

**MNCEDISI MLOTSHWA**

**And**

**ISHMAEL RASHAMIRA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 14 JULY 2022 & 28 JULY 2022

**Application for bail pending trial**

*B. Ncube* for the applicant

*N. Katurura with T. M. Nyathi* for the respondent

**DUBE-BANDA J:**

1. This is an application for bail pending trial. Applicants are charged with five counts. Count 1 is robbery as defined in section 126 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 27 February 2022, at around 0115 hours the applicants and others who are not part of this application hatched a plan to rob complainant. They went to the complainant's shop armed with machetes, axes and sjamboks, thereat they broke shop windows to gain entry whilst inside they assaulted the complainant with sjamboks and threatened to kill him with the machetes if he failed to surrender cash and valuables. They robbed him of US\$130-00, ZWL\$890-00, one mobile cell-phone, Nokia 1200 cell phone.
2. In count 2 they are charged with the crime of assault as defined in section 89 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 27<sup>th</sup> of February 2022, after robbing complainant in count 1, the applicants proceeded to shop Nyama, Zvishavane and upon arrival they knocked at the second complainant's door, she opened and they demanded money. Complainant did not have the money. The applicants and others who are not part of this application took turns to assault the complainant with sjamboks all over her body.
3. In count 3 they are charged with the crime of theft as defined in sections 131 and 113 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 27 February at around 0222 hours the applicants in the company of others who are not part of this application proceeded to third complainant's shop, broke windows and gained entry. Whilst

inside the shop they took 10 by 500grams makanyanisi; 4 by 2 litres cooking oil; 5 by 500grams cremora; 4 by 2 kilograms Nivea Body Lotion; 200 by \$5 Net One airtime; one cartoon of Royco; 3 cases of torch cells and USD50.00.

4. In count 4 they are charged with the crime of malicious damage to property as defined in section 140 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 27 February 2020, at around 0230 hours the applicants damaged fourth complainant 15 panels with axes trying to gain entry into her shop. Failed to enter the shop due to burglar bars.
5. In count 5 they are charged with the crime of robbery as defined in section 126 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 27<sup>th</sup> of February 2020, at around 0230 hours the applicants and their accomplices who are not part of this application entered the fifth complainant's shop by breaking the door and whilst inside the shop they threatened the fifth complainant with machetes demanding cash and valuables. They robbed complainant of twenty-four packets of spaghetti; two skhala lotions; Samsung cell phone and six Colgates.
6. In count 6 they are charged with the crime of unlawful entry as defined in section 131 and 131 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 27<sup>th</sup> day of February 2020, at around 0300 hours the applicants and their accomplices who are not part of this application broke the windows of the sixth complainant's shop, gained entry and while inside the shop they unlawfully took ZWL\$906-00.
7. In support of their bail application applicants filed a bail statement and supporting affidavits. The applicants contend that it is in the interest of justice that they be released on bail pending trial. It was submitted that applicants are family men with minor children, and sole providers of their respective families. It was contended further that the applicants did not supply false names and false addresses to the police and the courts. They submitted that they have a strong defence against the charges levelled against them, put differently that the State does not have a strong *prima facie* case against them. They contended that in 2020 they did not know each other, and both of them did not know one Tavonga Machokoto their accomplice who is not part of this application. After their arrest no identification was conducted. It was submitted further that the police are fabricating evidence against the applicants. They did not try to flee or resist arrest and they will not abscond if released on bail.

8. In his supporting affidavit the 1<sup>st</sup> applicant avers that he was born and bred in Zimbabwe. He is married with three minor children. He is an artisanal miner in Collen Bawn. He has no previous convictions but has a pending matter at the Gwanda Magistrates' Court under CRB No. CRB436-445/22. The charge is conspiracy to commit robbery. He was released on bail on the 27 June 2022, and was arrested for these crimes at the prison gate. He was not subjected to an identification parade. In 2020 he was based in Collen Bawn and he does not recall visiting Zvishavane in February 2020. His alleged accomplices were not known to him in 2020.
9. In his supporting affidavit the 2<sup>nd</sup> applicant avers that he was born and bred in Zimbabwe. He is married with three minor children. He is an artisanal minor. He neither has a previous conviction nor a pending case. He was not subjected to an identification parade. He was based in Gweru and does not recall visiting Zvishavane in February 2020. His other alleged accomplices were not known to him in 2020.
10. This application is opposed in respect of the 2<sup>nd</sup> applicant, and not opposed in respect of the 1<sup>st</sup> applicant. The respondent contends that there are no compelling reasons justifying the continued incarceration of 1<sup>st</sup> applicant. Regarding the 2<sup>nd</sup> applicant it was submitted that if released on bail he is likely to abscond. It was argued that there is nothing that connects the 1<sup>st</sup> applicant with the commission of these crimes, while the 2<sup>nd</sup> applicant was positively identified by the complainants in count 1 and 5. It was submitted further that there was a strong *prima facie* case against the 2<sup>nd</sup> applicant, upon conviction he was likely to be sentenced to a long term of imprisonment which may induce him to take flight and not stand his trial.
11. The respondent filed an affidavit deposed to by the Investigating Officer (I.O.). He is opposed to the release of the applicants' on bail. He avers that that the applicants were arrested in Gwanda after they conspired to commit similar offences. At arrest they were found in possession of 2 sachets of fake gold; iron bars; knives; 2 machetes and a bolt cutter. These are said to be the weapons and tools they used in the commission of these offences, which they also wanted to use in Gwanda. They were then arrested in Gwanda and are appearing in court under CRB numbers 436; 437; 439; 440; 442 and 446/22. At arrest 2<sup>nd</sup> applicant provided a false name. The 2<sup>nd</sup> applicant was positively identified by complainants in 1 and count 5.
12. The fundamental principle governing the court's approach to bail applications is to uphold the interests of justice. The court must take into account the factors set out in section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07] and try to strike a balance between the protection of liberty of the individual and the administration of justice. Section 117 says the

refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established: where there is a likelihood that the accused will abscond, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or not stand his or her trial or appear to receive sentence; or attempt to influence or intimidate witnesses or to conceal or destroy evidence; or undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system.

13. In our law persons are presumed innocent until their guilt has been proved. Whenever the interests of justice will not be prejudiced by pre-trial release the courts should lean in favour of liberty and grant release on bail. This is particularly so if the offence in which the accused is being charged is not likely to attract a prison sentence. See: Prof. Feltoe *Magistrates' Handbook* (Revised 2021) 76. In *casu* if convicted applicants will likely serve a long prison term prescribed by law in this jurisdiction.
14. It is on the basis of these legal principles that this bail application must be viewed and considered.
15. I now turn to deal with the case of each applicant.

### **1<sup>st</sup> applicant**

16. The law is that the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where there is a likelihood or risk that an accused if released on bail might endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule. In considering this factor a court may take into account among other factors the degree of violence implicit in the charge against the accused; and a disposition to commit a particular crime as evident from past conduct. In *casu* the 1<sup>st</sup> applicant and his accomplices were arrested in Gwanda and are appearing in court under CRB numbers 436; 437; 439; 440; 442 and 446/22. They are charged with crime of conspiracy to commit robbery. In this case they are charged with two counts of robbery; assault; two counts of unlawful entry and theft and one count of malicious damage to property. The facts underlying these charges speak to serious violence allegedly unleashed by the 1<sup>st</sup> applicant and his accomplices on the complainants. On the facts of this case I take the view that the public must be protected against further criminal activity of this nature. This is specially so because these are grave crimes.

17. In our law the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where it is established that the release on bail may undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system. In considering this question the court may take into account the fact that the accused knowingly supplied false information at the time of his arrest or during bail proceedings. False information relating to identity and place of abode would be relevant in this inquiry. In Form 242 “C” it is stated that at the Gwanda Magistrates’ Court the 1<sup>st</sup> applicant gave his residential address as 245 Mkoba 5 Gweru, and at Criminal Investigations Department (C.I.D.) Zvishavane he gave number 258/1 Mkoba 6 as his address.
18. Further in determining the issue whether the release on bail may undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system the court may take into account that the accused is in custody or bail on another charge. In Form 242 “C” it is stated that the 1<sup>st</sup> applicant has, like his co-accused persons a pending case at the Gwanda Magistrates’ Court. Here a word of caution is necessary, that an accused may not be deprived bail simply on the basis of his past conduct. Much should depend on the circumstances of the case and the nature of the charges. In *casu* the 1<sup>st</sup> applicant is facing serious charges and it is said at arrest he and his accomplices were found in possession of 2 sachets of fake gold; iron bars; knives; 2 machetes and a bolt cutter. These are said to be the weapons and tools they used in the commission of these offences, which they also wanted to use in Gwanda. In Gwanda Magistrates’ court he was released on bail. To release the 1<sup>st</sup> applicant on bail on these facts would in my view undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system.
19. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted. I am of the view that it would not be in the interest of justice to release 1<sup>st</sup> applicant on bail, in that there is a likelihood or risk that the applicant might endanger the safety of the public or commit other offences. Further on the facts of this case to release the 1<sup>st</sup> applicant on bail will undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system.

## **2<sup>nd</sup> applicant**

20. This application is opposed on the grounds that if released on bail, the 2<sup>nd</sup> applicant will abscond and not stand his trial. In deciding whether flight is lightly and in the absence of concrete evidence of a predisposition to abscond, account must be taken of a number of factors

which common experience have shown might influence a person either to stand trial or abscond. See: Prof. Feltoe *Magistrates' Handbook* (Revised 2021) 77. When assessing the risk of an applicant for bail absconding before trial, the court will be guided by the following: the gravity of the charges and the severity of penalties which would be likely to be imposed if convicted; the apparent strength or weakness of the State case; applicant's ability to flee to a foreign country, whether he has contacts in the foreign country who will offer him sanctuary and the absence of extradition facilities in that country; whether he has substantial property holdings in Zimbabwe and his status in Zimbabwe, that might mean he would lose so much if he absconded that flight is unlikely; whether he has substantial assets abroad; if he was previously released on bail, whether he breached the bail conditions; and the assurance given that he intends to stand trial. See: *S v Jongwe* 2002(2) ZLR 209(S), *S v Chiadwa* 1988(2) ZLR 19 (S); *Aitken & Anor v A-G* 1992(1) ZLR 249 (S).

21. For the purposes of this application I accept that the 2<sup>nd</sup> applicant was positively identified by complainants in count 1 and 5. The State has a strong *prima facie* case against the 2<sup>nd</sup> applicant, upon conviction he is likely to be sentenced to a long term of imprisonment which may induce him to take flight and not stand his trial. The temptation for the 2<sup>nd</sup> applicant to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002.
22. At Gwanda Magistrates' Court he gave his address as 226 Mkoba 7, Gweru, and at C.I.D. Zvishavane he gave number 3021/1 Mkoba 5 Gweru as his address. These are two different places and such suggests an intention to mislead. Like the 1<sup>st</sup> applicant he was arrested in possession of weapons and tools for use in the commission of violent crimes. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.
23. Like in the case of the 1<sup>st</sup> applicant I am of the view that it would not be in the interest of justice to release the 2<sup>nd</sup> applicant on bail, in that there is a likelihood or risk that he might endanger the safety of the public or commit other offences. Further on the facts of this case to release 2<sup>nd</sup> applicant on bail will undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system.

## **Conclusion**

24. Taking all the evidence into consideration and weighing that evidence against the applicants' defence and personal circumstances, together with the submissions made on their behalf, I hold

the view that the administration of justice will be prejudiced if the applicants are released on bail.

25. On a conspectus of the facts and all the evidence placed before court, I am of the view that it is not in the interests of justice that applicants be released on bail pending trial.

In the result, I order as follows:

The application for bail be and is hereby dismissed and applicants shall remain in custody.

*Malinga & Mpofu Legal Practitioners* applicant's legal practitioners  
*Prosecutor-General's Office* respondent's legal practitioners