

EDWARD DAVE

And

SHEUNESU NHLIZIYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 15 & 28 JULY 2021

Bail Pending Trial

Ms. A. Phiri, for the applicants

Mr. K. Jaravaza, for the respondent

KABASA J: This is an application for bail pending trial. The applicants are facing a charge of robbery. The allegations are that on 8th June 2021 the applicants, in the company of 4 others, hired a motor vehicle to Esigodini from Bulawayo and proceeded to the complainant's home. One Thabisa Ncube who was part of the gang of 6 was a former employee of the complainant and is the one who led his co-accused to the complainant's house. The group was armed with axes, knives and what looked like a firearm. The complainant was attacked using an axe and a log resulting in him losing consciousness. His wife was threatened with rape and the kidnapping of the couple's 9 month old baby. As a result, the complainant surrendered ZAR300, ZWL\$5 000 and three cellphones. The gang went on to ransack the house, taking property valued at US\$3 749,00.

Most of the property was recovered after the hired driver refused to carry the loot. The gang managed to leave the area but the hired motor vehicle had a tyre puncture and that immobilized the vehicle leading to the arrest of the hired driver and some of the gang members. The applicants however managed to find their way back to Bulawayo where they were eventually arrested except for one who is still at large.

The state opposed bail on the grounds that:

- (a) The applicants are a flight risk who gave police trouble as they proved difficult to apprehend. The seriousness of the offence and the likely penalty will therefore induce them to be fugitives from justice. The first applicant has ties in South Africa and may therefore flee to that country thereby removing himself from the court's jurisdiction.
- (b) The applicants may interfere with witnesses as the hired driver lives in the same neighbourhood with them. They may therefore manipulate him.
- (c) The 2nd applicant has no identification documents and may therefore prove difficult to locate should he be granted bail and default court.

- (d) 1st applicant has 2 pending cases of robbery under Nkulumane CR 119/03/21 and Bulawayo Central CR 203/03/21 and is therefore likely to commit other offences if released on bail.
- (e) The evidence against the applicants is overwhelming making conviction very likely and with that the likelihood of abscondment becomes high.

In *Mwonzora and Others v S* HH-72-11 the court stated that the initial onus is on the state to establish the necessity of keeping the applicants in custody.

This accords with the law as applicants are presumed innocent until proven guilty. Incarceration before conviction therefore cuts across the presumption of innocence.

The state put forward its reasons for seeking to have the applicants detained in custody pending their trial. The applicants must meet these concerns in persuading the court to find that it is in the interests of justice to release them on bail. This is so because s115C of the Criminal Procedure and Evidence Act, Chapter 9:07 provides that:

- “(2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail –
 - (a) before a court has convicted him or her of the offence –
 - (i) ...
 - (ii) the accused person shall, if the offence in question is one specified in –
 - A. Part 1 of the Third Schedule, bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail, unless the court determines that, in relation to any specific allegation made by the prosecution, the prosecution shall bear the burden.”

In casu, it is alleged the complainant was attacked with an axe and lost consciousness as a result of the injuries he sustained. The robbery therefore falls into the category listed in Part 1 of the Third Schedule.

The applicants addressed each and every ground proffered by the state in its opposition to their quest to be admitted to bail. I will look at each of the grounds in turn.

1. The applicants are a flight risk

In *S v Hudson* 1980 (4) SA 145 the court held that where an accused confirms on oath that he has no intention of absconding, due weight has to be given to his statement on oath. However, since an accused who does have such an intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say-so of the accused. The court should examine the circumstances.

The applicants submitted that they are innocent and had left Bulawayo for Filabusi where the 2nd applicant had information of a gold rush. The 2nd applicant invited people to go with him and that is how the other 5 accused joined him. One of them hired Khumbuza Nyathi to drive them to Filabusi. Along the way Thabiso Ncube

directed the driver to what was to be the complainant's house where the robbery took place. They had no idea Thabiso had ideas to commit a robbery.

From this account, there is therefore no doubt that the two applicants were part of the six men gang that was held to be responsible for the robbery. They were in the motor vehicle which was driven to the complainant's home. It is equally not in dispute that part of the property taken from the complainant was recovered from the hired motor vehicle.

The motor vehicle could not be driven back to Bulawayo due to a tyre puncture. Only the driver was located when a follow-up was made. None of the applicants were at the scene and the two applicants were arrested later, not at their houses but at a friend's house for the 2nd applicant and at a house in Bellevue for the first applicant.

Both applicants submitted that they are family men with strong ties in Zimbabwe and would not want to worsen their plight by absconding.

Is the state's fear that applicants are a flight risk well grounded? In *Hussey v State* 1991 (2) ZLR 187 (S) the Supreme Court held that it is insufficient for the state to make bald assertions, such assertions must be well-grounded.

I asked that the Investigating Officer appear and testify. His testimony was to the effect that the police had problems arresting the applicants. The first applicant was not at his home and it took all of 3 hours to finally get him to open the door. The second applicant was arrested with the assistance of members of the Criminal Investigation Department as he could not be located on the day of first applicant's arrest.

The seriousness of the offence, the heavy penalty which is likely to be imposed and the overwhelming evidence against them will therefore induce them to flee from justice.

These facts, looked at in light of the fact that none of them waited with the hired driver after the robbery suggests a desire to evade justice.

Granted this bail application does not seek to establish the applicant's guilt but this court cannot ignore the fact that the applicants are mum as to the reason they decided to leave the area where the robbery occurred and abandoned the "gold rush mission" which was their reason for going to Filabusi that day. The robbery also occurred at night at around 21:00 hours, some of the perpetrators were arrested that same night but the 2 applicants who had no clue that a robbery was on the cards managed to evade the police.

There is no doubt the offence is serious and it is public knowledge that robberies are on the increase with almost daily reports of their occurrence. Should the applicants be convicted they are likely to face a long prison term.

Given the circumstances of this case, can it therefore be said the state's assertions are bald and unsubstantiated? I think not.

In *Jongwe v State* 2002 (2) ZLR 209 (S) the Supreme Court set out the factors a court should look at in assessing the risk of abscondment. These are:

- (i) the nature of the charges;
- (ii) the likely penalty upon conviction;
- (iii) the strength of the state case;
- (iv) the accused's ability to flee to a foreign country;
- (v) past responses to being released on bail and the assurances given of the intention to stand trial.

In casu, whilst the applicants painted a picture of individuals who have families and have fixed abodes, the evidence showed that they could not be located at their respective homes and when they were eventually located they did not simply surrender themselves to the arresting details.

1st applicant travels to South Africa, Botswana and Mozambique and is obviously familiar with these countries. His travels may be linked to business trips but that does not mean he cannot remove himself from the court's jurisdiction and go to any one of these countries. If the police experienced problems arresting him here in Zimbabwe, would it be easy to account for him should he choose to leave Zimbabwe for any one of these countries? I would say it will not.

The fear of abscondment must therefore be considered in light of the particular circumstances of this case. I have already highlighted the gravity of the offence, the likely penalty and the strength of the state case. These factors weigh against the applicants.

In *Mambo v State* 1992 (1) ZLR 245 (H), the appellant had been denied bail on the ground that he was likely to abscond. On appeal the appellant was successful as it was held that he was unlikely to abscond. He had travelled to South Africa but returned when he was informed the police were looking for him. The seriousness of the charge on its own was therefore no reason to deny him bail.

Mambo's circumstances are the opposite of the two applicants'. They were aware of the robbery and had left the area of occurrence until sought by the police. There is nothing in their favour as regards their willingness to surrender to the police and allow the law to take its course.

In *Biti v State* 2002 (2) ZLR 209 (S) the court held that where the evidence shows that there is a strong case for the prosecution, that a heavy sentence is likely thereby increasing the risk of absconding, and that other perpetrators of the crime are still at large, the onus falls

on the accused to show that the interests of justice will not be prejudiced should he be admitted to bail. Have the applicants succeeded in doing so? I think not.

In considering whether there are compelling reasons to deny an accused bail, the court also considers whether the release of the accused will undermine or jeopardise the public confidence in the criminal justice system and this includes the bail system.

Given the circumstances of this case, i.e., the severe assault on the complainant which is not disputed, the threats of rape and kidnapping, the hiring of a motor vehicle to go to the complainant's home and the subsequent fleeing from the scene, would it engender public confidence in the criminal justice system and the bail system to release applicants on bail? I think not.

I must hasten to add that the court is aware of the need to balance the interests of justice and the applicants' liberty and that where the interests of justice will not be prejudiced the court must lean in favour of granting bail (*Mwonzora & Ors v S* HH-72-11). The court is equally aware that where conditions can be imposed to allay fears of abscondment, bail should be granted with such conditions as are necessary but each case must be considered in accordance with its particular circumstances.

I am of the considered view that where there is a real fear that applicants will not stand trial, all other considerations are of a secondary nature. That being so because if the applicants do not stand trial, the issue of interference with witnesses pales into insignificance.

The fear of interference with witnesses was one of the grounds upon which the state argued against granting of bail.

2. Fear of interference with witnesses

The Investigating Officer has completed investigations and all possible witnesses' statements have been recorded. It was the Investigating Officer's evidence that the docket has already been submitted to the Regional Court and all he is waiting for is to be called to testify.

In *Bennet v S* 1976 (3) SA 652 the court had this to say:

"It appears to me that, as an applicant has this far not interfered with state investigations, the proper approach should be that, unless the state can say that there is a real risk that he will, not merely may interfere, there does not appear to me to be a reasonable possibility of such interference."

In casu all witnesses' statements have been recorded, all investigations have been completed and the matter is now ready for trial. I therefore do not see what interference there can be at this juncture.

What is of crucial importance now is that the applicants stand trial, such trial is imminent and it is important in the proper administration of justice for applicants to avail themselves and submit to due process. The facts do not engender such confidence in them, that they will indeed avail themselves should they be granted bail.

3. Likelihood to commit further offences

The applicants have no previous convictions. Where applicants have previous convictions, the fear that they may commit further crimes may be well grounded. In *Attorney General v Phiri* 1987 (2) ZLR 33 (H) the evidence of the propensity to commit further offences was found to be present due to the fact that the accused had a bad criminal record and was facing charges of a similar nature for which he was yet to be tried.

In casu, there was reference to crime reports references but the accused therein were said to be unknown. Whilst the Investigating Officer mentioned that their intelligence appeared to link the first applicant to the case under Nkulumane CR 119/03/21 and Bulawayo Central CR 203/03/21 the fact is the complainants therein did not know the perpetrators and the applicant has not been arrested in connection with these offences.

The apprehension that the applicants may commit further offences is therefore not borne out by any evidence and consequently it is not a well-grounded fear.

Granted section 50 (1) (d) of the Constitution provides that a person arrested must be released unconditionally or on reasonable conditions thereby making bail an entitlement but the constitutional provision equally acknowledges that such entitlement can be curtailed where there are compelling reasons.

What could be more compelling than a well-grounded fear that an accused may not stand trial thus justifying a denial of bail? The wheels of justice must be allowed to turn unhindered and where a hindrance is a real possibility, the source of such hindrance ought to be addressed.

In casu, the hindrance finds expression in the conduct of the applicants before, during and after the complainant was robbed. The only way to ensure applicants stand trial is to keep them in custody until the conclusion of the trial, a trial which is already imminent.

The applicants have not shown that it is in the interests of justice to admit them to bail. Bail therefore ought to be denied.

In the result, I make the following order: -

The application for bail for both applicants be and is hereby dismissed.