

ELLATONE BONONGWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 8 December 2023

Application for bail pending trial

J Nemaisa, for the applicant
M Manhomo, for the state

MUTEVEDZI J: It is not always that one hears a practising legal practitioner being charged with the offence of robbery in aggravating circumstances. This case unfortunately stands out as one of those rarities. The applicant Ellatone Bonongwe, is a legal practitioner running his own law practice in the town of Mt Darwin. He faces the robbery allegations jointly with Musa Gandhi (accused 2), Agness Kunaka (accused 3), Raby Gwenya (accused 4) and Tafadzwa Obrey Chipashu (accused 5). The allegations against him are that sometime in October 2023, he enlisted accused 2 with whom he is related in two ways in that he is not only accused 2's nephew but is also his legal practitioner after he represented him in court facing a charge of robbery at Bindura Magistrates Court on CRB No. BNP2453-55/19. The state however alleges that when he contacted him in October 2023, their discussions had nothing to do with legal representation. Instead, the applicant is alleged to have directed accused 2 to assemble a team of gangsters to rob Emson Chitsungo (the complainant) in Mt Darwin. Accused 2 obliged. He recruited seven other hoodlums who included accused 3, 4, 5 and four others who are currently fugitives from justice. They all met in Harare on 25 October 2023 to plan out how they would carry out the robbery. They mobilised two sharp iron bars and an AK47 raffle bayonet knife before proceeding to Mt Darwin in a motor vehicle described in the papers as a Toyota Sienta with registration numbers AGD 3196. Accused 5 was the driver of that car. In Mt Darwin, they met the applicant at Redan filling station. The applicant is alleged to have pointed out the complainant's house to the team before they parted ways. Later that night, in fact in the early hours of the next morning

around 0030 hours the gang besieged the complainant's homestead. They scaled the perimeter wall, got into the premises and gate-crashed into the complainant's house. Whilst inside the house they assaulted the occupants with iron bars and open hands. They burnt the complainant with an iron which was scorching hot. As they attacked the occupants, they were demanding cash and other valuables. They turned the house inside out and pillaged everything. The complainant and his family later noted that various valuables had been plundered during the robbery. The items taken included clothing apparel, electrical gadgets and cash amounting to USD \$1600. In the end the total value of everything lost was estimated to be **USD \$ 30 049**.

After the robbery, the accused persons left Mt Darwin and drove towards Harare. They ran out of luck because they encountered a police road block at a place called Mazoe on their way. They were flagged down by the police but as the car stopped, all the accused alighted from the automobile and took to their heels. It took an armed member of the police team at the road block to fire four shots for the police to subdue the fleeing robbers. It was only then that accused 2, 3, 4 and 5 were apprehended. Four of their colleagues escaped. The police recovered part of the stolen property and the implements used to commit the robbery after searching the accused persons' car. After the arrest of the accused persons, the police interviewed them. It was during those interviews that they implicated the applicant as the brains behind the robbery. The police confiscated the accused persons' cellphones where they discovered WhatsApp and sms text messages in accused 2's phone showing communication between him and the applicant. In those messages, the applicant was allegedly directing accused 2 to recruit robbers to raid the complainant. That led to his arrest. Together they were later taken to court at Bindura where the remand processes were undertaken. It appears that it never occurred to the applicant and his colleagues that they needed to challenge the facts on which they were placed on remand if they did not agree with them. I will later on demonstrate the danger of failing to do so. Soon after the remand procedure, the applicant and presumably all his accomplices were advised to apply for bail in this court given that the offence they are charged with is listed in the third schedule of the Criminal procedure and Evidence Act [Chapter 9:07] (the Code) and forms part of those crimes which the Magistrates' Court's power to admit persons to bail is either excluded or is qualified.

As a result of the above, the applicant lodged his application for bail before me on 13 November 2023. I heard arguments in the matter and on the same day, dismissed the

applicant's request to be admitted to bail. I gave my reasons for doing so *ex tempore*. On 15 November 2023, the applicant's counsel addressed a letter to the registrar of this court requesting my full and written reasons for the dismissal of the application. The letter was only issued and uploaded onto the IECMS platform and onto my portal on 23 November 2023. I set out the reasons below.

At the hearing of the bail application, the applicant acknowledged that he bore the onus to show, on a balance of probabilities that it is in the interests of justice that he be admitted to bail. He set out to discharge that burden by indicating that he is a career legal practitioner with somewhat heavy family responsibilities. He is the sole partner in his law firm. He is a polygamist and has a total of eight children with his two wives. He added that he does not hold a valid Zimbabwean passport because the one he has expired on 20 June 2023. It has not been renewed since. For purposes of discharging his obligation under s 117 A (5) of the Code, the applicant advised the court that he neither has previous convictions nor pending cases in any court. He added that he has no relatives living outside Zimbabwe and despite having held a valid passport for the past ten years he had never set foot outside the country.

Concerning his attitude towards the charge, the applicant said he denied committing the offence as alleged or at all. He said he was neither an accomplice/perpetrator nor acted in common purpose with any of the accused. He was not seen at the scene of crime. He was not found with any of the stolen property. In fact he alleged that he was nowhere near the crime scene on the night in question. Put in another way he alleged that nothing connected him to the scene of crime. He said he was only arrested through the confessions made by his co-accused but at law those confessions would only be admissible in evidence against their makers. He blamed the complainant and what he called the complainant's proxies for his arrest because prior to his arrest, there was acrimony between them. He alleged that he had reported the complainant to the police after he had discovered that the complainant and his colleague councillors in Mt Darwin Council had fraudulently sold a stand in the town. After the complainant got wind of the report he had enlisted anonymous callers to contact the applicant threatening him with unspecified action. The dispute became public knowledge and at one time, the police invited both of them to a meeting but he (applicant) had turned down the invitation. The complainant's brother called Anderson at one time also invited the applicant to a meeting where he alleged that the applicant was trying to cause his brother's arrest and wanted to know what was happening. As a result he said he believed that the

complainant was out to fix him and is behind the fabrication of these charges and his arrest by the police. He said he did not communicate with any of the accused before, during or after the commission of the offence. He said if the police were going to produce any messages linking him to the commission of the offence he would challenge them as dubious and of doubtful authenticity. He pleaded an alibi by saying at the material time he was playing a game called pool in the same town at a lodge called Panzvimbo. He then advised the court that if released on bail he would not endanger the safety of the public, will not commit further offences, will remain available to stand his trial and will not attempt to influence witnesses or to conceal or destroy evidence.

On the other hand prosecution opposed the applicant's application. The prosecutor said the court must not lose sight of the fact that the applicant is allegedly the mastermind of the robbery. On the day following the robbery the police had searched high and low for the applicant without success. They had gone to his place of residence and still failed to locate him. He was only arrested the following morning. What surprised the police officers was that the applicant had his passport in his pockets. To them, that coupled with his disappearance earlier on when they were looking for him indicated that the applicant was a flight risk.

The prosecutor equally urged the court to look at the allegations in their totality. That the applicant acted together with his accomplices. In that regard they had all attempted to flee. At the road block all of accused 2, 3, 4 and 5 had fled from the car together with their colleagues who succeeded in escaping. In addition, they all attempted to tamper with evidence. They fiddled with the third number plate and the registration numbers of their gate away car which do not match with the identification/chassis number of the same vehicle. He added that both accused 5 and the applicant are well known individuals in Mt Darwin and their chances of interfering with evidence or witnesses are real. Some of the witnesses, so the argument went are the applicant's clients. Further, the prosecutor argued that some of the stolen property is yet to be recovered and that if released on bail, the applicant and his accomplices were likely to commit further offences because during investigations, it was discovered that in accused 3 and 4's phones that they were actually planning other robberies elsewhere. An additional point raised related to the safety of the applicant. The prosecutor said he was an officer of the court from who a lot was expected and that the community he lived in had looked up to him. Since his arrest, that community had become agitated. It was likely that if released on bail he could be harmed in Mt Darwin. That danger, so he added,

was amplified by the fact that when they went for indications accused 2 was actually attacked by a mob which wanted to mete instant justice on him. The prosecutor rounded off by highlighting the seriousness of the offence with which the applicant is charged. It attracts severe penalties. As such the applicant being a legal practitioner is well aware of the consequences of a conviction of this nature. That, so the prosecutor concluded, is likely to incentivise him to flee the jurisdiction of the court.

The law on bail

The administration of the criminal justice is heavily dependent on the bail procedure. Without it I doubt that the prisons and other holding facilities would be able to cope with the influx of inmates held in custody pending the commencement of their trials. Thousands and thousands of accused persons apply for bail at the various levels of the courts in this jurisdiction each year. The bail system is therefore an indispensable tool to ensure that those who are unlikely to jeopardise the administration of justice are released pending trial and that those who may be a danger to society or are likely to commit further offences, to skip the court's jurisdiction, to interfere with evidence /investigations or commit some other act which will compromise the effective administration of justice are safely kept in custody pending the commencement of their trials. Motions for admission to bail are routinely filed leading to the general belief that the law on bail has become trite in Zimbabwe. Admittedly, it is. But worryingly there remain pockets of that law which continue to be elusive to litigants and legal practitioners. In broad terms, the law regarding bail 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 Criminal Procedure & Evidence 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. That clearly shows that the onus is firmly on prosecution to prove the existence of the compelling reasons. But there are instances where that onus is reversed. The law permits the reversal of that onus. I am heartened that counsel for the applicant in this case was well aware of that requirement and did not seek to parrot the oft-made statement that bail is a constitutional right which appears to have been understood to mean that every person who stands before a court accused of crime should simply repeat that statement and walk home. For completeness I wish to state

that s 115 C(2)(a)(ii) of the Code places the onus on an accused person to show on a balance of probabilities, that it is in the interests of justice that he/she be admitted to bail. It says:

- (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;

The above provision means exactly that. Until it is challenged and expunged from our statute books every accused charged with a third schedule offence will be required to show, on a balance of probabilities that it is in the interests of justice that he/she be admitted to bail. What that entails is that an applicant to bail is required to adduce evidence to prove the averments he/she makes in his/her application. In matters where the prosecution bears the burden all that an accused needs to do is state for instance that he is not likely to abscond and leave the state to illustrate why they say he will do so. An applicant who simply makes bald assertions as if he has no onus to discharge does himself/herself a big disservice.

It is from the above understanding of the law that I deal with the issues at hand. The applicant appears to start from the premises that he was not at the crime scene, that he was not found with anything that linked him to the crime scene and therefore his hands are clean. He forgets that he has the onus to show that it is in the interests of justice that he be admitted to bail. If there had not been anything to link him to the commission of the offence, the route to take was to have challenged his placement on remand in the Magistrates Court. His acquiescence to being placed on remand is itself an admission that there is reasonable suspicion that he committed the offence. In the case of *Loveridge Dzimwasha and Others v the state* HH 119/23 this court dealt with that issue in the following terms:

“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 applicant in this case similarly appears to miss the same point. He is connected to the commission of the offence. By extension he is connected to the crime scene and to the activities and depredations of his accomplices. An accused who is jointly charged with others is allowed to challenge the facts on which he is placed on remand. It is wise to do so even without challenging the placement on remand itself. A failure to do that results in the inevitable inference that the accused admitted the facts as they appear in the allegations. A challenge on the allegations/facts at remand stage is important even if it does not succeed. It will serve to show that the applicant disputed the facts right from the beginning. On one hand where that challenge has been made, an applicant to bail can proudly produce a record of his disputation of the facts. On the other, silence about it means that the accused agreed with the facts as alleged by prosecution. It becomes impermissible for that same accused as an applicant for bail to start challenging those facts in bail proceedings. The difference between bail and remand procedures is like that between day and night as highlighted above. The trend that has emerged where numerous witnesses are called to testify in bail proceedings is inappropriate in my view. It threatens to annihilate all that we know about the conduct of bail applications and turn that process into trial action. I have said previously that bail proceedings are written applications which for all intents and purposes must be dealt with on the papers. The real opportunity to deal with disputed facts therefore avails itself to an accused at remand stage.

In the instant case, to compound the applicant’s problems, he failed to deal with critical allegations even in the bail application itself. They remained uncontroverted and therefore will be taken as admitted. For instance it was alleged that the second accused is his uncle. It was further alleged that he at one time represented that second accused as a legal practitioner when he was charged with committing robbery. The applicant remained mute on both allegations despite their damning nature. It does not and cannot bode well for him. The second accused was amongst those persons who were caught *in flagrante delicto*- to borrow the applicant’s own phrase. He was apprehended in possession of an assortment of goods stolen during the robbery. The applicant’s denial of any link to the second accused becomes baseless. The police would not have prophesied that he is related to the second accused and

that at one time he was his lawyer. In addition to that relationship communication is then found in the second accused's phone regarding conversations directly linked to the commission of the robbery. He is, based on that communication, regarded as the brains behind the robbery. Section 196 A of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] deals with the liability of co-perpetrators. It tellingly provides under subsection (2) that the fact that two or more people were associated in any conduct regarded as preparatory to the conduct which resulted in the crime with which they are charged or that they engaged in criminal behaviour as a group or a team prior to the conduct which resulted in the crime with which they are charged shall be regarded as indicative of those people having acted with a common design. Admittedly, as argued by the applicant, the confession of one accused cannot be used against another. But that only applies at trial. The rules of admissibility at remand and bail stages are so relaxed that anything can be admitted including the evidence of such confessions, hearsay evidence and the submission of evidence from the bar by the prosecutor or by the applicant or his counsel. In addition a confession is a statement made by an accused outside court admitting the offence. If that accused admits committing the crime during trial, the admission does not constitute a confession. It is regarded as evidence admissible against any of the co-accused who it implicates. It is unwise therefore to simply allege the inadmissibility of the evidence of confession without knowing what the accomplice would say in court.

The allegations on which the applicant was placed on remand make him part of a larger gang. Some members of the gang escaped arrest. They are still at large. There are indications from the police that they intercepted communication in some of the applicant's co-accused's phones that they plan to commit further offences. Their brains, as already said are the applicant. The leader of a gang is intrinsically connected to his coterie. If such approach were not taken surely the courts would be leaving the public at the mercy of those that control criminal elements from the comfort of their homes. Such people would never be made accountable. If they did, they would briefly appear in court and be admitted to bail as a rule. They would remain untouchable because they never set foot at the places where the offences are actually committed. Yet those that go to the crime scenes may simply be pawns in the entire process.

Because the applicant missed the connection which the court explains above he did not focus his mind on it. To begin with his tirade against the complainant and the reasons

why he said he suspected the complainant's hand in his arrest support the police's suspicions that he instigated the robbery more than they abet his own cause. There was clear acrimony between him and the complainant. The applicant alleges that he had reported the complainant to the police but he made a volte-face and said when the police called him for a meeting at one time which he refused to attend. That behaviour is not synonymous with a person who was bent on seeing justice take its course but someone who could have been angling for vengeance. His defence therefore actually strengthens the state's case more than it weakens it. The applicant is clearly seen as an aggrieved person with every reason to plot the robbery at the complainant's house. If the applicant were to go to trial with that defence he would be required to do a lot to escape conviction. Section 117(3)(a) of the Code guides the court on what to look at when there is an allegation that an accused must not be released on bail because he/she is likely to endanger the safety of the public or any person thereof. Among other issues, the court must consider the degree of violence implicit in the charge and the resentment that an accused allegedly harbours against any person. What that entails is that the nature of a charge on its own is a major consideration when assessing an accused's ability to endanger the safety of the public. In this case, the applicant faces charges of robbery in aggravating circumstances. It is an inherently violent offence. Needless to say it is worsened by the allegations of severe assaults on the complainant and other occupants of his house. They were allegedly attacked with iron bars, knives and the complainant was burnt with a hot iron. The applicant is alleged to have commandeered a gang that had the temerity of breaching a perimeter wall to gain access into the complainant's premises and then forced their way into the house in the dead of the night. They could only have been heartless. In addition, I have already described the kind of resentment which the applicant openly disclosed harbouring towards the complainant. They have a long standing grudge which will certainly be made worse by his suspicion that the complainant played a role in his arrest. There is a similar fear that the accused may still take command of the fugitive members of the gang to commit further offences in view of the communication intercepted by the police in his accomplices' phones which betrayed their plans. If the applicant can do that it then goes without saying that he becomes a danger to the public. I equally take note of the number of cases of robbery that this court deals with on a daily basis and the correspondingly heightened need to protect the public. The conclusion is therefore that the applicant fits

squarely into those requirements which prove that he is likely to endanger the safety of the public or that of the complainant.

Section 117(3)(b) speaks to the considerations which a court assessing the likelihood of an accused to skip its jurisdiction must turn to. I have already said the applicant here is symbiotically tied to his gang and all its activities. It is from that connection that the prosecutor based his apprehension that the applicant will flee if granted bail. Subsection (3) of s 117 provides that in that assessment the court shall among other factors, consider the nature and gravity of the offence and the nature or gravity of the likely penalty therefor. IN the paragraphs above I have described the heinous nature of the crime of robbery in aggravating circumstances. Its seriousness can never be underestimated. In fact it is one of the very few offences in the Criminal Law Code which attract sentences of up to life imprisonment. The applicant is a legal practitioner who does not need any enlightenment on the severity of the penalties imposable on a conviction for armed robbery. His team fled when they were confronted by the police. Some of them have not been apprehended up to now. There are indications that the applicant himself evaded the police for a considerable period. When he was arrested he had his passport in his pockets. He did not explain in the application, why he had the passport on him particularly given that it had expired. With the allegation that he intended to flee the applicant overlooked/neglected to explain that aspect or he simply didn't have any such explanation. The factors that an accused has family ties and runs a business or has no passport do not on their own stop an accused who is bent on skipping bail from doing so. I take judicial notice that a number of people before these courts some of them more prominent than the applicant escaped the jurisdiction of the court despite the imposition of conditions, having strong family ties and being employed in high offices. See for example the case of *S v paradza* 2006 (1) ZLR 20 (H). What is important is for the court to assess if there has been an attempt to flee by the applicant and tie it together with all the other factors which the courts have approved for consideration such as the accused's financial ability to live outside the country and if he/she has any relations who reside outside our borders. In this case, based on the fears I have already highlighted I harbour a real apprehension that there is a likelihood that the applicant will abscond if admitted to bail.

It was for the above reasons that the court was convinced that the applicant had failed to prove on a balance of probabilities that it is in the interest of justice that it admits him to bail and accordingly dismissed his application.

MD Hungwe Attorneys applicant's legal practitioners
National Prosecuting Authority respondent's legal practitioners