

MTHOKOZISI NCUBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 11 JUNE 2018 AND 14 JUNE 2018

Bail Application

N Sithole for the applicant
T Hove for the respondent

MATHONSI J: The applicant's trial on 5 counts of robbery has already commenced at the magistrates court, it having commenced on 12 April 2018. He is jointly charged with two other people. He has however seen it fit to approach this court seeking his admission to bail pending trial, a trial which is mid-stream, because prison authorities have not been bringing detained accused persons to court for trial because of logistical challenges.

He commends himself for admission to bail because he says he denies the charges and questions his identification following the holding of a parade which was only conducted after his photograph, along with those of his two co-accused, had been published in the Chronicle Newspaper accompanied by a story that they had appeared at Western Commonage magistrates court on charges of robbery. According to the applicant the identification process was suggestive, unreliable and contaminated. Therefore the state case against him is weak.

The applicant is aged 22 years, he is not married and has no children. He was arrested on 25 January 2018 following a raid by detectives at a hide-out in Emganwini, Bulawayo after they had received a tip-off from members of the public. As I have said five counts of robbery, one of them involving the use of a firearm, have since been preferred against the applicant. He faces a further charge of theft from a motor vehicle at Western Commonage magistrates court.

In count one, the applicant and his two co-accused are alleged to have waylaid a 39 year old woman as she arrived home in Cowdray Park on 27 July 2017 at about 1920 hours. The moment she parked her vehicle in the yard, her assailants pounced on her armed with a pistol which they used to break the driver's side window after firing three shots in the air. When she locked herself in the car they fired a shot through the window but missed her. They robbed the complainant of R2000-00, \$7 800-00 and other valuables. In count two they are alleged to have used the same *modus operandi* after waylaying a 31 year old man as he parked his vehicle at his home in Nkulumane Bulawayo at 1900 hours on 29 November 2017. They robbed him of \$13 00-00 and R7000-00.

In count four it is alleged that on 25 December 2017 the trio grabbed a 45 year old woman by the neck and took away her handbag containing \$250-00, R4000-00, P1 050-00 and a cellphone. In count six they allegedly robbed a 43 year old woman on 16 January 2018 after assaulting her. They took her handbag containing money and other valuables. In count seven they allegedly grabbed the 22 year old male complainant by the neck and assaulted him before taking away \$3 500-00 and two cellphones.

Detective sergeant Maxwell Mbindi of CID Western Commonage has submitted an opposing affidavit stating that the applicant and his co-accused targeted illegal foreign currency dealers whom they robbed of large sums of money and other valuables. Apart from the robbery charges the applicant has another pending case of theft from a motor vehicle at western Commonage court. He states that the firearm used in count one has not been recovered and if released on bail the applicant will hide it. The applicant and his co-accused are extremely violent people who are likely to interfere with witnesses if released. At the time of their arrest members of the public, and possibly victims, were baying for their blood. It took the timely intervention of the police to save them. If released the applicant's safety cannot be guaranteed. The nature of the offences suggests that he may commit further offences especially as the firearm has not been accounted for.

In terms of s 115C of the Criminal Procedure and Evidence Act [Chapter 9:07] the grounds specified in s117 (2) as grounds upon which a court may find that it is in the interests of

justice that an accused person should be detained in custody pending trial are to be considered as compelling reasons for the denial of bail. It therefore means that there would be compelling reasons for denial of bail if there is a likelihood that if released on bail the accused will endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule, will not stand trial, or appear to receive sentence; will attempt to influence or intimidate witnesses or to conceal or destroy evidence, or will undermine or jeopardize the objectives or proper functioning of the criminal justice system. See *Ndou and Another v The State* HB 103-17.

I think there is merit in the argument that the applicant may commit more offences. This arises from the fact that there are multiple charges suggesting a propensity to commit robbery. There is also a pattern in how the offences were allegedly committed as the victims were generally illegal money changers who were isolated at their homes before being attacked. I am particularly worried that a firearm which was brandished in count one has not been recovered. It is still out there and may be used to commit more offences.

Considering that the offences obviously involved a lot of planning and surveillance, which enabled the offenders to track the victims to their homes, the addresses of the complainants are known. It would therefore be easy to interfere with them and to intimidate them. That risk is therefore very high.

I must add that robbery involving the use of a firearm is listed in Part I of the Third Schedule to the Criminal Procedure and Evidence Act. In terms of s115 C (2) (a) (ii) of the Act, the applicant bears the burden of showing, on a balance of probabilities, that it is in the interests of justice for him to be released on bail pending trial. I am not persuaded that the applicant has discharged that onus. In fact *Mr Sithole* only attacked the evidence of the state as weak merely on the basis of what he regards as a flawed identification. The trial having already commenced there is no likelihood of a lengthy pre-trial incarceration. In my view the logistical problems experienced by prison authorities in transporting accused person to court cannot possibly be permanent or enduring. It is a temporary setback which will soon be overcome.

I conclude that the interests of justice will be best served by keeping the applicant in custody. There is no merit in the application.

It is accordingly dismissed.

Ncube Attorneys, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners