NTABISO NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 6 OCTOBER 2021 & 14 OCTOBER 2021

Application for bail pending trial

S. Chamunorwa, for the applicant
K. Ndlovu, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is being charged with two counts, i.e. murder as defined in section 47 of the Criminal Law [Codification and Reform] Act [Chapter 9:23] (Criminal Law Code), and attempted robbery as defined in section 189 as read with section 126 of the Criminal Law Code. It being alleged that on the 9th August 2021, applicant in the company of his accomplices, and armed with pistols proceeded to the complainant's house, and upon arrival at the scene realised that the police had laid an ambush for them. In the ensuing gun battle with the police, applicant and his accomplices, one or more of them shot a member of the police killing him instantly. Applicant fled from the scene of crime.

The factual matrix

The applicant chose to bring his application for bail by means of a bail statement in terms of Part XV of the High Court Rules, 2021. He filed two affidavits in support of his application. The second one being an answer to the State's response to his application. He averred that he neither has previous convictions nor pending cases before the courts. He is unemployed, a family man and has five children.

In his bail statement and affidavits he categorically denies involvement in the crimes that is he charged with. It is the applicant's contention that on the 9th August 2021, he was coming from drinking alcohol at a house in New Luveve area. As he was walking he heard a loud sound of a gunshot. He was hit once on his right arm and he fell down bleeding profusely.

When he tried to get up, he was hit by a car and fell down. He suffered various injuries to his left hand, legs and back. He did not see the person(s) who fired the gunshot or who knocked him down with a car. He remained on the ground for some time but he is not able to say how long as he had lost consciousness. When he gained consciousness he crawled from the road and took refuge at a nearby house as he feared for his life. He spent a night at that house and left early in the morning and went to Lobengula West, Bulawayo intending to seek assistance. He was arrested while at this house in Lobengula West, and before he could be taken for treatment at a medical facility.

Applicant contends that he does not know how exactly the police are linking him to the alleged crimes as he never went to house No. 116 Luveve 5, Bulawayo and does not know the occupants of that house. He disputes firing a firearm and killing the deceased. He dispute that he had at any material time a CZ pistol with erased serial numbers. He did not know the deceased during his life time, and was not present when the offence was committed. He has not been identified as the perpetrator of the crimes.

In his first affidavit, applicant avers that the charges against him are actuated by mistake of facts. The case against him is so underwhelming that there does not exist a reasonable suspicion that he committed the crimes charged. Such allegations cannot induce him to flee. He cannot interfere with any witnesses or tamper with police investigations in this matter as he believes that the police have already recorded statements from them. He is prepared to abide by whatever bail conditions this court might impose on him.

In his second affidavit, he addresses the issues raised in the State's response. He disputes the averments in the supplementary affidavit of the investigating officer, and submit that such allegations have been fabricated in an attempt to link him to the commission of the crimes. It is contended that in his first affidavit the investigating officer states that the alleged crimes took place in Luveve 5, and in his second affidavit he now states that the crimes took place in New Luveve. These are two different locations. It is averred that there is no explanation proffered for the discrepancy regarding the scene of the crime. The weapon that was allegedly recovered at the scene of the crime and attributed to him was explicitly identified as a CZ pistol with an erased serial numbers, whereas the said weapon is now identified as a Sarsilmaz pistol with a serial number. He avers that this suggests an attempt to fabricate evidence.

Applicant criticises the State for not obtaining an affidavit from Detective Sergeant Nkomo, who is said to have been the recovering officer and who labelled the weapon and entered it in the exhibit book. It is averred that the CID Forensic Ballistic Report (Ballistic Report) does not confirm that the alleged weapon was discharged at the scene of crime. Instead the Report states that the alleged weapon is linked to other crimes committed in Gwanda and Gweru, where he is not a suspect. Again, it is averred that the Ballistic Report does not confirm that the bullet that was lodged in the head of the deceased is the same as the bullets that were discharged by the recovered weapon. It is contended that notwithstanding, applicant does not own a CZ pistol or a Sarlismaz pistol, nor was he in possession of a firearm on the day in question. It is averred that this is a desperate ploy by the police to try and link him to the crimes by tampering with evidence.

Respondent filed heads of argument in support of its opposition to this application. It attached to its heads of argument an affidavit deposed to by the investigating officer. Detective Sergeant Ngwenya (Ngwenya), the investigating officer in this matter also filed two affidavits in opposition to this application. Again, he adduced oral evidence in court. In his affidavits and oral testimony, he detailed the extent of applicant's alleged involvement in these crimes. At the conclusion of the oral testimony of the investigating officer, Mr *Ndlovu*, counsel for the respondent made a U-turn and conceded that it is in the interests of justice that applicant be released on bail pending trial. The facts will then be summarised below.

In his first affidavit, deposed to on the 12 August 2021, Ngwenya says *inter alia*: On 9 August 2021, the accused person (applicant) in the company of his accomplices armed with pistols went to house number 116 Luveve 5, Bulawayo where they intended to rob the complainant. Upon arrival at the scene they realised that there was a police ambush laid for them. The applicant shot a member of the Police Special Tactics Unit on the head killing him instantly. The accused persons fled from the scene. The accused person was arrested the following day at his girlfriend's house number 71924 Lobengula West, Bulawayo where he had sought refuge. After arrest he was taken to Mpilo Hospital where he was treated and admitted.

On evidence linking the applicant to the offence the investigating officer averred that applicant was shot at the scene of crime and is nursing gunshot wounds at Mpilo Hospital. He

is admitting to the charge. His CZ pistol with erased serial numbers was recovered at the scene. Reasons for opposing bail were stated as that applicant is a Zimbabwean who is based in South Africa, and crosses the border without a passport, if given bail he is likely to cross the border and abscond. He is not gainfully employed and is likely to commit more robberies to sustain his life.

In his second affidavit, deposed to on the 23 September 2021, Ngwenya says *inter alia*: On 9 August 2021, Police received a tip off to the effect that there were some armed robbers who were based in South Africa who were in the country with a mission to rob the complainant at house number 116 New Luveve whom they believed had large sums of money. Armed with the above information, a team comprising of members from CID Homicide and Police Special Tactics Troop was set up to thwart the robbery. A team of officers was deployed strategically at the scene of crime to stop and apprehend the accused persons in the event that they came for the robbery. On the same day the 9th August 2021, at about 1900 hours, the applicant in the company of his accomplices, armed with pistols went to house number 116 New Luveve Bulawayo. Upon arrival at the scene they were confronted by the police officers who were already at the scene. The accused persons opened fire towards the police officers hitting one of the police officers on the head killing him instantly. The accused persons managed to shoot their way out of the scene and fled. Applicant was however shot on both hands during the shootout but he still managed to make good his escape. He was arrested the following day at his girlfriend's house at number 71924 Lobengula West, where he was being nursed of some gunshot wounds without seeking medical care. During the escape, applicant tripped and fell down. During the fall he dropped his unregistered 9 x 19mm Sarsilmaz pistol, serial number T1102-18U01181 that was blood stained.

In this second affidavit investigating officer averred that in his first affidavit he entered the recovered pistol as CZ Pistol. His explanation is that the recovering detail, Detective Sergeant Nkomo had assumed it to be a CZ Pistol, labelled it as such on the exhibit label and thereafter entered it in the exhibit book as CZ Pistol. After inspection, the ZRP Ballistic Specialist, submitted that it was not a CZ but a Sarsilmaz pistol. He attached a copy of the Ballistic Report. He explained that in his first affidavit he erroneously averred that the serial numbers were erased on this CZ *cum* Sarsilmaz pistol when in actual fact the serial numbers were there and read T1102-18U01181.

In his oral evidence, Ngwenya testified that applicant is a flight risk. He is a Zimbabwean based in South Africa. When he arrived from South Africa he stayed with his newly found girlfriend in Lobengula West. Upon arrest he was asked about his actual home address, but refused to disclose it. The information gathered through investigations is that his parents stay at Emganwini, Bulawayo. On the date of the commission of the crimes he is charged with, he escaped from the police. The fire arm recovered from him was used to commit other crimes. Nothing will stop him from committing further crimes if released on bail. It will be very difficult to locate him once he is released. There is a strong case against him, he is likely to face a stiff penalty, and this may induce him to abscond.

He testified that applicant was shot at during a shootout with the police at the scene of crime. As he was escaping from the police, he was seen carrying a fire arm by one of the police details who was on the scene and part of the ambush. He tripped and fell and dropped the fire arm. The fire arm was blood stained. Cartridges were picked from the scene, recorded in the exhibit book and taken to Ballistic experts for examination. The fire arm recovered from the applicant is a Sarsilmaz pistol. This witness explained that in his first affidavit, he said the gun was a CZ Pistol. He got this information from the recovery detail, a Detective Sergeant Nkomo. Nkomo assumed it was a CZ pistol. It was taken for ballistic examination as a CZ Pistol. It is the ballistic experts, after examining the fire arm who noted that it was not a CZ Pistol but a Sarsilmaz pistol. This witness testified that the scene of crime is number 116 New Luveve, Bulawayo. When it was pointed out to the witness that in his first affidavit, he said the scene of crime is 116 Luveve 5, Bulawayo, he said it was a mistake.

Under cross examination, this witness testified that he was not part of the police team that laid an ambush to thwart the robbery at number 116 New Luveve, Bulawayo. He did not witness applicant tripping, falling and dropping a fire arm at the scene of crime. He was informed by a witness who was present at the scene of crime, i.e. Detective Sergeant Nkomo. Asked whether he had an affidavit from Nkomo, he said he does have such an affidavit, it is in the docket. The docket is at the office. Asked whether he wanted the court to determine the matter on the basis of an affidavit in his office, he said he did not know it was required in court.

He testified that he submitted that fire arm for ballistics examinations. He said Sarsilmaz pistol is very similar to a CZ pistol that is the reason they thought it was a CZ pistol.

Questioned about the reason he said in the first affidavit that the pistol had erased serial numbers, but in the second affidavit he said, the pistol had serial number, his answer was it was a mistake. On the question that in his first affidavit, he did not mention that the fire arm had blood stains, but says this in his second affidavit, his answer was it was a mistake due to pressure. It was put to him that in his first affidavit he says applicant admits to the crimes, but this does not appear in his second affidavit, his answer was when he did the second affidavit, someone said to him they should not rely on what accused said, but must find evidence against him. He was cross examined about the procedure followed to take blood samples from the applicant for DNA analysis, his answer was an application was made to Mpilo Hospital, thereafter blood samples were drawn from the applicant by a doctor. The DNA report is being held by the service provider due to outstanding fees.

Asked about other crimes appearing in the ballistic report, his answer was that these had been cold cases. They were not committed in his policing jurisdiction, officers from the jurisdictions where they were committed are working on the investigations. Asked about the relevance of other pistols in the ballistic report, the answer was upon arrest applicant informed the police that he went to 116 New Luveve with others, who included Xolani Ncube. He informed the police that Xolani Ncube resides at number 3470 Emakhandeni, Bulawayo. He led police to that address. Xolani Ncube was not present when the police got to his alleged residence. However, the police conducted a search and recovered a Star Pistol, which is in the Ballistic Report.

Detective Sergeant Ngwenya was asked about the date the police took applicant to hospital. He said it was on the 10th August 2021, at around 2 p.m. He was asked why applicant was taken for indications when he was supposed to be taken to hospital. The witness then testified that applicant said he must be taken for indications before he flees to South Africa. Asked why the evidence of indications is not mentioned in the two affidavits, the answer was the witness was dealing with applicant not Xolani Ncube. It was put to this witness that applicant did not lead police to the Emakhandeni house, the answer was he did.

Asked whether he recovered any cartridges from the scene, the answer was personally he did not recover any. The recoveries were made by one Constable Masuka. Masuka recovered five cartridges from the scene of crime and two from Unity Village, Bulawayo. He

denied that the scene at 116 New Luveve was tampered with, it was preserved by Luveve Police.

Detective Sergeant Ngwenya, was asked in cross examination whether there was evidence it is the Sarsilmaz Pistol not the Norinco Pistol that was used at the scene as both use the same cartridges as shown by the Ballistic Report. The witness's answer was he is not qualified in that area. When it was suggested to him that the police are fabricating evidence against the applicant, he denied and said they do not have anything against the applicant. Asked why he says applicant had a gun wound, his answer was applicant said it himself. He said this on admission to Mpilo Hospital. Asked what evidence was there that it is a gun wound, the answer was that applicant said so himself. Again the witness is yet to collect a medical report from Mpilo Hospital.

Principal argument by the parties

Mr *Chamunorwa*, counsel for the applicant strenuously emphasised that there is no strong *prima facie* case against the applicant. Counsel argued that applicant was not involved in the crimes he is charged with. It is contended that the investigating officer deposed to two affidavits, and both cannot be the truth. It was contended that in the first affidavit the investigating officer says the crimes were committed at number 116 Luveve 5, while in the second affidavit, it is said the crimes occurred at number 116 New Luveve. It is argued that these are two different locations, and there is no explanation for the discrepancy. It is argued that the identity of the pistol has changed, in the first affidavit it is a CZ Pistol and in the second affidavit it is a Sarsilmaz Pistol. The issue of erased serial numbers in the first affidavit and available serial numbers in the second affidavit was highlighted. Counsel submitted that the issue of blood stains in one affidavit and not in the other, the issue of DNA test, all these show an attempt to fabricate evidence against the applicant. It was submitted that applicant has discharged the *onus* of showing that it is in the interests of justice that he be released on bail pending trial.

In his U-turn submissions, *Mr Ndlovu* counsel for the respondent argued that notwithstanding the fact that the burden of proof is on the applicant, the State must show that it has a strong *prima facie* against the applicant. He argued that in this case, the State has failed

to show that it has a strong *prima facie* case against the applicant. It is contended that the discrepancies allegedly highlighted by Mr *Chamunorwa* go to the root of this matter and they have not been satisfactorily explained. Mr *Ndlovu* highlighted the following alleged discrepancies: the first affidavit says it is a CZ pistol, while the second affidavit says it is a Sarsilmaz pistol, these are two totally different pistols. He says in an application of this nature litigants must show that they can be trusted. Consistency is required.

Mr *Ndlovu* attacked the extraction of blood samples from the applicant for DNA profiling. He says this was done without applicant's consent and without a court order in violation of section 41B of the Criminal Procedure and Evidence Act. In summary it is argued that such evidence is inadmissible. In conclusion, Mr *Ndlovu* argued that the State has no strong *prima facie* case against the applicant, and as such he is a good candidate to be released on bail pending trial. He then went on to suggest what he considered to be appropriate conditions to be attached to applicant's release on bail.

Mr *Ndlovu* made the submission to the effect that he had agreed with Mr *Chamunorwa* that this court must release applicant on bail pending trial, subject to certain conditions that he highlighted. I quickly reminded him that the grant or refusal of bail is a judicial function. Determining a bail application calls for a delicate balance between the liberty of the accused and the interests of society which demands that an accused should be able to stand trial or avail himself for trial when he is so required. Where there are such competing interests, a court is enjoined to balance the competing interests by taking into account the evidence, facts and the circumstances of the matter, including the position taken by the State. In fact this is what section 117(5) of the Criminal Procedure and Evidence Act [Chapter 9:07] (Act) alludes to, it provides that:

> Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interests of justice as contemplated in subsection (4).

In a bail application, a court does not merely rubber-stamp an agreement made between the State counsel and counsel for the accused. The grant or refusal of bail is a judicial function.

Applicable legal principles and analysis

Bail applications of accused persons are regulated by section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The section provides that:

> (1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.

Section 117(2) of the Act provides that 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:

> (*a*) where there is a likelihood that the accused, if he or she were released on bail, will—
> (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
> (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; or
> (*b*) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

In this case, the charges levelled against the applicant involve offences listed in the Third Schedule of the Act. Murder is specified in Part I to the Third Schedule where the victim is a law enforcement officer, and the offence is also specified where the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit robbery with aggravating circumstances; or the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy. In this case the deceased is a law enforcement officer, the offence was committed in attempting to commit robbery using firearms, and by a group acting in common purpose. Applicant is charged with crimes specified in Part 1 of the Third Schedule. His bail application must therefore be determined in terms of section 115C (2) (a) (ii) A of the Act, which provides as follows:

> Where an accused person who is in custody in respect of an offence applies to be admitted to bail before a court has convicted him or her of the offence the accused person shall, if the offence in question is one specified in—
> A. Part I of the Third Schedule, bear the burden of showing, on a balance of probabilities that it is in the interests of justice for him or her to be released on bail, unless the court determines that, in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden.

Section 115C (2) (ii) A of the Act places a burden or an *onus* on an accused to satisfy the court by way of evidence that it is in the interests of justice for him or her to be released on bail. In other words, the applicant has to prove on a balance of probabilities that it is in the interests of justice for him to be released on bail. It then follows that the bar for granting bail in the crimes listed thereat is lifted a bit higher by the legislature. This is what applicant has to contend with, and this court must give full effect to such legislative provisions.

Again ection 117 (6) of the Act says: "Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in 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."

Whether a court may be satisfied that exceptional circumstances exist depends on the facts and circumstances established in a given application. It is clear, however, that they must at least be compelling enough to take the case made out for the granting of bail beyond the ordinary. See: *S v Jonas* 1998 (2) SACR 677 (SE). In *S v Bruintjies* 2003 (2) SACR 575 (SCA) at *para* [6] the court gave the following exposition on what is meant by exceptional circumstances:

> What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence. …If, upon an overall assessment, the court is

satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.

In determining this matter I take into account that the principles and considerations underlying bail is that no one should remain locked up without good reason. See: *S v Bennet* 1976 (3) SA 652 (C). Applicant's counsel criticised the evidence of Detective Sergeant Ngwenya as riddled with hearsay. The criticism was anchored on the fact that this witness's testimony, regarding the circumstances surrounding the finding of the Sarsilmaz pistol by the police, and the recovery of the spent cartridges was based on what he was told by other police officers. He was not present at the scene of crime on the day of the gun battle.

In a bail application a court may in suitable cases place reliance upon hearsay evidence. In a bail application the question of what weight a court places on hearsay evidence depends on the facts and circumstances of the case. See: *S v Tshabalala* 1998 (2) SACR 259 (C) 265g. Again, in the exercise of its discretion and depending on the facts and circumstances of the case a court may rely on the opinion of the investigating officer, even though the officer's opinion is not supported by direct evidence. See: *S v Hlongwane* 1989 (4) SA 79 (T) 113H-114A.

During the hearing of this matter I got a distinct impression that Mr *Chamunorwa* and Mr *Ndlovu* argued as if applicant was on trial. This is not a trial. I am not called upon to determine the guilt or innocence of the applicant. That will be the function of the trial court. This is a bail application. It has its own rules on admissibility of evidence and weight to be attached thereto. I am entitled though to take into account the apparent strength or weakness of the case against the applicant as far as that could be determined at this stage. 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.

Detective Sergeant Ngwenya conceded that in the first affidavit he said the scene of crime is number 116 Luveve 5, and in the second affidavit he said it is 116 New Luveve. In his testimony in court he clarified that the scene of crime is 116 New Luveve, Bulawayo. He said mentioning 116 Luveve 5 in his first affidavit was his mistake. He attributed the cause of the

mistake to working under pressure. He took responsibility for the mistake. Mr *Chamunorwa* made much stock of this issue. I accept that in the first affidavit Ngwenya made a mistake regarding the scene of crime. The mistake about the scene of crime must be weighed contextually with other evidence that I shall describe presently that clearly links the applicant to the crimes he is charged with.

Ngwenya testified that during the escape, the applicant tripped and fell down. During the fall he dropped his unregistered 9 x 19mm Sarsilmaz pistol, serial number T1102-18U01181 that was blood stained. He testified that it is Sergeant Nkomo who witnessed this occurrence. Ngwenya says he has an affidavit deposed to by Nkomo in the docket which speaks to this occurrence. Regarding the identity of the fire arm, he said he was informed by Nkomo that it was a CZ pistol. He recorded it and sent it for ballistic examination as a CZ pistol. It is the ballistic experts who noted that it was not a CZ Pistol but Sarsilmaz Pistol. He says the two types of pistols are similar. He and Nkomo are not trained ballistic experts, they merely concluded that it was a CZ Pistol, when in fact it was not such a pistol. For the purposes of this application I accept the explanation given by the investigating officer regarding the mix-up about the calibre of the pistol allegedly found in possession of the applicant. For the purposes of this application I find that applicant dropped the 9 x 19mm Sarsilmaz pistol, serial number T1102-18U01181 when he fled from the scene.

Detective Sergeant Ngwenya testified that he did not personally recover any cartridges from the scene, the recoveries were made by one Constable Masuka. Masuka recovered five cartridges from the scene of crime and two from Unity Village, Bulawayo. The Ballistic Report shows that the Sarsilmaz Pistol was manufactured after the year 1900. It is functional. Its chamber and barrel shows that it was fired, but it could not be ascertained when it was fired. Test cases filed on the Sarsilmaz Pistol matched spent cartridges recovered from the scene of crime. The expert evidence shows that the Sarsilmaz pistol was fired at the scene of crime. I have already accepted the evidence that applicant dropped Sarsilmaz Pistol when he fled from the scene.

The applicant told the police that he went to number 116 New Luveve in the company of other accomplices, including one Xolani Ncube. He then made indications which led to the recovery of a 32 /7. 65mm Star pistol (serial numbers erased) at number 3470 Emakhandeni, Bulawayo, the residence of Xolani Ncube. The Ballistic Report shows that this pistol was

manufactured after the year 1900 and is functional. Its chamber and barrel shows that it was fired, but it could not be ascertained when it was fired. Spent cartridges recovered showed that it was fired at the scene of crime. It is applicant who led the police to the house where this Star pistol, which was fired at the scene was recovered. For the purposes of determining this matter, this court cannot ignore such evidence. The statements and indications emerged as a result of a fair and legitimate answer to a question in cross examination posed to the investigating officer by Mr *Chamunorwa*. The indications and the statement directly links applicant to these crimes he is charged with. At least *prima facie*, the State case against the applicant is considerably strong

The applicant's version in support of his bail application was riddled with improbabilities and untruths. His version that coming from drinking alcohol at a house in New Luveve, he heard a loud sound of a gun shoot, was hit once on his right arm and he fell down bleeding profusely, tried to get up, was hit by a car and fell down, suffered various injuries to his left hand, legs and back, did not see the person(s) who fired the gunshot or who knocked him down with a car, remained on the ground for some time but he is not able to say how long as he had lost consciousness, he re-gained consciousness, crawled from the road and took refuge at a nearby house as he feared for his life, spent a night at that house and left early in the morning and went to Lobengula West intending to seek assistance: cannot withstand serious scrutiny. For the purposes of this application, I accept that the reason he did not seek medical treatment is that he was shot in a gun battle with the police at the scene of crime. This in itself speaks to the real danger of abscondment should he be admitted to bail thereby jeopardising the proper administration of justice.

By his own version he had a gunshot wound which bled profusely. When he tried to get up, he was hit by a car and fell down, suffered various injuries to his left hand, legs and back, lost consciousness and spent the night at the house of strangers. He then left that house in the morning and went to Lobengula West. He was arrested at this Lobengula house, where he was being nursed some gun wounds without seeking medical care. With such serious injuries, which led to unconsciousness he does not seek medical treatment. This is just an untruth.

The appellant denies that he played any role in the crimes he is charged with, but his denial rings hollow having regard to the evidence of the investigating officer and his own

version. It is also inherently improbable that the police would fabricate evidence against the applicant just to appear to have solved a crime. For the purposes of a bail application there is evidence that links the applicant to the crimes he is charged with, though much will depend at the trial on how that evidence fits with the other pieces of the jigsaw.

There are certainly many features in the evidence put up by the State that make out the basis of a strong *prima facie* case against the applicant. The applicant did not show on a balance of probabilities that the case against him is weak. In fact, the effect of the State's evidence constitutes a strong *prima facie* proof of applicant's involvement in the crimes preferred against him. In the context of the public interest considerations related to the serious nature of the crimes with which he stands charged and the potentially negative effect his release might have on the investigation and prosecution thereof, the facts and arguments put up by the applicant in support of his application are, in my view, not sufficient to tip the balance in his favour.

In determining this bail application I have completely disregarded the evidence of the DNA. Mr *Ndlovu* submitted that the taking of a bodily sample was done without applicant's consent and without a court order in violation of section 41B of the Criminal Procedure and Evidence Act. It is on this basis that I disregarded such evidence.

Conclusion

On a conspectus of all the evidence placed before court, I am of the view that the applicant has failed to show any exceptional circumstances which, in the interests of justice, would have permitted his release on bail. The Criminal Procedure and Evidence Act [Chapter 9:07] clearly provides that the interests of justice do not permit the release from detention of an accused where one or more of the grounds referred to in the subsections of section 117(2) are established. In considering whether a bail applicant will abscond, this court is entitled to take into account the nature and gravity of the offence or the nature and gravity of the likely penalty therefor and the strength of the case for the prosecution and the corresponding incentive of the accused to flee.

On the evidence, facts and circumstances of this case, I find that the State has a strong *prima facie* case against the applicant. Applicant is facing very serious charges. If convicted,

he is most likely going 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. In this case applicant will not stand his trial if released on bail. He will just abscond.

The investigating officer testified that upon arrest applicant refused to divulge his residential address. He further testified that applicant is a Zimbabwean based in South Africa, he crosses borders without the use of a passport. If released on bail, he is likely to cross the border at an undesignated exit point and escape to South Africa. It is a notorious fact that the border between Zimbabwe and South Africa is porous. After the shotout with the plice he shot his way out of the scene and escaped. He went on to hide at a house of a girl-friend. On the facts on this case I accept this characterisation by the investigating officer. It is not speculation. It is real. Applicant is a flight risk. Furthermore, the applicant is not only a flight risk but his release on bail given the serious allegations against him of use of a fire arm in the alleged commission of the offence of attempted 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.

Finally, I am of the view that on the evidence, facts and circumstances of this case the concession made by Mr *Ndlovu* was not properly taken.

Disposition

On a conspectus of the facts and all the evidence placed before court, I am of the view that it is not in the interests of justice that applicant be released on bail pending trial.

In the result, the application for bail be and is hereby dismissed and applicant shall remain in custody.

It is so ordered.

Calderwood, Bryce Hendrie and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners