PROSPER RWODZI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 24 & 30 SEPTEMBER 2021

Application for bail pending trial

M. Mahaso, for the applicant
B. Gundani, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is charged with the counts, count one: robbery as defined in section 126 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23]*. It being alleged that on the 7th March 2021, at around 2020 hours, applicant in the company of four others who are still at large, proceeded to the complainant's residence armed with pistols. Thereat disarmed a security guard and assaulted him. Threatened with pistols the people at the residence, assaulted one with a pistol butt on the back of the head. Assaulted some with a baton stick. Force marched some people, made then lie down on their stomachs. Ransacked the house took cash amounting to ZW$4570.00 and US$5.00. Took car keys, wallet containing US$230 and a Sumsung J4 cell phone. Took a motor vehicle, drove it for about seven metres and abandoned it, ran away leaving the car keys, ZW$4570.00 and US$5.00 on the passenger seat of the vehicle.

In count two applicant is charged with the crime of attempted murder as defined in section 189 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23]*. It being alleged that on the 7th March 2021, at around 2020 hours, members of the police attended the robbery scene and found the crime in progress. The applicant and others fired shots towards the police and a shoot-out ensured with the police. During the shoot-out one member of the police was shot on the right leg, left leg and on the stomach, the second was shot on the right ankle. A member of the police shot on the stomach sustained serious injuries.

The applicant chose to bring his application for bail by means of a bail statement. He advanced his case in the bail statement on the following lines. He is a male adult aged 33. He was born in Gweru where he continues to live. He has no desire to leave Gweru. He lives at a family residence. He is married and has two children both of whom are minors. He does not hold a passport. He has no connections abroad. He is currently at Whawha remand Prison.

Applicant contends that on the 7th March 2021, he never left his house until he retired to bed at around 2100 hours. On the 8th March 2021, applicant visited a sick relative who was admitted and recuperating at Clay Bank Clinic in Gweru. He was arrested at the clinic on accusations of robbery that occurred on the 7th March 2021. He denies that he was identified by witnesses. He contends that if he was indeed identified, it must have been a mistaken identification. He submits that if released on bail, he will not interfere with state witnesses. He does not even know who those witnesses are. He will not commit any crimes. He has no previous conviction.

In his oral submissions, Mr *Mahaso,* counsel for the applicant argued that the State case is weak against the applicant. There is nothing that links the applicant to the commission of these offences. There was no identification parade. He was not at all identified as one of the robbers. If he was identified by some other means, that must have been a mistaken identification. The State has not rebutted his defence. There is nothing to induce the applicant to abscond, in fact it is his wish to stand trial and clear his name. It was contended that it is in the interests of justice that he be admitted to bail pending trial.

In its opposition to the granting of bail the State contends that applicant is a flight risk. It is argued that applicant is clearly linked to the crimes of robbery and attempted murder. It is contended that he was identified at the scene of crime and he was arrested at Clay Bank Clinic where he has visiting his co-accused person who had sustained a gunshot wound during the shoot-out with the police. It is argued that he is linked to the offences thus there is a strong *prima facie* case against him. The strength of the State case coupled with the seriousness of the offence which calls for a lengthy prison term if convicted is an incentive to abscond. It is argued that it is not in the interests of justice to release applicant on bail pending trial.

The applicant is facing a crime referred to in Schedule 3 Part 1 of the Criminal Procedure and Evidence Act [Chapter 9:07] (Act), being robbery, involving the use of a firearm. In terms of section 115C (2) (a)(ii) (A) of the Act applicant bears the burden of showing, on a balance of probabilities, that it is in the interests of justice that he be released on bail. It then follows that the bar for granting bail in the crime of robbery where there has been a use of a firearm is lifted a bit higher by the legislature. This is what the applicant has to contend with.

It is contended for the State that there is a strong *prima facie* case against the applicant. In the event of a conviction, and the possible penalty, this may motivate him to abscond and

not stand his trial. The *prima facie* strength of the state's case against an accused is a factor a court may consider, in determining whether there is a likelihood that that the accused, if released on bail, he or she will attempt to evade his or her trial. Our courts have over the years accepted that where there is a strong *prima facie* case against an accused, this is a factor which the court has to take into consideration in deciding whether it is in the interests of justice for an accused to be released on bail. However, this does not mean that the strength of the State's case is the all decisive factor. It simply means that it is a factor that has to be considered together with others. What the court is called upon to do is an examination of all the relevant factors, not individually, but as a whole, in determining whether an accused has established that the interests of justice permits his or her release on bail. In the evaluation of the relative strength of the State's case in a bail application, a court must caution itself against making a provisional finding of guilt and turning the hearing into a dress rehearsal for the trial. See: *S v Viljoen* 2002 (2) SACR 550 (SCA) *para* 25.

The evidence linking applicant to this crime is that he was identified at the scene of crime. He was arrested at Clay Bank Clinic, Gweru where he was visiting his co-accused person who had sustained a gunshot wound during the shoot-out with the police. For the purposes of this application, I take it that applicant was indeed identified at the scene of crime.

On the facts placed before court by the respondent, I find that the State has a strong *prima facie* case against the applicant. Applicant is facing a serious crime of robbery, where pistols were allegedly used to subdue the complaints. It is trite that the seriousness of the offence charged standing alone, cannot be a ground to refuse to release an applicant to bail pending trial. This is so, because, no matter the seriousness of the offence, the presumption of innocence still operates in favour of the accused. There must be something more than the mere seriousness of the offence, for the court to refuse to admit an accused to bail. In *S v Acheson* 1991 (2) SA 805 Nm, the court said the key consideration is whether or not the accused will return to court if released and ultimately whether he will stand trial. On the facts of this case, if convicted, applicant is most likely to be sentenced to a lengthy custodial term, thus he will be tempted to abscond and not stand trial. The temptation for the applicant to abscond if granted bail is real. See: *S* v *Jongwe* SC 62/2002.

Where there is a cognisable indication that an accused person 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. Furthermore, the applicant is not only a flight risk but his release on bail given the serious allegations against him of use a pistol in the commission of the offence of robbery will undermine the objective and proper functioning of the criminal justice system and the bail institution. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

In determining whether applicant should be released on bail pending trial, I have considered all factors that weigh in his favour as against those that weigh in favour of the State. I have also considered that applicant has not adduced evidence before court, i.e. oral evidence or by affidavit to show that it is in the interests of justice that he be released on bail pending trial.[1] He has not discharged the *onus* on him of showing that it is in the interests of justice that he be released on bail pending trial. There is a likelihood that the applicant 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 applicant has not discharged the burden of showing that it is in the interests of justice that he be released on bail pending trial.

In the circumstances, the bail application is hereby dismissed.

Hlabano Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

[1] Section 117(6) of the Criminal Procedure and Evidence Act [Chapter 9:07] says:
Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in—
(a) Part I of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice permit his or her release.
(b) Part II of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that the interests of justice permit his or her release.