

KHUMBULANI MPOFU
and
PHAKAMANI MOYO
and
MUNESTI TAKUNDA
and
MLAMULI KHUMALO
and
CANICIOUS SIBANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 17 February & 9 March 2023

Application for bail pending trial

T Runganga, for the applicants
T Maduma, for the respondent

DUBE-BANDA J:

[1] This is a bail application pending trial. The applicants are facing a crime of robbery as defined in section 126(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 22 December 2022 at around 0000 hours the applicants hatched a plan to steal from the complainant. They proceeded to the complainant's mine armed with a pistol, a rifle, machetes, Columbia knife, axes, electric shock and four pounds hammer. Acting in common purpose with one Misheck Deta (now deceased) tied the mine workers and security guards with shoe laces and a cable, and searched their victims for cash and cell phones. They opened the carbon room and offloaded 400kgs of carbon in 50kg sacks. The carbon was valued at US\$170.00.

[2] The applicants filed a bail statement in support of their application. It was contended that the investigating team lied and was misleading as the list of things allegedly stolen and the weapons allegedly used in the commission of the crime was compiled after the

arrest not per the report made on the 22 December 2022. The applicants dispute that they were arrested after a hot pursuit. They contend that their motor vehicle was just shot at the Toll Gate without cause, resulting in the death of their colleague. It was further contended that the whole idea was to deprive them of the gold carbon they were carrying, which carbon they allege the police have already been given to the complainant. The applicants argue that the State does not have a strong *prima facie* case against them. They have a defence to the allegations, which allegations they allege have been fabricated to cover up for the death of their colleague who was shot dead by the police at the scene of arrest.

[3] This application is opposed. The respondent contends that is not in the interest of justice to release the applicants on bail pending trial, in that they are a flight risk. It is contended further that the State has a very strong *prima facie* case against the applicants. It is contended further that all the stolen property was recovered from the applicants. The evidence against them is said to be very strong and this can incentivise them to abscond if released on bail.

[4] The respondent called the evidence of the investigating officer. The Investigating officer testified that seven individuals including the five applicants, armed with a pistol, a rifle, machetes, wooden sticks, knives and an electric shocker executed a robbery at Asley Red Mine in Shurugwi. They searched the workers and confiscated money and cell phones. They forcibly took 400kgs of carbon. As a result of further investigations the police staged an ambush at a Toll Gate on the Gweru-Shurugwi Road. Accosted by the police the applicants became defiant and attempted to escape by driving off the scene. A scuffle ensued and the police fired and deflated two front tyres of the vehicle used by the applicants. The shooting was occasioned by the applicants' attempts to escape arrests. The applicants were arrested except one Misheck Deta who was shot and killed at the scene. The reason for his shooting was that he had drawn a pistol and tried to shoot at the police. The vehicle a Ford Ranger that was used by the applicants was searched, the police found seven machetes; a black satchel; one four pound hammer; three axes; one Colombia knife; twenty-four size spanners; and 50kgs bags of carbon.

[5] The opposition to this bail application is premised on the allegation that the applicants are a flight risk. In considering a bail application the question whether the accused is a flight risk is a "prime consideration." In considering whether the likelihood

of the applicants evading trial has been established the court may take into account the nature and gravity of the charge; the strength of the case against the applicants and the incentive they may have to attempt to evade trial; the nature and gravity of the punishment which is likely to be imposed should they be convicted of the charges against them; and any other factor which in the opinion of the court should be taken into account.

[6] The applicants are charged with the crime of robbery, where it is alleged that they used a rifle, a pistol and other dangerous weapons to subdue the complainants. Robbery is a serious offence. No doubt. Further, the evidence of the investigating officer shows that for the purposes of a bail application, the State has a strong *prima facie* case against the applicants. At the scene of arrest and in the vehicle used by the applicants the police recovered a black satchel; one four pound hammer; three axes; one Colombia knife; twenty-four size spanners; and 50kgs bags of carbon. Stolen carbon was recovered and the complainant identified his 50kg sacks used to carry the carbon. The complainant further identified his 24 size spanner from the second applicant. The recovery of these dangerous weapons, and the identification of the 50kg sacks and the spanner by the complainant is indicative of the fact that the State has a strong *prima facie* case against the applicants.

[7] The evidence shows that the applicants resisted arrest. To subdue the applicants and stop them from fleeing the police shot and deflated two front wheels of the vehicle used by the applicants. A struggle ensued between the police and the applicants, leading to a police detail losing two teeth during the scuffle. One person who was in the company of the applicants draw a pistol and the police shot him, and he died from the gun-shot wound.

[8] 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 applicants are facing a serious offence of robbery where it is alleged that dangerous weapons were used to subdue the complainants. Generally armed robbery offences carry a heavy term of imprisonment, and if convicted there is a likelihood of heavy sentences being imposed on the applicants. The expectation of a

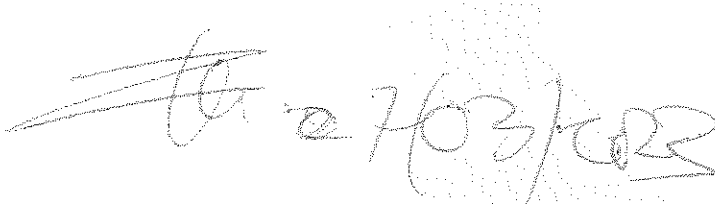
substantial sentence of imprisonment would undoubtedly provide an incentive to the applicants to abscond. See: *S v Jongwe* SC 62/2002.

[9] At this stage I am not satisfied that the applicants have 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.

[10] Furthermore, the applicants are not only a flight risk but their release on bail given the serious allegations against them of the use of a rifle, a pistol and other dangerous weapons in the alleged commission of this offence 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.

In the result, it ordered as follows:

The bail application be and is hereby dismissed.



Tanaka Law Chambers, applicant's legal practitioners
National Prosecution Authority, respondent's legal practitioners