

LOVERIDGE TONDERAI DZIMWASHA  
and  
PANGANAI MUNEMO  
and  
ZIVAI MANGWANDA  
and  
DESIRE TSAURAI KUPARA  
and  
ANESU DEFINITELY GAVAZA  
and  
NICHOLAS MURASIRI  
and  
GESELDA FADZAI KATEMA  
and  
TAFIRENYIKA MARIGA  
and  
TAPIWA MAFADZE  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUTEVEDZI J  
HARARE, 24 January & 14 February 2023

### **Bail Application**

*M Makuvasine* for applicant  
*T M Havazvidi* for respondent

**MUTEVEDZI J:** Cases of repeat violent offenders are a scourge that will always put bail law in this jurisdiction under heightened scrutiny. Those who wear their disdain of violent crime on their shirt sleeves have even gone to the extent of arguing that when the Constitution of Zimbabwe elevated bail to a constitutional right it made the bail system weak and exposed the public to the depredations of gangsters and kindred offenders. Some human rights defenders and those with contrary views however argue that the presumption of innocence entails that no matter how grave or gory an offence may be viewed by the public,

the offender is entitled to bail as of right.<sup>1</sup> Fortunately there appears to be no default position in relation to those issues in Zimbabwe. Each case must be determined on its own circumstances. This bail application was one such case.

On 24 January 2023, I heard argument in an application in which all the applicants sought bail pending trial. I dismissed the application after giving *ex tempore* reasons for my decision. On 25 January 2023, counsel for all the applicants wrote to the registrar of this court requesting the court's written reasons. The letter was received by the registrar on 26 January 2023 but for unexplained reasons, it only got to my assistant on 8 February 2023. Such tardiness is unhelpful regard being given to the urgency with which bail applications are viewed. Notwithstanding that glitch, I set out below the full reasons why I refused to admit the applicants to bail.

The applicants were arrested on different dates but ultimately all of them were placed on remand facing six counts of robbery committed in aggravating circumstances in contravention of s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The facts on which prosecution relied for their placement on remand and which the applicants appear to have acquiesced to can be summarized as follows:-

### **Count 1**

On 10 March 2022, the first complainant who is a truck driver met the 8<sup>th</sup> applicant Geselda Fadzai Katema (Fadzai) at the time that he was loading his truck at Fredmap Investments. It was around midday. Fadzai must have had information that the complainant was due to make deliveries with the truck at shops in Mashonaland Central. She approached him and requested a lift to Shamva. The complainant agreed. They made an arrangement that the complainant would contact Fadzai once the truck was loaded. At around 1700 hours, the complainant, his truck laden with 1300 boxes of cooking oil rang up Fadzai as per their prior arrangement. At around 1730 hours, they met at a place called Showgrounds in Harare. Fadzai had 2 x 20 litre buckets. They were both closed but she claimed they contained a substance called bronclear cough syrup. Once on board, Fadzai advised the complainant that her destination was Musiiwa business centre. When they got there Fadzai requested to disembark. The complainant stopped the lorry. He disembarked and went to the other side to open the door for his passenger. He had no sooner alighted than he was accosted by applicants 2, 3, 4 (Panganai, Zivai and Tsaurai respectively) and another only known as Shiri

<sup>1</sup> <https://www.cbc.ca/amp/1.6734446>

who the police allege is still on the run. They were driving a vehicle described in the papers as a white Toyota Wish. Applicant 3 was the driver. They identified themselves as detectives from the CID Drugs section. They accused the complainant and Fadzai of trafficking drugs. The two were handcuffed together and shoved into the Toyota Wish. The applicants with their captives aboard drove towards Harare. Along the way Fadzai, who all along pretended to be a stranger to the three applicants begged them to release the complainant because he knew nothing about the drugs. In turn applicant 4 (Tsaurai), grabbed the complainant's cellphone and removed its battery. They continued to drive until they got to Mvarechena shopping centre. Thereat, they removed the handcuffs from Fadzai and handcuffed the complainant on both hands. They gave him back his cellphone and USD\$ 10. Immediately after dumping the complainant, they sped back to where they had left the complainant's lorry. On arrival, they teamed up with applicants 5, 6, 7 and 9 (Anesu, Nicholas, Tafirenyika and Tapiwa respectively). They drove the truck some distance from where complainant had left it, off-loaded it and took their loot to Shadreck Matiyenga's warehouse in Glenview 1 in Harare. The complainant later found his way back to Musiiwa. To his horror his entire consignment was gone. To add insult to injury, 100 litres of diesel had been drained from the truck.

### **Count 2**

On 30 July 2022, Fadzai phoned the second complainant who is also a truck driver. They were known to each other from a previous encounter. She asked the complainant when he would go to Masvingo. The complainant indicated that he had a trip to deliver eggs to Marondera, Rusape and Mutare on 31 July 2022. Fadzai jumped onto the opportunity and indicated that coincidentally she also had planned a trip in that direction. On 31 July the complainant picked Fadzai at Rhodesville bus stop on his way to Mutare. She had a carrier bag on her. The fare for the ride was USD \$10. Fadzai indicated that she had no money on her person but would pay once they arrived in Rusape. When they did and the complainant asked for his fare Fadzai advised him that she was waiting for someone to arrive with the money. They waited a while after which the complainant asked when the person with money would arrive. Fadzai requested the complainant to be patient. Sometime later she then cooked up another story and said since complainant was going to Mutare they could meet the person with the money about five kilometres out of Rusape. The complainant swallowed the bait. At a lay-bye a few kilometres from Rusape, they stopped and met the accused who is still at

large called Shiri. He was also carrying a carrier bag. Whilst they were still discussing the issue of the fare, a white Toyota Wish arrived. Applicants 1, 2 and 3 disembarked. They introduced themselves as detectives from the CID drugs unit. They demanded to search the complainant's lorry. They announced that they had found drugs in the carrier bags which both Fadzai and Shiri were carrying. Applicants 1, 2, 3 and Fadzai then took the complainant into the Toyota Wish. They drove off towards Wedza after leaving Shiri at the lay-bye with the truck. At some bus stop in Wedza, they stopped and released the complainant. They immediately went back to the truck and teamed up with applicants 4,5,6,7 and 9. They took their loot and ferried it to Glenview 1 in Harare. Needless to say when complainant finally found his way to where he had left his truck he found it minus its cargo.

### **Count 3**

Complainant 3 is again a truck driver. He had been assigned to ferry a consignment of 30 tonnes of sugar from Triangle to Harare on 29 August 2022. He parked his loaded truck at a parking bay at Triangle Sugar Mill with the intention to proceed to Harare the next morning. He was approached by applicant 5 (Anesu) who solicited for transport to Harare. The complainant agreed but advised Anesu that even then he would not get into Harare but would park at a place called Gango Truck Inn just before Harare. Anesu agreed to the arrangement and said he would organize that his grandmother picks him up from there. When they arrived at the Truck Inn a white Toyota Wish suddenly appeared from the parking lot and blocked the complainant's truck. Fadzai once more emerged onto the scene. At the same time applicant 4 came out of the Toyota Wish, proceeded to complainant and pointed at him what the complainant suspected to be a firearm. True to their modus applicants 2, 3, 4 and Shiri once again posed as detectives from the drugs unit. They accused the complainant and his passenger of transporting dagga. A phantom search was conducted and applicant 4 turned up with what was alleged to be sachets of dagga. Applicant 4 handcuffed applicant 5 and the complainant together. The two were bundled into the Toyota wish ostensibly to be taken to the police station at Mahusekwa. Along the way and as expected, the applicants dumped the complainant before driving back to Gango Inn, off loaded their loot and transported it to Glen View 1. The truck and its trailer were later found abandoned some distance from Gango Inn.

### **Count 4**

On 22 September 2022, the 4<sup>th</sup> Complainant who was in the company of his wife was driving a scania lorry loaded with revive drinks of different flavours from Harare to Gweru.

Fadzai approached the complainant and solicited for transport to Kadoma. She was together with applicant 5 (Anesu). The complainant agreed. At a place called Family 24 along the way to Gweru, Fadzai told the driver that she had a parcel which she wanted to drop off. Immediately after she disembarked applicant 4 (Tsurai) arrived and accosted the complainant accusing him of carrying Fadzai who was trafficking drugs. He claimed to be a police officer from CID Norton. He handcuffed the complainant and pushed him onto the middle seat. Shiri who had arrived together with applicant 4 drove the truck towards Bulawayo claiming that they were proceeding to detain the complainant and Fadzai at Norton police station. Fadzai pleaded with them not to detain them as she could give them USD \$1500 at a place called Whitehouse. On reaching Chibhero turn off Shiri parked the truck. The infamous Toyota Wish appeared with applicant 3 (Zivai) on the wheel. The complainant was bundled into the Toyota wish. The assailants indicated that they were taking him to Whitehouse to get money from Fadzai's husband. On the way they assaulted the complainant. They drove him around Harare whilst calling the person whom they claimed to be Fadzai's husband who kept on changing the locations at which he said he was. It was a ploy to enable their accomplices to off load the truck. They succeeded. Later they dumped the complainant at Kuwadzana 2 round about. He found transport back to where he had left his truck. The cargo was missing.

#### **Count 5**

It occurred on 26 October 2022. Around 1500 hours the complainant was driving a haulage truck laden with 1300 boxes of 12 x 2 litres of Zimgold cooking oil from Harare to Gweru. At a place called Steps terminus in Hopley, a person called Sergeant who pretended to be a tout and wanted to find passengers approached complainant 5. Applicant 4 and another person who hasn't been arrested posed as the passengers and boarded the truck. Thirty or so metres away, applicants 2 and 3 were also picked up alleging that they were going to Mvuma and Chivhu respectively. At Boka, another passenger called Shane Musabayana was picked up before they embarked on the journey. Around 1800 hours one of the passengers requested the complainant to stop as he wanted to answer the call of nature. A few minutes after they stopped applicant 4 (Tsurai) drew out a knife which he pointed at the complainant. He proceeded to handcuff the complainant with his hands put at the back. With his accomplices they sprayed pepper into Shane Musabayana's eyes and nostrils before stealing various items from him. Shortly thereafter a blue Honda Fit car arrived. The

complainant and Shane were thrown into that car. The other occupants of the Honda Fit were applicants 5, 6, 7 and 9. The complainant and his unfortunate colleague Shane were driven to Mahusekwa where they were left tied to a tree. The applicants returned to the scene. One of their accomplices brought another truck horse onto which they hooked the laden trailer. About 3 km from Mvuma, they dumped the complainant's truck horse which was being monitored by a tracker system.

### **Count 6**

On 10 December 2022, Fadzai approached complainant 6 at Munela wholesalers in Harare. She pretended that she had a parcel which she wanted to send to Chegutu and was therefore looking for a truck going in that direction. The complainant agreed. The two exchanged numbers and complainant was given contact details of applicant 6 (Nicholas) who was supposed to be the recipient of the parcel. No parcel was however send on that day. On 14 December 2022 Fadzai contacted the complainant and gave him a parcel. He was supposed to drop it off at Chibhero turn off after Norton where he would meet applicant 6. The complainant left for Kwekwe. He was accompanied by his workmate. Around midnight on 15 December 2022 they met applicant 6 at Chibhero turn off as arranged. Applicant 6 was driving a Toyota Quantum car. In it were applicants 1, 2, 3 and 4. As soon as complainant handed over the parcel to applicant 6, applicants 1 and 2 jumped into the truck and advised the complainant that he was under arrest for possessing dangerous drugs. They handcuffed the complainant and his workmate, threw them into the Toyota Quantum car and ordered them to lie on the floor together with applicant 6. They drove them off leaving the truck in the custody of applicants 7, 8 and 9 and a driver only known as Stallone who is yet to be accounted for. The complainant and his workmate were later dumbered in Goromonzi. They made a police report at Goromonzi.

After some investigations, on 6 January 2023 detectives stumbled upon information about a relative of applicant 3 Zivai Mangwanda. They quizzed that relative and managed to get information relating to applicant 3. They tracked applicant 3 and arrested him near VID Eastlea in Harare. It was applicant 3 who in turn led the detectives to applicants 1, 2 and 4.

As part of their allegations, the police detailed that applicant 1 Tonderai Dzimwasha, is a serving police officer holding the rank of constable and stationed at ZRP Stodard in

Mbare. Applicant 2 Panganai Munemo is an ex-police officer. Applicant 3 is an ex-officer in the Air Force of Zimbabwe. Applicant 4 is an ex-officer in the Central Intelligence Organisation (CIO). The rest were indicated as being unemployed.

Prosecution opposed the applicants' admission to bail on the basis that:

1. The allegations against all the applicants are serious. The offences illustrated a lot of criminal planning and resolve
2. The series of offences committed showed that the applicants had a propensity to commit robberies
3. The prosecution's case against the applicants is very strong. At all material times one or more of the applicants would actually identify themselves to their victims pretending to be police officers or someone else genuinely seeking assistance. They all did not disguise their identities in all the counts which made their identification easy. In turn the victims were very positive about the identities of those applicants whom they interfaced with.
4. The applicants were arrested together with accused 10 and 11. It is to those two that the applicants either left the stolen goods for safe keeping or sold them.
5. In addition applicant 2 Panganai Munemo –the ex-police officer has a previous conviction for criminal abuse of office on CRB 150/22.
6. Applicant 7 Tafirenyika Mariga is on bail on another case on Harare CRB No. HREP 10586/22

In support of their application, the applicants each detailed their personal circumstances as appears from pp. 5-10 of the application. They also proffered general explanations to their alleged involvement in the different counts which affected all of them. Chief among those explanations is that there is nothing which links them to the commission of any of the counts. They further argue that accused 10 is the person who is alleged to have bought the stolen property from them and accused 11 as the one who had safe custody of the stolen property before it was sold to accused person 10. Both accused 10 and 11 are not part of the present application. The applicants further allege that nothing was recovered from those accused persons and therefore there is nothing to link them to the commission of the offences. They further explained their relationships to each other's in the following manner:

Applicant 1 was once based at Mutawatawa police station. It was then that he met and became acquainted to applicant number 4 who was at the time an operative in the CIO in the same area. Applicant 3 hails from Mutawatawa. He was previously a soldier in the Airforce of Zimbabwe. He became acquainted to the other two during beer drinking sprees at the times he would visit his home area. Applicant 6 met applicant 4 when they were students at the

University of Zimbabwe in 2009. They became friends. Applicant 7 met with applicant 4 at a city sports bar in 2021 through a mutual friend called David Nyakaruru and they became drinking mates. Accused 11 on the charge sheet is uncle to applicant 4. Applicant 6 hails from the same communal area as applicant 7. Applicants 7 and 9 are uncle and nephew. Applicant 8 –Fadzai- was introduced to applicant 7 in 2021 by her friend called Tafadzwa when applicant 7 wanted to buy clothes for his children but was unable to do so due to COVID-19 lockdowns. Fadzai was into business of selling clothes. As a result of this web of relationships, the applicants said they kept each other's' contact details and constantly communicated through their cellular phones.

They were each arrested in the following circumstances:

Applicant 3 was the first to be arrested after he was called by a person from whom he had bought the commuter omnibus he was driving. It is important to point out that neither the name of that person nor the make or registration details of that commuter omnibus were disclosed. He however alleged that the person called because they had an outstanding arrangement that the commuter omnibus would be sold if a buyer was found. The seller therefore wanted them to meet in town as there was a potential customer interested in purchasing the bus. They met in town. Applicant 3 was given a temporary car to use by the potential buyer who took the bus that was for sale. Applicant 3 was later called to come to VID Eastlea to finalise negotiations of the sale. On his arrival there, the police arrested him. They advised him that he was under arrest for a spate of robberies and that they were aware of his accomplices such that he had to cooperate with them otherwise they would kill him. The police then took his phone and dialled a set of numbers until they came to applicant 4's number. Again it is not explained how they picked that number from the applicant's entire phone book. They ordered applicant 3 to call him and arrange to meet in town. He did. Applicant 4 came and was arrested. The police then checked applicant 4's phone and found applicants 1 and 2's numbers as the most frequently called. They ordered him to call them. He did. They both reacted and were arrested on their arrival. The same modus was used to lure the rest of the applicants.

At individual level, some of the applicants' explanation of the allegations were as follows:

Applicant 2 alleges that he was arrested for criminal abuse of office during his time in the ZRP. He was convicted and sentenced to imprisonment. He started serving his time on 16



June 2021 at Chinhoyi prison and was released on 16 June 2022. It was therefore not possible for him to have participated in the robbery of 10 March 2022 since he was in prison. The police refused to accept this information.

What makes the above allegation by applicant difficult to accept is that he chose not to furnish the police with any documentation relating to his imprisonment and the time that he was released from prison. He deliberately does not mention the length of his prison term. If he had done so, the court could at the very least have estimated the duration of his time in prison. As will be shown later, where it suited them, the applicants produced documentary proof to support their allegations but when it did not, they withheld such proof. In any case, even if the police were mistaken about count 1, applicant 2's alleged participation in the robberies runs through the other counts which allegedly occurred when he was already out of prison as per his chronology of events.

Applicant 7 makes a similar argument. He says he was in prison between 10 October 2022 and 16 November 2022. He attached an extract from the CRB at Harare Magistrates' Court and the receipt which shows the day when he deposited bail. Tellingly, the period of his incarceration is slightly more than one month. The state's allegations viewed in their totality are that the applicants were a gang of conspirators who apparently operated a coordinated criminal enterprise. The 7<sup>th</sup> applicant has not been able to extricate himself from all the other counts he is alleged to have participated in even if the court were to give him the benefit of doubt that he was not involved in count 5.

Applicant 5 argues that he was not in Zimbabwe on 24 July 2022 because he was in South Africa. He says he temporarily entered Zimbabwe on 27 September 2022 and exited on the same day before returning on 10 October 2022. He attached copies of the purported entries and exists which he made to and from Zimbabwe as annexure D. There are three pages of that annexure. The first page is the bio section of the passport. The second page shows date stamps on a page of his passport. There are many dates which appear there. What is important however is that he appeared to have exited Zimbabwe on 23 June 2016 and immediately returned on 24 June 2016. There is no stamp which shows that he thereafter exited Zimbabwe. The only stamp which is significant is a South African Immigration stamp with the date 24 July 2016. That date appears on a section captioned expiry date. 24 July 2016 is then endorsed thereon. To me that does not mean that the applicant left Zimbabwe on that date. As already said there is no indication on that page that after his entry into

Zimbabwe on 24 June 2016 he exited the country again. In fact to show his dishonesty in terms of dates, applicant 5 alleges that he left the country of 27 September 2022 and returned on 10 October 2022. On the last page of annexure D, there are two date stamps for 27 September 2022. One shows the applicant exiting the country and the other one shows him entering the country. There are no times on the date stamps to show whether the entry preceded the exit or vice versa. He further alleges that after his exit on 27 September he only returned to the country on 10 October 2022. That is not possibly true because on the same page there is a stamp that clearly shows that he exited Zimbabwe on 10 October 2022 meaning that he had been in the country all along. In my view therefore applicant 5's attempt to explain the charges against him is illogical at worst and muddled at best. There are several gaps and dates which do not make sense in his passport explanation. His absence from Zimbabwe is on the face of the evidence he provided himself very improbable.

Apart from the above three (applicants 2, 5 and 7) the rest did not proffer individual explanations to the charges. They sought to rely on the blanket attack of there being no link between them and the crimes indicated earlier. In addition all applicants urged the court to treat them in the same manner that their co-accused numbers 10 and 11 had been treated. The two were granted bail by the Magistrates' Court after prosecution consented to their release from custody.

Counsel for the applicants further directed the court to the provisions of s 50(1) (d) of the Constitution of Zimbabwe, 2013 which provides that any person who is arrested must be released unconditionally or on reasonable grounds pending a charge or trial unless there are compelling reasons justifying their continued detention. He further made reference to s 117(1)(2)(a) of the Criminal Procedure and Evidence act [*Chapter 9:07*] and several authorities to support the application.

### **The law on bail**

The law governing applications for bail has become fairly trite in this jurisdiction. Generally, it is that a person arrested or detained must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention. See s 50(1) (d) of the Constitution. Further s 117(1) of the CP & E Act accords every arrested and detained person a general right to be admitted to bail except where the court makes a finding that it is in the interests of justice that bail be refused.

A few issues however appear to continue to cause challenges to many legal practitioners and those applicants prosecuting their applications in person. The protestations from the applicants *in casu* betray some of those challenges. Below I deal with each of those challenges in determining the issues which arise in this application.

**That there is no link between the applicants and the commission of the offence**

This court has noted with concern the stratagem by many legal practitioners to seek to turn bail applications into remand proceedings. To many of them, alleging lack of a nexus between the applicant and the crime committed is standard boilerplate designed to crush the state's opposition to the admission of their clients to bail. They have a very single-minded give no quarter approach. As already stated, all the nine applicants challenged the link between themselves and the crimes alleged against them by prosecution. They argued that nothing was recovered from them or from accused 11 and 10 to whom they allegedly sold and gave for safekeeping respectively, the stolen goods. Put differently, their position is a veiled allegation that they must be admitted to bail because there is no reasonable suspicion that they committed the offences preferred against them. The point which proponents of this approach appear to miss is that although there is a relationship between the request for remand procedure and an application for bail, there is an equally marked difference between the two. The question of bail does not arise until prosecution has successfully applied for the placement of an accused on remand. In appropriate instances where the state fails to satisfy the requirements to have an accused person placed on remand, that accused is released without the need to apply for bail. For purposes of completeness, I restate the elementary principle that the request for remand will only succeed where prosecution has shown that there is reasonable suspicion that the accused committed the offence charged. The requirements for that were succinctly laid out in the oft-quoted case of *Attorney-General v Blumears & Anor* 1991(1) ZLR 118 (S) where the Supreme Court held that the prosecutor must allege facts that constitute a crime. He/she must justify why the state alleges there is reasonable suspicion that the accused committed the crime. I will be quick to point that it is at this stage that the battle on whether there is a link between the accused and the commission of the crime must be fought. The accused or his legal practitioner is at liberty to challenge the facts as stated by the prosecutor. He or she may lead evidence in that regard which may persuade the court to reject the allegations by the prosecutor. The remand procedure is central

in that it provides for a neutral arbiter detached from both prosecution and the police to test whether indeed there is reasonable suspicion that the accused committed the crime alleged against him/her. The procedure and the rules of evidence are so liberal to the extent that restrictive principles like the exclusion of hearsay evidence and the prohibition of submission of evidence from the bar by legal practitioners do not apply. Literally, the accused is allowed to bring in anything to oppose the allegations of reasonable suspicion against him. It is also important that at that stage, there is no expectation or onus on the prosecutor to prove the accused's guilt beyond reasonable doubt or even on a preponderance of probabilities. See the case of *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S). The courts have on times without number said that suspicion by its very nature connotes a state of conjecture whereof proof is lacking. If anything more was required it would then cease to be suspicion and become fact. In *S v Mukoko* 2009 (1) ZLR 93 (H) this court held that it would be incompetent for a court to grant bail before ascertaining whether there is legal justification for the accused to be placed on remand. It held further that the phrase "after a person has appeared in court on a charge" must be construed to mean "after the initial process of a criminal trial", which is the initial appearance in court before a judicial officer and the presentation to the legal officer of legal justification for the person's arrest and placement on remand. It is only when that first rung has been satisfied that the issue of whether the accused is to be held in custody or not arises. It is therefore incompetent to raise the issue of reasonable suspicion during a bail application. The question of reasonable suspicion must necessarily precede the application for bail.

I deliberately discuss these elementary aspects of criminal procedure in order to bring into the open the folly of seeking to challenge the existence of reasonable suspicion in an application for bail. The procedure for applying for bail is different from the request for remand. The considerations are totally different. Once an accused has acquiesced to his placement on remand on a particular set of facts it is those facts which he/she, the prosecutor and the court must rely on in the determination of whether he /she must be admitted to bail. It is not possible for the accused/applicant in a bail application to call evidence or make submissions which challenge the existence of reasonable suspicion. The court understands that for purposes of expedience some legal practitioners deliberately abstain from challenging the placement of their clients on remand because the processes may take long to complete whilst the accused remains in custody. Whilst that may be ingenuity on their part and

expedient for the client it must be appreciated that it comes at a premium. The courts will not allow an applicant in bail proceedings to challenge the existence of reasonable suspicion through the back door. Once that route to accept as correct the facts as they appear on the request for remand form is taken, the applicant must be prepared to be hoist by their own petard. In any case, it is not like the applicant will have no remedy. The law allows him/her at any time to go back to the remand court to allege that there is no reasonable suspicion that he/she committed the crime charged. The result where a challenge of reasonable suspicion succeeds is that the accused is set free. In a bail application, the applicant is simply allowed to stand his trial whilst out of custody.

In this case, the allegations are that the applicants were linked to the commission of the six counts through various means. The majority of them were positively identified by the complainants. It is on record that the state alleges that all of them were so reckless that they did not attempt to disguise themselves in their interactions with their victims. In turn those victims managed to positively identify the applicants when they were arrested. Worse still the applicants are alleged to have given accused 11 the stolen goods for safekeeping and later sold them to accused 10. Those two so allege the state, have confirmed to the police that it was indeed the applicants who brought the stolen goods to them. The applicants confirm the relationships between and amongst themselves on one hand and between themselves and accused 10 and 11 on the other. Those were the unchallenged facts placed before the remand court. I refuse to determine or revisit them in these bail proceedings because I have no right to. As discussed above and as presented by applicants 2, 5 and 7 what is permissible is for an applicant to proffer a defence which explains his involvement or lack of it in the commission of the crime alleged. That is done only for purposes of attempting to illustrate to the court that the state's allegations against him/her are weak.

### **The *onus* in bail applications**

The general rule is that prosecution bears the onus to show that there are compelling reasons why an accused must not be admitted to bail. See *S v Munsaka* 2016(1) ZLR 427 (H). Section 115 C (2) (a)(i) of the CP&E Act puts the issue beyond doubt. It provides that:

**115C Compelling reasons for denying bail and burden of proof in bail proceedings**  
(1)...

(2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail—

(a) before a court has convicted him or her of the offence—

(i) the prosecution shall bear the burden of showing, on a balance of probabilities, that there are compelling reasons justifying his or her continued detention, unless the offence in question is one specified in the Third Schedule;

Unfortunately, in terms of s 115 C (2)(a)(ii) of the CP& E Act a reverse onus is placed on the accused person to show on a balance of probabilities, that it is in the interests of justice that he/she be admitted to bail. The provision is couched as follows:

- (ii) the accused person shall, if the offence in question is one specified in—
- A. Part I of the Third Schedule, bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail, unless the court determines that, in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden;
  - B. Part II of the Third Schedule, bear the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail;

Simplified, the above provision means that the courts are empowered to require offenders charged with offences which appear in the Third Schedule to the CP &E Act to give reasons why they should be admitted to bail instead of requiring prosecutors to prove why they should not. All the applicants in this case are facing several counts of robbery in aggravating circumstances in contravention of s 126 of the Criminal Law Code. That offence falls in Part 1 of the Third Schedule to the CP& E Act. It follows therefore that the onus rests with them to show on a balance of probabilities that it is in the interests of justice that they be admitted to bail. For instance, applicant 2 had the onus to show on a balance of probabilities that he was in prison not only at the time that count 1 was committed but that it was also impossible for him to have committed all the other five counts. He did not provide the details of his detention, the duration of the sentence he served and the details of his release. The court accepted in relation to applicant 5 that he was in custody for slightly over a month between 10 October 2022 and 16 November 2022 but that even if it would give him the benefit of doubt in relation to the robbery committed on 26 October 2022, there is no indication how he seeks to extricate himself from the other counts. Applicant 7 bore the onus to show that he was outside Zimbabwe at the material times. As discussed above he dismally failed to do so.

#### **Propensity to commit similar offences**

Propensity refers to a predisposition, a proclivity or inclination to commit crimes. The traditional approach is that for an accused to be considered to have a propensity to commit

crimes, it must be shown that he/she was previously convicted of or is on remand for an offence of a kindred genre to the one for which he/she is seeking to be admitted to bail. A further argument oft-resorted to by applicants for bail is that as long as the accused has not been previously convicted the presumption of innocence operates in his/her favour. Whilst it is true that at that stage the accused stands innocent, I entirely agree with the approach that was taken by ZISENGWE J in the case of *The State v Talk Take Sibanda* HMA 23/21 where he cited with approval the dicta in *James Makamba v The State* SC 30/04 that:

“It is a fundamental requirement of the proper administration of justice that an accused stands trial and if there is any cognizable indication that he will not stand trial, if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence.

Although the court was discussing the risk of absconding, the point remains that where it is in the interests of justice to do so, a court may refuse to admit an accused to bail despite the operation of the presumption of innocence. I wish to take the principle further by adding that in instances where an accused appears to be a serial offender, it would be preposterous to assume that as long as he has not been convicted previously or has not been caught and placed on remand before he commits the next offence then he can't be held to have a proclivity to committing offences. The development of the law and policing methods unfortunately spurs an equal dynamism in the methods employed by criminals. It may take long before a criminal is apprehended yet in the meanwhile he/she would continue committing offences. In the instant application the applicants are alleged to have committed six different robberies between 10 March 2022 and 10 December 2022. The modus which was used in the commission of the offences leaves this court with little doubt if any that the persons who committed the different robberies are the same. The careful planning and the criminal resolve which is evident in all the six counts betray a heightened determination to commit offences by those persons. I have already indicated that there is strong evidence which links the applicants to the commission of the offences. The court cannot ignore the strong and reasonable suspicion that it is the accused who may have committed those offences. The fact that they were not accounted for soon after the robbery in March and the others which followed and that they were linked to the crimes after their arrest in 2023 and placed on remand at the same time does not take away the clear evidence pointing to their

insatiable appetite to commit robberies. In *Attorney General, Zimbabwe v Phiri* 1987 (2) ZLR 33 (H) this court had occasion to remark on such conduct when it said:

“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.”

As per the allegations, the applicants are not only violent but are vicious, dangerous and very calculating. Their conduct if proved, typifies organised crime. Their victims in all the six counts are truck drivers assigned to ferry large consignments of grocery products. The robberies all start with Fadzai –the only woman gangster amongst them- approaching the victim pretending to be a harmless trader looking for transport. The male marauders like angels of death, appear on the scene from nowhere once Fadzai succeeds in tricking the driver to stop at secluded places. The possession or trafficking of drugs allegations are then made. The attack is completed by the handcuffing, torture and abduction of the complainant into a car which is then used to dump him far away from his truck and cargo to give the looters who remain at the scene ample opportunity to plunder the trucks. Like a predators’ hunt, the robberies were all well-coordinated. The experiences must have been harrowing for all their victims. That the violent offences were perpetrated repeatedly in a few months makes the applicants’ crimes akin to the depredations of serial killers and serial rapists. It is never safe to imagine that they will not strike again. What makes the situation even scarier for the public is that applicants 1, 2, 3 and 4 all have a security sector background. Applicants 1 and 2 have police training. Applicant 3 is a former C.I.O operative whilst applicant 4 is a trained soldier. To admit them to bail will be irresponsible and mischievous of me. I have a duty to protect the public against these recalcitrant elements who through their repeated attacks on innocent truck drivers have exhibited a complete disregard of the law and the safety of others. There is real danger and a reasonable possibility that if released on bail the applicants are likely to strike again.

### **The seriousness of the charges and the strength of the State’s case**

In discussing the above issues I have also adverted to the seriousness of the charges and the strength of the state’s case Mr *Makuvatsine* for the applicants admitted that there is



no questioning the gravity of the charges that his clients are facing. He argues however, that the evidence against them is weak. But by any measurement, it cannot be. The applicants were identified by the various complainants. I mentioned earlier that either out of ill-informed bravery or genuine daftness the applicants at no time attempted to disguise themselves when they allegedly committed the robberies. The complainants clearly identified them. For others like Fadzai and applicant 5 they either travelled or interacted with some of the complainants for considerable distances and periods. The question of identification cannot arise in circumstances where an accused and a witness are well known to each other. I also alluded to the revelations of accused 10 and 11 who transacted with the applicants after the robberies. The two also knew the applicants. They are relatives to a few of them. The goods which were stolen were all expendables. They could be disposed very easily and once put into the market eggs, cooking oil or drinks belonging to the complainants could not be distinguished from those from other sources. I therefore cannot accept the argument that there is no evidence against the applicants because the stolen goods were not recovered from them. There is evidence, independent of the stolen goods which fully incriminates them. If at their trial the applicants present the tenuous defences they presented in this application, then their convictions will be an open and shut process for prosecution. A combination of the grave charges and the weighty evidence against them can be quite some incentive for the applicants to abscond. These are the ordinary '*motives and fears that sway human nature*' which the Supreme Court alluded to in *Aitken & Another v Attorney General* 1992 (1) ZLR 249 (S). The character of the crime and the evidence against the accused serve to inform the penalty which is likely to be imposed in the event of a conviction. I don't need to restate the view I have already expressed that the six counts of robbery in aggravating circumstances added to the smoking-gun type of evidence alleged against them means an extended stay in prison for all the applicants if convicted. There cannot be any better motivation for the applicants to flee and not stand trial.

### **That the applicants' co-accused were admitted to bail**

The applicants argued that their co-accused namely accused 10 and 11 as appears on the request for remand forms were granted bail. As such they demanded, in terms of s 56 of

the Constitution, to be treated in the same way as their colleagues. The provision is as follows:

**56. Equality and non-discrimination**

1. All persons are equal before the law and have the right to equal protection of the law.

The concept of equality before the law which is also known by the nomenclature of isonomy is as ancient as the law itself. It is centred on the understanding that all individuals are equal before the law and should therefore be treated in the same manner. In practice however the application of the principle is often exaggerated at best and clearly misunderstood at worst. Under the criminal law, this requirement of the law applies to accused persons who find themselves in identical or similar circumstances. See the case of *S v Shamhu* HMA 18/21. It entails the observance of due process to achieve the ends of justice. Due process in turn requires the application of objective criteria to arrive at a decision. Put simply, the court must not use subjective and arbitrary considerations when treating accused persons who are charged with the same offence. It does not amount to unequal treatment where the same criteria is used to determine the suitability of an accused to be admitted to bail but that objective determination yields different results for the individuals. It does not necessarily follow that people who are jointly charged with the same offence are always in identical or similar circumstances. A lot of variables may come into play. For instance the personal circumstances of the accused may be different. Their levels of participation and involvement in the commission of the crime may equally differ.

In the instant case, accused 10 and 11 are clearly not in identical positions to the applicants. Whilst all the applicants can be bracketed as principal co-perpetrators, the same cannot be said about accused 10 and 11. Without more their evidence of participation in the robberies is very tenuous. In my view, instead of being charged with robbery, the allegations against the two actually depict them as either accessories after the fact or persons who received stolen property knowing it to have been stolen. It is on the basis of such distinction that the applicants cannot demand to be treated similarly to accused 10 and 11.

**Disposition**

In the end, it goes without saying that the adverse findings against the applicants above cumulatively militate against their admission to bail. They are likely to reoffend; they are a danger to the public and are likely to abscond. Their admission to bail is likely

undermine or jeopardise the objectives or proper functioning of the criminal justice system, particularly the bail system. It was for those reasons that I held that their application for bail must fail. I accordingly directed that the application by all the applicants stood dismissed.

*Machaya & Associates*, applicant's legal practitioners  
*National Prosecuting Authority*, state's legal practitioners