

BHEKIMPILO NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 30 MARCH 2023 AND 20 APRIL 2023

Bail Application

K. Ngwenya, for the applicant
C. Mabhena, for the respondent

MOYO J: This is an application for bail pending trial. The applicant faces a charge of armed robbery as defined in section 126 of the Criminal Law Codification and Reform Act Chapter 9:23.

Allegations are that on the 13th of September 2022 he, together with his accomplices robbed CBZ Bank at the corner of 10th Avenue and Fife Street. Applicant is alleged to have been the driver of the getaway car a silver Honda Fit. Applicant denied the charge and in his defence presents an alibi to the effect that on the date of the alleged robbery, he was in Inyathi at his father's homestead. Applicant is allegedly implicated by his co-accused in the commission of the offence.

This matter was heard on 2 separate sittings, the reason being that at the initial hearing, the Investigating Officer having been called told the court that the state had not investigated the accused's alibi as they were not aware of it. The court deferred the matter and advised the Investigating Officer to investigate the alibi. The matter was then re-set down after the further investigations. The Investigating Officer gave evidence and told the court that the father of the accused denied ever swearing to an affidavit about accused's whereabouts and in fact disowned the same affidavit. However applicant's father was called in to give oral evidence and he told

the court that he did sign the affidavit and he confirmed that indeed on the alleged dates the applicant was at his homestead.

This court not being a trial court, uses the *prima facie* evidence before it and whilst there is confusion as to what happened between the Police and the applicant's father as to whether he disowned the affidavit on applicant's alibi or not, this court should just use what he stated before it and that is to the effect that he stands by his testimony that applicant was indeed at his homestead at the material time. For purposes of this hearing and the nature of a bail application where *prima facie* facts are used, I hold the view that the alibi evidence given by applicant's father, should be accepted as *prima facie* evidence of a defence on the part of the applicant. Whether the father is telling the truth or not or whether the state may successfully rebut the alibi at trial, is a matter for the trial court. For the purposes of a bail application, the alibi evidence of applicant's father suffices as *prima facie* evidence of a defence on the part of the applicant.

Once this court accepts that there is *prima facie* evidence of an alibi, then the risk to abscond is negated. The court can thus not find any compelling reason, as none was proffered by the state, to deny applicant bail in these circumstances. It is my considered view that on the facts of this matter as a whole, applicant has made a case for his release and the state has failed to show any cogent reasons for his continued incarceration as well as the risk to abscond.

This court is also alive to the fact that applicant has already been granted bail in 2 other matters that the state had used in paragraph 16 of its response that is CRBs 119 and 120/23 to oppose bail, buttressing the view that he is not a flight risk as he has not been found to be so in the other 2 matters.

It is this court's considered view that bail is not denied as a matter of course. The state must come up with cogent reasons and compelling reasons for the restriction of an accused's liberty. The state must proffer a strong *prima facie* case as against a weak defence case. It is in the analysis of the strength and weaknesses in either case that the court can infer either the risk to abscond or the determination to attend trial and from the facts of this case, application armed with his alibi, that the father testifies to, does not strike the court as one who faces an overwhelmingly strong state case warranting that the risk to abscond be inferred and that the result be to deny him bail. I am aware that the state also seeks to rely on the identification

evidence by the parking lady, however, that evidence will be tested during trial although I should comment that at this juncture, other than that it is alleged that she saw him at the parking lot, there are no peculiar features of applicant being given together with those of the motor vehicle. It is for these reasons that I do not hold the view that there is a strong *prima facie* state case allowing me to infer the risk to abscond.

Applicant should in these circumstances be entitled to his liberty.

It is for these reasons that I will grant the application in terms of the draft as amended.

T. J Mabhikwa and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners