

CLEARANCE ZINDI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE 27 August, 2021

Bail Application

T Mbala, for the applicant
B. Murevanhema, for the respondent

CHIKOWERO J:

This is an application for bail pending trial.

The applicant is on remand at the Harare Magistrates Court. He is facing one count of robbery and another count of rape as defined in Sections 126 and 65, respectively, of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]

The allegations are these: On 25 May 2021 at around 0120 hours, the applicant in the company of George Zindi, Kudakwashe Choga and three unknown accomplices proceeded to House number 17169 Stoneridge Park, Harare. They were armed with a Silver CZ pistol, bolt-cutter, electric shocker and baton stick. On arrival, they forcibly entered the house through the main door. They headed towards the main bedroom. They used force to enter that room. They corked the CZ pistol and pointed it towards the husband. The electric shocker was also applied on his body. They stole the couple's property namely a dual sim Gtel infinity 8 cellphone with subscriber numbers 0172548824 and 0783508437 and a Huawei tablet IMEI 865543939338027 with subscriber number 0772837361. A gang member, wielding the baton stick, assaulted the couple all over the body. More money and the car keys were demanded of the complainants. US\$60 was stolen from a wallet in the wardrobe. The wife was dragged from the bedroom. Inside the cottage, the gang stole a Samsung JI cellphone subscriber number 0776507048 and an Itel cellphone subscriber

number 0776421577. This property belonged to the two ladies. They ordered the 22 year old to undress. She refused. This drew the ire of the intruders. Baton stick in hand, multiple blows were unleashed on her body. She capitulated. Three gang members took turns to rape her. They used no protection. They stole a blanket from the main house.

Using the couple's car keys the members of the gang unlocked two vehicles. The first was a blue and white Nissan Caravan registration number AFH 8059. The second was a navy blue Honda Fit registration number AFM 5162. There was RTGS\$6000 in the latter. This money was stolen. The gang drove off in the two cars. They dumped the vehicles in the neighbourhood. The couple recovered these the following morning.

Acting on information obtained from Econet Zimbabwe, a team from Criminal Investigations Department Homicide, Harare, arrested Tapiwanashe Vutete. This was so because he was found in possession of and using the Samsung JI that had been stolen from the 22 year old lady. It will be recalled that three members of the gang had also raped that lady.

Vutete led the police to the applicant. The latter had sold the cellphone to the former in May 2021. The purchase price was US\$15.00.

On searching the applicant's wardrobe, the police also recovered a blue jacket. This apparel was stolen during the robbery. One of the complainants identified it as belonging to him/her.

The recovered cellphone and jacket constitutes the evidence linking the appellant to the robbery and the rape. In addition, the Request for Remand Form indicates that the prosecution shall call witnesses at trial.

Both in the Request for Remand Form and his affidavit attached thereto, the investigating officer cites the following grounds in opposition to the applicant's release on bail:

- The applicant is likely to abscond due to the strength of the prosecution case. He was found in possession of some of the stolen property. The same was positively identified by the complainants as part of their stolen property. What was recovered from the applicant was the jacket and the cellphone. The applicant had sold the cellphone to Vutete.

- The applicant is facing serious charges which attract lengthy custodial sentences in the event that he is convicted. The fear of lengthy incarceration will act as an inducement to the applicant not to stand trial;
- The applicant is likely to interfere with evidence and witnesses. This is predicated on the fact that some of the stolen property has not yet been recovered. If the applicant is released the chances of recovering the stolen property would be next to none as he would dispose of the property thereby tampering with the evidence.
- Applicant is likely to team up with his accomplices, all of whom are at large, to commit offences of a similar nature since the firearm and implements used during the commission of the offences have not yet been recovered.

Mr *Murevanhema* relied on the same reasons both in his written response to the bail application and in oral argument.

Mr *Mbala* argued that applicant will stand trial. His roots are firmly anchored in this country. He is not a holder of a passport. He has never travelled outside the country. The applicant is gainfully employed by the Elton Chigumbura Cricket Academy. He is a single father of a five year old boy who solely depends on the applicant. The applicant also resides with his elderly mother. She looks up to the applicant for sustenance. In addition, counsel urged the court to impose stringent bail conditions to allay any fears of abscondment.

Counsel submitted that the case for the prosecution is not strong. No identification parade was conducted. There is no allegation that any fingerprints were uplifted either from the scene of the offences or from the dumped vehicles. The Request for Remand Form does not spelt out the specific role that the applicant played in the robbery. Neither is it alleged that he is one of the three persons who took turns to rape the complainant. Possession of the cellphone and the jacket does not translate to a strong case against the applicant. Those items were brought to the applicant's residence by George Zindi. He is cousin to the applicant. George is a convict. On being released from prison after serving his sentence for robbery George Zindi had no roof over

his head. The applicant took him in, unaware that George was back to his bad old ways of making a living out of robbery. This is how the applicant got to possess the cellphone, which the applicant thought belonged to George. With the latter's permission, he sold the tell-tale cellphone to Vutete. The jacket was found inside the applicant's wardrobe because he shared that piece of furniture with George before the latter relocated to South Africa. It is George who left the jacket inside the applicant's wardrobe. The applicant would not have retained the jacket if he had participated in the robbery and the rape. The applicant did not participate in perpetrating these offences. He has never been at the scene of the crime at all. The only difference between Vutete and himself is that the former was able to lead the police to the applicant while the applicant is unable to lead the police to George who is now residing in South Africa. The nature of the applicant's defence is such that the issue of his identification shall be key, at the trial. The net effect is that the prosecution does not have a strong case against him. He is unlikely to be convicted. Despite the admitted gravity of the offences and the stiff sentences upon conviction, the weakness of the state case means that the applicant has no incentive to abscond.

As for the likelihood of the applicant endangering the safety of the public or any particular person or his likelihood to commit an offence referred to in the first schedule, Mr *Mbala* submitted that the applicant neither has previous convictions nor other pending matters of any kind. That the applicant neither has previous convictions nor other pending cases is not disputed by the respondent.

No evidence was placed before me in respect of the existence and location of assets held by the applicant. I therefore proceed on the basis that he has no immovable assets situate in this country.

As for his ties to the place of trial, his personal circumstances are these. He is a single father to a five year old boy. He looks after his elderly mother. He is employed by the Elton Chigumbura Academy. It appears that institution is located in Harare. These circumstances are in favour of the applicant. In normal circumstances the fact that the applicant is not a holder of a passport would weigh in his favour. My view is that this is no longer the case. The applicant, with or without a passport, can still abscond by hiding inside this country or crossing the border into a neighbouring country. George Zindi, his cousin, has already fled to South Africa. In addition, four other accomplices are on the run. Their whereabouts are unknown.

I think this application turns on two grounds. The first is that the applicant is not likely to stand trial if he is admitted to bail. The offences of robbery committed in aggravating circumstances and rape in the course of that robbery are serious offences. It goes without saying that, if convicted, the applicant will be incarcerated for a long period. It is the fear of such incarceration, combined with the real prospect of conviction (emanating from a strong prosecution case) that, in my judgment, will lead to the applicant not standing trial or appearing to receive sentence. I have taken the view that the case for the prosecution is strong. The jacket and cellphone recovered from the applicant were stolen during the course of the robbery and rape. They were not recovered from George Zindi. Applicant sold the cellphone to Vutete in the same month that the offences were committed. I have already set out, in detail, how these offences were committed. A high degree of violence was exhibited towards the four complainants and their property during the commission of the offences. I am mindful of the fact that the applicant is presumed to be innocent of these charges. This notwithstanding, the degree of violence by the gang is such that I think that if the applicant is released on bail he will endanger the safety of the public, both men and women, or will commit offences of robbery and rape.

In view of my conclusion on the grounds of abscondment and danger to the safety of the public, it becomes unnecessary to deal with the respondent's opposition to bail on the basis that the release of applicant on bail will result in him attempting to influence witnesses or see the applicant concealing or destroying evidence.

I do not think that I can impose any bail condition the effect of which would be to allay the danger that applicant poses to the public. Robbery and rape committed in the course of robbery are offences which place the generality of the public at risk. Neither residence, reporting nor a hefty bail deposit are conditions capable of minimising the danger that the applicant is to the public, if released on bail.

As for abscondment, I think the peculiar circumstances of this matter are such that the fear of lengthy incarceration will induce the applicant to abscond, even if stringent conditions are imposed. Although the issue of bail is individualized, it is not an irrelevant factor that all the accomplices, minus the applicant, are on the run.

In the result, the application for bail pending trial be and is dismissed.

Nyawo Ruzive Attorneys, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners