

BONGANI SICELO MBAMBO

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 22 AUGUST 2011 AND 25 AUGUST 2011

Mr R. Ndlovu for applicant

Mr T. Hove for respondent

Bail Application

MATHONSI J: This is an application for bail pending trial which was only filed on 3 August 2011 when the applicant and his 3 co-accused were arrested in May 2010. The applicant had not applied for bail until now.

The applicant and his co-accused are facing a charge of armed robbery the allegations being that on 27 March 2010 himself, Bekezela Lizile Moyo, Everton Khupe and Mandlenkosi Gumisayi committed a robbery at No. 6 Wallasey Road Donnington Bulawayo using a licenced firearm belonging to the applicant.

They were all arrested in Harare about two months later leading to the recovery of some of the stolen property. The applicant has remained in custody awaiting trial since that time. The main thrust of the argument made by *Mr Ndlovu* for the applicant is that one of the applicant's co-accused Bekezela Lizile Moyo was admitted to bail on 12 April 2011 and as such the applicant should be treated the same as his co-accused. *Mr Ndlovu* further submitted that it is undesirable to treat co-accused persons differently when they are facing the same charge.

Mr Hove for the state, argued that when the court granted Bekezela Lizile Moyo bail it had been swayed by the fact that the state could not give a trial date and their co-accused persons had been transferred to Harare to stand trial on other charges. Their date of return to

Bulawayo was unknown and for that reason the justice of the case demanded that Moyo be admitted to bail.

Mr Hove further argued that the applicant's situation is different in that the trial of his co-accused in Harare has been completed, they have been returned to Bulawayo and trial dates, being the 13th and 14th September 2011, have been set for the trial of the applicant and his co-accused.

When Bekezela Lizile Moyo first applied for bail in August 2010, I had denied him bail and the reasons for doing so appear in my judgment in *Moyo v S HB 88/10*. He filed a fresh application citing a change of circumstances, which I heard on 12 April 2011. In granting him bail I stated as follows:

"This matter came before me as an application for bail in August 2010. During that hearing the state opposed bail *inter alia* on the basis that investigations were complete and the matter was to be allocated a trial date in a short while. In refusing the Applicant bail then I had been swayed by the fact that a trial date was imminent and that the applicant needed to concentrate on that in order to prove his innocence. Regrettably, more than 7 months have lapsed since the last bail hearing and not only has the state failed to set the matter down for trial, it has also taken the applicant's co-accused to Harare making the possibility of a trial even more unlikely. This is particularly so, as *Mr Ndlovu* for the state has pointed out, that his office is not aware why the co-accused have been taken to Harare and when they are likely to come back. In my view the lapse of time, in this case 7 months, and the patent inability of the state to point to when the applicant is likely to stand trial, amounts to fresh facts which are favourable to the applicant and militate in favour of his admission to bail."

The present case is distinguishable from *Moyo* (*supra*) in many ways the most important one being that the applicant has approached the court seeking bail for the first time when a trial date has been set. Indeed his trial is only three weeks away. Surely one would expect him to be focusing on proving his innocence at the trial instead of fighting for bail, a fight he shied away from since his arrest more than a year ago. The other factor is that the state case against the applicant is much stronger than that against Bekezela Lizile Moyo. While the only thing linking Moyo to the robbery, other than the confessions, appears to be the telephone call he made to the complainant hours before the robbery, the applicant's weapon, a star pistol, was allegedly used in the robbery. The same firearm, though licenced, was allegedly recovered

hidden in the ceiling, a curious place to keep a firearm, of a house in Harare where the applicant did not even stay.

The present inquiry involves striking a balance between the liberty of the individual and the administration of justice. Where there is strong evidence linking the applicant for bail with the commission of the offence and it is likely that upon conviction the applicant will be sentenced to a lengthy term of incarceration, the risk of abscondment is high. *S v Jongwe* 2002 (2) ZLR 209(S).

I am apprehensive that if granted bail the applicant will not stand trial. This is particularly so considering that this application has come rather late in the day when a trial date has already been set. It may well be that realizing that the day of reckoning is nigh, the applicant wants to evade justice.

In the premises, the application is dismissed.

R. Ndlovu and company, applicant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners