

DZUDA ZVIDOZVASHE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 27 and 31 August 2021

Bail Application

Applicant in person
L Masango, for the respondent

CHIKOWERO J: The applicant filed and argued this bail application as a self-actor. The arresting detail and the investigating officer adduced evidence for the respondent. The former opposed the applicant's release on bail while the latter consented to the same. Counsel for the respondent had filed a written response opposing the application. However, in light of the testimony of the investigating officer, the respondent's representative, in her oral submissions, consented to the release of the applicant on bail pending trial.

After hearing submissions by the applicant and counsel for the respondent, I delivered an ex tempore judgment dismissing the application for bail pending trial. The applicant has now engaged the services of a legal practitioner and, through the latter, has requested for written reasons for my decision. These are they.

The applicant is appearing at the magistrates court in Harare facing eight counts of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The annexure to the Request for Remand Form sets out the allegations as follows.

COUNT 1

On 7 October 2020, at House number 4985 Unit C, Seke, Chitungwiza, the applicant, in the company of his accomplices some of whom are already on remand and those yet to be arrested, connived to rob Josiah Ezekiel Masamvu. Pursuant to the common purpose, the applicant, a member of the Zimbabwe National Army, supplied the ammunition. He, together with the others, then drove to the complainant's residence. They had firearms. Around midnight they broke the complainant's wall. They gained entry into the yard. Thereafter, they forced open the main door. They entered the house. They pointed firearms at the complainant and his spouse. They threatened to shoot the couple should their orders be defied. The couple's

hands were tied up. The intruders demanded cash. They ransacked the house. They stole US\$2 800, four laptops, three cellphones, various items of clothing and a 38 Amadeo Rossi Revolver serial number AA571356. Thereafter, they vanished from the scene. The property stolen is worth US\$4 950. The revolver, valued US\$500, was recovered.

COUNT 2

On 23 September 2020 around a quarter to midnight, the gang decided to rob another complainant. Again, the applicant supplied the ammunition. They wielded pistols, iron bars and a hammer. Aboard a Honda CRV, Honda Fit, Toyota Corolla and a Toyota Belta, all with unknown registration numbers, they drove to House number 267/64 Chiltan Drive, Waterfalls in Harare. They made some noise in entering the yard. The complainant opened a window. She screamed for help. The gang fired two shots in the air. The complainant retreated into her bedroom. She hid inside the toilet. There, she called the Safeguard Reaction Team via their control room. She alerted them of the robbery. She also alerted her neighbour. That neighbour peeped into the complainant's yard. The neighbour fired some shots in the air. The gang was undeterred. Using the hammer and bar, it forced the screen door open. It gained entry into the veranda. Thereafter, the intruders applied pressure onto the aluminium door leading into the dining room. They entered the house. There, they confronted all the occupants whom they proceeded to bind hand and feet. Electrical cables were used to achieve this feat. The occupants were then held as hostages. Inside the house, the gang fired two more shots. They hit the complainant on the head, using an iron bar. She sustained some injuries. They ransacked the house, searching for valuables.

They stole US\$51 600, a Samsung cellphone econet mobile number 0785640098, Samsung Galaxy cellphone econet mobile number 0788904098, IMEI number 351773114797 183, Samsung Galaxy Note 8 cellphone Econet mobile number 0772207702, Nokia Adronic cellphone Econet mobile number 0772893220 and a Pucker bill laptop.

The Safeguard Reaction Team arrived during the course of the robbery. It heard the sound of gun-shots emanating from the house. The team retreated. It proceeded to Waterfalls Police Station to file a report. However, by the time the team returned to the scene of the crime, in the company of the police, the gang had already left.

COUNT 3

On 7 October 2020 the accused persons decided to rob Ephynes Mhembere. The applicant supplied the ammunition. Wielding some firearms, they drove to the scene of the crime, 8577 Glenwood Park, Epworth in Harare. Around 10:00pm, they damaged the main

door and were inside the house. The applicant and his accomplices assaulted the complainant and the other occupants. The assaults were perpetrated using clenched fists, booted feet and open hands. Pistols were pointed at the complainant. The complainant was covered with a blanket. The gang ransacked the house. It stole US\$910, ZAR9 000, ZWL\$15, Samsung Galaxy J 5 cellphone, Infinix cellphone, various items of clothing, three blankets and a satchel. A mob gathered outside the complainant's house. The gang fired some shots and managed to disappear from the scene. The property stolen is worth US\$1 440, ZAR900 and ZWL\$15. The Infinix cellphone, valued at US\$200, was recovered.

COUNT 4

On 10 March 2021, with the applicant having supplied the ammunition, the gang, armed with pistols, was at Seedex Company situated at 182 Munondo Road in Ruwa.

It removed two panels from the pre-cast wall. Some hammer blows broke the complainant's door. The gang fired a single shot into the house. It apprehended the complainant, Tapera Foya. His wife was not spared. The couple's hands were tied, from the back. The gang stole the keys of the complainant's Honda Fit registration number AEO 0400. The couple's children were sleeping in a cabin. The intruders employed force to open the cabin door. But they failed to enter the cabin. The children resisted the intruders' efforts. This prompted the gang to fire two shots into the cabin. The cabin's window was shattered. The gang force-marched the complainant to the main offices. There, the intruders used a hammer to damage the doors. Inside the offices, the gang conducted a search. It discovered US\$20 019 in a small safe. It stole that money.

Using the hammer once more the gang broke the screen and door to the Director's office. Efforts to open the big safe using the hammer were not successful. The arrival of the Security Guards Reaction Team led to the gang disappearing from the crime scene.

A spent cartridge was picked up from the scene of the crime. The US\$20 019 stolen was not recovered.

COUNT 5

On 28 March 2021 the gang was at 1314 Spitzkop, Snake Park, Harare. The applicant supplied the ammunition. He, together with his accomplices, armed themselves with some firearms. They broke down the main screen door. They met the complainant in the corridor. They pointed firearms at the complainant. They got hold of him, demanding money. They ransacked the house whereupon they stole US\$470, HP 250 laptop serial number CDN03827BT, two Itel P33 cellphones, car keys for an Isuzu single cab registration number

ADR S152 and Toyota Belta registration number AFF 8909. The gang fired one shot into the air before disappearing from the scene. The total value of the property stolen is US\$970 of which nothing was recovered.

COUNT 6

On the same day around twenty minutes past midnight the gang appeared at Gateway High school, Emerald Hill, Harare.

The applicant supplied the ammunition

He, together with his accomplices, had firearms. They pointed a pistol at one of the security guards, Kundishora Musikanzwa. They used a rain coat to tie up the complainant's legs. A gang member remained standing guard over the hapless complainant. The rest of the gang members proceeded to the main administration block. They used force to open the main door and broke down the main door to the deputy headmaster's office. They ransacked that office but did not steal anything. Using explosives, they blasted open the Chubb safe whereupon they went on to open the metal cabinets and stole US\$250 000. Thereafter, they vanished from the scene of crime. Nothing was recovered.

COUNT 7

On 15 June 2021 the gang members were at the University of Zimbabwe Farm Compound in Marlborough, Harare.

The applicant had supplied the ammunition.

They were armed with pistols, iron bars and a hammer.

They assaulted Christopher Chizhanga, one of the security guards. A demand was made that he leads them to where one of the company directors was.

Another security guard saw the gang members. He fired at them. The members of the gang were undeterred. They fired back. Chizhanga led them to Zhang Wend Dong's house. Hammer in hand, they broke down the door. They pointed pistols at Dong, got hold of him and demanded money.

Having ransacked the whole house they stole US\$20 000, two Huawei laptops, a 55m Astra revolver serial number 6572v3 loaded with two rounds of ammunition, a shotgun and ammunition.

The total value of the property stolen is US\$22 000. Nothing was recovered.

COUNT 8

On 27 June 2021 at 12:50 am the gang members were at Zimstrong located at the corner of Kirkman Drive and Golden Quarry Road, Harare.

The applicant supplied the ammunition.

Armed with pistols, they scaled the perimeter wall and confronted the complainant, a security guard.

They pointed pistols at the complainant. They threatened to shoot him. They disarmed the complainant of his 303 rifle serial number M63778. The rifle was loaded with three live rounds of ammunition.

The gang members force-marched the complainant to the residence of the company's director. They failed to open the door to that residence. The noise prompted the director, a Chinese national, to fire at the gang members. The latter fled from the scene. The 303 rifle, still loaded with ammunition, was recovered.

THE PERTINENT GROUNDS ON WHICH THE APPLICANT SOUGHT TO BE RELEASED ON BAIL

The applicant sought to be admitted on bail on the basis that he will neither interfere with state witnesses nor commit offences while on bail. It is not necessary for me to deal with the ground relating to interference because the application was not opposed on this basis. Further, the applicant argued that he will stand trial and, by implication, that he will appear to receive sentence in the event that he is convicted. He drew my attention to the following factors. He is married and is blessed with three children aged 5, 9 and 12 years old respectively. He is the breadwinner for his family as well as for his mother and the children of his late brother. Applicant is of fixed abode, residing at 2463 Glaudina in Harare. He is employed by the Zimbabwe National Army in the Ordinance Directorate, Transport Section in Harare. He undertook to reside at the given address and to continue in employment while appearing at court for remand and trial. His roots are therefore firmly anchored in this country. He is not a holder of any travel documents neither does he have the means nor ability to escape beyond the jurisdiction of the courts of this country. He also does not have the means or ability to put himself beyond the reach of the law enforcement agents. By this I understood him to be referring to the police.

Although he is facing serious allegations that would attract a custodial sentence in the event that he is convicted, the seriousness of the offence on its own is not a reason to refuse bail. He is still presumed to be innocent until he is proven guilty.

It is true that the applicant has a pending case of unlawful possession of a firearm. However, the magistrate's court granted him bail in that matter. The police took advantage of that pending case to prefer the instant charges against the applicant. This they did after alleging

that the applicant was implicated by Godfrey Josi. There is a contradiction in the allegations preferred against him. In his affidavit opposing the admission of the applicant on bail the investigating officer alleged that it is the applicant who supplied the ammunition to facilitate the commission of the robberies which is not the same thing as saying that the applicant actually participated in the robberies.

The applicant has no reason to abscond. He has nothing to fear. The charges against him are trumped up. Indeed, the case for the prosecution is weak. This is confirmed by the oral testimony of the investigating officer. That witness stated in open court that the interests of justice will not be jeopardised if the applicant were to be released on bail pending trial. The witness went on to testify that apart from the implication by Gofrey Josi and Norest Madzima (also known as Dhuterere), there is no other evidence against the applicant. No recoveries of the stolen property were effected from or at the behest of the applicant. The applicant did not make any indications. The alleged confessions by Josi and Madzima, who are accomplices, will not be admissible evidence against the applicant at the trial. The result is that the prosecution has a weak case against the applicant. He is unlikely to be convicted. There is thus no incentive for him not to stand trial. The release of the applicant on suitable conditions is in the interests of justice.

The applicant did not breach the bail conditions in respect of the charge of unlawful possession of a firearm. Since it is that charge that led the police to prefer the eight counts of robbery against the applicant it became necessary for him to disclose his defence to that charge. He did not possess the firearm in question at all. He had neither a firearm nor ammunition on his person when he was arrested at the Kuwadzana roundabout on 3 July 2021.

The arresting police officers unleashed dogs on him. The dogs bit him. The police officers assaulted him. He became semi-conscious. It was only on regaining full consciousness, in Ruwa, that the police officers told him that he had been found in possession of a Retan air pistol, 5 x 9mm live rounds of ammunition and 6 x 7,65mm live rounds of ammunition. He disputes that he was found in possession of these.

He also disputes the arresting detail's evidence. The latter testified that the applicant fled on seeing the police team at the Kuwadzana Roundabout and that the arrest was successful only because warnings were issued to the applicant to stop running away lest the police dogs would be unleashed on him.

THE RESPONDENT'S OPPOSITION TO THE BAIL APPLICATION

In her written response Ms *Masango* submitted that the applicant is likely to abscond. Two reasons were relied upon for this position. The first was that the applicant is facing serious allegations as the robberies were committed in aggravating circumstances. This was married to the strength of the case for the prosecution. The submission was that the case for the prosecution is strong, the prospect of the applicant being convicted is high and that the court is likely to impose a custodial sentence on the applicant. It is the fear of being incarcerated for a not inconsiderable period that will act as an incentive for the applicant not to stand trial. The respondent referred to the firearm and the ammunition recovered from the applicant in submitting that the prosecution has a strong case against the applicant.

The respondent also relied on the degree of violence implicit in the eight counts of robbery in submitting that if the applicant is released on bail he will endanger the safety of the public or commit an offence specified in the First Schedule of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. An offence specified in the First Schedule is any offence in respect of which a punishment of a period of imprisonment exceeding six months is provided and may be imposed without the option of a fine, and any conspiracy, incitement or attempt to commit, or being a participant in, any such offence.

The sentence for robbery committed in aggravating circumstances is, in terms of s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] imprisonment for life or any definite term of imprisonment. In terms of s 126 (3) of the Criminal Law Code, robbery is committed in aggravating circumstances if the convicted person or an accomplice of the convicted person possessed a firearm or a dangerous weapon or inflicted or threatened to inflict serious bodily injury upon any person or killed a person on the occasion on which the crime was committed.

THE RESPONDENT'S CONCESSION TO THE APPLICATION FOR BAIL PENDING TRIAL

Believing that she was hamstrung by the evidence of the investigating officer, Ms *Masango* submitted that she was constrained to concede to the application for bail. As already noted, that witness took the view that the applicant's release on bail would not jeopardise the case for the prosecution.

The investigating officer also testified that the only link between the applicant and the eight counts of robbery was the implication by Josi and Madzima, the arrested accomplices. The respondent therefore thought that its case against the applicant was weak. There was no

longer prospect of the applicant being convicted. The fear of incarceration was gone. Resultantly, there was no incentive for the applicant to abscond.

What remained was the seriousness of the offence. It was an invalid reason to oppose bail.

As for the evidence of the arresting detail that the applicant fled in an endeavour to avoid arrest, Ms *Masango* was of the view that I should not place reliance thereupon because it only cropped up in the arresting detail's oral testimony during the bail hearing. The investigating officer's affidavit, attached to the Request for Remand Form, did not speak to the circumstances of the applicant's arrest at all.

I also understood Ms *Masango* to have abandoned the submission contained in her written response, that the release of the applicant on bail would endanger the safety of the public. She did not say this in so many words. What I deduced from her changed attitude to the bail application is that since the case for the prosecution is weak (as being solely based on implication by accomplices) this means that the applicant is in fact not a danger to the safety of the public because that from which the danger was earlier sought to be drawn is in itself a weak prosecution case.

DISPOSITION

The attitude of the police is not a decisive factor in a bail application. See *Mahata v Chigumira N.O. and Another* 2004 (1) ZLR 88 (H).

The investigating officer was not able to comment on the circumstances of the applicant's arrest and their relevance to the question of bail. This was so because he was not a member of the arresting team.

The arresting detail gave clear evidence on the circumstances of the applicant's arrest. His undisputed testimony was that the first person to be arrested was Godfrey Josi. It took a shootout with the police, in Ruwa, for them to arrest this accomplice. Josi was injured in the process. Josi told the arresting team that he committed these eight counts of robbery in the company of, among others, the applicant. The ammunition used in committing the robberies was supplied by the applicant, a member of the Zimbabwe National Army. The arresting team caused Josi to lure the applicant to the Kuwadzana Round-about. This was to enable the arresting team, made up of fourteen police officers from the Criminal Investigations Department Homicide branch reinforced by members of the Zimbabwe Republic Police Support Unit canine section, to arrest the applicant. According to the applicant himself, at least two members of the arresting team were armed. The members of the canine section had dogs.

A police officer drove Josi's car. The applicant saw Josi's car. The vehicle stopped at the roundabout. The applicant observed that it was not Josi behind the steering wheel, but a police officer. The applicant fled, so says Simbarashe Zvinogona, the arresting detail who testified before me. A chase ensued. The police commanded the applicant to stop lest they would be forced to unleash their dogs on him. The vendors at the roundabout also fled, presumably believing the operation was targeted at them. The applicant denies that he fled. He says he was ordered to lie down and on complying with this directive, the dogs were unleashed on him with the result that they inflicted serious injuries on him to the point where he became semi-conscious. He had neither a Retan air pistol nor eleven rounds of live ammunition on his person. He does not know where the police obtained those things. They planted them on him. They compounded the situation by preferring the eight counts of robbery against the applicant when he in fact was not involved in the commission of these offences. I record that the arresting detail also told the court that, upon arrest, Josi told the police that he, together with the applicant and others, were planning to commit a robbery in Mutoko that very day with the applicant taking the lead in executing the same.

I accepted the detailed evidence of the investigating officer on the circumstances of the applicant's arrest. The applicant's past conduct, painted by that testimony, convinced me, on a balance of probabilities, that the applicant is a flight risk his personal circumstances notwithstanding.

I also accepted, again on a balance of probabilities, that the release of the applicant on bail would endanger the safety of the public. The degree of violence implicit in the allegations against the applicant is certainly high. Josi, who implicated the applicant, was found in possession of the 38 Amadeo Rossi Revolver serial number AA 57/ 356 stolen in the course of the robbery in the first count. The applicant himself is on remand on a separate charge of unlawful possession of a Retain air pistol. It matters not for my purposes that the pistol was not, before me, proved to have been used during the commission of these offences. I am not the trial court.

I am of the view that, for purposes of the application for bail, I had more to consider beyond the implication of the applicant by the two accomplices arrested, in point of time, on both sides of the applicant. Josi is said to have told the police that it is the applicant who supplied the ammunition to the gang of robbers. The evidence section of the request for remand form is linking the applicant to the commission of these offences not only through the Retan

air pistol alleged to have been found on his person. The following are the additional pieces of evidence:

- Five 9mm live rounds of ammunition.
- Six 7,65mm live rounds of ammunition.

These live rounds of ammunition appear to have been manufactured for use on different firearms. This seems to be so because the five are of different size from the other six.

The applicant revealed that he is appearing before both the magistrates' court and the court martial in respect of these counts of robbery.

In my judgment, that the applicant is alleged to have been found in unlawful possession of a firearm, is alleged to have been in possession of eleven rounds of live ammunition on arrest (without, apparently, also having the firearm on which such ammunition would be used) persuaded me to find that he poses a danger to the public if he were to be released on bail. The air pistol and the eleven rounds of live ammunition are pieces of evidence beyond the implication by his two accomplices.

I think it is too simplistic and misleading to postulate that the case for the prosecution is weak because the evidence against the applicant consists of the confessions by his accomplices, which confessions are not admissible evidence against the applicant at the trial. At this stage it remains unknown what form that evidence will take. The court can convict on the basis of accomplice evidence. The rider is that the trial court should approach accomplice evidence with caution. At this stage, indications are that two accomplices have linked the applicant to the commission of these offences. The door is still open for the respondent to use one or both accomplices as witnesses against the applicant. That way, the implication by those two would transcend the confines of confessions by them to become admissible evidence against the applicant. I have said this to demonstrate that it is not correct to argue that the implication of the applicant by the two accomplices means there is no other admissible evidence against the applicant and that the case for the prosecution is accordingly weak.

In addition, the applicant admitted during the bail hearing that the allegations clearly demonstrate that eight counts of robbery were committed. His defence is that he neither participated in the commission of those offences nor supplied the robbers with the ammunition to use in the commission of the offences. Ms *Masango's* concession that the prosecution has a weak case against the applicant is not one that I share. To me, the seriousness of the offences, the strength of the case for the prosecution and the prospect of lengthy incarceration, if the applicant is convicted, are factors likely to induce the applicant not to stand trial.

This is one matter where even the imposition of stringent conditions will not allay the risk of abscondment.

The multiplicity of the charges and the degree of violence implicit in those charges as such as satisfied me that no conceivable condition would allay the danger to the safety of the public that the release of the applicant on bail would bring in its wake. The application for bail pending trial being without merit it be and is dismissed.

Mutumbwa, Mugabe and Partners, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners