1. FANUEL MUSAKWA B 366/21
versus
THE STATE

2. KELVIN MUSAKWA B 327/21
versus
THE STATE

HIGH OF ZIMBABWE
CHITAPI J
HARARE, 13 April 2021

Bail pending trial

R. Muchirewesi, for the applicants
A.Masanha, for the respondent

CHITAPI J: The two applications were consolidated for purposes of hearing by consent to accommodate the investigating officer who is common to both cases so that he testified once in relation to both applications. The applicants stand charged with the offence of robbery committed in aggravating circumstances (colloquially called "Armed robbery") as defined in s 126 (1) (a) (b). The charges against the applicants arise out of their alleged involved in a robbery involving the waylaying of a cash in transit carrying vehicle laden with USD$2 775 000.00 belonging to ZB Bank and destined for delivery to the bank's branches in Chinhoyi, Kadoma, Kwekwe, Gweru, Bulawayo, Gwanda and Zvishavane. The well reported robbery now commonly referred to in the press as the "Chinhoyi, Road, ZB Bank cash heist" occurred on 6 January, 2012 around 11.30 am.

The first applicant Fanuel Musakwa appeared before the magistrate for initial remand on 13 January, 2021. The first applicant did not challenge the allegations made against him before the remand magistrate. The failure to challenge the grounds for remand implies that applicant admitted that the allegations against him grounded a reasonable suspicion that the first applicant committed the offence charged. The first applicant cannot challenge the grounds for remand in the bail application because the ruling to place him on remand is final in nature and such subject to appeal or review as the case may be. The applicant can also challenge his continued remands before the

same court that placed him on remand. This application must be determined against the factual allegations as accepted by the magistrate and a summarized hereafter.

The first applicant is an employee of the complainant ZB Bank. He was the one who together with another employee Shadreck Njowa were the banks representatives and part of the cash in transit crew which involved security guards and travelled in the vehicle carrying cash. The cash in transit vehicle was waylaid at the 60km peg on the Harare-Chinhoyi road by alleged accomplices of the first applicant who were driving three vehicles, Toyota passo, a Toyota hilux twin cab and a Toyota lexus. The gang fired gun shots into the air and subdued the cash in transit crew from whom they forcibly took two fire-arms, a pistol and a rifle. The cash in transit vehicle was then driven to a secluded place about 900metres off the main road. The cash in transit vehicle was ransacked and all the seven boxes with cash which were in the vehicle were taken away. The cash in transit crew and the first applicant were left at the scene.

The allegations were that the first applicant was an active accomplice if not the master mind of the robbery. The undisputed and unchallenged allegations against him were that the applicant and his accomplice who is still at large. Shadreck Njowa, hatched a plan to rob the employer of in transit cash as happened.

It was alleged that the first applicant organized a meeting involving his accomplices in Kuwadzana on the night prior to the robbery committed on the following day. The modalities of how the robbery would be carried out was then agreed. It was alleged that there was evidence of phone communications between the first applicant and accomplices whereby the first applicant would give updates on the movement of the cash in transit vehicle. The first applicant also arranged to have accomplices disguised as genuine hitch hikers picked up along the way but turned out to be part of the robbers. It was again alleged without challenge that the first applicant supplied money to fuel the vehicle which the first applicant's accomplices used to trail the cash in transit vehicle and to make good their escape after the robbery. It was alleged that a sum of US$48 000 which was the applicant's share of the robbery proceeds was recovered at the first applicant's rural home buried under the floor of a fowl run.

The second applicant Kelvin Musakwa is a brother to the first applicant. He was arrested on 9 January, 2021 and appeared for remand before the magistrate at Harare together with his alleged accomplices, namely Gerald Rutizirira, Tendai Zuze, Neverson Mwamuka and Trymore Chapfika. The second applicant as with the first applicant did not challenge the allegation on which

his remand was granted. The only link of the second applicant to the commission of the offence was stated in the request for remand form 242 as:

> "Accused (2) led to the recovery of cash US48 000 which he obtained as his brother co-accused Fanuael Musakwa's proceed of the crime."

The investigating officer detective assistant inspector Pikisai Chipwazo did not allege any further facts to link the second applicant to the commission of the offence. In all the circumstances, the second applicant was not shown to have been part of the robbery and his alleged liability would at best have to be based upon the dictum of an accessory after the fact. The basis of the second applicant liability will at his trial be a matter for legal argument after the facts of how the second applicant was involved in the matter have been established.

It is convenient to consider the second applicant's bail application first. There is no indication that the second applicant participated in the actual robbery. It was alleged in the respondent's response that the second applicant was implicated by accomplices. They were not named. The second applicant is however alleged to have voluntarily disclosed the existence of money which he had hidden at his and first applicant's rural home. The money US$48 000 was recovered on the second applicant's indications. The investigating officer testified that the second applicant led police to his rural home in Biriri village in Nyanga to recover the money. The investigating officer testified that the second applicant followed the cash in transit vehicle so that he would be given the first applicant's share of the proceeds. There was no tangible fact alleged to support the assertion by the investigating officer. The investigating officer did not testify to any objective reason as to why bail should be refused in the case of the second applicant.

The second applicant is married and is of fixed abode. He was arrested at his residence. The house belongs to his father. He offered to continue staying at his present residence at 5254 Kuwadzana7, Harare 3 where there is security of tenure in that the house belongs to the applicant's father. He buys and sells cell phones apart from performing menial jobs. He supports his family of three minor children and his wife as the sole bread winner. The second applicant has no previous brushes with the law and does not hold a passport or other travelling documents. He also averred that his co-accused, Gadzikwa B235/21 was granted bail. The second applicant seeks to be treated the same with the co-accused and be granted bail. Mr *Masamha* correctly pointed out that the doctrine of parity of treatment of co-accused depends on the parity of the circumstances of the co-accused. The second applicant was required to but did not juxtapose his circumstances with those

of the bailed co-accused to enable the court to draw the similarities between the circumstances of the two and to determine whether to treat the second applicant the same as the alleged co-accused.

The investigating officer averred in his affidavit that the applicant was likely to abscond and avoid trial because he was facing a serious offence which attracted a lengthy custodial sentence. He stated that "That alone is an incentive to abscond justice if granted bail." He also stated that the cash recovered did not tally with the stolen money. It is trite that the seriousness of the offence as a stand-alone factor does not debar the grant of bail. There should be other factors which support the likelihood of a sure conviction. I have already expressed my view on the relative strength of the State evidence. The second applicant explained that he was given the bag with money by Shadreck Njowa, the first co-accused who remains at large. The second applicant was told that he should keep the money for the second applicant who was in a little trouble and would need the money. The second applicant averred that he accepted the money for safe-keeping but that when he then tried to contact the first applicant, the first applicant's phone was not reachable. Obviously the decision to take the money to the village raises suspicions of knowledge that the money was tainted with illegality. I have balanced that consideration against the readiness of the second applicant to own up and lead police to recovery of the money as matters whose impact will be determined at trial.

Mr *Masamha* also submitted that the release of the second applicant on bail would undermine the public confidence in the justice delivery system. Counsel did not develop the point further. The public expects the courts to observe and implement the rule of law and this includes determining bail applications as guided by the law. The constitution provides for the right to bail unless there are compelling reasons to deny the accused bail. The presumption of innocence must be given effect to. There will be cases where the factual allegations and evidence available is so overwhelming that the presumption of innocence becomes difficult to uphold. It is in a such case that the public would question the ends of the bail system were the court to grant bail in such a scenario. The situation of the second applicant does not fit into that type of scenario. In my view there have not been shown or established that it would not be in the interests of justice to grant the second applicant bail. Whilst it is true in this case, that the second applicant bears the onus to establish that it is in the interests of justice to grant him bail, he will discharge the burden by showing that the grounds of application advanced by the State are not tenable or compelling

enough to justify the denial of bail. In *casu*, the second applicant made a good case for release on bail.

The case for the first applicant if different. In para 2.7 of his bail statement, the applicant averred that he did not commit the offence charged nor did he mastermind the heist. He denied all allegations made on the form 242 of how he is connected to the office. The denials are bare. In para 3.8 of the bail statement, the first applicant averred that the State case is weak and there is no evidence to link him to the commission of the offence. In short this is a ground of challenge to the remand of the first applicant. These are matters which should be argued before the remand court. It is improper for the first applicant to sneak in a bail application an appeal or review of the decision of the magistrate and the grounds on which the first applicant's remand were established. For the purposes of this bail, application, I will be guided by the decision of the magistrate to place the applicant on remand. I cannot hold that the magistrate was misdirected to do so in a bail application.

The police in the form 242 opposed bail on the grounds that the first applicant was likely to abscond, considering the seriousness of the offence and the likely sentence provided for upon conviction. The sentence provided for robbery committed in aggravating circumstances is life imprisonment at the extreme end and a definite term of imprisonment at the lower end. There is no provision for the imposition of a non-custodial sentence. Imprisonment cannot be avoided. Therefore where the State case is *prima facie* strong, it is proper as in this case to infer that there is a likelihood of the first applicant absconding to avoid the assured imprisonment term on conviction which on the unchallenged allegations on which the first applicant was placed on remand, way likely.

The first applicant as observed by the State Counsel Mr *Chesa,* deliberately refrained from commenting on the recovery of US$48 000 which was alleged to be part of his share of the robbery proceeds. The applicant bears the onus to show that it is in the interests of justice to admit him to bail. The factors listed in s 117(3)(b) of the Criminal Procedure Evidence Act are considered by the court in determining the likelihood of abscondment. The first applicant made a bare assertion that he is of fixed abode at the address given in the form 242. He did not demonstrate the nature of the ties which he has got to the abode. It is not clear whether the residence is owned leased or other basis of tenure. Being a parents' house is not sufficient to demonstrate the nature of the ties which he has to the house. The applicant did not allege the existence of any assets and location of

the same. All said and considered, I am not persuaded that the first applicant if a proper candidate for admission to bail considering the nature and gravity of the offence, combined with the likely penalty therefor coupled with the strength of the case as evidenced by a consideration of the undisputed facts on which the applicant was placed on remand, such facts being still extant. There are indeed compelling reasons to deny the first applicant bail.

The first applicant attached copies of bail orders in respect of the first applicants accomplices namely Tatenda Gadukwa B 240/21. Tozivepi chirara B 244/21 and Terrence Matimba B244/21. There was no allegation made that the circumstances of the co-accused is similar to that of the first applicant. To begin with the first applicant was an employee of the complainant bank which the others were not. The applicant was the alleged mastermind planner and co-odinator of the robbery which the others were not alleged to be. Quite apart from the non-binding nature of the decisions given in the other bail decisions referred to, the first applicant did not make any effort to persuade me that the circumstances of the first applicant and the co-accused's are similar. Every case is after all dealt with on its facts. The following order will therefore be made:

1. The application by Fanuel Musakwa for bail B366/21 is dismissed.
2. The application by Kelvin Musakwa for bail pending trial B327/21 succeeds and bail is granted on the following conditions-
    a. The applicant shall deposit $50 000,00 with the Clerk of Court, Harare Magistrates Court.
    b. The applicant shall reside at 5254 Kuwadzana 7 Harare pending the finalization of the matter
    c. The applicant shall report every Mondays, Wednesdays and Fridays at Kuwadzana Police Station between 6.00 am and 6.00 pm
    d. The applicant shall not interfere with witnesses and evidence.
    e. Copies of this judgment must be filed in both case umbers B327/21 and B366/21

Muchiwereri & Zvenyika Legal Practitioners, 1st applicant's legal practitioners
Mtukwa Attorney Legal Practitioners, 2nd applicant's legal practitioners
National Prosecuting Authority, Respondent's legal practitioners