

**USHER MOYO**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 22 September 2023 & 12 October 2023

**Bail application pending trial**

*V. E. Ndlovu*, for the applicant  
*T. Muduma*, for the respondent

**DUBE-BANDA J:**

[1] This is a bail application pending trial. The applicant is charged with the crime of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Criminal Code). It being alleged that on 18 August 2023 at 2200 hours the applicant in the company of accomplices who still at large, armed with one unidentified firearm, knobkerries, axes, a hammer and a machete attacked the complainant, disarmed him of his revolver gun loaded with three rounds. And forcibly took his identity card, NSSA card, CBZ bank debit card, Itel cellphone, and loaded stolen gold ore into their vehicle and took it for processing. The applicant was arrested, charged and appeared in court for initial remand, and he was remanded in custody.

[2] The bail application is not opposed. However, it is important to restate the trite position of the law that the grant or refusal of bail is a judicial function. This principle is located in jurisprudence and also in s 117(5) of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act) which says:

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).

[3] In the case of a concession, the court must require the prosecutor to place on record the reasons for not opposing the application. This serves two purposes; it forces the prosecutor to apply his mind to the matter, and gives the court the opportunity to assess the merits or validity

of the prosecutor's reasons. It is in this context that I asked Mr *Ndlovu* Counsel for the applicant to make submissions in support of the application and Mr *Maduma* Counsel for the respondent to make submissions in support of the concession.

[4] In support of his bail application the applicant filed a bail statement and an affidavit deposed to by his wife. The applicant denies involvement in this crime, and avers that on the night the crime was committed he was at his home with his family. The applicant's wife, one Sibekezeli Ngwenya seems to corroborate his version that on the night of the robbery he was at home with his family. He avers further that he was arrested at Inyathi Shopping Center were in the company of others they were waiting for a Mr Ngwenya who was supposed to pick them up and take them to his mine to repair a broken compressor and pump.

[5] The applicant disputes that he is linked to the commission of this crime. It was contended that there was no identification parade to enable the complaint to identify the persons who committed this crime; it was further argued that nothing was recovered from the applicant in person or at his residential address to link him to this crime; and that his cell phone triangulation would show that on the night of the crime, he was at his home. The applicant contends that the interests of justice will not be prejudiced if he is released on bail pending trial.

[6] Mr *Muduma* informed the court that the application was not opposed. Counsel in his brief oral submissions submitted that the reason for the concession was that the applicant's co-accused one Collen Mawisire had been released on bail by the court (*per* NDLOVU J), and therefore, in terms principle of uniformity accused persons who find themselves in similar circumstances should be treated without any differentiation.

[7] It is important to highlight that the applicant is facing an offence referred to in Part 1 of Schedule 3 of the Criminal Procedure and Evidence Act [Chapter 9:07], being robbery, involving the use by the accused or any co-perpetrators or participants of a firearm. Section 117(6) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07] says:

Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in— (a) 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.

[8] It follows that s 117(6) (a) CP & E Act lifts the bar for granting bail in a crime of robbery involving the use of a firearm a bit higher. This is what the applicant had to contend with. The burden of proof is on the applicant to show that the interest of justice will not be prejudiced by his release on bail. For him to discharge such a burden of proof, he must adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release on bail.

[9] The fact that an accomplice has been granted bail requires closer scrutiny. It is trite that persons who find themselves in similar circumstances should be dealt with uniformly, and without ant discrimination. In *S v Lotriet & Another* 2001 (2) ZLR 225 the court commented that it was vital that in the administration of justice there does not appear any form of discrimination, particularly in a matter where the liberty of a person is involved. This accords not only with common sense and justice but constitutes one of the tenets of the rule of law. In *Shamu v The State* HMA 18/21 ZISENGWE J made the pertinent point that:

“That said, it is however equally indisputable that situations may indeed arise which justify the differential treatment of individuals who are jointly charged in a particular criminal case. Such differentiation should be based on the equal application of certain objective criteria either pertaining to the individual’s personal circumstances (such as his health, age, whether or not he has previous convictions, pending matters, whether he is out on bail in respect of other similar cases and so forth) or it may be based on circumstances related to the commission of the offence. The latter may relate to the level of his alleged participation in the commission of the offence as well as his conduct in the wake of thereof particularly the question of whether or not he or she exhibited an intention to abscond.”

[10] It is seriously inadequate for Counsel to merely argue that the applicant is entitled to bail on the basis of the principle of uniformity without showing that his circumstances are similar with those of his accomplice who has had been admitted to bail. A bail record or judgment in respect of the accomplice must be produced, or the case number be provided so that the court may ascertain for itself the similarities between the cases of the applicant and his accomplice. In this case no judgment, no order was produced, nor was I given the case number for the matter of the accomplice. Bail being inquisitorial as opposed to adversarial I looked for the record of

the accomplice. Again, a court is entitled to refer to its own records and proceedings and take notice of their contents. See *Mhungu v Mtindi* 1986 (2) ZLR (S) at 173A-B. I perused the record in respect of the co-accused Collen Mawisire.

[11] The accomplice Mawisire is charged with the crime of robbery as defined in s 126 of the Criminal Code. He is alleged to have committed the crime with a number of accomplices who include the applicant. His version is that he was hired by one DK, a small-scale miner to ferry gold ore from a certain mine to his mine for the purposes of milling. The milling was to be done at Mawisire's mine, and he was paid US\$100.00. In his affidavit of evidence in support of his bail application Mawisire states that:

“As I was sitting in the car, I observed some of the man (*sic*) in the truck disembarking from the truck and wielding machetes. I then noticed at this juncture that DK and his friends had commenced to commit an offence although I was not sure of what the offence was. .... Ore was loaded into my truck and we left heading to my mine for milling purposes. .... I telephoned CID Homicide and informed them about what I witnessed. I was informed by the CID that they had received a report of robbery and that it was alleged that my vehicle was used.”

[12] It is clear that the version of the applicant is materially at variance with that of his accomplice Mawisire. According to Mawisire he was hired to transport gold ore to his mine for milling, and he euphemistically admits that the persons who hired him committed an offence of robbery. And according to the investigating officer Mawisire implicated the applicant in the commission of this crime. The applicant denies that he was part of the people who had hired Mawisire and committed the crime of robbery. The applicant avers that on the night of the robbery he was at his home with his family. Cut to the bone, the accomplice exculpates himself and incriminates this DK person and the applicant. Therefore, the applicant cannot on the facts of this case rely on the principle of uniformity, because his version is diametrically at variance with that of his accomplice who was released on bail.

[13] The inquiry is whether there are exceptional circumstances that permit the release of the applicant to bail pending trial. In showing the existence of exceptional circumstances the applicant is given a broad scope, he may deal with the circumstances relating to the nature of the crime, his personal circumstances; or anything that is cogent. See *S v Dlamini* 1999 (2) SACR 51 (CC). The applicant denies complicit in this crime of armed robbery, I juxtapose his version with the evidence

of the investigating officer. The investigating officer in his affidavit avers that the applicant and his co-accused led the police to the recovery of the stolen gold ore which was being milled at Charlotte 30 Mine in Inyathi. They also led the police to the recovery of four machetes, a button stick, a small axe and axe handle the weapons used during the commission of the crime.

[14] In a bail application, depending on the circumstances, the court may in the exercise of its discretion to refuse or allow bail also rely on the investigating officer's statement. This statement should be weighed with all the other evidence. For the purposes of this application, I accept the evidence of the investigating officer that the applicant and his co-accused led the police to the recovery of the stolen gold ore which was being milled at Charlotte 30 Mine in Inyathi. They also led the police to the recovery of four machetes, a button stick, a small axe and axe handle the weapons used during the commission of the crime. I also accept that a fire-arm and other dangerous weapons were used in the execution of the robbery. I further accept that the applicant was implicated by accomplice Mawisire. I accept this evidence taking into account the general facts of this matter, and the averments by the accomplice Mawisire.

[15] The applicant is 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. Therefore, the submissions that there was no identification parade; and that nothing was recovered from the applicant in person or at his residential address; and that his cell phone triangulation would show that on the night of the crime he was at his home are of no consequence. They are of no moment. These are the issues the trial court might consider, but for this bail application I am satisfied that the State has a strong *prima facie* case against the applicant.

[16] In considering this application 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 applicant to flee. The effect of the State's evidence constitutes a strong *prima facie* proof of applicant's involvement in this crime preferred against him. In the context of the public interest considerations related to the serious nature of the crime 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.

[17] It is trite that in this jurisdiction an accused is presumed innocent until his guilty is established by due process of the law. The court should always grant bail where possible and should lean in favour of the liberty of the accused provided that the interests of justice will not be prejudiced. But in determining the question of bail, too much emphasis cannot be placed upon the presumption of innocence. See *S v Fourie* 1973 (1) SA 100 (D) 101G. The applicant is facing a serious crime of robbery where it is alleged that dangerous weapons were used to subdue the complainant. Generally, armed robbery offences carry a heavy term of imprisonment, and if convicted there is a likelihood of heavy sentence being imposed on the applicant. The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the applicant to abscond. See *S v Jongwe* SC 62/2002.

[18] At this stage, I am not satisfied that the applicant has established a defence which has reasonable prospects of success at the trial, this is a factor pulling the pendulum against the granting of bail. It is a fundamental principle of the administration of justice that an accused person stand trial and if there is any cognizable indication that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence. See *S v Fourie* 1973 (1) SA 100 (D) 101g.

[19] 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 and other dangerous weapons in the alleged commission of the offence of 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.

[20] On a conspectus of the facts and all the evidence placed before court, I am of the view that the applicant has not established exceptional circumstances that permit his release to bail pending trial. It is for these reasons that this application must fail. My view is that the concession by Mr *Muduma* that the applicant was a good candidate for bail was not properly taken.

In the result I order as follows:

The application for bail pending trial be and is hereby dismissed.

**It is so ordered.**

*Tanaka Law Chambers*, applicant's legal practitioners

*National Prosecuting Authority*, respondent's legal practitioners