TAPIWA MANGOMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 4 February 20221 & 12 March 2021

Bail pending trial

Applicant in person
A Masamha, for the respondent

CHITAPI J: The applicant Tapiwa Mangoma is an attested member of the Zimbabwe Republic Police based at Beitbridge Urban Police Station in Beitbridge. He applies for bail in respect of three counts of "Armed" robbery as defined in s 126 of the Criminal Law 9codifuication & Reform) Act [*Chapter 9:23*]. In terms of s 126 aforesaid there is no offence called "armed robbery." The offence is defined as robbery, which in terms subs 3 of s 126, if during its commission, the accused or accomplice

"(a) possessed ma fire arm or a dangerous weapon; or
(b) inflicted or threatened to inflict serious bodily harm; or
(c) killed a person

on the occasion on which the crime was committed, the robbery is then qualified as having been committed in aggravating circumstances. A robbery committed in aggravating circumstances attracts a sentence of life imprisonment or any definite period of imprisonment. By contrast a robbery committed without aggravating circumstances attracts a fine not exceeding level fourteen or twice the value of the stolen property which is subject of the charge or fifty years imprisonment or both. In the latter instance, the court may suspend the whole or any part of the sentence of imprisonment on condition that the convicted person restores to the victim the property stolen from such victim or compensates the victim for the loss.

The proper distinction on the nature of the robbery charged is important because the accused should be conscientized of the elements thereof. A proper understanding of the nature

of the charge ensures that the accused if minded to reply to the allegations as opposed to exercising the right to keep silent, gives an informed reply. In *casu,* the reference to armed robbery arose from allegations that the applicant or his accomplices used fire-arms and other dangerous weapons to commit the alleged robberies whose details I will deal with in due course.

In this application, the three cases for which bail is sought are pending under CRB 11846-53/20; under CRB 11865-72/20 and under CRB 11873-80/20. The applicant is the eighth accused in each of the three cases. The applicant in all three cases is charged with seven accomplices, namely,

1. Mussa Taj Abdul (alias Salim Rahman)
2. Liberty Mupamhanga
3. Prince Makodza
4. Godfrey Mupamhanga
5. Charles Lundu
6. Rudolph Kanhanga alias Taps Munatsi
7. Innocent Jairos

The applicant is also said to use the alias TAPA. The applicant and his accomplices appeared on initial remand beofore the magistrate at Harare on 17 December 2020. The brief details of the charges of robbery committed in aggravating circumstances were as follows:

(a) **CRB 11846—53/20**

It was alleged that on 23 July 2019 the applicant and his accomplices, acting in common purpose, and whilst armed with pistols and metal bars made forced entry into the complainant's shop at Murambinda Growth Point, Buhera. They allegedly confronted the complainant whom they threatened with a fire-arm to induce submission to part with his property before beating up the complainant with metal bars. The applicant and his accomplices are alleged to have fired some gun shots in the air upon jumping into their gate away and driving away at high speed. It was alleged that upon their arrest in Beitbridge on 24 August 2020, the applicant was found in possession of a pistol with obliterated serial numbers and a magazine with live rounds of ammunition. It was further alleged that the recovered fire-arm was examined by CID Ballistics Section which found that the spent cartridges recovered at Murambinda Growth Point after the robbery herein matched the ones fired from the fire-arm recovered from the applicant and his accomplices.

(b) **CRB 11865-72/20**

It was alleged against the applicant and his accomplices that on 19 October 2019, the eight some acting with a common purpose, armed themselves with a pistol, an axe and two iron bars. They proceed to a property called 1813 Sherwood, Concession where they unlawfully gained entry into the house around 0200 hours with intention to commit robbery. They threatened complainant to induce his submission to part with his property. They threatened to shoot the complainant and kill him before assaulting him with iron bars and booted feet. They further threatened the complainant's wife and children demanding money before firing two shots into the air. The group ransacked the complainant's house and stole US$1650; RTGS$200.00, four cell phone handsets, digital camera, laptop and 80 litres diesel. The applicant and his accomplices then deflated the tyres of the complainant's three motor vehicles parked in the yard before they drove off. It was alleged that the applicant and his accomplices upon their arrest in Beitbridge on 16 August 2020 was found in possession of the firearm which was used in the commission of the robbery herein. Part of the complainant's property was found in the possession of the group.

(c) **CRB 11873-80/20**

The allegations against the applicant and his accomplices were that on 16 June 2019 around 0200 hours, they armed themselves with fire-arms and an electric grinder. The group proceeded to Wholesale Beef premises in Belmont industrial area in Bulawayo. On arrival they confronted the security guard whom they threatened with fire-arms before tying him up. They gained entry into the building through the roof. Whilst inside the building, they used the grinder to open the safe before stealing therefrom USD$3450.00; $ZWL915.00, two cell phones and a laptop. The group allegedly fired shots at police who had reacted to the report of robbery, before the group fled from the scene. Police recovered spent cartridges of which one matched the fire-arm recovered from the applicant upon their arrest of the group in Beitbridge.

The three charges were preferred against the applicant and his accomplices when they were already in custody after being remanded by the magistrate at Harare on other charges under case No. 7771-8/20 on 28 August, 2020 of unlawful possession of a fire-arm and ammunition as defined in s 4 (a) and (b) of the Firearm Act, [*Chapter 10:09*]. The applicant has however captured CRBs 7678 and 7654/20 as the cases for which he was remanded and/or subsequently brought to trial before being charged for the offences *in casu.* These cases do not concern this application directly, save to the extent that they bear on the history and connection of the applicant with the courts in that he is not a stranger to the courts. The applicant would in any event be required at law to disclose pending cases before the court in any application for

bail which he may make, failing which the applicant would commit an offence in regard to that non-disclosure as fully provided in s 117 A (5) as read with subsection (8) thereof of the Criminal Procedure & Evidence Act.

In regard to all the three counts, the subject of this bail application, the applicant did not challenge his placement on remand. I must therefore assume that the applicant accepted that the facts as alleged by the prosecutor and as outlined in the Forms 242 for each count and accompanying documents established a reasonable suspension that the applicant committed the offences charged. The decision of the Supreme Court in *Attorney General* v *Blumears & Anor* 1991 (1) ZLR 118 (S) is to the effect that if the accused brought to court for remand challenges the facts alleged by the State on the grounds that the facts do no constitute a crime or justify a reasonable suspicion that the accused committed the offence, the accused may lead cogent evidence to prove otherwise and the magistrate may if satisfied on the accused's evidence, reject the allegations by the State and dismiss the State's application for the placement of the accused on remand. The applicant should therefore not use a bail application as a window to challenge the remand and if he desires to do so, he should make such application in the remand court because the State has a duty to satisfy the court that the continued remand of the applicant is justified at law. In other words, the reasonable suspicion should be shown to be still supportable at every remand. See *Williams and Anor* v *Msipha N.O & Ors* 2010 (2) ZLR 552 (S).

The applicant avers in the application that the police arrested an innocent person. He averred that he was arrested inside his house but there was no exchange of gunfire during this arrest. He also states that he did not resist arrest and further that he was arrested in broad daylight. He denied that a fire-arm was recovered from his house. He stated that in any event he was undergoing trial for unlawful possession of that disputed fire arm. He averred that he will be acquitted of the charge when his trial is concluded. The applicant largely deals with an attack or challenge on the veracity of the State case against him in the ongoing trial of unlawful possession of a fire-arm. As I have already pointed out, the bail court judge does not sit to hear a challenge to the grounds for remand. That is a function of the Magistrates Court. A decision given on such challenge is appealable and reviewable and the High Court will only deal with the challenge if brought via the appeal or review procedure.

In further motivating the bail application, the applicant averred that the requirements of the law to deny him bail had not been satisfied by the state. The applicant stated as follows:

"**AD POINT 4**

The requirements of the law have not been met. The State has failed to show the following:
(i) Evidence undisputed that the applicant committed the offence
(ii) That applicant is a flight risk
(iii) That applicant has propensity to commit other crimes of similar nature or any other crimes for that matter
(iv) That the matters are genuine not fabricated against the applicant
(v) That keeping the applicant is just, especially in the present circumstances where the courts are not sitting for trial because of the national lockdown to the corona virus.
(vi) That keeping the applicant in custody where a trial is not in sight
(vii) That the applicant has no previous convictions
(viii) Evidence to show that the applicant participated in the armed robberies in question
(ix) The applicant will interfere with witness and or investigations
(x) The applicant survives through the commission of crimes."

The applicant is misdirected in casting an onus on the state to prove that the applicant is not a suitable candidate to be granted bail. The correct position at law on onus in bail applications is set out in s 115C. Firstly the three counts of robbery subject of the application for bail fall under section 3 of Part 1 of the Third Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides as follows:

"3. Robbery, involving—
(*a*) the use by the accused or any co-perpetrators or participants of a firearm; or
(*b*) the infliction of grievous bodily harm by the accused or any co-perpetrators or participants; or
(*c*) the taking of a motor vehicle as defined in section 2 of the Road Traffic Act [*Chapter 13:11*]."

In all the three counts, it was alleged that the victims of the robberies were threatened with a firearm(s); shots were fired into the air and the victims were also badly assaulted using metal bars. The alleged offences were therefore committed in circumstances defined in section 3 (a) and (b) as above quoted.

In terms of section 115 C which I have referred to, it is provided in material parts as follows:

"115C Compelling reasons for denying bail and burden of proof in bail proceedings
(1) In any application, petition, motion, appeal, review or other proceeding before a court in which the grant or denial of bail or the legality of the grant or denial of bail is in issue, the grounds specified in section 117(2), being grounds upon which a court may find that it is in the interests of justice that an accused should be detained in custody until he or she is dealt with in accordance with the law, are to be considered as compelling reasons for the denial of bail by a court.
(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) ……
(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. ……
> (b) ……..”

It therefore follows that in this application, the applicant bears the burden of showing that it is in the interests of justice to release him on bail. He must do this by relating to the relevant provisions of s 117 (2) as they apply to his situation and circumstances of the case as well as to the grounds for opposing bail advanced by the prosecution. There is no onus on the state to establish that the applicant is not a suitable candidate for bail. The state is expected to outline reasons founded on cogent allegations why it would not be in the interests of justice to admit the applicant to bail. The applicant is one who must satisfy the court that the interests of justice would be served by his admission to bail. In other words, the applicant bears the burden on a balance of probabilities to show that there are no compelling reasons to deny him bail. This also means that where the prosecution has advanced what in its opinion are compelling reasons to deny the applicant bail, the applicant has the onus to disprove the existence or presence of the compelling reasons so alleged. It is therefore not a walk in the park for an applicant who applies for bail in respect of offences listed in Part 1 of the Third Schedule.

The prosecution in its response averred that the applicant was facing several cases of “armed” robbery. This fact is not disputed by the applicant because he listed the CRB reference numbers in relation to previous bail applications. He even stated that the State was bringing up charges piece meal and used the words “charges are being dolled out in instalments as a means to thwart his efforts towards his quest for freedom….” The applicant averred in paragraph 17 of his application that he was served with a summons on 27 November, 2020 wherein he is charged with four (4) counts of “Armed” robbery. He was supposed to appear at the Magistrates Court on 11 January, 2021 but did not appear in answer to the summons because of the limited court operations due to COVID 19 lockdown regulations which curtailed court operations. I will despite the failure of the applicant to appear at court to answer to the four (4) counts he related to, take note that the applicant is due to appear before the court on additional similar charges to the ones for which he applies to be admitted to bail herein.

The prosecution averred that the applicant was facing several serious charges in which he is on remand and may be remanded on others, that the applicant being a police officer was aware of the possible punishment he would face and that coupled with strong evidence against the applicant, the applicant would abscond. The strong evidence referred to was that a fire arm

which was loaded with ammunition similar to spent cartridges recovered at the robbery scenes was found in the possession of the applicant in a washing basket in his house. The serial numbers on the fire-arm had been obliterated. The applicant submitted that he was on trial for unlawful possession of the fire-arm, that there was no strong evidence led against and he would be acquitted. As I indicated, I am not sitting on trial nor on review of the ongoing trial proceedings. I am directed by the undisputed facts on which the applicant was remanded consequent to which this bail application was then made.

In regard to the risk of abscondment, section 117 (2) provides that:

> (2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—
> (*a*) where there is a likelihood that the accused, if he or she were released on bail, will—
> (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
> (ii) not stand his or her trial or appear to receive sentence; or
> (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
> (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system.
>
> (b) where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine public peace or security."

Having considered all the facts and circumstances of this application including the personal circumstances of the applicant to the extent that they impact on this bail application, I am not persuaded to accept contrary to what is alleged on the papers by the prosecution that if released on bail, the applicant is likely to interfere with evidence and witnesses and also to commit other offences. There have been no cogent facts placed before me to suggest that the fears in that regard are well founded. These are just empty fears. The same cannot however be said in regard to the risk of abscondment and the undermining of or jeopardizing of the objectives and proper functioning of the criminal justice system including the bail system.

In regard to the likelihood that the applicant is likely to abscond and not stand trial, ss (3) of s 117 provides in para (b) thereof as follows: -

"(3) In considering whether the grounds referred to in-
(a) ……
(b) ss (2) (a) (ii) has been established, the court shall take into account-
(i) the ties of the accused to the place of trial.
(ii) the existence and location of assets held by the accused.
(iii) the accused means of travel and his or his possession of or access to travel documents
(iv) the nature and gravity of the offence or the nature and gravity of the likely penalty thereof
(v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee
(vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions

(vii) any other factor which in the opinion of the court should be taken into account."

The applicant is the one who bears the onus to show that it is in the interests of justice to grant him bail. The applicant must in his application relate to the peremptory factors which the judge or magistrate is required to take into account as quoted above. The applicant did not do that. He did not address the details of his ties to the place of trial, assets he holds and the other factors. For example, it is not sufficient for the applicant to just provide a residential address. His ties to the place must be detailed. If property is rented or freehold, such detail must be provided and if available, copies of title, lease agreements and other documentation which connects the applicant to the household must be provided as attachments in copy form with originals if required for inspection being available.

The applicant has devoted a lot of time to deal at length with his ongoing trial for unlawful possession of the fire-arm which is the main link between him and the three offences involved in this application. He has even commented on the witnesses and their evidence in that trial in an endeavour to show that the evidence against him is weak. As already indicated, the bail judge cannot review those proceedings, the record whereof is not even before the judge. The applicant in short is expected in a bail application to build his profile as a suitable candidate for bail. The bail proceedings are not intended to determine the guilt or innocence of the applicant in relation to the charges on which the applicant is on remand. The applicant therefore said very little if anything to discharge the onus to establish that it is in the interests of justice to grant him bail.

The other issue is to determine whether or not taking into account all the circumstances at play in this application, there is a likelihood that the release of the applicant on bail may undermine or jeopardize the objectives or proper functioning of the criminal justice system including the bail system. The interpretation of this ground has not in this jurisdiction been subject to much interrogation, at least from my limited research. M*r Masamha* for the respondent relied on this ground for denying bail to the applicant. He expressed himself as follows in para 6 of the respondents' response-

> "6. Indeed, the applicant's release on bail will undermine the public confidence in the justice delivery system particularly the bail system. It is not in dispute that he has several armed robbery cases that are pending. It is also not in dispute that he had another bail application for other counts of Armed Robbery, dismissed by this Honourable Court and is also not in dispute that he is undergoing trial for unlawful possession of ammunition and fire-arm. The net effect of above is that the Court of public opinion will not rule it safe to have such person back on the street without exhaustion of the due process thereby undermining or eroding the public confidence in the judiciary. "

The applicant also addressed this ground. He submitted that the words "public confidence in justice delivery is simply justice delivery." As regards, the allegation that the public confidence will be undermined if the applicant is granted bail, the applicant averred that it was the State which is guilty of spreading falsehoods and branding the applicant a criminal using other offensive titles. He averred that he had lost face in the eyes of the public because of police who continue to brand him as a criminal thereby attracting the press which publishes what police say. Applicant averred that it was necessary that the public should instead be protected from the false press reports. He averred that the Court should uphold the applicants' right to liberty.

Without full argument on the extrapolation of the said ground to refuse bail, I lack the necessary ammunition to provide a complete expose or unpacking of the ground. What is however clear is that the ground refers to the need to ensure that the bail system and in turn the criminal justice system itself should be safeguarded and not be rendered an ineffective system. It will be ineffective as a system if *inter-alia* the public loses confidence in its purpose and efficacies. The public should not end up regarding bail as a tool which hinders the administration of justice instead of promoting it. Bail must be granted in a deserved case and not for the sake of it. The grant of bail must in all circumstances be guided by the interests of justice. Section 117 (3) (d) provides that the court shall consider the following factors in determining whether the ground that the release of applicant on bail will undermine or jeopardize the criminal justice and for bail systems has been established-

"(i) whether the accused supplied false information at arrest or bail proceedings;
(ii) whether the accused is in custody on another charge or is released on license in terms of the liaisons act [*Chapter 7:11*]
(iii) any previous failure by the accused to comply with bail conditions;
(iv) any other fact which in the opinion of the court should be taken into account."

In casu, the applicant is on remand on an unlawful possession of fire-arm charge on which trial has commenced. He is on remand on two other charges of "Armed" Robbery and Murder. He is on remand on the current- three charges for which he seeks bail. He was served with a subpoena to appear at court on four (4) charges again of "Armed" robbery. The applicant also produced the ballistic report on tests done using the pistol allegedly recovered from the applicant. The results matched about seven scenes of robbery committed in aggravating circumstances. Some of those scenes inform the charges preferred against the applicant. Whilst the applicant is critical of the fact that charges appear to be preferred piece meal, it must be appreciated that the offences were not committed in one place and at the same time. Police

investigations will obviously not be limited to the ballistic report but a thorough investigation of each scene and case.

In *casu*, I do appreciate that the fact that the applicant is in custody on another charges is not a bar to the grant of bail. In the case of the applicant however, the pending cases are very serious and heavy penalties are provided for. The crimes were violent in nature and the public indeed has an increased interest in the cases. The issue boils down to a balancing act wherein the applicants' rights to liberty and presumption of innocence until found guilty are pitted against the danger to the due administration of justice were bail to be granted. In the circumstances of this application, although I do not endorse the view that there is a court of public opinion as averred by Mr *Masamha*, the fact remains that the arrest and charges preferred against the applicant have become a matter of public interest. Courts, whilst they do recognize the public interest in a matter, should not dispose of a matter according to public opinion but according to law. *In casu*, I am of the view that bail be refused on this additional ground that the circumstances of the commission of the offences, applicant's circumstances including pending cases will undermine the proper functioning of the bail system and in turn the criminal justice system.

The risk or likelihood of abscondment by the applicant is high in this case. The applicant did not discharge the burden to show that it is in the interests of justice to grant him bail for reasons I have extrapolated.

The application for bail is dismissed.

National Prosecuting Authority, respondent's legal practitioners