**PETER MARE**

**And**

**ZENZO MHAMBI**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 3 May 2023 & 18 May 2023

**Application for bail pending trial**

*T. Runganga,* for the applicants
Ms. *C Mabhena,* for the respondent

**DUBE-BANDA J:**

[1] This is a bail application pending trial. The applicants are charged with the crime of robbery as defined in s 126 (1)(a) as read with s 126 (2)(a) and s 126(3)(a)(b) of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on 11 March 2023 acting in common purpose with other two accomplices, armed with an unidentified pistol and Okapi knife used violence or threats of violence to subdue and rob the complainants of USD 3597.00, a black Itel cellphone, a Samsung J6 Plus, Gtel infinity cellphone, an Itel tablet and company keys.

[2] In support of this application the applicants filed a bail statement, and contend that the interests of justice permit their release on bail pending trial. In respect of both applicants, it is contended that the State does not have a strong *prima facie* case against them.

[3] In respect of the first applicant it is contended that he was not present at the scene of crime, and that he did not act in common purpose with the robbers who are alleged to have committed this crime. It is contended further that the Honda Fit vehicle that was allegedly used as a getaway vehicle was in the possession of one Kuziva Japhet and the applicant took possession of it at around 8pm, i.e., after the alleged commission of the offence.

[4] Regarding the second applicant it is contended that he did not participate in the commission of this offence and that he was arrested as a result of inadmissible confessions. It is said that he was implicated by his co-accused persons, and that such evidence is inadmissible against him.

[5] About both applicants it is contended that they were assaulted by the police during the investigations. That the property allegedly stollen from the complainants was not recovered from them, but was recovered in the boot of the Honda Fit and some from the residence of one Japhet Mupunga. It is contended further that there is no evidence that the cash recovered from the applicants is the cash that was robbed from the complainants. It is argued that the recovered cash was from their savings. The applicants contend further that there is nothing that links them to the commission of the offence. They argue that no identification parade was conducted, nothing was recovered from their persons, and that the weapon allegedly used (by whosoever used it) is a toy gun.

[6] This application is opposed. The thrust of the opposition is that it will not be in the interests of justice to release the applicants on bail because they are a flight risk. In support of its opposition the respondent relies on the affidavit of the investigating officer. I reproduce in part the affidavit of the investigating officer, it says:

> Brief circumstances
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> On 11 March 2023 at around 1745 hours, accused persons and their accomplices Sherpard Samson Myo, Bruce Makara and Kuziva Japhet Mupunga [who is still at large] proceeded to Fideliquip company situated at number 128B Fife street Bulawayo driving a Honda Fit registration number ACJ 2538 affixed with a fake number ACD 4509, produced an unidentified pistol, an okapi knife and ordered the complainants Sherpard Mudondo and Adolf Ndudzo to lie down. They started assaulting them with booted feet and hands demanding cash. During the process, Zenzo Muhambi stabbed complainant Adolf Nduzo once on the right buttock. The complainants were robbed of cash amounting to US$3597-00, a Samsung J6 plus cell phone valued at US$130-00, Itel cell phone valued at US$20-00, G-tel infinity cell phone valued at US$350-00, Itel tablet valued at US$70-00, a bunch of keys on a key holder inscribed FIDELIQUIP and went away. On the same day [11/03/23] information was received leading to the arrest of the accused person.
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> Evidence Linking Applicant 1 [Peter Mare] to the Offence
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> i. Upon his arrest a silver Honda Fit registration number ACJ 2548 which the accused used as a gate away car was recovered.
> ii. A search was conducted on the car and the fake number plate ACD 4509 was recovered from the car.
> iii. A small black Itel cell phone, bunch of keys on a key holder inscribed FIDELIQUIP, good hardened silver padlock, a black sling inscribed Meyers accessories, black sun hat inscribed how do you do, grey woollen hat and black woollen scarf were recovered from the car.

iv. The accused person was arrested wearing a pair of white tackies which he was wearing at the scene and they are held at the station as exhibit.
v. The accused led detectives to the recovery of a pellet gun which he used in the commission of the crime.
vi. Some of the clothes that accused 1 [Sherpard Samson Moyo] was putting on as described by the complainants were recovered from Mare's place of residence.
vii. The accused led to the recovery of US$300-00.
viii. The accused person admitted to have committed the offence and implicated. (*sic*).
ix. The detectives also recovered cash amounting to US$500-00 from Sherpard Samson Moyo.

Evidence Linking Applicant 2 [Zenzo Muhambi] to the Offence

i. Zenzo Muhambi who led to the recovery of US470-70 which was hidden in his Toyota Corolla registration number ABX 5440.
ii. He also led to the recovery of Samsung J6 cell phone at corner Antony and Holland Rd, Waterford, Harare.

Kuziva Japhet Mupunga was not in the car when I arrested Sherpard Samson Moyo and Peter Makara at the Balcony night club in Nkulumane, Bulawayo.

[7] It is trite law that bail is a right enshrined in the Constitution, and that bail proceedings must be looked at through a constitutional lens.

[8] The evidence of the investigating officer stands uncontradicted. The applicants had a fair and reasonable opportunity to adduce evidence to counter the allegations contained in the affidavit of the investigating officer but elected not to do so. The decision not to adduce evidence was made notwithstanding the fact that the applicants are facing a charge of armed robbery and that the bar for granting bail in such a case is lifted a bit higher by the legislature. See: s 115C(2)(a)(1) as read with 117(6)(a) and Part 1 Third Schedule of the Criminal Procedure and Evidence Act [Chapter 9:07].

[9] An arrested person is generally entitled to be released on bail if a court is satisfied that there are no compelling reasons to refuse bail, however the reverse applies where a person has been charged with a Part 1 Third Schedule offence. From the aforesaid provision, it is clear that a court is obliged to order an accused's detention where he stands charged with a Part 1 Third Schedule offence and a court will only be empowered to grant bail in those instances provided the accused can advance exceptional circumstances why he should be released. The standard of proof is on a balance of probabilities.

[10] In a Part 1 Third Schedule bail application, the accused has a clear and definite obligation to persuade the court that he is a proper candidate for admission to bail. The empowering provision places a burden or an onus on an accused to satisfy the court by way of evidence and on a balance of probabilities that exceptional circumstances exist which, in the interests of justice, permit his release on bail. Before a court may grant bail to a person charged with a Part 1 Third Schedule offence it must be satisfied, upon an evaluation of all the factors that are ordinarily relevant to the grant or refusal of bail, that circumstances exist that warrant an exception being made to the general rule that the accused must remain in custody.

[11] There is no definitive or exhaustive list of what constitutes 'exceptional circumstances' in the context of this provision. Each case has to be dealt with according to its merits. Exceptional circumstances do not mean that they must be circumstances above and beyond. In fact, ordinary circumstances, present to an exceptional degree, may lead to a finding that the release on bail is justified. See: *S v Rudolph* 2010 (1) SACR 262 (SCA) para 9. In *S v Petersen* 2008 (2) SACR 355 (C), para 55 the court said that generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different.' It was of the view that there are 'varying degrees of exceptionality' and that this depends on the context and the particular circumstance of the case under consideration. See: *S v Bruintjies* 2003 (2) SACR 575 (SCA). In *casu* the applicants did not adduce evidence (oral or by means of affidavit), they merely filed a bail statement referred to above. A bail statement is not evidence.

[12] The evidence of the investigating officer and the submissions by the respondent's Counsel were mainly about the seriousness of the charge and the strength of the State case. It is trite law that the primary reason for these factors is to establish an inducement to abscond and not stand trial – *S v Nichas* 1977 (1) SA 257 (C), *S v Hudson* 1980 (4) SA 145 (D); *S v Vermaas* 1996 (1) SACR 528 (T). In other words, in assessing the risk of flight the courts may properly take into account not only the strength of the case for the State and the probability of a conviction but also the seriousness of the offence charged and the concomitant likelihood of a severe sentence. The reason for this traditional approach is that the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond.

[13] The first inquiry is whether the State has a strong *prima facie* case against the applicants? It is clear that according to the investigating officer the first applicant is linked to the offence by witness statements and that he was found in possession of the following: silver Honda Fit registration number ACJ 2548 which was used as a getaway car was recovered; a search was

conducted in the car and fake number plate ACD 4509 was recovered from the car; a small black Itel cell phone; bunch of key holder inscribed FIDELIQUIP (complainant company); good hardened silver padlock; a black sling bag inscribed Meyers accessories; black sun hat inscribed how do you do (*sic*); grey woollen hat and black woollen scarf were recovered from the car; he was arrested still wearing a pair of white tackies which he was wearing at the scene of crime; he made indications which led to the recovery of a black pellet gun which was used in the commission of the crime; he led to the recovery of USD300 00; some of the clothes that one of his accomplice was wearing at the scene as described by the complainants were recovered at this applicant's residence; and he admitted having committed the offence.

[14] These recoveries undoubtedly link the first applicant to the commission of this offence. On the facts of this case the argument by Mr *Runganga* counsel for the applicants that the recoveries were not made on the first applicant but from the motor vehicle cannot be taken seriously. As regards the alleged statements and indications allegedly made by this applicant after arrest, it stands to be noted that in a bail application the strict rules of evidence do not apply. The court is permitted to consider statements and indications allegedly made by the accused, and does not require a trial within a trial to determine their admissibility. In general, it merely becomes a matter of weight and not admissibility. In this application I consider that indeed this applicant made incriminating statements and indications, and that these links him to the commission of this offence.

[15] Furthermore according to the investigating officer the second applicant is linked to the offence by witness statements and that he led the police to the recovery of cash in the sum of USD 470-00 and a Samsung J6 cell phone. These recoveries link the second applicant to the commission of this offence.

[16] The applicants are undoubtedly facing a very serious offence. I accept that in dealing with bail a court must be loath in determining the matter on the basis of the seriousness of the crime as a sole determining factor and overlooking the presumption of innocence and the liberty of the accused. However, in this case there is just too much against the applicants. There is a strong *prima facie* case against the applicants. The allegations are that this robbery was committed in aggravating circumstances. The applicants are alleged to have used a fire-arm and an okapi knife to subdue the complainants. The argument that what was used was a pellet gun is of no moment. Whether what was used is a fire arm as defined in the Firearms Act [Chapter 10:09] is for the trial court to determine. At this point in time, I take the view that the

applicants used a fire-arm to subdue their victims. Further it is alleged that the second applicant used an okapi knife to stab complainant Adolf Nduzo once on the right buttock. I take cognisance that robbery committed in aggravating circumstances carries heavy sentences, which could even be escalated to life imprisonment. Even if the robbery was not committed in aggravating circumstances, it could still attract imprisonment for a period not exceeding fifty years. These by any stretch of imagination are heavy sentences. The temptation for the applicants to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002.

[17] For the purposes of this application, and at this stage, I am not satisfied that the applicants have established a defence which has reasonable prospects of success at the trial, this is a factor pulling the pendulum against the granting of bail. I am unable to conclude that the State's case against the applicants is non-existent, or that it is subject to some serious doubt.

[18] It is a fundamental principle of the administration of justice that an accused person should stand 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. See: *S v Fourie* 1973 (1) SA 100 (D) 101g.

[19] It is common cause that two accomplices have been released on bail. It is trite that generally there is need for justice to be seen to be administered evenly. The headnote in *S v Lotriet & Anor* 2001(2) ZLR 225 (H) says:

> It is vital in the administration of justice that there does not appear to be aby form of discrimination, particularly where the liberty of a person in involved. Where a number of persons involved in the same offence apply for bail, it is not proper for one of them to be released on bail and others kept in custody unless good and sufficient reason is shown for a distinction to be made.

[20] However, in a bail application an accused may be treated differently from other accused persons due to his personal circumstances or circumstances of the alleged offence or some other justifiable basis. Ms *Mabhena* respondent's Counsel argued that the applicants' cases are distinguishable from their accomplices who were released on bail. Counsel argued further that on one hand the State does not appear to have a strong *prima facie* case against the two accomplices who were released on bail. And on the other hand, there is a strong *prima facie* case against the applicants, in that the first applicant made indications and admitted to the

commission of this offence, and the second applicant also made indications. I agree that in *casu* good and sufficient reason has been shown for a distinction to be made.

[21] Finally, I must emphasise the fact that the presumption of innocence and the liberty of the accused must not be accentuated or given more prominence than other factors when it comes to the consideration of the merits of the bail application. For the court may in fact serve the needs of justice by refusing bail if there is a cognizable indication that the accused will not stand trial if released on bail. See *S v Fourie* 1973 (1) SA 100 (D) at 101G-H. In *casu* the seriousness of the offence, the strong *prima facie* case against them, and the possible sentences militate against releasing the applicants on bail. There is nothing to qualify as special circumstances in this case, nor was there an attempt by Mr *Runganga* to address the issue of special circumstances.

[22] Furthermore, their release on bail in the face of such serious allegations of armed robbery will undermine the objective and proper functioning of the criminal justice system and the bail institution. The release of the applicants at this stage will certainly undermine the public confidence in the criminal justice system. I am not persuaded that the interests of justice permit the release of the applicants on bail. For the foregoing considerations, I am not satisfied that applicants have established the presence of exceptional circumstances that, in the interest of justice, permit their release on bail pending trial. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

In the result, I order as follows:

The bail application be and is hereby dismissed.

*Tanaka Law Chambers,* applicants' legal practitioners
*National Prosecution Authority,* respondent's legal practitioners