PETER MUSHIPE
and
MASTER KATSANZA
and
KILLIAN SHONHIWA TAGARIRA
and
VESTOR MARETEKWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 17 & 21 July 2015

**Bail application**

*K. Masasire,* for the 1st, 2nd & 3rd applicants
*W. Chishiri,* for the 4th applicant
*D. H. Chesa,* for the State

ZHOU J: This is an application for bail pending trial by the four applicants. The applicants are facing charges of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act (*Chapter 9:23*). In count one, it is alleged that on 2 January 2015 the applicants and their accomplices who are still at large attacked Verbena Freight Company using a pistol and force marched the security guards guarding the premises into a container which was parked at the premises. They searched the guards and took away cellular phones. They then removed wheels and batteries from the motor vehicles which were parked at the premises. They got into the offices and stole a computer and some workshop tools. In the second count the allegation is that on 14 February 2015 at around 0130 hours the applicants raided the complainant's premises at 6548-50 in Southlea Park and held the security guard at gun point. They stole wheels from the parked motor vehicles, some batteries and fuel, as well as the security guard's cellular phone. The first applicant was the first among them to be arrested. His arrest led to the arrest of the other three applicants.

Bail is being opposed in respect of the first and second applicants but not in respect of

the third and fourth applicants.

Section 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] lists the factors which should be taken into consideration in the determination of an application for bail pending trial. These are:

1. Whether the accused if released on bail will endanger the safety of the public or any particular person or will commit an offence referred to in the first schedule.
2. Whether the accused will stand trial or appear to receive his sentence.
3. Whether the accused will attempt to influence or intimidate witnesses or to conceal or destroy evidence.
4. Whether accused's release will undermine or jeopardise the objectives or proper functioning of the criminal justice system including the bail system.

The rights of accused persons as enshrined in s 50(6) and the presumption of innocence enshrined in s 70(1)(a) of the Constitution of Zimbabwe are fundamental rights to which the applicants are entitled. The above factors are, therefore, considered within the context of the fundamental rights guaranteed by the supreme law of the land. The idea is therefore to strike an equitable balance between the constitutionally enshrined rights and the need to ensure that the administration of justice is upheld. See *S* v *Dube & Anor* HB 9 – 03; *S* v *Acheson* 1991 (2) ZLR 805.

The State does not contest the granting of bail to the third and fourth applicants. The attitude of the State, though not binding on this court, is a relevant consideration. See *Mahata* v *Chigumira NO & Anor* 2004 (1) ZLR 88(H); *S* v *Ndhlovu* 2001 (2) ZLR 261(H). Having examined the concessions by the State in relation to the third and fourth applicants, it seems to me that they are properly made. Those two applicants were only arrested after being lured to Machipisa by the police using the first and second applicants, and nothing appears to have been recovered from them which would directly link them to the offence. There are no facts linking them to the commission of the offence other than that they came to meet the first applicant who had been arrested by the police without realising that they were going to meet the police. The court is, therefore, inclined to accede to their request for release on bail.

The respondent contests the admission of the first and second applicants to bail on the grounds that there is a risk of abscondment and that the first and second applicants are likely to interfere with the investigations. In the case of *S* v *Jongwe* 2002 (2) ZLR 209(S) at 215B-C, CHIDYAUSIKU CJ said:

"In judging the risk that an accused person would abscond the court should be guided by the following factors:

(i) the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction;
(ii) the apparent strength or weaknesses of the State case;
(iii) the accused's ability to reach another country and the absence of extradition facilities from the other countries;
(iv) the accused's previous behaviour;
(v) the credibility of the accused's own assurance of his intention and motivation to remain and stand trial."

The offence of armed robbery is no doubt a serious one which, in the event of a conviction, invariably attracts a considerable term of imprisonment. The offence involved the use of a firearm. The two applicants led the police to a place where some of the tyres which had been stolen were recovered, together with some tools which were used in the commission of the offence. There are therefore sufficient facts linking the applicants to the offence. The case against the two applicants is therefore very strong. The respondent argued that some of the accomplices have not yet been apprehended. Also, the firearm which was used in the commission of the offence has not yet been recovered. The allegations are very serious, involving, as they do, the use of a firearm in the commission of well-planned acts of robbery. There are, therefore, genuine grounds for believing that the first and second applicants will abscond if they are released on bail. The offences were allegedly committed in January and February 2015. The two applicants allegedly evaded arrest for a period of about five months after the offences were committed by changing their residences. They were only arrested in July 2015. That factor, too, taken together with the seriousness of the offence and the fact that there are witnesses who can testify against the applicants are factors which I have taken into account in reaching the conclusion that there is a risk of abscondment by the first and second applicants. Further, the two applicants have not shown that they have title to the properties which they have given as their residential addresses. In view of the allegation that they have previously changed residences upon realising that the police were looking for them, it seems to me that the administration of justice would be endangered by releasing them on bail.

As for the third and fourth applicants, this court is prepared to release them on bail. Their circumstances are significantly different from those of the first and second applicants, and justify different treatment in this application. I believe, though, that given the seriousness of the allegations involved the amount which they should deposit with the clerk of court must be increased to US$100-00.

In the result, IT IS ORDERED AS FOLLOWS:

1. The application for bail by the first and second applicants is dismissed.
2. The third and fourth applicants be and are hereby admitted to bail pending trial on the following conditions:
   2.1 The third and fourth applicants shall each deposit a sum of US$100-00 with the Clerk of Court, Harare Magistrates Court.
   2.2 The third applicant shall continue to reside at Village Shonhiwa, Chief Chinamhora, Domboshava until the matter is finalised.
   2.3 The fourth applicant shall continue to reside at House No. 1209 Miti Crescent, Budirio 4 until the matter is finalised.
   2.4 The third and fourth applicants shall each report once a week at Waterfalls Police Station on Fridays between the hours of 0600 hours and 1800 hours.
   2.5 The applicants shall not interfere with the state witnesses or evidence.

*Musoni Masasire Law Chambers*, 1st, 2nd, and 3rd applicants' legal practitioners
*Rubaya & Chatambudza*, 4th applicant's legal practitioners
*National Prosecuting Authority*, respondent's legal practitioners