The applicants were only arrested after a car chase by the police. In fact, police only managed to catch up with them after the vehicle they were driving developed technical problems. The respondent opposes bail and filed an affidavit by the investigating officer in support of his case.

It is trite that in bail applications the presumption of innocence – in *favorem vitae libertatis et innocentia omnia praesumuntur* is in favour of the applicant see *S* v *Essack* 1965(2) SA 161 (D) and *Dumisani Ndlovhu* v *State* HH-177-2002. The primary question for consideration in such an application is whether the applicant will stand trial or abscond. *In casu*, the respondent seems to be relying only on this factor in opposing the application. In the circumstances, the court has to strike a balance between the interests of the society (the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of the individual, *viz* the applicant (who, pending the outcome of his trial, is presumed to be innocent) – see *R* v *McCarthy* 1906 TS; *Attorney-General, Zimbabwe* v *Phiri* 1988(2) SA 696 (ZHC) and *S* v *Mhlauli and Ano* 1963(3) SA 795 (C).

The onus is upon the applicant to prove, on a balance of probability, that the court should exercise its discretion in favour of granting him bail – see *De Jager* v *Attorney-General*, Natal 1967(4) SA 143(D) and section 116 (7) (C) of the Criminal Procedure and Evidence Act [Chapter 9:07]. As pointed out earlier on, the main issue here is risk of abscondment. There is no doubt that in this case the applicants, if convicted, for theft of the motor vehicle will face a long prison sentence. The facts reveal premeditated conduct by a gang. The likelihood of a long prison sentence is a factor to be considered as a possible source of inducement to abscond by the

applicants – see *S* v *Hudson* 1980 (4) SA 145 (D) and *S* v *Ito* 1979 (3) SA 740 (W). In this case the police only succeeded in apprehending the applicants after a car chase i.e. after the vehicle that the applicants were using developed clutch problems. Why would they abscond if there are innocent? It is trite that the interests of justice demand that an accused person stand his trial and if there is any cognisable indication that he will not do so if released on bail, the court should deny him bail – see *J* v *Forie* 1973 (1) SA 100 at 101G-H. The seriousness of the offence as shown above and the attempts by the applicants to abscond at the time of their arrest cumulatively amount to cognisable *indiciae* that there is a risk of abscondment. In the circumstances I find that the applicants are not suitable candidates for bail. The interests of justice demand that I deny them bail.

I accordingly, dismiss their application.

Moyo-Hara and Partners applicants' legal practitioners
Attorney-General Office respondent's legal practitioners