

TAWANDA MAFIDI MUNANGAGWA
and
VENGESAI MUNANGAGWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 3, 4 & 17 May 2022

BAIL APPLICATION

HEM Ushewokunze with RT Nyarugwe, for the applicants
A Masamha, for the respondents

CHIKOWERO J:

INTRODUCTION

1. This is an application for bail pending trial pursuant to the applicants' placement on remand on two counts. The first count is the offence of conspiracy to commit robbery in aggravating circumstances as defined in s 188 as read with s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the code). The second count is the offence of unlawful possession of a firearm as defined in s 4(1) as read with s 4(2)(b) of the Firearms Act [*Chapter 10:09*] (the Firearms Act).

THE FACTUAL BACKGROUND

2. The first and second applicants are siblings. The former, 35 years old, has three minor children. He has been residing at Stand Number 9103 Retreat Farm, Waterfalls in Harare since 2017. He was allocated that piece of land by Black Empowerment Housing Cooperative Society, of which he is a member. He is a squadron in the Airforce of Zimbabwe and is currently stationed at Manyame Airbase in Harare. He is also a partner in Litapet Mining Syndicate, which entity carries out mining activities at Plot Number 5 Overlaw Farm, Muzvezve in Kadoma. The first applicant's savings are ZWL\$10 000 which he offers to pay as bail deposit.

3. His brother, the second applicant, is a 45 year old blessed with six children the youngest of whom is a four year old. He was allocated Subdivision 24 of Brantingham Farm in Marondera in or about 2010 by the then Minister of Lands, Land Reform and Resettlement. The land, measuring 24.30 hectares, is where he resides and carries out farming activities. He also is a partner in Litapet Mining Syndicate. He offers to deposit his ZWL\$10 000 savings as bail money.
4. The respondent's allegations are these:-
On 14 April 2022 members of the Criminal Investigations Department received information to the effect that the applicants had conspired to commit robbery in aggravating circumstances at Plot Number 5 Overlaw Farm, Muzvezve in Kadoma. The arresting team intercepted the applicants along Bulawayo Road near Norton. The latter were driving a white Nissan Hardbody twin cab, registration number ABY 4331. Searches conducted inside the vehicle yielded an AK47 rifle with serial number ZA 43870 as well as a magazine containing thirty (30) rounds. These were under the driver's seat. This led to the applicants' arrest.
5. On 15 April 2022 the police conducted further searches at the first applicant's residence whereupon he is alleged to have led to the recovery of a 9mm Tokarev Pistol, serial number 16014372, with an empty magazine. The annexure to the Request for Remand Form indicates that the pistol had been placed between the mattress and the bed's base, inside the first applicant's bedroom. On being interviewed in relation to the origin of the pistol, the first applicant is alleged to have claimed that the firearm belonged to the second applicant. Since both applicants are not licenced to possess the pistol in question, this gave rise to the charge of unlawful possession of that firearm.

THE BAIL PROCEEDINGS

6. Mr *Nyarugwe*, while abiding by the written application for bail, presented oral submissions on behalf of the applicants. Mr *Masamha*, despite not having filed a written response, vehemently opposed the application in the course of which he disclosed information, from the bar, not apparent on a reading of the Request for Remand Form, the annexure thereto and the Investigating Officer's affidavit. The court was privy to the contents of the foregoing documents because they were attached to the bail statement. Mr *Masamha's*

revelation was that the applicants were arrested as a result of a trap set up by the police on information supplied by Chifamba, a serving member of the Zimbabwe National Army whom the applicants had conspired with to commit the robbery. The first applicant had sold the plan to commit the robbery to Chifamba and requested the latter to bring a firearm for the purpose. Chifamba had pretended to accept membership into the alleged criminal enterprise, alerted his superiors, authority was issued to release the AK 47 and the full magazine from the armoury, as well as his own release to join the alleged conspirators (the applicants). Meanwhile, a trap had been set which led to the applicants' arrest when they were in the company of Chifamba. Chifamba would be the prosecution's key witness. The AK 47 rifle would be produced at the trial as an exhibit.

7. Mr *Nyarugwe* emphasized the following points, set out in the bail statement. Both applicants deny the charges. Chifamba was on a frolic of his own, the applicants did not even know that he had on his person an AK 47 rifle and the magazine with the 30 rounds of ammunition. He boarded their car at the Harare Exhibition Park indicating Chegutu as his destination. As far as they were concerned Chifamba would disembark in Chegutu while the applicants would proceed to Plot 5 Overlaw Farm, Muzvezve in Kadoma to attend to some issues at the mine. Their partner in the syndicate, Peter Masasi, was expecting them there on the day they were arrested. His supporting affidavit is attached to the bail statement. His mother, Lita Gomo, is also a member of the Mining Syndicate. The applicants aver that they had no dealings whatsoever with Chifamba. They denied that the AK 47 rifle was recovered while hidden under the driver's seat. Their contention is that it was inside Chifamba's satchel. Chifamba had the satchel beneath his legs. They were shocked to see the firearm when the police conducted a search in Norton. As for the Tokarev Pistol, it was the police details who planted it inside the first applicant's house. Both applicants neither owned nor possessed the same.
8. The court adjourned the bail hearing to 4 May 2022 to enable the Investigating Officer to testify. There was need for clarity since the respondent alleged that the applicants conspired to commit robbery at Plot 5 Overlaw Farm, Muzvezve Kadoma yet the applicants had placed documentary evidence indicating that they were partners in Litapet Mining

Syndicate with their primary role being that of sponsoring mining activities being carried out at the same farm.

9. The hearing resumed on 4 May 2020 with Tirivangani Madhibha, a Detective Sergeant in the Zimbabwe Republic Police, giving evidence. He was subjected to extensive cross examination by Mr *Ushewokunze*, re-examined by Mr *Masamha* after which counsel presented further oral argument.
10. The respondent opposed bail on two bases namely that the applicants will not stand trial and that they will interfere with state witnesses.

THE ONUS

11. Robbery is an offence specified in Part 1 of the Third Schedule of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Act). Accordingly, the applicants bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for them to be released on bail. See s 115 C (2)(a)(ii) of the Act.

THE ISSUES

12. The court will determine whether it is in the interests of justice to release the applicants on bail. In other words, the issues are:-
 - whether there is a likelihood that the applicants, if they were released on bail, will not stand trial or appear to receive sentence and;
 - whether there is a likelihood that the applicants, if they were released on bail, will interfere with state witnesses.

WHETHER THE APPLICANTS WILL NOT STAND TRIAL OR APPEAR TO RECEIVE SENTENCE

13. The trial will be held at the Regional Court sitting at Harare. I have already set out the applicants' ties to the place of trial. The first applicant resides under his own roof at a piece of land allocated to him in Waterfalls, Harare. He stays with his family. He is a serving member of the Zimbabwe Defence Forces. He holds business interests in a mining claim located in Kadoma. The second applicant is a farmer residing at a fairly big piece of land situated in Marondera allocated to him by the relevant Minister. He stays with his family. He also holds business interests in the same mining claim. Both tender their modest savings as bail deposit. There is no evidence that either is possessed of such means or

travel documents as to enable him to lawfully travel out of and lead a new life outside this country. What all this tends to suggest is that the ties of both applicants to the place of trial, the existence and location of assets held by them and the applicants' means of travel and their possession or access to travel documents are in favour of their admission to bail. But that is not the end of the matter.

14. The applicants did not dispute that the offence of conspiracy to commit robbery in aggravating circumstances is a serious offence which on conviction invariably attracts a severe custodial sentence. The sentence for robbery committed in aggravating circumstances is imprisonment for life or any definite period of imprisonment (s 126 (2)(a) of the code). There is no option of a fine. The punishment on conviction for conspiracy to commit robbery in aggravating circumstances is the same as that for committing robbery in aggravating circumstances (section 192 of the code). It is trite law that the seriousness of an offence on its own is not a valid reason to refuse bail. See *S v Hussey* 1991 (2) ZLR 187 (S).
15. The bulk of the argument was devoted to the strength or otherwise of the case for the prosecution and the corresponding incentive of the applicants to flee. I agree with Mr *Masamha* that the prosecution appears to have a very strong case against the applicants. This is manifest from the evidence of the Investigating Officer. The applicants gave the impression that Chifamba was a total stranger to them, that the only link between them and him was that they had, purely by chance, stumbled upon and offered him a lift at the Harare Exhibition Park on his way to Chegutu while they were travelling to Plot 5 Overlaw Farm, Muzvezve in Kadoma. The witness testified that he had applied for a record of the call history between Chifamba and the first applicant because Chifamba had disclosed that he had received a number of phone calls from the first applicant. The latter had called requesting Chifamba to bring along a firearm for use in committing the intended robbery. He had kept on calling, on the day that the applicants were arrested, to establish the whereabouts of Chifamba whereupon the parties had agreed on the rendezvous. If the prosecution is able to place the call history before the trial court, such piece of evidence will destroy the applicants' defence that Chifamba was a mere passenger in their vehicle with whom they never conspired to commit robbery in Kadoma. I do not think the witness

- would have gone to the extent of applying for a call history from the service provider if Chifamba had not spoken about the phone calls in the first place. It matters not for my purposes that Madhibha testified that he had not yet received the call history from the service provider. What I am determining is a bail application. This is not the trial proper.
16. It appears to me that Chifamba's superiors at 2 Brigade will also testify for the prosecution. Madhibha's testimony was that Chifamba advised them of the conspiracy and that the first applicant asked for a firearm.
 17. Madhibha said that Chifamba's superiors in turn advised members of the Special Investigations Branch (SIB) about the alleged conspiracy and the first applicant's request for a gun. It seems to me that some person or persons from the SIB will testify for the prosecution at the trial of the applicants.
 18. The relevant members of the SIB, according to Madhibha, alerted members of the Criminal Investigations Department Crack Team leading to a trap being set and the eventual arrest of the applicants. It is inconceivable to perceive of the trial being held without the arresting details testifying.
 19. Chifamba himself will testify. It appears that he will be the prosecution's key witness.
 20. Circumstances surrounding the release of the AK 47 rifle and the magazine containing thirty live rounds of ammunition will be laid bare at the trial.
 21. Chifamba is not an accused person. If he was in unlawful possession of the AK 47 rifle and the ammunition it would have been expected that he would be facing charges under the Firearms Act. He is not.
 22. The applicants admitted in para 16 of their bail statement that the AK 47 was seized as an exhibit.
 23. The applicants did not suggest any reason why Chifamba, if he was not to them a co-conspirator, would cause not only their arrest but would in the process have occasioned the involvement of other personnel both within the Zimbabwe Defence Forces and the Zimbabwe Republic Police prior to such arrest being effected. I say this because the bail statement presents Chifamba as a stranger clad in civilian attire whom the applicants were kind enough to avail transport to his own destination while they were proceeding to Plot Number 5, Overlaw Farm in Kadoma. I agree with Mr *Masamha* that

the existence or otherwise of not only a trap authority but a seizure form in respect of the AK 47 rifle and the ammunition do not appear to water down the apparent strength of the case for the prosecution. This is so because the applicants themselves accept that the rifle and ammunition in question were seized as exhibits.

24. For completeness, I record that Madhibha clarified that the conspiracy was to commit robbery not at Plot 5 Overflow Farm in Kadoma but on artisanal miners operating near that farm. The Request for Remand Form, which indicated the farm as the place of the would-be robbery, is neither a charge sheet nor a state outline. The case for the prosecution remains strong.
25. It appears that the verdict will turn on the sufficiency of evidence and the credibility of the witnesses. In my opinion, the prosecution appears to have at its disposal an array of witnesses apparently bringing forth a chain of strong evidence against the applicants. On the other hand, their defence strikes me as weak. It seems to have self-evident gaps. I have already adverted to these.
26. It is unnecessary in my view to discuss the place of the second count in determining whether the applicants will not stand trial. This is so because an analysis of that issue in respect of the first count suffices for purposes of disposing of this matter.
27. In addition to offering ZWL\$10 000 each as bail deposit, the applicants tender conditions requiring them to reside at their given addresses to report at their nearest police stations and not to interfere with witnesses. They urge me to tighten the conditions and present this as an assurance that they will stand their trial. I do not think this is a matter where bail conditions are decisive.
28. The personal circumstances of the applicants tend to suggest that it is in the interests of justice to admit them to bail. However, everything else is against them. The offence is serious and the evidence against them appears to be strong. This is an offence which is likely to attract a lengthy custodial sentence. In the circumstances, my finding is that there is a very high risk that the applicants will not stand trial in fear of the real prospect of conviction and a lengthy custodial sentence being imposed in respect of the first count, if they were to be released on bail. See *S v Jongwe* 2002 (2) ZLR 209 (S).

29. In the circumstances, the need to determine whether the applicants are likely to interfere with witnesses if admitted to bail falls away.

ORDER

30. The application for bail pending trial be and is dismissed.

Ushewokunze Law Chambers, applicants' legal practitioners

The National Prosecuting Authority, respondent's legal practitioners