

QAPHELANI SIKHOSANA**Versus****THE STATE**IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 1 & 8 OCTOBER 2020**Bail Pending Trial***Advocate Siziba instructed by Ngulube, for the applicant*
K. Jaravaza, for the respondent

MAKONESE J: The general principle is that an applicant facing criminal charges is entitled to bail pending trial unless there are compelling reasons to deny him bail. Applicant is facing a charge of robbery in contravention of section 126 (1) (a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The applicant denies the charges and contends that he is a proper candidate for bail. The state opposes this application.

Factual background

The state alleges that the applicant and three accomplices intentionally used violence against the complainant Khumbulani Tshuma, Lyton Moyo and Bhekani Ncube to induce them to surrender various goods and cash. It is specifically alleged that on 4th August 2020, the applicant and his associates, proceeded to Nyezi Village, Chief Sikhosana in the Filabusi area.

The applicant and his colleagues were armed with a pistol and machetes. Upon arrival at Luckson Moyo's homestead applicant and his crew assaulted everyone present demanding gold, cash and other valuable goods from their victims. They forcibly took 24 grams of gold, a gold detector, and various items of clothing including blankets and cash amounting to USD\$1 500. During the course of the robbery, applicant struck Luckson Moyo once on the head with a machete before searching the victim. Lyton Moyo was again struck once with a machete on the

right palm before he was robbed of cash amounting to Z\$5 000. Applicant and the other assailants fled the scene following the robbery. A report was made at ZRP, Filabusi.

In his bail statement, the applicant makes the following averments:

- (a) he went to Filabusi with his two friends Sinobukhosi Mpofu and Brighton Mpofu.
- (b) it was Sinobukhosi who used coercion against the complainants since he claimed they owed him money in a failed gold detector transaction.
- (c) the complainant only identified him because he was with Sinobukhosi who is now at large, having absconded.

During oral submissions, *Advocate Siziba* appearing for the applicant conceded that the applicant was found in possession of some of the stolen loot at the time of his arrest. In particular, a passport belonging to one of the complainants, Lyton Mpofu was found in the possession of the applicant. Certain other goods and cellphones were also recovered from the applicant at his residence at 5369 Nketa 9, Bulawayo. The explanation given by the applicant was that he was keeping the stolen property on behalf of Sinobukhosi. It is difficult to understand why the applicant would keep property stolen in a robbery at his place of residence. Applicant portrays a picture of someone who went along with robbery but took no active role at all. His conduct after the robbery is not consistent with the events. The state has a strong *prima facie* case against the applicant.

The Law

The law is now settled in this jurisdiction regarding matters of bail pending trial. In terms of section 50 (4) (d) of the Constitution of Zimbabwe (Amend No, 20), 2013, as read with section 117 of the Criminal Procedure and Evidence Act (Chapter 9:07), an accused person is entitled to release unless there are compelling reasons to why their detention should continue. It is the applicant's assertion that he did not participate in the commission of this offence. It is

however shown in the sworn statement of the Investigating Officer, Mkhululi Dube, that applicant had in his possession property that was positively identified by the complainants. It is the state case that applicant was positively identified by witnesses at the scene of crime and during the course of the robbery. This fact is corroborated by the applicant himself who says he was in the company of Sinobukhosi at the time of the robbery.

The applicant, who admits having been in possession of property recently stolen, has an onus to prove how he acquired possession of such property. He is required to explain his possession of property that was recently stolen.

The courts generally adopt the view that the stronger the state case, the more serious is the risk of abscondment. Each case must however be decided on its own merits. Where the state has a watertight case against an accused person, there is greater temptation to abscond. See; *S v Jongwe* 2002 (2) ZLR 209 p 215F-G. It is common cause that the main perpetrator in the robbery Sinobukhosi Mpofu has absconded and is still at large. It was argued that because of that fact the trial is unlikely to kick off and that this could be prejudicial to the applicant. *Mr Jaravaza* appearing for the applicant, correctly pointed out that the absence of the main perpetrator does not prevent the court from trying the applicant provided there is sufficient evidence to prosecute. The applicant admits having taken a role in keeping the stolen property. The applicant admits having been present when the robbery occurred. His explanation is that he was just an “innocent bystander”. In other words, whilst the robbery took place he did not find it necessary to disassociate himself from the unlawful enterprise. This does not make sense.

It is a fundamental principle of our criminal justice system that in admitting or denying an applicant to bail, the due administration of justice must not be endangered. See *S v Fourie* 1973 (1) SA 100. The liberty of the individual must be balanced against the interests of the state and the due administration of justice.

Disposition

The applicant does have a fixed abode and does not have travel documents. The case against him is serious and in the event of conviction the applicant faces a lengthy prison sentence. The applicant was found in possession of the stolen goods and a passport belonging to Lyton Moyo which was hidden under a bed at his residence. The state has a strong and *prima facie* case against the applicant. There are compelling reasons as to why the applicant might not be released on bail. The risk of abscondment is high. The granting of bail is not in the interests of justice.

In the circumstances, I would accordingly dismiss the application.

Sengweni Legal Practice, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners