ALFRED ZVAPERA
and
FAITH NGWENYENYI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 13 MARCH 2017 AND 23 MARCH 2017

Bail Pending trial

A J Dhliwayo for the applicants
S Ndlovu for the state

MOYO J: This is an application for bail pending trial.

The two applicants are charged with two counts, the first being of robbery as defined in section 126 of the Criminal Law Codification and Reform Act [Chapter 9:23] (The Code) and the second being that of attempted murder as defined in section 47 as read with section 189 of the code.

The allegations they face are that on 21 February 2017, the two applicants together with three other unknown persons connived to rob West Garage in Lupane. They armed themselves with two pistols and used first applicant's motor vehicle. The first applicant's motor vehicle is a Toyota noah, registration number AED 5411. They got to the alleged garage and ordered a full tank. The fuel attendant complied and supplied them with 40 litres of fuel valued at $54-00. When he asked for payment, they produced pistols and fired two shots ordering everyone to lie down. The accused persons further fired two more shots at a honda fit motor vehicle registration number ADX 7407. The bullet missed the occupant of the Honda fit motor vehicle and hit the right side of the bonnet below the windscreen. The accused persons searched the fuel attendant and took from him cash amounting to $107-00.

The state did not oppose bail in relation to the second applicant and consequently second applicant was granted bail by consent.

It is the first applicant that the state views as a flight risk. The state has opposed bail in relation to the first applicant the reason being that he is likely to abscond given the nature of the seriousness of the charges that he is facing.

In an application of this nature there are guidelines that the court should follow in determining whether or not it would be in the interests of justice that the applicant be released on bail, that is whether there are no compelling reasons that the applicants be detained pending trial.

Critical to the court's determination, is the question whether applicant once granted bail will not abscond. In the case of *Jongwe* v *S* SC 62/02 the then Chief Justice, CHIDYAUSIKU CJ , stated that in assessing the risk of an applicant to abscond, the court should consider the following;

1) the character of the charges and the penalties which in all probability would be imposed if convicted,
2) the strength of the state case
3) the accused's ability to flee to a foreign country and the absence of extradition facilities.
4) the past response to being granted bail.
5) the assurance given that the accused intends to stand trial.

In the case of *S* v *Ndlovu* 2001 (2) ZLR 261 (H) the court held that in deciding whether there is a risk of the accused person absconding, it should consider such factors, as the seriousness of offence, the likely sentence and the incentive to abscond, and the strength of the prosecution case. It was also held in that case that it may be desirable for the accused person to disclose his or her defence and not merely make bold assertions that he or she is not guilty of the offence.

At this juncture I will hasten to point out that the state does have a strong *prima facie* case against the first applicant whose motor vehicle was allegedly used in the commission of the alleged offences. Of course he makes an assertion that he had been kidnapped by unknown assailants prior to his attackers committing the alleged offences.

In such cases the court has to balance the interests of the applicant in so far as his liberty is concerned with those of justice. In so doing the court should consider whether once admitted to bail the applicant will avail himself for trial. The risk to abscond is central to the determination and to be juxtaposed with it, are the strengths and weaknesses in the state case.

Refer to *Jongwe* v *S (supra).* Armed robbery and attempted murder are serious charges that usually attract a lengthy term of imprisonment. First applicant's defence leaves a lot of questions in one's mind such that it cannot be held that first applicant in this defence weakens the strong *prima facie* case against him. It is clearly not in dispute that first applicant was in the motor vehicle during the robbery. He also does not dispute that. One Ntuthuko also confirms first applicant's presence in the motor vehicle. I hold the view that the serious charges that the applicant faces stand out and it cannot be held that his allegations that he was kidnapped render the state case weak. The inducement to abscond exists and cannot be underplayed in this case. I do not hold the view that the applicant has sufficiently shown the court that the risk to abscond is non existent in the circumstances. Applicant's co-accused are also still at large as indicated in the request for remand forms.

It is for these reasons that I will not grant the first applicant bail pending trial. I have however granted the second applicant bail pending trial any whist jointly charged accused person should normally be treated in the same manner with regard to bail matters, they can be treated differently in certain aspects in the administration of justice where such differentiation is justified. Refer to the case of *S* v *Ruturi* HH 26/03.

I accordingly make the following order:

1) First applicant's application for bail pending trial is dismissed.

Pundu and Company, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners