BROWN MUBAIWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 March, 2021 & 1 April, 2021.

Bail Pending Trial

T Semwayo, for applicant
L Masango, for the respondent

CHITAPI J: The applicant appeared before the magistrate at Harare on 8 February, 2021 on initial remand on allegations of having committed the offence of robbery committed in aggravating circumstances as defined in s 126 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The applicant was charged together with a co-accused, one Gift Moffat. The brief details of the charge were that on 2 February, 2021 at around 19:00 hours the applicant and his co-accused and three other accomplices still at large proceeded into the Harare City Centre in a vehicle owned and driven by an outstanding accused Arnold Kwarira. The vehicle was driven to Pomona shopping Centre and parked outside Chicken Inn Shop. The gang members armed themselves with two pistols and a pair of catapults before proceeding to the complainant's house within the vicinity of the Shopping Centre. Four gang members proceeded to scale the pre-cast wall surrounding the complaint's house and gained unlawful entry into the premises. The applicant's co-accused Gift Moffat remained in the gateway car.

On entry into the premises the gang members manhandled the complainant Zhang Guanghui and five other occupants. It was alleged that the gang tied the complainant with cables and assaulted him before robbing him of 600 grams of gold, three iPhone handset, a Huawei handset, a gold chain and USD10 000 cash. It was alleged that the value of the stolen property was USD50 000. The gang then left the premises and got into their gate away vehicle and left the scene. I noted a curious omission in the allegations in that nothing was mentioned about the fate of the

other five occupants or invitees of the complainant who were said to have been in the complainant's company.

In relation to the evidence linking the applicant to the commission of the offence, it was alleged that there are witnesses who positively identified the applicant. It was also alleged that the police retrieved call records from the service providers in relation to the applicant's and Gift Moffat's cell phone handsets and noted that on the date and time of the robbery the two communicated within the area of the scene. It was further alleged that the applicant and his co-accused made indications on how they committed the offence. The complainant was said to have identified the co-accused Gift Moffat only. The co-accused Gift Moffat was alleged to have led police to the recovery of a cellphone power bank charger which belonged to the complainant and USD$200 which was part of the complainant's money robbed from him. The further evidence alleged against the allegations was that the applicant's co-accused led police to the recovery of his vehicle which was said to be the gateway vehicle. The vehicle was allegedly captured on the CCTVs parked outside Chicken Inn and CBZ Bank in the parking bays thereat at Pomona Shopping Centre. The applicant was duly remanded on the above summarized factual allegations. Against the above brief backgrounds facts, the applicant applies to be admitted to bail pending trial. The applicant as provided for in s 117 (2) (a) (ii) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] bears the burden of showing on a balance of probabilities; that it is in the interests of justice for him or her to be admitted to bail. The court may however cast the burden on the prosecution to prove any specific allegation.

In the request for remand form, the police raised three grounds for opposing bail. These were firstly that the applicant was likely to abscond because he faced a serious offence which attracts a custodial sentence upon conviction. Secondly it was alleged that the applicant was likely to interfere with evidence and witnesses because the stolen property was yet to be recovered. The reasoning was that the release of the applicant would likely interfere with witnesses since he knew them. Lastly it was averred that the applicant was likely to commit other offences because since his accomplices were yet to be arrested, the applicant would team up with them to commit similar offences using the fire-arms which they used in the robbery of the complainant, since the firearms had not yet been recovered.

State counsel Mr *Muzivi* in the states response wherein he opposed bail averred that the court should consider the nature of the offence, its gravity, the likely penalty and strength of the State case against the corresponding incentive on the applicant to flee. Reliance was placed on the case of *State* v *Ndlovu* 2001 (2) ZLR 261. In particular, counsel averred that since the offence charged was committed in aggravating circumstances the only permissible sentence was effective imprisonment ranging from imprisonment for life to any definite period of imprisonment. Relying on the judgment in *S* v *Chipetu* HMA/17 counsel submitted that a lengthy custodial sentence is generally considered as an inducement to abscond. I must comment that such a statement is too generalized. The prospects of the lengthy custodial sentence and corresponding inducement to abscond may only be inferred in circumstances where the factual allegations and accompanying evidence if availed show that the state case is strong and renders the prospects of a conviction most likely. In circumstances where the prospects of a conviction can objectively be said to be a predictable certainly, then there will be justification to infer likelihood of abscondment. The Criminal Procedure and Evidence Act in s 117 (3) (b) lists factors which the court shall take into account in determining whether or not the interest of justice will be served by the denial of bail on grounds of abscondment.

Counsel for the State submitted that a proper weighting of the balance between the interests of justice against the interests of the applicant, such balance favoured the denial of bail and required that the applicants be detained in custody. The balance referred to is delicate because the issue is not just about the personal interests of the applicant as an accused. The issue has to do with balancing the constitutional rights of an arrested and accused person against the State's duty to curb crime and maintain law and order. The detention of an accused person before he is or she is tried found guilty and sentenced to imprisonment should only be resorted to where there are compelling reasons to order pre-trial detention. The compelling reasons without limit are set out in s 117 (2) of the Criminal Procedure & Evidence Act. Section 115 C (11) of the said Act is the one that defines compelling reasons as the grounds set out in s 117 (2). The grounds set out in s 117 (2) are to be considered by reference to the factors set out in s 117 (3) as applicable depending on the particular ground for opposing bail which will be at play.

The respondent opposed the grant of bail to the applicant on the sole ground that the applicant is likely to abscond. The respondent fortified its submissions on the factors that the

applicant was charged with a serious offence of robbery committed in aggravating circumstances and that a lengthy custodial sentence which is provided for upon conviction would act as an inducement upon the applicant to abscond. Counsel for the respondent relied on the *dicta* in the case of *S* v *Chipetu* HMA 06/17 wherein it was stated that where the offence charged is punished with a lengthy custodial sentence then such fact may act as an inducement on the applicant to abscond if admitted to bail. In support of the strength of the evidence supporting the State case, the respondent's counsel submitted that the applicant was implicated by his co-accused and led police on indications. It was also contended that there were call records which suggested that the applicant was within the area of the commission of the robbery

It was however noted from the testimony of the investigating officer David Chikungwa that there was no independent evidence gathered which connected the applicant to the commission of the offence. The sufficieny of evidence to secure a conviction is not a matter for the bail judge to determine as it is not an issue that the bail application judge can conclusively decide upon. It is for the trial court to determine the guilt or innocence of the applicant as an accused person. However, where as in this case, the investigating officer testifies on oath in the bail application and is cross examined thus placing the bail court judge in an informed position to make findings on the veracity and credibility of the evidence, such evidence is given the usual weight given to sworn evidence.

The evidence of the investigating officer was to the effect that apart from the implication of the applicant by a co-accused, and call records as well as indications made, there was no other evidence to link the applicant to the commission of the offence. The indications did not result in any recovery of the stolen property. The applicant made a complaint to the magistrate that police assaulted him and the indications are in issue at trial. The strength of the State case is to be determined on the basis of these three pieces of evidence.

After considering the nature of the evidence, I cannot say that a conviction is a certainty. This leads me to comment on the submissions that where in a bail application, the offence charged calls for a lengthy prison term being imposed upon conviction, such realization acts as an inducement on the accused person to abscond. This proposition will just be an abstract if it is not qualified. The qualification is that there should be *prima facie* strong evidence to infer the likelihood of the accused being convicted on that serious charge.

In terms of s 117 (2) (b) of the Criminal Procedure & Evidence Act, where bail is opposed on the grounds that the accused in likely to abscond, the court is required to consider the following factors where applicable—

"(i) the ties of the accused to the place of trial

(ii) the existence and location of assets held by the accused

(iii) the accused means of travel and his or her possession of or access to travel documents

(iv) the nature and gravity of the likely penalty therefor

(v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee

(vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;

(vii) any other factor which in the opinion of the court should be taken into account."

In considering the above factors, it must be remembered that the applicant herein has the onus to establish that it is in the interest of justice to grant him bail. The applicant is of fixed abode. He stated that he is married to two wives who between them have seven minor children. The applicant sustains the family through farming tobacco. He stays at Kamoto Village, Chief Chipuriro, Guruve and has resided thereat for all his 47 years of existence. He stated in his application that he was severely assaulted by the police, a complaint which he raised before the magistrate. He stated that he requires treatment for his ears, eyes and his back. The applicant does not possess any travelling documents. He is just a peasant farmer with no assets which can sustain him were he to be minded to flee the jurisdiction of the court. He offered to report at Guruve Police Station as a check mechanism to ensure his continued availability. It will not therefore be difficult to enforce bail conditions which the court may impose. He offered a reasonable bail deposit of $10 000.00.

The onus upon the applicant to show that it is in the interests of justice is to be determined on a balance of probabilities. The applicant must relate to the factors in s 117 (2) when discharging this onus. The applicant was able to do that in my view. The factors have all been dealt with. There is in addition no suggestion that the applicant resisted arrest. The suggestions in the form 242 request for remand form that the police still want to recover stolen property was of no significance because it was accepted that nothing was recovered from the applicant on investigations. There is therefore no basis to assume that there will be recoveries from the applicant as would have been the case had police discovered any property from the applicant to link the applicant to the

commission of the offence. The further ground that the applicant may interfere with witnesses again does not sit upon a sound basis because the witnesses are in Harare whilst the applicant offered to stay in Guruve. There was no suggestion made that the applicant made any attempts to interfere with witnesses. In the premises it has not been shown that there is a likelihood of the applicant to interfere with state witnesses. A curious feature of the charge is that the exact place of occurrence of the office was not disclosed. The charge falls short of the requirements of s 146 of the Criminal Procedure & Evidence wherein it is provided that the charge must set forth the time and place of occurrence and if any property is involved, the name of the owner of the property. The applicant raised the point that the place of occurrence was not named. This omission remains unplugged. The court cannot for example order that the accused should keep away from the precincts of the unnamed place.

In weighting the interests of justice against the right of the applicant to his personal freedom, I am inclined in favour of granting bail. I do appreciate that the offence is serious. However the circumstances of each case will determine how the seriousness of the offence is likely impact on the risk of the applicant to abscond. The state case not being open and shut if one considers the allegations made and evidence said to be available, a conviction is not given. The interests of justice will be served if bail is granted and the ensuing order is made.

(i) The applicant is granted bail.

(ii) He shall deposit ZWL$10 000.00 with Clerk of Court Harare, Magistrates Court

(iii) He shall reside at Kamota Village, Chief Chipuriro, Guruve.

(iv) He shall report every week on Fridays at Guruve Police Station between 6:00 a.m. and 6:00 p.m.

(v) He shall not interfere with state witnesses or investigations.

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