

BRANDON ISHEANESU GUMBO GUTU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 28 FEBRUARY 2022

Application for bail pending trial

H. Shenje, for the applicant
K.M. Guveya, for the respondent

DUBE-BANDA J: On the 28th February 2022, in an *ex tempore* ruling I dismissed applicant's application for bail pending trial. On the 1st March 2022, applicant addressed a letter to the Registrar of this court requesting written reasons for the dismissal of his application. These are the reasons.

This is an application for bail pending trial. Applicant is being charged with one count of robbery as defined in section 126 of the Criminal Law [Codification and Reform] Act [Chapter 9:23] (Criminal Code). It being alleged that on the 16th October 2021, applicant with his accomplices proceeded to complainant's residence armed with an unregistered black Taurus Pistol serial number TDT 11347 and demanded cash from the complainant. Applicant who was armed with the pistol assaulted complainant with the butt of the pistol once on the forehead forcing her to hand over her cash to him and his accomplices. The other accomplice armed with a machete stood guard at the door. The applicant and his accomplices tied the complainant with shoe laces before leaving the scene.

In support of his bail application applicant filed a bail statement. In his statement he contends that there are no compelling reasons to refuse to release him on bail pending trial. In the bail statement it is contended that applicant and other occupants of the motor vehicle he was driving were arrested at a roadblock in Zvishavane. Upon being stopped by the police a search was conducted and a bag belonging to one Hlongwane was found to be containing firearms. They were taken to ZRP Zvishavane and charged with possession of firearms without licences, and Hlongwane was convicted of possessing firearms without a licence. Initially attempts to link applicant and his accomplices to armed robbery cases failed, then

later it was alleged that they committed an armed robbery a Collen Bawn. The vehicle they were using was impounded by the police.

It is contended that applicant's co-accused was released on bail, and that the jurisprudence is that persons jointly charged must be treated in the same manner, unless there are factors which set them apart. It is argued that there are no factors which distinguish applicant from his co-accused who was released on bail. It is contended that bail is a right in terms of section 50(1) (d) of the Constitution of Zimbabwe.

This application is opposed. In its opposition, respondent contends that the applicant is a flight risk. It is argued that there is strong evidence linking applicant to the commission of the offence. Applicant is facing serious charges and the likely penalty upon conviction will be a lengthy term of imprisonment. No stringent reporting conditions can allay respondent's well-grounded fear of applicant's abscondment. It is further contended that applicant is facing a charge of robbery as defined in section 126 of the Criminal Code, which is a Third Schedule offence, and he has failed to discharge the *onus* upon him to show that it is in the interest of justice that he be released on bail. It is argued that he has not demonstrated the existence of exceptional circumstances which in the interest of justice warrant his release on bail.

Respondent adduced evidence of Detective Constable Sekai Mwale, a member of the Zimbabwe Republic Police (ZRP) stationed at Criminal Investigations Department (CID), Gwanda. In her affidavit she avers that on the 16th October 2021, at around 0200 hours, applicant who was in the company of eight other accomplices who are still at large proceeded to certain houses armed with pistols, *machetes* and iron bars. Upon arrival at the houses they forced open the doors and gained entry into the houses and demanded money at gunpoint. At one house they ran sacked the house and took cash amounting to ZAR 130 000-00 belonging to Lawrence Malamba. They proceeded to another house where they used the same *modus operandi* to steal cash amounting to USD40 000-00, and a 21 Samsung cellphone belonging to Agrippa Ncube. The police spotted them in Zvishavane town, and they tried to apprehend them. They escaped and were finally arrested at a police roadblock. The evidence is that the firearm which was recovered from the accused is still awaiting results of scientific ballistic examination to establish if it is not linked to other outstanding scenes. Part of the stolen property was recovered from the applicant. The applicant has other pending cases of armed robbery, which are Queenspark CR 28/09/21 and CID Homicide DR 09/09/21.

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. For him to discharge such a burden of proof, he must adduce evidence before court, i.e. oral evidence or by affidavit.

In *Van Brooker v Mudhanda & Another AND Pierce v Mudhanda & Another* SC 5/2018 it was held thus:

When one speaks of the need to discharge an onus, it immediately becomes clear that there is an evidentiary burden that must be met. There is no suggestion that such burden as required to be met was met by documents filed of record. There were no affidavits placed before the court *a quo*.

The standard of proof required from the applicant to establish that it is in the interests of justice that he be released on bail is on a balance of probabilities. Such burden cannot be discharged by mere submissions contained in a bail statement. Applicant must adduce evidence. The evidence must show that exceptional circumstances exist which in the interests of justice permit his release on bail pending trial. In fact section 117(6) of the Criminal Procedure and Evidence Act [Chapter 9:07] says:

Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in—

(a) Part I of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice permit his or her release. (My emphasis).

Applicant did not adduce evidence. Mr *Shenje* counsel for the applicant, contended that this application is in terms of section 50(1) (d) of the Constitution which provides thus:

Any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention.

It is contended that in an application made in terms of this constitutional provision, notwithstanding the fact that the applicant is charged with a Part 1 Schedule 3 offence, the *onus* remains on the State. This argument cannot be correct. On the principle of the presumption of constitutional validity and the notion of legal certainty the provisions of the Criminal Procedure and Evidence Act which casts the *onus* on a bail applicant are valid and enforceable provisions until such time that a competent court rules to the contrary. The procedure of declaring legislative provisions constitutionally invalid is clearly set out in the Constitution. Until such time, if it ever happens, that the provisions that reverse the bail *onus* are declared constitutionally invalid, courts must give full effect to them. In *Magaya v Zimbabwe Gender Commission* SC 105/2021 the court held thus:

It is pertinent to point out that for every law that is gazetted there is a presumption of validity and appropriate legal mechanisms have been put in place in terms of the law where one intends to challenge the validity of a legal instrument. Until it has been set aside, the General Notice has the force of law and anything done under it is presumed to be lawful and valid.

A bail applicant who is charged with a Part 1 Schedule 3 must adduce evidence. Adducing evidence simple means placing evidence before court, this could be by way of oral evidence or by affidavit. Submissions in a bail statement do not constitute evidence. This is basic. Applicant did not adduce evidence. He has failed to take the first procedural step of showing that exceptional circumstances exist which in the interests of justice permit his release. This is fatal to this application.

Further there is uncontroverted evidence which shows that the State has a strong *prima facie* case against him. He was the driver of the getaway vehicle. A firearm and a machete used in the commission of the offence was recovered from him. A Samsung cell phone stolen from the complainant was recovered and positively identified. He struck complainant with the butt of the pistol once on the forehead forcing complainant to hand over her cash to him and his accomplices. This evidence is uncontroverted. In his warned and

cautioned statement he admits having committed the offence he is charged with. Mr. *Shenje* submitted that the statement was not given freely and voluntarily as required by the law, I take the view that applicant can deal with that issue during the trial. For the purposes of this application, I factor it into the equation in deciding whether the State has a strong *prima facie* case against him.

The fact that he must be released on bail because his co-accused was released is an argument which is being made far too often in bail applications. The fact that his co-accused has been released on bail standing alone does not tilt the pendulum in favour of releasing applicant on bail. He has not adduced evidence to show that exceptional circumstances exist which in the interests of justice permit his release. The State has a strong *prima facie* case against him, in the event of a conviction he is still likely to be sentenced to a long prison term and this might still induce him to flee and evade justice. At arrest he fled from the police and was only arrested at a roadblock. No evidence has been adduced to show that he is not a flight risk. In the circumstances of this case the release on bail of his co-accused is inconsequential.

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 charges. 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.

Furthermore, the applicant is not only a flight risk but his release on bail given the serious allegations against him of use of a fire arm in the alleged commission of the offence of armed robbery will undermine the objective and proper functioning of the criminal justice system and the bail institution. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

On a conspectus of the facts and the uncontroverted evidence adduced by the State, I am of the view that applicant has not shown that exceptional circumstances exist which in the

interests of justice permit his release. 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.

Shenje & Company applicant's legal practitioners
National Prosecuting Authority State's legal practitioners