HH 23-2002

CRB B106/2002

STEPHEN BITI
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDOU J
HARARE 28 January and 1 February 2002

Mr *N. Maredza,* for the appellant
Mr *C.U. Kandemiiri,* for the respondent

NDOU J: The applicant is charged with four counts of armed robbery. The allegations are that he was part of a gang of six robbers. In the first charge the allegations are that on 7 September 2001 applicant and his gang robbed Standard Chartered Bank, Karingamombe at gunpoint. During the robbery the robbers fired two gunshots and assaulted bank officials. As the gang were leaving the scene one of them dropped his cellular phone which led the Police to where he was hiding resulting in exchange of gunfire. The gang member was killed in this exchange. Applicant, after his arrest, allegedly admitted to the Police that he had supplied the vehicle registration numbers which were used on the gate-away vehicle and these number plates were recovered from him.

In the second charge it is alleged that on 7 September 2001 the applicant's gang robbed Standard Chartered Bank, Mount Pleasant at gunpoint. The gang members ordered all the people who were in the banking hall to lie down and robbed them of the cash. Before departing from the scene one member of the gang

fired one shot in the air to scare people. An AK cartridge was found in the gate-away vehicle. In the third charge the allegations are that the applicant's gang approached five Zambian nationals who were driving a UD lorry. At gunpoint they robbed them of US$4 250, Z$45 000 and 520 700 Zambian kwacha. The gang is also facing a charge of robbing Stanbic Bank in Avondale using a *modus operandi* similar to that in the first two charges. According to averments in an affidavit of the Investigating Officer, Inspector Huni, the applicant was positively identified at Identification Parade by witnesses in respect of all the four charges. Applicant was identified as the one who was armed with the AK rifle during the robberies. Detective Inspector Huni opposes bail on the basis that the applicant is aware that these are serious offences which invariably attract custodial sentences upon conviction. He further states that one of the weapons used during the robberies was not recovered thus providing the applicant with means of committing further offences should he be released on bail. Further, the applicant's mother has indicated to him that the applicant no longer resides with her at her home resulting in him concluding that he is of no fixed abode. Further, he states that two members of the gang have not been arrested. His fear is that the applicant may link up with these two and commit further offences.

Overall the respondent's attitude is that there is evidence linking applicant with the offences. Applicant has been positively identified at an identification parade in all counts. He

has also made indications to the police. The expectation of a substantial custodial sentence upon conviction will provide an incentive for him to abscond. Once in default, it will be difficult for the police to apprehend him. It is further alleged that the investigations are at an advanced stage and it is not in the interest of justice to admit applicant to bail. It is trite that in bail applications the primary question for consideration is whether the applicant will stand trial or abscond. Of equal importance, however, is whether the applicant will influence the fairness of the trial by intimidating witnesses or interfering with evidence – see *Ndlovu v State* HH 177-2001 at page 3. In bail applications, the presumption of innocence ii *in favorem vitae libertatis et innocentiae omnia praesumuntur* is favour of the applicant – *S v Essack* 1965 (2) SA 161 (D). In other words, the court should always grant bail where possible and should lean in favour of the liberty of the applicant provided that the interests of justice will not be prejudiced – see *Attorney General, Zimbabwe v Phiri* 1988 (2) SA 696 (ZHC); *S v Smith* 1969 (4) SA 175 (N); *S v Hlongwa* 1979 (4) SA 112 (D) and *S v Mhlavli and Another* 1963 (3) SA 795 (C). The approach is one of striking a balance between the interest of society (i.e. the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused (who, pending the outcome of his or her trial, is presumed to be innocent).

<u>Expectation of a lengthy custodial as an incentive for abscondment</u>

Mr *Maredza,* for the applicant submitted that this factor should not be taken into account because the applicant has not yet been convicted. Whilst he concedes that the allegations against the applicant are very serious calling for custodial punishment, he submits that this should not be used to refuse the applicant bail. He argues that to do so would amount to convicting the applicant of the charges even before the trial. In my view, the seriousness of the offence charged and the likelihood of a severe sentence being imposed (upon conviction) are factors that the court must take into account as an inducement for abscondment – see *S v Ito* 1979 (3) SA (W) 740 and *S v Hudson* 1980 (4) SA 145 (D). I will take this factor into account in the determination of this application.

Strength of the Prosecution Case

According to Mr *Kandemiiri,* for the respondent, the applicant was positively identified at an identification parade. He has also made indications to the police. This evidence provides a nexus between the applicant and the serious crimes against him. These facts, if proven during the trial, will establish a strong prosecution case. I have to take into account this factor in determining this application – see *S v Lulame* 1976 (2) SA 204 (N); *S v Hartman* 1968 (1) and the *Ndlovu* case (*supra)*. On the facts before me it appears that the respondent has a strong case against the applicant. I will take this into account in determining the outcome of this application.

Risk of commission of further crimes:

Bail is non-penal in character, but in bail applications the

court is empowered to refuse bail in instances where the court considers it likely that if the applicant is admitted to bail he would commit an offence – see section 116(7) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In this regard it was stated as follows in *Attorney General, Zimbabwe v Phiri supra)* –

> "The test, in my view, should be one of deciding whether or not there is a real danger, or a reasonable possibility that the due administration of justice will be prejudiced if the accused is admitted to bail. If this real possibility exists, then the public is entitled to protection from the depredations of the accused, and bail should be denied to him. In the absence of exceptional circumstances, I believe that it would be irresponsible and mischievous for a judicial officer to allow bail to a person who has given indication that he is an incorrigible and unrepentant criminal."

Such preventive detention, however, should not be used as a means deterring the offender. The orthodox way of dissuading those of criminal propensities from their inclination is by the threat of detection and punishment – see *S v Visser* 1975 (2) SA 342 (c) and *R v Gewntry* (1956) Crim. LR 120 (CCA). Although this factor was alluded to by the investigating officer I do not seem to find reliable facts in its support in this application. In the circumstances it is safe to disregard it.

<u>Where applicant was not acting alone; but in association with others still at large</u>

<u>The respondent states –</u>

> "Investigations into the matter are almost at an advanced stage. What is outstanding is to apprehend two outstanding accused … There is danger that if released on bail, applicant may interfere with investigations."

In this regard Detective Inspector Huni states "The Police are

still looking for two more outstanding accused responsible for these cases who might team up with accused once granted bail." This is a factor that I will also take into account in this application. The allegations are that the applicant acted in association with five other armed persons in the commission of these offences. Such an association with others who are still at large is a relevant factor in applications of this kind – see *S v Vankathathnam* 1972 (2) PH, H 139 N.

The applicant has offered to report daily to the police to allay some of the fears of the respondent. Whilst conceding that his mother informed the investigating officer that he no longer resides with her, the applicant alleges that she did so in a fit of anger.

I have considered all the facts placed before me and applied the above legal principles. I conclude that the applicant has failed to prove on a balance of probability that I should exercise my discretion in favour of granting him bail. The onus is on him and he failed to show that the interests of justice will not be prejudiced, namely, that it is likely that he will stand his trial or otherwise interfere with the administration of justice or commit an offence – see *De Jager v Attorney General, Natal* 1967 (4) SA 143 (D).

The respondent has shown that the applicant is facing four serious allegations of armed robbery. He has shown that these were well-orchestrated allegations carried out with criminal precision. Perpetrators of such organised armed robberies realistically expect long custodial sentences. In this case this factor will serve as an incentive or inducement for abscondment. The respondent has also established that it has a strong case against the applicant. The respondent has also established that the applicant was acting with others, two of whom who are still

at large.

The effect of these facts, established by the respondent, is that the applicant is not a candidate for bail. In the circumstances I dismiss his application for bail.

Honey & Blankenberg, applicant's legal practitioners.
Office of the Attorney General, respondent's legal practitioners.