

SIMELWEYINKOSI DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 29 & 31 DECEMBER 2021 & 6 JANUARY 2022

Application for bail pending trial

T.Tashaya for the applicant

T.M. Nyathi for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is being 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 8th September 2021 at around 0450 hours applicant in the company of seven others armed with pistols, a machete and a knife robbed complaints of US\$32 078.00, Itel S15 cell phone and an Itel P36 cell phone. Total value stolen is US\$32 240.00 and nothing was recovered.

In support of his bail application applicant filed a bail statement and adduced evidence by means of a supporting affidavit. Applicant contends that it is in the interests of justice that he be released on bail pending trial. He denies the allegations levelled against him, and states that he was nowhere near the scene of crime as he was at his rural home in Maphisa during the first two weeks of September 2021. He denies that he is on a warrant of arrest and avers that the only pending case he is aware of he was placed off remand. He contends that it is in the interests of justice that he be released on bail pending trial.

Respondent filed a written response in support of its opposition to this application. In the response it is contended that: the investigating officer in his affidavit opposing bail has clearly indicated that applicant has another pending case at the courts. So respondent harbours the fear that applicant is likely to commit similar offences once released on bail. Further it is argued that applicant is facing a very serious offence which upon conviction attracts a fairly lengthy custodial sentence. It is contended that the State has a strong *prima facie* case against the applicant, hence this would provide him an incentive to abscond and evade justice.

At the hearing of this application Mr *Nyathi* counsel for the respondent changed track and informed the court that respondent was no longer opposed to the release of applicant on bail pending trial. He made the following submissions in support of his concession: that there are no compelling reasons to justify the continued incarceration of the applicant; the fact that he has a pending case does not take away his right to presumed innocent until proven guilty; and that seriousness of an offence standing alone is not a ground to refuse to release an accused on bail pending trial.

I drew counsel's attention to the following averments in the Request for Remand Form, that the applicant was implicated in the commission of this offence by his alleged accomplice one Eric Mathema; that the cell phones stolen from the complainants were recovered during the arrests of the applicant and his other co-accused, and that applicant led to the recovery of a fire arm that was used in the commission of the offence.

In Section C of the Request for Remand Form the reasons for opposing bail are given as these: applicant has pending cases, he is likely to interfere with investigations in that some of his alleged accomplices are still at large and are in possession of stolen property and other fire arms which are yet to be recovered, and that he resisted arrest and tried to flee and the police had to use minimum force to arrest him. Further it is averred that he defaulted court in other three pending cases and warrants of arrests were issued in respect thereof.

In answer to the issues Mr *Nyathi* said he was not familiar with the facts of this case, he was allocated this matter in the very morning of the hearing date. The officer who was seized with this matter was off-duty. He then asked that the matter be postponed to enable him to consult with the investigating officer. I granted the request and the matter was postponed to the 31st December 2021.

On the 31st December 2021, Mr *Nyathi* informed the court that the concession made on the 29 December 2021 was being withdrawn. Counsel submitted that it was not in the interest of justice to release applicant on bail pending trial. He then called the investigating officer Mr Blessed Ngwenya to testify.

The investigating officer testified that applicant's *pseudo* name which he uses in the underground criminal world is "Mthe." He was arrested on the 24th November 2021. At arrest he attempted to run away from the police. The Detectives pursued him and he was eventually

arrested. He tried to disarm the police of a fire arm and in the ensuing struggle he was mistakenly shot on the back of the thigh. He led police to the recovery of a fire arm.

This witness testified that it is not his first time to investigate applicant. He had been arrested on number of occasions for armed robbery cases. Some of the armed robbery cases are these: Luveve C.R. 124/10/20; Luveve C.R. 140/10/20; Hillside C.R. 48/10/20; Khumalo C.R. 99/10/20; and Tshabalala C.R. 56/10/20.

The investigating officer testified that applicant was released on bail pending trial in respect of some of his pending armed robbery cases. While on bail he committed several other armed robbery cases. Police are yet to charge him in respect of the following: Khumalo C.R. 212/12/21 and Matopo C.R. 13/11/21. These are also armed robbery cases. He has a pending court for armed robbery case i.e. C.R.B. Byo. 21/21. He defaulted court and a warrant of arrest was issued.

Under cross examination, this witness testified that he was not part of the arresting team. He was informed of what happened at arrest by the arresting team members. He denied that the allegations against applicant were a fabrication. It was put to this witness that the warrant of arrest issued against the applicant was cancelled. The witness said he was not sure he would check with the Clerk of Court. He said the fire arm recovered at the instance of applicant has been taken to ballistics experts to verify whether it matches other armed robbery cases. A lot of issues were raised in cross examination, e.g. regarding the vehicle the arresting team was using when it arrested applicant, and the circumstances that led to the shooting of the applicant.

It is important to highlight that applicant is facing a crime referred to in Part 1 of Schedule 3 of the Criminal Procedure and Evidence Act [Chapter 9:07], being robbery, involving the use by the accused or any co-perpetrators or participants of a firearm. In terms of section 115C (2) (a)(ii) (A) Criminal Procedure and Evidence Act applicant bears the burden of showing, on a balance of probabilities, that it is in the interests of justice that he be released on bail. It then follows that the bar for granting bail in the crime of robbery involving the use of a firearm is lifted a bit higher by the legislature. This is what the applicant has to contend with and this court must give full effect to such legislative provision.

The evidence linking applicant to this crime is that he was implicated by his alleged accomplice. In his warned and cautioned statement Erick G.M. Mathema implicates a person

called “Mthe” in the commission of this offence. Firstly the investigating officer testified that applicant’s *pseudo* name which he uses in the underground criminal world is “Mthe.” Secondly the evidence contained in a statement by a co-accused is allowed in bail applications. It may be taken into consideration against the other accused during bail proceedings. In this application I accept that Mthe is the applicant and that he was implicated in the commission of this offence by his alleged accomplice.

Further the stolen cell phones belonging to the complainants were recovered during the apprehension of the applicant and his co-accused. It is alleged that applicant’s indications led to the recovery of a fire arm that was used in the commission of this offence. The indications and the statement by the co-accused directly link applicant to the offence he is charged with.

Applicant is facing a serious offence and the State has a *prima facie* strong case against him. Upon conviction he may be sentenced to a severe term of imprisonment. The risk of abscondment is real. Again the investigating officer testified that at arrest he attempted to run away from the police and tried to use violence to disarm the police of a fire arm. These are indications that show that if released on bail he will abscond and evade justice.

The applicant denies that he played any role in the crimes he is charged with, but his denial rings hollow having regard to the evidence of the investigating officer and the statement from his co-accused Eric Mathema. For the purposes of a bail application there is evidence that link the applicant to the crimes he is charged with, though much will depend at the trial on how that evidence fits with the other pieces of the jigsaw.

In terms of section 117 (2) (a) (i) of the Criminal Procedure and Evidence Act 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 that the accused, 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. The evidence of the investigating officer shows that applicant has a number of armed robbery cases pending against him, some of them committed while on bail for other armed robbery cases. On the facts of this case and for the purposes of this bail application my thinking is that applicant has a propensity to commit armed robbery cases. If he is released on bail he will continue his armed robbery spree. He has failed to observe bail conditions in the past. I take the view that the public is at peace now that he is in custody.

Further the applicant was given bail before with conditions to be observed. However, he failed to observe the same, and therefore, what guarantee would this court have that if released on bail applicant could be trusted to come back and stand his trial. Further the interest of justice would not permit his release when there is such a flagrant disregard of the law that the applicant had demonstrated when he defaulted court and committed crimes while on bail. It is inconsequential that his co-accused Eric Mathema was released on bail. Their circumstances are very different.

Considering the seriousness of the case and the sentence that the applicant might face if convicted, there is a likelihood that the applicant might abscond resulting in the interest of justice being prejudiced. In my opinion, there is nothing to keep applicant to stand trial and there would be a strong incentive to flee if released on bail. His *ipse dixit* to the contrary in his bail statement and affidavit carries little persuasive weight given the facts of this case and the evidence of the investigating officer.

Conclusion

On a conspectus of all the evidence, I am of the view that applicant has failed to show that the interests of justice permit his release on bail. The Criminal Procedure and Evidence Act [Chapter 9:07] clearly provides that the interests of justice do not permit the release from detention of an accused where one or more of the grounds referred to in the subsections of section 117(2) of the Act are established. In considering whether a bail applicant will abscond, this court is entitled to take into account the nature and gravity of the offence or the nature and gravity of the likely penalty thereof and the strength of the case for the prosecution and the corresponding incentive of the accused to flee.

On the evidence, facts and circumstances of this case, I find that the State has a strong *prima facie* case against the applicant. Applicant is facing very serious charge. If convicted he is most likely going to be sentenced to a lengthy custodial term, thus he will be tempted to abscond and not stand trial. The temptation for the applicant to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002. In this case applicant will not stand his trial if released on bail. He will just abscond.

If released on bail applicant will just continue his armed robbery spree. His release on bail will undermine the objective and proper functioning of the criminal justice system and the bail institution. Again it will bring the criminal justice system into serious disrepute.

Having considered the applicant's circumstances, I find that the applicant failed to show on a balance of probabilities that it is in the interest of justice that he released on bail. Instead, my view is that the interest of justice will be best served if this application is refused.

Disposition

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 applicant be released on bail pending trial. In the result, the application for bail be and is hereby dismissed and applicant shall remain in custody.

It is so ordered.

Sengweni Legal Practice, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners