

COSMAS KWASHATA
and
MACLEENAH NYATI KO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 13 May 2021

Bail Pending Trial

1st Applicants in Person
2nd Applicant in Person
Mrs *T. L. Katsiru* , for the State

MWAYERA J: The applicants approached the court with an application for bail pending trial. The state opposed the application.

Background

The applicants were both arraigned before the magistrates court facing 1 count of armed robbery as defined in section 126 of The Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 23 February 2021 at Mukahwi Store, Dorapindo, Zimunya, Mutare both accused approached the complainant while driving a Mazda 323 silver in colour with no number plates. The second applicant produced a pistol from the handbag ordering the complainant to remain silent. At the same time the second applicant packed grocery items they had demanded from the complainant. The grocery items were loaded into the two applicant's motor vehicle. On 17 March 2021 the police acting on a tip off recovered the get away vehicle and arrested the applicants who were identified by the applicant.

The Law.

Sections 116, 117 and 117A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] gives general guidelines on what falls for consideration when the court seeks to consider whether or not to admit an applicant to bail. It is clear that in befitting circumstances

where there are no compelling reasons the court should lean in favour of admitting an applicant to bail on the basis of the operative presumption of innocence till proven guilty by a competent court of law. S 50 and 70 of the constitution of Zimbabwe (No. 20) 2011 provide the rights of arrested and detained persons and accused. The bottom line is that only where there are compelling reasons should an applicant be denied bail. In dealing with an application for bail pending trial a court should always seek to strike a balance between the liberty of the accused person and interest of justice.

Section 50 of the constitution is instructive on what falls for consideration in applications of this nature it states

“any person who is arrested must be released unconditionally or on reasonable conditions pending charge or trial unless there are compelling reasons justifying the continued detention.”

Analysis of the Circumstances

The first applicant denies the allegation of armed robbery. He admits proceeding to the complainant's shop in the company of the second applicant but denies robbing complainant. The first applicant's brief defence is that he bought the property in question and did not rob the complainant as alleged. The second applicant also denies robbing the complainant pointing out she was just given a lift by the first applicant but did not rob or steal any property.

Both applicants argued that they are suitable candidates for bail. The respondent vehemently opposed bail citing that there are compelling reasons why both applicants should not be admitted to bail as their admission to bail would prejudice of interest of administration of justice. The state argued that the state case is strong since the applicants were both identified during an identification parade. The two applicants do not dispute having been at the scene of crime on the day of the robbery. The vehicle they were using was recovered even though the pistol is still outstanding. Further the applicants have pending similar cases and fraud involving use of ecocash transactions to purchase goods. The nature of allegations when viewed in conjunction with the strength of the state case and likely sentence in the event of conviction will act as an inducement and temptation to abscond on the part of the applicants. *S v Jongwe*. 2002 (2) ZLR and *S v Roy Bennet* HH 178/12

In striving to strike a balance between the right to liberty of the accused which is anchored on the time honoured presumption of innocence and the interest of administration of justice the facts that fall for bail consideration of necessity have to be considered

cumulatively as opposed to being viewed in isolation. In the present case the interest of justice is ensuring proper administration of justice system, including the bail system seems to tip the scales against the applicant's liberty.

The applicants are facing a very serious offence of pre-planned armed robbery for which if convicted will be visited with lengthy custodial sentences. It is trite the seriousness of the offence alone is not good enough basis to deny bail but when viewed in conjunction with the strength of the state case and likely sentence in the event of conviction then the fears of jeopardising the interest of administration of justice stand out as compelling reasons why the applicants should not be admitted to bail. The applicants in this case have other pending matters allegedly committed using the same modus operandi of demanding grocery items as if to purchase and using fake ecocash transactions and display of pistol get away with the grocery items in the recovered getaway car.

The right to liberty in circumstances where the interest of justice and bail system will be jeopardised cannot be acceded to.

In this case there are compelling reasons why the applicants should not be admitted to bail.

The applications for bail pending trial are accordingly dismissed.

National Prosecuting Authority, legal Practitioners for the State.