LIBERTY NKOMO

And

MBONGENI MASIZA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 9 JUNE 2021 & 17 JUNE 2021

Application for bail pending trial

Ms. L. Mguni, for the applicant
T. Muduma, for the respondent

DUBE-BANDA J: This is a bail application pending trial. Applicants are jointly charged with two counts of robbery as defined in section 126 (1) (a) of the Criminal law (Codification and Reform) Act [Chapter 9:23]. It being alleged that, on the 26th day of April 2021, and at around 1800 hours, the complainant Thokozile Zororo (complainant) was inside the shop Mutetso Investment in the company of Mostaff Murombo and Muchaita Marodza preparing to knock off when the applicants in the company of their two accomplices who are still at large arrived and entered into the shop holding pistols. They then threatened to shoot the complainant if she failed to surrender cash. One of the accused persons fired one gunshot on the floor whereas the other one hit the complainant several times on the head using the butt of the pistol. It is alleged that Liberty Nkomo (1st applicant) was then identified by Muchaita Marodza taking cash amounting to ZAR500 000 and US$6 000. Mbongeni Masiza (2nd applicant) and the other two outstanding accomplices stood guard near the door holding pistols. After some few minutes all the accused ran away firing gunshots in different directions to scare away members of the public.

In their written application, applicants contend that they are good candidates for admission to bail pending trial. They argue that they have a defence to the charge. They contend that they were not at the scene of crime. They deny that they were identified by the witness. They argue that their clothes were not properly identified. 1st applicant denies that he has a

pending case of rape. He further denies that he was convicted of the crime of robbery in South Africa. It is alleged that applicants will not abscond and evade their trial as they have not exhibited an inclination to do so.

The application is opposed and the State contends that both applicants are facing serious charges; that there is overwhelming evidence linking them to the offences committed and that they failed to show that it is in the interest of justice for them to be released on bail. In support of its opposition, the State placed before court an affidavit of Ndlovu Badson, the investigating officer in this matter. He avers that:

1. The accused persons should not be granted bail basing on the following reasons:-
    a) The accused persons were positively identified by one of the witnesses Muchaita Marodza.
    b) Clothing which was worn by accused one during commission of crime was identified by one witness and have since been recovered.
    c) Accused was hiding in South Africa after fleeing a pending case of rape in Gwanda Rural. (*sic*)
    d) Since the accused persons are facing a serious offence which is likely to attract a long term jail sentence if convicted, and with this knowledge in mind accused persons are likely to abscond court if released on bail.

In its written submission filed before court respondent highlighted the following issues that:

1) The *onus* is on the Applicant to show on a balance of probabilities that his release on bail will not jeopardise or prejudice the interests of justice. In the case of *S v Makamba* 2004 (1) 365 (S), it was held that an applicant can discharge this *onus* by either denying the allegations or telling the court such information as would establish his innocence or to show that even if he were to be convicted the likely penalties were not such as to present a temptation for him to abscond.
2) In trying to fulfil the above requirements applicants are simply denying the charge. One of the Applicants was positively identified at the scene of crime. Applicants have dismally failed to remove themselves from the scene of the crime.

3) The State at this point in time has established as robust or rather a strong *prima facie* case against both Applicants. Applicants are facing a very serious offence and coupled with the likely penalty upon conviction can induce them to abscond.
4) It is also important to take judicial notice of the fact that cases of this nature are now rampant. It is therefore not in the interests of justice for the applicants to be granted bail pending trial. It is respondent's view that the applicants are at flight risk taking into account the seriousness of the offence. Indeed applicants are not proper and good candidates for bail pending trial.

It is therefore common cause that the charges that the appellants face are referred to in Schedule 3 Part 1 of the Criminal Procedure and Evidence Act [Chapter 9:07], being robbery, involving the use of a firearm. Applicants bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for them to be released on bail. It then follows that the bar for granting bail in the crime robbery where there has been a use of a firearm is lifted a bit higher by the legislature. This is what the applicants have to contend with.

When one speaks of the need to discharge an *onus*, it immediately becomes clear that there is an evidentiary burden that must be met. Such burden cannot be discharged by submissions contained in a bail statement. There must be evidence placed before court. Applicant must adduce evidence. The evidence must show that it is in the interests of justice that he be admitted to bail. Such *onus* is discharged by evidence not bold statements. In such an application, an applicant may place evidence before court by way of an affidavit. In *casu,* applicants neither testified nor filed affidavits in support of their applications. Therefore, applicants have not even attempted to discharge the *onus* of showing that it is in the interests of justice that they be released on bail.

The opposition by the State is anchored on that applicants are flight risks. If admitted to bail, they will abscond and evade their trial. It has repeatedly been held that in assessing the risk of flight, courts must take into account not only the strength of the case for the prosecution and the probability of a conviction, but also the seriousness of the offence charged and the concomitant likelihood of a severe sentence. The obvious reason of this approach is that the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the applicant to abscond. In *S v Nichas* 1977 (1) SA 257 (C) 263G-H, the court said, if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. In *S*

v Hudson 1980 (4) SA 145 (D) 164H, the court held that the expectation of a substantial sentence of imprisonment would undoubtedly provide incentive to the accused to abscond and leave the country. In *S v C* 1995 SACR 639 (C) 640 H, it was said that whilst the possibility of absconding is always a very real danger, it remains the duty of the court to weigh up carefully all the facts and circumstances pertaining to the case.

This court will not factor into the equation the point made by Mr *Maduma,* counsel for the respondent that this court must take judicial notice of the fact that cases of robbery are now rampant, and therefore must deny applicants bail for that reason. Though it might be possible to refuse an accused bail for the purposes of protecting society, such can only be justified in extreme circumstances. See: *S v Petersen & another* 1992 (2) SACR 52 (C) 55e – f. I take the view that this case does not represent one of those extreme circumstances, I will therefore not factor this aspect in deciding where the in interests of justice lie in this matter.

The two applicants are jointly charged. It is significant that when persons are jointly charged and apply for bail together, a fair trial requires that their individual's cases be carefully evaluated. Treating them as a group might deny the court the opportunity to see beyond the group, and then paint all the applicants with one colour. In *casu*, in respect of the 1st applicant, there is evidence that he was arrested following police investigations in a case of robbery. There is evidence that he was identified at the scene of crime. The clothes he was wearing at the scene of crime were identified and subsequently recovered by the police. Again, there is evidence before court that he has been hiding in South Africa after fleeing a pending case of rape. This is indicative of the fact that if he is released on bail he is likely to evade justice. As regards the 2nd applicant, like the 1st applicant he was arrested following police investigations in a case of robbery. There is evidence that he was identified at the scene of crime.

In their bail statement (which is not evidence), applicants contest the allegations that they were identified at the scene of crime. They placed before court a copy of a page from the Report Received Book (RRB). It is recorded in the RRB that the robbers were unknown. Ms *Nguni,* counsel for the applicants argued that this shows that the robbers were not identified at the scene of crime. I am not swayed by this argument, it is rather superficial. A closer look at the RRB shows that the police report was made by one Mostaff Murombo, this is the person who indicated to the police that he did not identify the robbers. However, there is an affidavit

before court by one Muchaita Marodza, who avers he identified the two applicants at the scene of crime. This witness describes the role played by each of the applicants at the scene of crime. In such cases, a court may rely on the evidence of the investigating officer. See: *S v Hlongwane* 1989 (4) SA 79 (T) 113 H – 114A.

On the evidence placed before court by the respondent, I find that the State has a strong *prima facie* case against the applicants. Applicants are facing a serious charge of robbery. If convicted, they are most likely going to be sentenced to a lengthy custodial term, thus they will be tempted to abscond and not stand trial. The temptation for the applicants to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

Where there is a cognisable indication that an accused would evade his trial if released from custody, the bail court would be serving the interests of justice by refusing bail. The liberty of an accused person would, in such circumstances have to give-way to the proper administration of justice. See: *S v Dial and Another* 2013 (2) SACR 665 (GNP). On the facts of this case, admitting applicants to bail will undermine the objectives of bail and the criminal justice system, it will lead to the public losing confidence in the bail system.

Therefore, upon careful consideration of all the circumstances based on the facts and evidence before me, weighing up the interests of justice against the right of the applicants to their personal freedom and any potential prejudice because of their detention pending trail, I am satisfied that the interests of justice do not permit their release from custody. There is a likelihood that they will abscond and evade trial.

Disposition

On a conspectus of the facts and all the evidence placed before court, I am of the view that it is not in the interests of justice to release the applicants on bail pending trial.

In the result, I order as follows: the application for bail is dismissed.

Malinga and Mpofu Legal Practitioners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners