HB 264/18
HCB 194/18
X REF CRB GP 1409-10/18

OFFMAN PHIRI

And

GODFREE DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 18 & 25 OCTOBER 2018

Bail Application

I. Mafirakureva for the applicants
Mrs C. C. Muhwandavaka for the respondent

MAKONESE J: This is an application for bail. The applicants seek their release from custody pending trial. The application is opposed by the state.

The applicants are being charged with robbery as defined in section 126 of the Criminal Law (Codification and Reform) Act, (Chapter 9:23). It is alleged that on the 19th May 2018 and at number 29 Corona Crescent Ivene, Gweru, the applicants in the company of unknown accomplices, attacked the complainant as soon as he entered his yard. They stabbed him on the thigh and dragged him inside the house. They took complainant's 51 inch Plasma television set, J5 Samsung cell phone, Y500 Huawei cell phone x 2 and all bank cards and pin numbers, including complainant's ecocash pin number. The applicants and their associates then boarded a commuter omnibus that was pirating between Gweru and Bulawayo. The applicants stole a cellphone belonging to the driver of the pirate taxi during their journey to Bulawayo. The applicants or one of them used the ecocash account number belonging to the complainant to pay for their fare to Bulawayo. The applicants were identified by the kombi driver at a drinking spot in Bulawayo leading to their arrest.

The applicants aver that they are suitable candidates for bail. They indicate that they have no reason to interfere with the evidence. The applicants assert that they have a strong defence of alibi. They assert that they were nowhere near Gweru on the day of the robbery and they never committed the offence as alleged. In other words, applicants argue that they have been wrongly implicated in the robbery and this could be a case of mistaken identity. Further, the applicants aver that an identification parade was conducted by the Investigating Officer and the complainants failed to identify them. The parade was recorded on video. The applicants state that the case against tem is weak.

Counsel for the state, *Mrs Muhwandavaka*, clarified the issue of the identification parade and pointed out that the complainant was away in South Africa when the identification parade was conducted. Be that as it may, the applicants were positively identified by the conductor of the commuter omnibus who travelled with the applicants from Gweru to Bulawayo.

The risk of abscondment

The Constitution of Zimbabwe (Amendment No. 20) 2013, in section 50 (1) (d) provides that a person who is arrested must be released unconditionally or on reasonable conditions pending bail unless compelling reasons justify the continued detention. In *S* v *Moyo* HB-307-17 the court held that this constitutional provision must be balanced with the fundamental principle of the need for the proper administration of justice and assurance that an accused person will indeed avail himself for trial when the time comes. The risk of abscondment is therefore central to any consideration of an application for bail pending trial. In *S* vs *Jongwe,* 2002 (2) ZLR 209 (5) CHIDYAUSIKU CJ held as follows at page 215:

> *"In judging this risk the court ascribed to the accused the ordinary motives and fear that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted, the strength of the state case, the ability to flee to a foreign country and the absence of extradition factors, the past response to being released on bail, and the assurance given that it is intended to stand trial."*

The Law

An accused person is presumed innocent until proven guilty by a competent court of competent jurisdiction. There is evidence that one of the applicants used an ecocash account belonging to the complainant to pay for his fare for his travel from Gweru to Bulawayo on the night of the robbery. The applicants were identified by the conductor of the commuter omnibus. This is what led to their arrest. It is a trite principle of our law that the strength of the state case on its own is not a sufficient basis to deny an applicant bail. In the case of *S* v *Ndlovu* 2001 (2) ZLR 261 (H), the court reaffirmed the position that the applicant is required to disclose his defence. In the present matter the applicants have disclosed their defence, which is one of alibi, but they appear to have lied as to their whereabouts on the day of the robbery. The complainant alleges that his ecocash account, whose pin number had been stolen during the course of the robbery was actually used by one of the applicants to pay for their fare for their journey from Gweru to Bulawayo. Where an applicant tells a lie about a critical aspect of his defence in a bail application, then the court is entitled to draw adverse inferences against the applicant. Further, and most crucially, the applicants robbed the pirate taxi driver of his phone. They were spotted at a drinking "hole", leading to their arrest. I accordingly, hold the view that the applicants have not been entirely candid with the court about their activities and whereabouts on the day of the robbery.

In the circumstances, the applicants are not suitable candidates for bail.

Accordingly, the application for bail pending trial is hereby dismissed.

Messrs Moyo & Nyoni, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners