SIPHOSENKOSI SIBANDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 22 September 2023 & 12 October 2023

Bail application pending trial

T. Tashaya, for the applicant
K. Jaravaza, for the respondent

DUBE-BANDA J:

[1] This is a bail application pending trial. The applicant is facing two counts, in count 1 he is charged with the crime of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Criminal Code). It being alleged that on 24 June 2023 the applicant and his accomplices unlawfully and intentionally threatened the complainant with a fire arm and induced him to relinquish control of his property. In count 2 he is charged with kidnapping as defined in s 93(1)(a) of the Criminal Code. It being alleged that on 24 June 2023 the applicant in the company of his accomplices unlawful deprived the complainant of his freedom of bodily movement in that they purported to arrest and detain him. The applicant was arrested, charged and appeared in court for initial remand, and he was remanded in custody.

[2] The bail application is not opposed. However, it is important to restate the trite position of the law that the grant or refusal of bail is a judicial function. This important principle is located in jurisprudence and also in s 117(5) of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act) which says:

> Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interests of justice as contemplated in subsection (4).

[3] In the case of a concession, the court must require the prosecutor to place on record the reasons for not opposing the application. This serves two purposes; it forces the prosecutor to

apply his mind to the matter, and gives the court the opportunity to assess the merits or validity of the prosecutor's reasons. It is in this context that I asked Mr *Tashaya* Counsel for the applicant to make submissions in support of the application and Mr *Jaravaza* Counsel for the respondent to make submissions in support of the concession.

[4] In support of his bail application the applicant filed a bail statement and denied the charges levelled against him and stated that he was nowhere near the scene of crime. He contends that he is a pirate taxi driver and was hired by one Ndabezinhle Sibanda (Sibanda) to transport him and his friends to Mawabeni area at Esigodini. He drove to Mawabeni and dropped Sibanda and his friends at their chosen destination. And on his return to Bulawayo, Sibanda phoned him to return to Mawabeni and collect two persons, he complied and made a turn to Mawabeni. The applicant avers that it was at the point he picked the two persons that he saw a vehicle a white Honda Fit blocking his way, thereafter another vehicle made a sudden stop and men in civilian clothes armed with an AK47 rifle jumped out of the car towards his vehicle. He avers that he thought the persons armed with an AK47 were robbers and panicked and made a sudden U-turn in an attempt to escape. The applicant contends further that all the witnesses in their police statements confirm that he was not present when these crimes were committed. He did not know that the persons who hired him wanted to commit crimes. Cut to the bone, the applicant contends that he has a defence to the charges levelled against him and that the prosecution does not have a strong *prima facie* case against him.

[5] The applicant has harsh criticism for the police for allegedly stating that armed robberies are on the increase in Bulawayo in particular and the whole country in general, and therefore if accused persons facing robbery allegations are admitted to bail, a mistrust would exist between the courts and the community. A contention is made that if the courts deny deserving candidates for bail on the basis that armed robbery cases are on the rise, society will start to mistrust the courts and such will be sad day in the justice delivery system in the country.

[6] The respondent filed a written response in support of its concession. In the response it is submitted that the applicant's co-accused was admitted to bail pending trial, and that in terms principle of uniformity accused persons ought to be treated in a similar fashion. Mr *Jaravaza* relied on *S v Lotriet and Anor* 2001 (2) ZLR 229 for the submission that accused persons who

find themselves in similar circumstances should be treated without any differentiation or discrimination. Counsel submitted further that the complainant's statement does not speak to the role played by the applicant in the commission of these crimes. Counsel further argued that the evidence shows that the co-accused who was admitted to bail seems to have been in a more precarious position as compared to the applicant. The net effect of Counsel's submissions was that the interests of justice will not be prejudiced by the release of the applicant to bail pending trial.

[7] It is important to highlight that the applicant is facing an offence 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. Section 117(6) (a) 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.

[8] It follows that s 117(6) (a) CP & E Act lifts the bar for granting bail in a crime of robbery involving the use of a firearm a bit higher. This is what the applicant has to contend with. The burden of proof is on the applicant to show that the interest of justice will not be prejudiced by his release on bail. For him to discharge such a burden of proof, he must adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release on bail.

[9] In this case the application was filed without an affidavit of evidence. I queried this with Mr *Tashaya*, after some measure of reluctance Counsel conceded that indeed an accused charged with a Part 1 Schedule 3 offence must adduce evidence to show that exceptional circumstances exist which in the interests of justice permit his release on bail. Without evidence the applicant would not have surmounted the first huddle, and in my view a court would not even begin to engage with such an application. I permitted the applicant to file an affidavit for the purposes of complying with the requirements of the law.

[10] On the strength of *S v Lotriet & Another* 2001 (2) ZLR 225 both Mr *Tahsaya* and Mr *Jaravaza* argued in unison that the applicant deserves to be treated in a similar fashion as his co-accused person who had been admitted to bail. It is trite that persons who find themselves in similar circumstances should be dealt with uniformly. In *S v Lotriet & Another* (*supra*) the court commented that it was vital that in the administration of justice there does not appear any form of discrimination, particularly in a matter where the liberty of a person is involved. This accords not only with common sense and justice but constitutes one of the tenets of the rule of law. In *Shamu v The State* HMA 18/21 ZISENGWE J made the pertinent point that:

> "That said, it is however equally indisputable that situations may indeed arise which justify the differential treatment of individuals who are jointly charged in a particular criminal case. Such differentiation should be based on the equal application of certain objective criteria either pertaining to the individual's personal circumstances (such as his health, age, whether or not he has previous convictions, pending matters, whether he is out on bail in respect of other similar cases and so forth) or it may be based on circumstances related to the commission of the offence. The latter may relate to the level of his alleged participation in the commission of the offence as well as his conduct in the wake of thereof particularly the question of whether or not he or she exhibited an intention to abscond."

[11] It is seriously inadequate for Counsel to merely argue that the applicant is entitled to bail on the basis of the principle of uniformity without showing that his circumstances are similar with those of his co-accused person who has been admitted to bail. For completeness, I perused the record in respect of the co-accused Tinashe Tarusenga (Tarusenga). A court is entitled to refer to its own records and proceedings and take notice of their contents. See *Mhungu v Mtindi* 1986 (2) ZLR (S) at 173A-B.

[12] The co-accused Mr.Tarusenga has been admitted to bail by this court (*per* NDLOVU J). His version is that at around 5:20 am. at Filabusi turn off he boarded a black Honda Fit heading to Bulawayo. The vehicle had five occupants, and because he was exhausted, he slept and woke up at Mawabeni where the vehicle had parked beside the road. One of the passengers disembarked from the vehicle and went to a nearby homestead allegedly to collect his money. The occupants of the vehicle later asked him to board another white Honda Fit. Thereafter he was arrested for armed robbery. It is clear that the version of the applicant is materially at variance with that of his co-accused Tarusenga. Therefore, the applicant cannot

on the facts of this case rely on the principle of uniformity, because his version is diametrically different with that of his co-accused who was released on bail. In fact, a closer analysis shows that their versions are mutually destructive.

[13] Whether the applicant remained in the vehicle as a hired taxi driver or as the driver of a gate away car is for the trial court to decide. What is clear is that the statement the complainant gave to the police does not mention the applicant. It is Tarusenga who appears prominently in the statement and the role he played in commission of these heinous crimes is highlighted. It is in this context that Mr *Jaravaza* submission that Tarusenga is in a more precarious position compared to the applicant finds justification.

[14] The question is whether there are exceptional circumstances that permit the release of the applicant to bail pending trial. In showing the existence of exceptional circumstances the applicant is given a broad scope, he may deal with the circumstances relating to the nature of the crime, his personal circumstances; or anything that is cogent. See *S v Dlamini* 1999 (2) SACR 51 (CC). The complainant is his statement does not mention the role played by the applicant in these crimes; I juxtapose this with the applicant's contention that he was hired to provide transport by the perpetrators of these crimes, and that he did not know that their mission was to heinous commit crimes. I cannot say, on the basis of the material before me at this stage, that the State has a strong *prima facie* case against the applicant. It is for these reasons that I lean towards granting the applicant bail. I say so because the court should always grant bail where possible and should lean in favour of the liberty of the accused provided that the interests of justice will not be prejudiced.

[15] Before disposing of this matter, there is one issue that I must advert to. It is the issue of the spart of armed robberies in Bulawayo and the country in general. The prevalence of armed robberies and the arrest of this tide is a legitimate concern to the police and the public at large. The police have a constitutional mandate to fight crime, and its efforts in this regard must not be unnecessarily castigated and disparaged without cause. The criticism levelled against the police for its fight against this category of crime is rather unfortunate. In my view a court is entitled in considering a bail application to factor into the equation the protection of society from serious crimes like armed robbery and accord such appropriate weight. As long

as it is understood that the actual refusal of bail for the purposes of protecting society is only justified in extreme circumstances.

[16] In the circumstances, the concession that the applicant is a good candidate for release on bail was well made. I am persuaded that the applicant has shown that there are exceptional circumstances that permit his release on bail pending trial. The interests of justice will not be prejudiced by the release of the applicant on bail pending trial.

In the result I make the following order:

1. The bail application be and is hereby granted on the following conditions:
    i. Applicant to pay US$ 150.00 as bail recognizance to be deposited with the Registrar of the High Court, Bulawayo.
    ii. Applicant to report at Tshabalala Police Station twice a week on Mondays and Fridays between the hours of 6 a.m. and 6 p.m. until this matter is finalised.
    iii. Applicant to reside at house number 4271 Emganwini, Bulawayo until the finalisation of this matter.
    iv. Applicant not to interfere with witnesses and /or police investigations.

It is so ordered.

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