LIFE HAHLANI
and
MQONDISI AKIM SIBANDA
and
ARDONIA MASHONGA
and
LOSWITA JOYCE NDAROVA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE 18 March 2021 and 23 April 2021.

Bail Pending Trial

Ms Mujakachi, for the Applicants
J Mugabe, for the respondent

CHITAPI J: The four applicants together with one Vusumuzi Reynold Dube who was granted bail by CHINAMORA J in case No. B 186/21 on 15 February, 2021 appeared before the magistrate at Bindura on 12 January, 2021 on allegations of having committed the offence of robbery in aggravating circumstances as defined in s 126 of the Criminal law (Codification and Reform) Act, [*Chapter 9:23]*. It was alleged that on 20 December, 2020 the five accused connived to rob the complainant Daniel Chigwada of cash at his residence at Chigonda village, Chiweshe. The fourth applicant herein was the alleged mastermind who advised the other four accused, that the complainant was his uncle and had lots of cash in his house. The fourth applicant resides in Harare whilst the other four accomplices reside in Bulawayo. The four Bulawayo based accomplices, namely first, second and third applicants herein and Vusumuzi Reynolds Dube drove from Bulawayo and teamed up with the fourth applicant. The quintet then drove to the complainant's homestead in a Honda fit driven by the first applicant. The fourth applicant showed the rest of the gang members the complainant's homestead before she returned to Harare.

It was alleged that late at night around 23:00 hours the remaining quartet without the fourth applicant who had returned to Harare, armed themselves with weapons which included a pistol, machetes, iron bars and wheel spanners. They cut open a hole in the security fence surrounding

the complainant's residence and gained entry into the yard. They confronted the complainant who was in the dining room. They manhandled him whilst threatening him with a pistol to induce his submission to their demands. They force marched the complainant to his bedroom where they found the complainant. The quintet then tied both the complainant and his wife's hands and legs together before assaulting both of them with machetes, iron bars and a wheel spanner whilst demanding money from the complainant.

It was further alleged that the quintet dragged the complainant's daughter to where the complainant and his wife were. They threatened to rape the daughter in front of his parents, unless the complainant produced cash. The complainant fearful of harm to himself, wife and daughter then surrendered to the quintet US$9 410 which was in the safe including money wallets. The quintet demanded car keys to the complainant's Honda fit vehicle which they drove away in and dumped a few kilometres from the complainant's house. The quintet further stole the complainant's laptop, groceries, four cellphones and two bags.

In regard to details of the evidence which linked the applicants to the commission of the offence, it was alleged that they led police to the recovery of stolen property. The applicants allegedly led to the recovery of their Honda fit gate away vehicle which police recovered. The applicants were said to have started using the stolen cellphones soon after the robbery. It was further alleged that the applicants were geographically within the same location and in constant communication, before during and after the commission of the offence. It was also alleged that there was evidence of the quintet's Honda Fit vehicle having passed the Esbank tollgate located outside Harare enroute to the scene of the robbery on the day of the robbery.

It is important to observe that the allegations aforesaid were not challenged by the applicants and must be taken as having been accepted in content by the applicants. The allegations reveal a serious and grave case of robbery committed in aggravating circumstances in a savage manner. The seriousness and gravity of the offence does not escape the attention of the court. Equally the court takes note of the likely sentence upon conviction which is a sentence of imprisonment for life at the extreme end or a definite term of imprisonment. Imprisonment is therefore guaranteed on conviction.

As regards the relative strength of the state case, it has already been recorded that the allegations against the applicant were not challenged by the applicants. The alleged linking facts are *prima facie* strong. The investigating officer gave evidence. In regard to how the applicants

were arrested he testified that police tracked the applicants to Bulawayo by monitoring the cellphones which they were using. The cellphones had been stolen from the complainant during the robbery. In regard to the first applicant life Hahlani, police blocked him in Bulawayo as he attempted to run away. In regard to the third applicant, Ardonia Mashonga police raided his residence twice without finding him. They managed to arrest him in hospital. In regard to the second applicant, Mqondisi Akim Sibanda, police raided his home and did not find him. They arrested him at his workplace at Techeerz furnitures. The investigating officer testified that of the stolen cellphones, Vusumuzi Reynolds Dube's girlfriend was in possession of one, the second applicant had one of the cellphones, the third applicant had another one and the fourth phone was in the possession of the second applicant's elder brother. The investigating officer further testified that each of the applicants made indications of their participation in the robbery. He also testified that the first applicant led police to the recovery of the Honda fit which the gang was using. The investigating officer also testified that the first, second and third applicants were on warrants of apprehension for robbery cases committed in Mazowe, Gweru, Kwekwe and Lupane. The police still have to clear the cases for which the applicants are wanted persons. As regards checks made on the residences of the applicants to authenticate them, the investigating officer testified that all of them were lodgers at those residences. I should record that the applicants did not show the nature of the ties they have to the places of abode and the court could not determine the certainty of the tenure of the applicant's stay at the premises they lodged at.

In cross examination by the applicants' counsel, the investigating officer stood well to cross examination and was not shaken and neither did he change his testimony . In regard to the co-accused Vusumuzi Reynolds Dube having been granted bail, the investigating officer testified that it was a decision of the judge based on submissions made before him. He reiterated that there was overwhelming evidence against the applicants because they were arrested whilst in possession of property, subject of the robbery. He testified that the applicants were a flight risk.

Applicants' counsel had difficulties in advancing the applicants'case for admission to bail. It was easy to symphathise with counsel because the unchallenged allegations and evidence of the investigating officer against the applicants was so compelling that the presumption of innocence was difficult to presume. Where the allegations, unanswered, leave no doubt on the probability of the applicants being the ones who committed the *actus reus* the effect of the presumption is watered down. Counsel in closing submission advanced only one point, that there should be equality of

treatment of co-accused persons. Generally speaking the court will treat like accused alike. Equality of treatment as the statement suggests means exactly that. There should be established the factors of similarity between the co-accused in the circumstances on the commission of the offence and the personal circumstances of the co-accused . For example one co-accused may have previous convictions and the other one does not have, There is no parity of circumstances in such a case and the principle of equality of treatment of co-accused will not apply to his application.

In *casu*, the applicants in terms of the provisions of s 115C(2)(a)(ii)A of the Criminal Procedure and Evidence Act, bear the burden to show that it is in the interests of justice to admit them to bail pending trial because they face a PART 1 Third Schedule Offence. The respondent fears that the applicants are likely to abscond. This fear is reasonable and the applicants have hardly discharged the burden to show that the fear is unfounded. The allegations against the applicants are very serious and the *prima facie* evidence strong. The likely sentence upon conviction is a long imprisonment term without the option of any alternative form of punishment. The principle that the more serious the offence coupled with *prima facie* evidence which makes a conviction likely, coupled with a heavy sentence to be imposed, the greater the likelihood of abscondment. This applies to the circumstances of this case. In this case the applicants have not discharged the onus to demonstrate that they are good candidates for bail. They were not guided to refer to provisions of s 117(3) of the Criminal Procedure and Evidence Act as may be applicable in addressing factors to be taken into account when a ground of appeal in s 117 (2) is alleged by the state.

There is no merit in this application. The application for bail pending appeal in regard to each of the four applicants is dismissed.

B Chipadza Law Chambers, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners