

PHIBION NYUKE  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MANYANGADZE J  
HARARE, 14 April & 26 May 2023

**Bail pending trial**

Mr *B. Pesanai*, for the applicant  
Ms *T.M. Havazvidi*, for the respondent

**MANYANGADZE J:** This is an application for bail pending trial. The applicant is facing charges of robbery (two counts) as defined in s 126(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and one count of possession of a firearm in contravention of s 4(1) of the Firearms Act [*Chapter 10:09*].

According to the Request for Remand Form (Form 242), the allegations are that on 6 October 2022, the applicant, in the company of five accomplices, proceeded to Steward Bank's Highlands branch. They were armed with firearms, explosives and machetes. They disarmed the security guard and took his firearm, a Revolver, 22 Special (Serial No. 44561) which was loaded with 5 rounds of ammunition. They also took his vivo cell phone.

The applicant and his accomplices went on to break into the bank, from where they took two chubb safes. Using a grinder, they broke open one of the safes but found nothing. They broke into the manager's office, looking for cash and other valuables. They found nothing of interest. They left the scene.

On 11 October 2022, one of the accomplices, known as Osinege Zvomuya, was arrested. He implicated the applicant. The applicant led to the recovery of a 9 mm P1 pistol with a magazine of 5 rounds of ammunition, 2 blank pistols loaded with 8 blank ammunitions each, balaclavas and gloves.

In the second count of robbery, it is alleged the applicant, again in the company of his accomplices, went to ABC Auctions, along Seke Road, on 8 October 2023, around 0100 hours.

At gunpoint, the 2 security guards manning the premises were ordered to lie down. They had their hands and legs tied with shoe laces. The gang then forced their way into the offices where they broke 6 safes using grinders and explosives. They managed to take US\$ 1 014 000,00 cash, and a large quantity of jewellery worth US\$ 250 000,00. The jewellery included an assortment of gold and diamond watches and rings.

On 13 October 2013, acting on information received, CID Homicide detectives arrested the applicant and managed to recover a PI pistol with a magazine of 5 rounds of ammunition, 2 Retay blank pistols, 5 caped fuses, 4 superpower 90 emulsion explosives, US\$ 19 657, 00, ZAR 8 470,00, pearl set yellow gold ring, cartier ball point pen, cross pen, silver bracelet, 2 brass rings, 18 carat gold ring, 9 carat gold bracelet, gold cross pen and gold necklace.

Total value of property stolen in the two robberies was put at US\$ 1 264 031,00. The value recovered was US\$ 19 657,00 cash and jewellery worth US\$ 43 656,00.

The recovered pistols were the basis for the third count, which is unlawful possession of firearms in contravention of the Firearms Act.

In its opposition to bail, the State alleges that there is a high risk of abscondment+. This is premised on the seriousness of the offence and the strength of the State's case. It is alleged that the applicant was at the robbery scenes and was later found in possession of a firearm without a certificate. It is further alleged that upon his arrest, he tried to flee and warning shots had to be fired.

It is trite that the seriousness of an offence on its own cannot be the basis for denying bail. It must be considered together with other factors such as the strength of the State's case. See *S v Hussey* 1991(2) ZLR 187 (S), *S v Kanoda and Ors* HH 200/90, *S v Makamba* 2004 (1) ZLR 367 (S).

The State avers that some property was recovered from the applicant's residence. This property includes US\$ 5 657,00 cash, ZAR8 470,00, gloves, 2 balaclavas, gold bracelet, 18 carat gold oyster perpetual watch, Rolex oyster perpetual two tone watch and a Rolex perpetual watch. The recovered items were positively identified by the complainant.

Further to that, the State invoked the provisions of s 115 (2)(a)(ii) of the Criminal Procedure and Evidence Act[ *Chapter 9:07*]. These provisions, read with s 117(6)(a)(b) of the same Act, place the onus on the accused to show that it is in the interests of justice that he be

released on bail, *where Third Schedule offences are concerned*. Section 115 (2)(a)(ii) reads as follows:

“(2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail—  
(a) before a court has convicted him or her of the offence—  
(i) the prosecution shall bear the burden of showing, on a balance of probabilities, that there are compelling reasons justifying his or her continued detention, unless the offence in question is one specified in the Third Schedule;  
(ii) the accused person shall, if the offence in question is one specified in—  
A. Part I of the Third Schedule, 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;  
B. Part II of the Third Schedule, bear the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail;”

Section 117 (6)(a)(b) provides:

“(6) 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;  
(b) Part II 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 the interests of justice permit his or her release.”

According to these provisions, the general position is that the prosecution bears the burden of proof in showing that there are compelling reasons why an accused person should not be admitted to bail. This burden shifts to the accused person in respect of offences specified in the Third Schedule. In both instances, the burden is discharged on a balance of probabilities. The accused must show that it is in the interest of justice for him to be released on bail. Section 17(6)(a) goes so far as to state that the accused “*adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist*” which allow him to be released.

The legislature, in its wisdom, included the above-cited provisions in recognition of the grave nature of certain offences. It seems the intention was to have the courts adopt a more

cautious approach when considering bail for such offences, without derogating from the accused person's constitutional rights.

The applicant completely denies the allegations. He avers that he was never at the scene of any of the robberies. He asserts that the money that was recovered from him was for the purchase of some poultry products, as he is in the poultry business.

The applicant sought to distance himself from the jewellery items recovered from a house in Budiro, which is said to be his residential premises. As already indicated, these items were positively identified by the complainant. In his affidavit, the investigation officer states that acting on information received, detectives proceeded to this house, No. 1023 – 181 Budiro 1, Harare, where the said property was recovered. They could not arrest the applicant as they had intended when they went to this place. They could not locate him there. There was a woman by the name of Primrose Dzikiti, said to be the applicant's wife. In an endeavour to distance himself from these recoveries, the applicant claimed that he was no longer staying at that house. However, he could not deny that the woman from whom the property was recovered was his wife. He only hastened to add that they were now on separation. Is the applicant shifting the blame for the robbery to his wife? It is highly unlikely she is the one who teamed up with the alleged accomplices and brought the loot home. It is not her, but him, who was implicated by his co-accused.

Entitlement to bail is enshrined in s 50(1)(d) of the Constitution. It is a fundamental right premised on a key tenet of our criminal justice system, which stipulates that an accused person is presumed innocent until proven guilty. This basic principle has found expression in s 70(1)(a) of the Constitution. However, the right to bail, like other fundamental rights, is not absolute. There are limitations, having regard to the rights of other persons and the interests of justice.

The facts of the matter establish a strong link between the applicant and the commission of the robberies. Where the facts given in a particular matter establish a strong *prima facie* case against an accused person, it is not in the interests of justice to release such person on bail. It is common cause the expensive jewellery items recovered were stolen from the scene of the second robbery. Also recovered were items whose use can only be in the commission of violent crimes such as robbery. These items include balaclavas, gloves, explosives and firearms.

Whilst the applicant may argue that the cash was for his poultry project, the jewellery, balaclavas, explosives and firearms can certainly not be for such a project.

Where there is a strong *prima facie* case, there is a high likelihood of conviction. A conviction for such serious offences inevitably results in very lengthy sentences of imprisonment. The fear of abscondment is real and not imagined or fanciful. There is need to protect the integrity of court processes such as the bail system. Public confidence in the system can be easily eroded if accused persons are admitted to bail when they are facing serious allegations, in circumstances where property and life are gravely endangered, and the facts are indicative of a strong link between the accused and the alleged offences. There is need to balance the accused's constitutional rights with the interests of justice and the community. Failure to do so may see the emergence of vigilantes, who will decide to take matters into their own hands. The result will be an anarchical society where no one is safe. It is certainly not an easy task for the courts, who are saddled with the unenviable task of balancing these often irreconcilable interests. Ultimately, each case turns on its merits.

*In casu*, when all the facts highlighted are cumulatively considered, they militate against the granting of bail.

**In the result:**

It is ordered that the application for bail pending trial be and is hereby dismissed.

*IEG Musimbe and Partners*, applicant's legal practitioners.  
*National Prosecuting Authority*, respondent's legal practitioners.