BONGANI MAPFUMO
versus
STATE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 17,23 March & 27 April 2022

Application for bail pending trial

Mr T. Tavengwa, for the applicant
Ms M. Mutumhe, for the respondent

ZISENGWE J: The applicant seeks to be admitted to bail following his arrest and subsequent detention on robbery charges (i.e. c/s 126(1) of the Criminal law (codification and reform), Act, [*Chapter 9:23*]). He is alleged to have planned and participated in the robbery of a cash in transit vehicle belonging to his employer-Fawcett security getting away with the sum of US$305 290 and a firearm and ammunition in the process.

The events leading to his arrest as captured in the papers filed of record are the following. Part of applicant's responsibilities as a security guard in the employ of the complainant company include among others driving a "cash in transit van". On the fateful day, the 25th of November 2021, he was the driver of one such vehicle namely an Isuzu van *en route* from Bulawayo to Harare. His co-crew consisted of three other fellow employees namely Thomas Chisambadzi, Langelilile Moyo and Emmanuel Nhamo. Their mission being to safely deliver the aforementioned sum of money to Harare. For reasons that are yet unclear the said crew upon their departure from Bulawayo picked up four passengers. Approximately half way through the journey, at the 243km peg near Connemara open prison to be precise, they fell under attack from the very passengers that had offered a lift. Not only were they apparently struck with spanners, overpowered and disarmed

of the CZ pistol they had in their possession, but they were also threatened with the very firearm that had been wrested from them.

The request for remand form, the i.e. Police form 242 gives a very detailed account of how the robbery allegedly played out, suffice it to say in the course of which the robbers apparently made away with the said sum of money, three mobile handsets, the CZ pistol and six rounds of ammunition.

However, according to the state this was no ordinary cash in transit heist as it was orchestrated by none other than the applicant, no less. The allegations in this regard are that the passengers-turned-robbers were nothing more than applicant's accomplices with whom he had planned the entire robbery. Further, it is the state's position that the applicant then sought to sell everyone a dummy by feigning to be a victim of the robbery but unfortunately for him the investigations, (whose nature I shall deal with in more detail later) unearthed and exposed him for who he truly was, namely co-conspirator to and principal co-perpetrator of the offence.

In his papers filed in support of this application, the applicant vehemently denies the allegations levelled against him and stuck to his version that he and his follow crew members were merely victims of a robbery. He therefore implores the court to release him on bail pending his trial which he confidently believes will exonerate him.

He insists justice demands in light of what he believes to be a palpably weak state case against. He further averred that he harbours no intention whatsoever to abscond. He claims therefore that he eagerly awaits his trial to clear his name.

The State on the other hand maintains that it has an arsenal of overwhelming implicatory evidence against the applicant. Accordingly, therefore, in view of the gravity of the offence and the inevitable heavy custodial sentence that awaits the applicant, same is likely to abscond. To shed more light on the details surrounding the commission of the offence and to demonstrate the involvement of the applicant, the State called the investigating officer of the case Sgt Mambwere to testify.

Sgt Mambwere's evidence was that the police reacted almost instantly to the information received that a robbery was in progress along the Bulawayo-Harare highway near Connemara. According to him, the initial report of the incident given by the applicant was to the effect that he and his fellow crew members had been stopped and subsequently robbed by persons who

pretended to be police officers. However, when the police attended the scene and conducted their investigations and confronted the applicant with their findings, the applicant made about turn and confessed to having committed this offence in cahoots with accomplices who had since gone on the run.

Further, according to the witness, the applicant candidly admitted to having carefully planned, this offence with four robbers whom he pretended to innocently pick in Bulawayo. This was unbeknown to his co-crew members. He identified two of applicant's accomplices as Blessing Lizhu and Agrippa Mloyi and that the other two are yet be accounted for.

Armed with information received, the police descended on Blessing Lizhu's house in Bulawayo from which they recovered US$ 18 750, allegedly as part of the loot stolen in the heist. According to the witness following information supplied by an informer, the police also recovered a motor vehicle from Agrippa Mloyi's residence which motor vehicle had been allegedly used as a "get-away" motor vehicle. He described this motor vehicle as a navy blue or purple Honda Fit.

During cross examination the witness was taken to task over several issues relating to his account, chief among which was the apparent discrepancy over the critical question of the involvement (if any) of applicant's crew members in the entire transaction. It was pointed out in this regard that the applicant's co-crew members are currently in custody over the same incident having been arrested for allegedly staging a robbery to facilitate the theft of the money in question from their employer. Counsel therefore stressed that applicant's fellow crew members could not conceivably have been both victims of the robbery (as alleged in the present proceedings) and perpetrators of the theft of money in question.

In response the witness expressed some degree of ambivalence on the issue but ultimately indicated that the police currently await the prosecution's advice and directions on the appropriate charges to prefer against applicant's co-crew members.

Secondly, the witness was quizzed over the discrepancies in the description of the get way motor vehicle. In this regard it was pointed out that whereas the witness described the getaway motor vehicle as Navy blue or purple "Honda Fit", with registration number AFO 5422 yet the form 242 compiled in respect of applicant's co-workers over the same incident describes the motor vehicles as a white Honda Fit. The witness's explanation for the apparent contradiction was that, the latter description was provided by those three Fawcett security guards. Implicit in his response

is the suggestion that the description given by the latter was incorrect aimed at misleading the police. He indicated however, that the police have it on good authority from information supplied by its informants that the getaway motor vehicle was in fact Navy blue and that it belongs to Agrippa Mloyi.

The third issue raised on behalf of the applicant during cross examination related to the to the place where the seizure of the $18 750 took place, i.e. whether it was seized in Bulawayo as testified by the witness during evidence in chief or it was in Gweru as stated in the seizure confirmation form. His explanation was that although he did not participate in the seizure of the said sum of namely, he could only surmise that it was seized in Bulawayo. However, the police officers who seized the money did not have the request documentation with then to record the same and only did so upon their return to Gweru and recorded the place of seizure as such, hence the apparent discrepancy. He however conceded that it was erroneous in the circumstances to refer to the place of seizure as Gweru.

Related to this was the proper identity of the person who led the police to Luzhi's home culminating in the recovery of the aforementioned sum of money. During cross examination it was pointed out that the statement by one D/Constable Ndomboya (who was part of the team which proceeded to Bulawayo), the person who led the police on that mission was Bongani Mpofu (as opposed to the applicant Bongani Mapfumo). In response the witness attributed this to a mere "slip of the pen" on the part of his colleague Ndomboya as the name should have been correctly recorded as Bongani Mapfumo.

Ultimately it would be argued on behalf of the applicant that the discrepancies which were identified during cross examination were such as to render the state case weak implying that there would be no inducement on the part of the applicant to flee from a palpably weak case.

The state countered and insisted that it has a solid case against the applicant and as such he should not be admitted to bail.

The test

The application will naturally be considered against the Constitutional touchstone captured in section 50(1) (d) thereof entitling any person arrested and held in custody on suspicion of committing an offence to be released on bail with or without conditions unless there are compelling reasons justifying the refusal of the same. Equally important are the twin related principles

consisting of the presumption of innocence operating in applicants' favour and the need to safeguard the individual liberty of an accused person should that be feasible without compromising the efficient administration of justice.

The main reason advanced by the state for its opposition to the granting of bail is the likelihood of abscondment which in turn in predicated on what it perceives as the relative strength of its case against the applicant in prospect coupled with gravity of the offence.

Section 117 of the Criminal Procedure and Evident Act, [*Chapter 9:07*] breathes life to section 50 (1) (d) of the Constitution as reiterates an accused's entitlement to bail unless there are compelling reasons justifying its denial. In particular subsection (2) (a) (ii) provides that bail may be denied if it is established that there is a likelihood that accused may not stand his trial or appear to receive his sentence; i.e. his/her likelihood of absconding.

Subsection 3 (b) fleshes out in broad strokes the factors which have a bearing on the determination of the likelihood of absconding, chief among them being the following: the nature and gravity of the offence or the nature and gravity of the likely penalty to be imposed as well on the strength of the case for the prosecution. In *State v Jongwe* 2002 (2) ZLR 209 CHIDYAUSIKU CJ quoted with approval the passage by GUBBAY CJ in *Aitke*n *& Anor* v *Attorney General* 1992 (1) ZLR 249 (S) at 254 D-G where the following was stated:

> *"**The risk of abscondment:***
> *In judging this risk the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the strength of the state case; the ability to flee to a foreign country and the absence of extradition facilities; the part response to being released on bail and assurance given that it is intended to stand trial.*
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> *It is quite clear from the above remarks that the critical factors in the above approach are the nature of the charges and severity of the punishment likely to be imposed upon conviction and also the apparent strength and weakness of the State case"*

Similarly, in *State* v *Ncube* 2001 (2) ZLR 556 (S) SANDURA JA had this to say in relation to a consideration of bail vis-a-vis the likelihood of abscondment:

> *"I should add that that in determining a bail application the strength of the case for the prosecution should be assessed. As MILLIN J said Liebman v Attorney General* 1950 (1) SA 607 (W) at 609:
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> *The court looks at the circumstances of the case to see whether the person concerned expects or ought to expect, conviction. If it is found on the circumstances disclosed to the court that the likelihood of conviction is substantial, that the person ought reasonably to expect a conviction, then the likelihood of his absconding is greatly increased. Thus, the court goes into the evidence at the disposal of the crown. Where there has been a preparatory examination that is the material which is used. Where no preparatory examination has yet been led the court has to consider such material as furnished it by the accused himself (appellant) or by the Attorney-General or his representative."*

In the present case I find from the available information that the State has at its disposal a fairly strong case against the applicant implicating him to the commission of the robbery. In paragraph 6 of the affidavit submitted in support of this application applicant summarised his attitude towards the allegations thus:

> *"My defence to the charges is simple, we were robbed. I am a victim of the crime of robbery not the perpetrator. I immediately made a report of the police after the commission of the offence. I do not know why the police decided to charge me of the robbery. However, whichever way one decides to look at it the State case is the parous like a sieve."*

Conspicuous by its absence in this potential defence is an explanation by the applicant of the circumstances surrounding the supposed robbery. This is by no means placing any onus on the applicant to prove his innocence. All that is being said is that surely in light of the detailed allegations against him as captured in the form 242 one would have expected the applicant to take the court into his confidence and divulge in some comprehensive detail facts on robbery supposedly played out. Did they give lift to persons who later robbed them as suggested in the Form 242? Or did they encounter high way robbers who stopped and robbed them? His silence on this critical issue is telling.

If indeed they were robbed by unknown people whom they gave a lift to, the question that immediately springs to mind is why on earth would they offer a lift to four men all of whom were total strangers given that they had in their possession such a huge sum of money destined for Harare? Why take such a huge risk? This tends to lend credence to the State's assertation that the robbery was orchestrated by none other than the driver of that cash in transit van (i.e. the applicant). As the driver of the van he was in charge thereof. I find it astounding that the applicant would offer

a lift to completely unknown male passengers when he was in possession of such a large sum of money. It is highly illogical, counter-intuitive and contrary to common sense. There are no prizes for guessing that this must have been contrary to his employer's express instructions. Giving a lift to such strangers in such circumstances defeats the very purpose of having armed protection of the cash in the first place. It is similar to employing stringent security measures (think of armed guards, dogs and the like) at one's home aimed at guarding against burglary (because you have large sums of money) but thereafter inviting random total strangers to spend the night inside the house!

If on the other hand the crew was ambushed by highway robbers at Connemara, as per the applicant's initial explanation to the police, then how did this play out? Why is the applicant reluctant to divulge the details of the supposed attack? The paucity of information furnished by the applicant in this application justifies the inference drawn by the State that he is deliberately concealing his true role in the disappearance of the complainant's cash.

Not only did the applicant fail to disclose the circumstances surrounding the supposed robbery in the affidavit accompanying this application but equally confounding is the fact that counsel in his cross examination of the investigating officer failed in the least put (as he was expected to do) applicant's version of events to him leaving everyone to second guess what the applicant's version of events really is.

Then there is the investigating officer's evidence that applicant initially reported that they fallen under attack and were robbed by persons who stopped them masquerading as police officers. That was before he (i.e. applicant) made an about turn and started claiming that his team had been robbed by their passengers. The question that begs is why the prevarication, why the ambivalence and inconsistency? The State cannot be faulted for concluding as it did that both versions peddled by the applicant were false and meant to mislead, and send everyone on a wild goose chase.

Equally pertinent is the investigating officer's evidence that in the heat of his interrogation by the police the applicant capitulated and confessed of having worked in cahoots with the four persons to plan and subsequently execute the robbery. Although the applicant sought to distance himself from the alleged admissions, the current proceedings cannot purport to delve into the intricacies of the veracity of those admissions. That is left for the trial court to interrogate, suffice or to say that should those admissions be proved to have been made and that they were extracted

in a manner compliant with the rules of admissibility then a conviction is more likely than not to ensue.

In the same vein, the evidence of applicant having led the team of detection to Bulawayo to the residence of Blessing Lizhu where US$18 750 in cash was recovered is not insignificant. It is evidence, which if proved at trial intricately connects the applicant to the commission of the offence.

The question of whether the name Bongani Mpofu appearing in one of the potential State witnesses' statement is a typographical error or it whether it indeed relates to someone else other than the applicant is to be ventilated at the trial. At that stage the author of that statement if called, will testify and explain herself. What one cannot do at this stage is to flippantly discount the evidence of the investigating officer as unreliable solely on the basis of that apparent discrepancy. In any event it is trite that at the subsequent trial the court will assess the evidence holistically instead of focusing too intently on individual parts thereof.

The same principle is applicable to the perceived discrepancy regarding the description of the motor vehicle which was used as a getaway motor vehicle. This is equally is for the trial court to consider in the evaluation of the evidence. In any event the explanation proffered by the investigating officer in this regard is quite reasonable. He explained that the description of that motor vehicle as a white Honda Fit is one which the applicant's co-employees provided which is at variance to the information supplied by the police informers. This explanation is by no means for fetched or so implausible as to discredit the entire State case.

Turning now to the question of the State's ambivalence in respect of the appropriate charges to prefer against the applicant and his fellow crew members. While the State cannot escape censure for its apparent indecision, this does not in the least detract from the potency of the evidence against the applicant in light of what it was highlighted above. The impression created by the investigating officer's evidence is that the State is yet unsure of whether or not applicant's other crew members were complicit in the entire series of events leading to the theft of the cash in question or they were mere victims thereto. On the whole however, one finds that this ambivalence notwithstanding, the State has a strong case against the applicant.

That the offence of robbery committed in aggravated circumstances is viewed in a very serious light cannot be disputed. It is an offence that involves premeditation and careful planning.

It is also executed until brazenness with scant regard to the rights of the victims who are usually left traumatized and with a heightened sense of insecurity. For this reason, it is an offence which almost invariably attracts severe punishment from the courts. This is particularly so where it is committed in circumstances such as the present (as alleged by the State) involving a security guard gone rogue who plans and executes a heist against the very company which employs him. If the quantum of the cash stolen is factored in, it is no secret that the consequences of a conviction on the applicant would be grim.

Ultimately therefore, there is merit in the State's contention that the net effect of the twin factors consisting of the strength of the case for the state against the applicant and the likely heavy custodial sentence that potentially awaits him are such as to induce the applicant to abscond.

Part of the applicant's argument was that he should be treated the same way as Agrippa Mloyi who has since been admitted bail. Reliance was placed in a passage from the case of *State v Shamu* HMA 18-21 where the following was stated:

> *"It can hardly be controverted that persons who finds themselves in identical or similar circumstances should be dealt with uniformly. This accords not only with common sense and justice but also constitutes one of the tenets of the rule of law. Further, equality before the law is a fundamental right as captured in Section 56 (1) of the Constitution."*

See also *State* v *Loriet and Another* 2001 (2) ZLR (H) and *State* v *Dlamini* HH 57-09. This may be so, however sight must not be lost to the fact that situations often arise where there is justification in the differential treatment of jointly charged persons. Such differential treatment may be justified on a number of considerations be they personal to the individual offender or pertain to the roles they played in the commission of the offence or their respective reaction in the wake of the surfacing of the allegations.

In *State v Samson Ruturi* HH 26-30, CHINHENGO J had this to say in this regard:

> *"…the general principle is that persons jointly charged with an offence must be treated the same way. In practice however, it is not often that persons jointly charged with the same offence are treated equally in every respect. One accused may have to be treated differently from another because of certain factors, either personal or related to the offence, which set him apart from the other person with whom he is jointly charged. In the case of admission to bail, one of jointly charged persons may in the view of the court, be likely to abscond and the other not. One may be more likely to interfere with evidence or witnesses and the other note. One may be more likely to commit the same or similar offences and the other not. And one may be much more closely connected to the offence and more liable to*

be convicted and the other not. These are some of the factors which may justify the granting of bail to the one and its denial to the other."

In the present matter the explanation proffered by the investigating officer (which explanation I find reasonable) for acceding to bail in respect of Agrippa Mloyi was that he (i.e. Mloyi) had only been arrested solely on the basis of being implicated by the applicant. Now that the applicant is denying the charges, there would be no justification in insisting on Mloyi's continued pre-trial detention. Agrippa Mloyi's situation is therefore markedly different from that of the applicant who appears on the available information more closely connected to the charges. Ultimately therefore I find that there is justification in making a differentiation, as far as bail is concerned, between applicant and Agrippa Mloyi.

Finally, over and above the finding that there is sufficient evidence to conclude that applicant is likely to be induced to abscond if admitted to bail, I also find that the fact that the pistol and bulk of cash stolen are yet to be recovered coupled with the fact that the remaining two participants to the robbery are yet to be accounted for tilt the scales against the granting of bail.

Ultimately therefore I believe the State has managed to establish compelling reasons justifying the refusal of bail, accordingly the application for bail pending trial is hereby dismissed.

ZISENGWE J

Mutuso, Taruvinga & Mhiribidi, applicant's legal practitioners
National Prosecuting Authority, respondent legal practitioners