HB 44/18
HCB 04/18
X REF CRB WC 48-9/17

BRIGHTON MASIYAMBIRI

And

BRIAN MUWATI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 19 JANUARY & 1 MARCH 2018

Bail Application

P. Ngulube for applicants
Ms N. Ndlovu for respondent

TAKUVA J: After imbibing one too many, applicants decided to upgrade their mode of transport by waylaying and robbing complainant of his motor vehicle and other belongings in that car. The specific allegations are that on the 25th of November 2017, the applicants stopped the complainant who was driving his Mazda X3 motor vehicle registration number ADN 8937, 1st applicant being known to the complainant. Complainant stopped the car and the two launched an attack on him using fists on his face, dragged him out of the motor vehicle which they took and sped off. Applicants only abandoned the car after crashing it at which point they took away complainant's property most of which was not recovered. The 1st applicant disappeared and was only arrested on the 4th of January 2018 after his brother surrendered him to the police. After his arrest, 1st applicant divulged the 2nd applicant's identity and he was immediately arrested.

The 2 applicants are now facing a charge of contravening section 126(1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23) "robbery". They were remanded in custody hence this application. Both applicants have submitted that they are good candidates for bail in that:

(1) they have no prior convictions

(2) they did not "evade arrest" after gaining knowledge that they were wanted by the police
(3) they did not attempt to escape at the time of arrest
(4) there is no risk of abscondment because applicants have fixed abode
(5) there is no risk of interfering with state witnesses
(6) given the potential delay in concluding a trial, it would be in the interests of justice that applicants be admitted to bail so as to mitigate the unnecessary pre-trial incarceration

The application was opposed by the respondent on the following grounds;

(i) applicants are facing a serious offence which attracts a lengthy sentence of imprisonment
(ii) the state case is *prima facie* so strong that a conviction is almost guaranteed, making the incentive to abscond even stronger – *S* v *Moyo* HB-23-05
(iii) the applicants have proffered a bare denial of the charge levelled against them leaving the court with no assurance that they will indeed stand trial – see *S* v *Ndlovu* 2002 (2) ZLR 26 (H)
(iv) there is a risk of abscondment because 1st respondent disappeared after committing the offence and was only arrested 1½ months later according to the investigating officer's affidavit filed or record.

The Law

It is trite law that in an application of this nature, the court ought to judiciously strike a balance between the ever conflicting interests of the liberty of the individual on one hand and the interests of the administration of justice on the other. Such an approach is desirable in view of the presumption of innocence constituting the heart of the criminal justice system in our jurisdiction – see section 70(1) (a) of the Constitution of Zimbabwe. Also, in terms of section 50(1) (d) of the Constitution, any person who is arrested must be released unconditionally or on

reasonable conditions pending trial unless there are compelling reasons justifying their continued detention.

Section 117 of the Criminal procedure and Evidence Act Chapter 9:07 entitles a person in custody to bail unless it is in the interests of justice that he or she should be detained in custody. The section states:

"117 **Entitlement to bail**

(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.
(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 –
    (1) 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 1st 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 jeopardize the objectives or proper functioning of the criminal justice system, including the bail system
(3) In considering whether the ground referred to in-
    (a) …
    (b) Subsection (2) (a) (ii) has been established, the court shall take into account –
        (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's means of travel and his or her possession of or access to travel documents;
    (v) the nature and gravity of the offence or the nature and gravity of the likely penalty thereof or;
    (vi) the strength of the state case for the prosecution and the corresponding incentive of the accused to flee;
    (vii) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;

(viii) any other factor which in the opinion of the court should be taken into account; …"

Where an accused person is facing an offence specified in Part I of the Third Schedule applies for bail, he or she shall 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 – see section 28 of the Criminal Procedure and Evidence Amendment No. 2 of 2016 that introduced a new section 115C.

In casu, applicants face a charge of robbery which offence is one of those specified in Part I of the Third Schedule. It follows therefore that they bear the onus of showing on a balance of probabilities that it is in the interests of justice for them to be released on bail.

As regards the nature and gravity of the offence, I agree with *Ms N. Ndlovu* for the respondent that it is akin to hijacking and attracts a sentence of imprisonment of up to fifty years or life imprisonment depending on whether it is committed under aggravating circumstances or not. It is accepted that the more severe the likely sentence, the greater the incentive to abscond. In this regard, I concur with CHIDYAUSIKU CJ's sentiments in *S* v *Jongwe* 2002 (2) ZLR 209 (S) that "in judging the risk of abscondment, the court ascribes to an accused the ordinary motives and fears that sway human nature."

The other factor that weighs heavily against the applicants is that the state case is *prima facie* strong. It is common cause that the 1st applicant was well known to the complainant prior to the commission of the offence as a fellow resident at Nketa. Therefore, there is no question of mistaken identity. In any event, the two do not deny being at the scene and taking the complainant's vehicle. During the hearing their legal practitioner struggled to explain the circumstances surrounding the taking of the motor vehicle. He ended up giving a somewhat incredible version that the applicants simply ended up with the car keys belonging to the complainant whom they were drinking beer with and they drove the vehicle away. The second applicant was implicated by the 1st applicant and he too did not deny being at the scene.

Also 1st applicant does not deny that he went into hiding for a period close to 2 months after committing the offence. He was only arrested after his brother fished him out of hibernation. If he is released on bail, what would stop him from finding a more secure hiding place? As regards the 2nd applicant, despite knowledge that they had crashed complainant's car and abandoned it after stealing his belongings, he did not see it fit to tell the police. He was content to remain anonymous. This, in my view makes the risk of abscondment great in this case.

For these reasons, I conclude that both applicants have dismally failed to discharge the burden cast upon them of showing on a balance of probabilities that it is in the interests of justice for them to be released on bail.

Accordingly, the application is dismissed.

Sengweni Legal Practice, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners