JONASI MUSEKIWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 1 APRIL 2021

Bail Pending Trial

S Drau, for the applicant
E Chavarika with B Maphosa, for the respondent

KABASA J: This is an application for bail pending trial. I handed down an *ex tempore* judgment after the matter was argued. I have decided to provide written reasons although such have not been requested for.

The applicant who is aged 40 is facing one count of armed robbery as defined in section 126 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 and a second count of attempted murder as defined in section 47 as read with section 189 of the same Act.

The allegations are that on 7th March 2021 around 2100 hours the applicant in the company of four others who are still at large proceeded to the complainant's house in Zambezi Park Gweru. On arrival they manhandled the security guard who was on duty at the premises, disarmed him of his service baton stick before confronting the complainant who was at the car park with two other individuals. They threatened them with pistols and assaulted the complainant before taking property from the two individuals who were in the complainant's company. The 3 were then force-marched into the complainant's house where 2 other individuals were. All were forced to lie down and assaulted with a baton stick. The applicant and his accomplices proceeded to ransack the house and took US$5 and ZW$4 570.

One Kudakwashe Murisa arrived at the house whilst the robbery was in progress and alerted the police who reacted swiftly and arrived at the scene when the applicant and his accomplices were still there. The alleged robbers abandoned their attempt to flee in one of the motor vehicles which they had found at the premises' car park. An exchange of gunfire ensued which resulted in two of the police officers and a third individual who was at the

complainant's house sustaining gunshot injuries. The applicant and his accomplices also sustained injuries but managed to make good their escape. The applicant was later arrested after he came out of hiding to seek treatment for the gunshot wounds sustained on the night of the robbery.

The applicant sought to be admitted to bail pending trial. The state opposed the application. The opposition was premised on 3 reasons, *viz*

1) The applicant is a flight risk.

2) The applicant is likely to interfere or intimidate witnesses.

3) The applicant's release on bail will undermine the proper functioning of the criminal justice system, including the bail system.

The offences the applicant is facing are Third Schedule offences, found in Part 1 and Part 11 thereof which places the onus on the applicant to show, on a balance of probabilities, that it will be in the interests of justice to release him on bail.

To that end the applicant submitted that he is of fixed abode, a family man with responsibilities and had no desire or the means to leave the country.

He is desirous to clear his name as he was a victim of dramatic coincidence. He was abducted by strangers and subjected to a thorough beating before being bundled into a motor vehicle from where he jumped out thereby sustaining injuries which unfortunately happened on the same night of the robbery. His injuries have nothing to do with the robbery, the state case is weak and he has no knowledge of the alleged witnesses as he never saw them. He therefore cannot possibly interfere with people he does not know.

Has the applicant successfully discharged the onus placed on him?

In answering this question it is important to consider what the law says in cases of applications for bail pending trial.

In *State* v *Ncube* 2001 (2) ZLR 556 (S) the Supreme Court stated that a court considering an application for bail pending trial must be aware of the presumption of

innocence which operates in favour of the applicant. Bail should therefore be granted where possible.

In *State* v *Biti* 2002 (1) ZLR 115 (H) the court held that where possible the court should lean in favour of the liberty of the applicant whenever the interests of justice will not be prejudiced.

The presumption of innocence enjoins the court to carefully strike a balance between the interests of an individual's liberty, an individual who is innocent until proven guilty and the interests of the proper administration of justice. It is a balance that is not always easy to achieve but one that should be struck with a view to guard against the denial of bail as a punitive measure.

Bail is therefore an entitlement unless there are compelling reasons militating against the admission of an applicant on bail.

Section 117 of the Criminal Procedure and Evidence Act, Chapter 9:07 sets out what such compelling reasons are. I will confine myself to only those which are applicable *in casu*.

In terms of section 117 (2):-

> "The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established –
>
> (i) …….
> (ii) not stand his or her trial or appear to receive sentence; or
> (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
> (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system; including the bail system."

In relying on any one of these grounds, the state must not make bald unsubstantiated assertions. To do so would make a mockery of the very essence of the bail system.

In *State* v *Hussey* 1991 (2) ZLR 187 (S) the point was made that bald assertions do not suffice. Cogent reasons must be proffered when the state seeks to rely on any of the grounds stipulated in section 117.

In casu state counsel submitted that the determination exhibited with the exchange of gun fire with the police who intended to thwart the robbery and arrest the culprits speaks to people who were determined to kill or be killed in order to evade arrest. Such determination demonstrates the real likelihood that given a chance such an individual will abscond and frustrate the proper administration of justice.

I must be careful not to approach this matter as if the allegations against the applicant have been proved. However it is important to note that the applicant submitted that although he sustained serious injuries on this night, such injuries did not include gunshot wounds. The injuries were only consistent with his jumping off a moving vehicle in order to escape from his abductors.

At the hearing of the application counsel for the applicant accepted that the applicant sustained gunshot wounds.

> "Applicant's alibi that he was kidnapped is the reason why he sustained gunshot wounds. …… I am of the view that since he sustained gunshot wounds he is injured and in need of medical assistance making it difficult for him to abscond."

This concession supports the state's contention that the applicant sustained gunshot wounds as a result of an exchange of gun fire with the police. The determination to evade arrest equally applies to the determination not to submit to due process and therein lies the state's fear of abscondment.

Can it therefore be said the state's assertion is a bald but unsubstantiated one? I think not. The state's fear is real and well-grounded in the circumstances.

I turn now to the ground relating to interference with witnesses. The state submitted that witnesses were able to identify the applicant at the scene. One of the witnesses received gunshot wounds at the scene. This speaks to both a desire to evade justice and the elimination of possible witnesses, the police officers included. Such a brazen confrontation with law enforcement agents who citizens are ordinarily expected to respect makes it very likely that witnesses could be interfered with in a desperate bid to scuttle the ends of justice.

It therefore cannot be said the state's assertion is unsubstantiated in the circumstances.

There was an issue on identification raised by applicant's counsel and the argument being that such identification was flawed as no proper identification parade was conducted. However the state's assertion is that the witnesses identified the culprits at the scene and the arrest followed such identification. In the circumstances the need for an identification parade was a non issue.

Identification parades are done for a purpose. The objective will be to identify the suspect but where such identification is done at the scene and in the circumstances as *in casu*, the need to hold an identification parade may not be necessary.

These are the very witnesses the state is fearful may be interfered with. Given the manner in which the robbery is alleged to have occurred, this court cannot take such a fear lightly. In looking at the grounds stipulated in section 117 of the Criminal Procedure and Evidence Act, each case must be looked at in accordance with the particular circumstances of that case.

The overriding issue is the need to strike that balance between the liberty of the applicant and the proper administration of justice.

This brings me to the ground relating to whether the release on bail will undermine the proper functioning of the criminal justice system, including the bail system.

Incidents of robberies where firearms are used brazenly are on the increase. This is a fact borne out by almost daily press reports of armed robberies where firearms are used. Citizens have been warned to be wary of armed robbers who are on the prowl. It is not an exaggeration therefore to say that citizens are fearful because of the rate at which such robberies are occurring.

The bail system will fall into disrepute if suspects are routinely granted bail notwithstanding the seriousness of the charges, the likely penalty in the event of a conviction, the strength of the state case and the assurance or lack thereof that the applicant will stand trial if released on bail. (*State* v *Jongwe* 2002 (2) ZLR 209 (S).

Suitable conditions may be imposed to allay fear of abscondment, of interference with witnesses and of jeopardising the proper administration of justice and the bail system but not

every case can be addressed in that manner. Again the circumstances of each case must be considered in deciding whether the imposition of conditions suffices.

Where the state has laid ground and cogent reasons in opposing the grant of bail, the court ought not to pay lip service to such and fail to properly weigh the competing interests of the right of an individual to their liberty on the one hand and the proper administration of justice on the other.

The applicant is presumed innocent until proven guilty. This can only be done through trial proceedings. The wheels of justice ought therefore to be allowed to turn without hindrance so as to establish the guilt or innocence of the applicant.

In *State* v *Mwonzora and Others* HH 72-11 it was held that a balance should be struck between the interests of society and the liberty of the accused.

In casu the interests of justice in ensuring the proper administration of the justice system, including the bail system tip the scales against the applicant's liberty.

There are well grounded reasons for the opposition of bail. The reasons have been reasonably substantiated.

The interests of justice therefore demanded that the applicant's application for bail pending trial be not acceded to.

It is for these reasons that I dismissed the applicant's application.

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