BRINE MUGOTA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 27 January 2016

Bail application

M H Chitsanga, for the applicant
A Muzivi, for the respondent

KUDYA J: The CABS banking hall in Mount Pleasant is under surveilleilance by a closed circuit television security system and is manned by four bank tellers and an armed security guard. The allegations levelled against the applicant on his initial remand were as follows.

On 12 January 2016, the applicant went into this banking hall at around 1525 hours. He loitered in the banking hall until he was the only potential client left. He withdrew a 7.62 mm Tokarev pistol, serial number 81050025, pointed it at the security guard and ordered him to surrender his pistol. The security guard attempted to disarm the applicant. The two wrestled for possession of the firearm. The applicant overcame the guard, held the offensive weapon by the muzzle and whipped the guard four times on the head with the butt. He floored the guard and again hit him on the head twice with the butt of the pistol. The security guard lost consciousness and sustained several deep cuts on the head and a fractured skull. On immobilising him, the applicant stormed into the bank vault, pointed his pistol at the bank manager and demanded the safe keys. One of the bank employees locked off the main exit. The applicant abandoned his demand and threatened to shoot the four tellers in exchange for safe passage. The bank manager opened the main exit by hitting the panic button after which the accused fled the scene. He surrendered himself to the police on the following day after learning that they were after him.[1] The firearm in question was unlicensed. He was arrested

[1] Last sentence of para 13 of the applicant's bail statement

and arraigned on remand on allegations of attempted robbery, attempted murder and possession of an unlicensed firearm.

His version was diametrically opposed to the allegations. He averred that he was an innocent victim of an overzealous armed security guard who on noticing the firearm daggling in his unfastened waist holster violently dispossessed him of the weapon. He, however, managed to despoil the security guard notwithstanding that he was now wielding two weapons and avenged himself on the security guard. The weapon belonged to his late father. It was missing until 19 December 2015 when it was found at his late father's rural home. He took possession of it on 10 January 2016 intending to take it to the Central Firearms Registry for verification and licencing. He, however, visited the banking hall to make a cash deposit and was involved in the melee before he could fulfil his avowed intentions. It seems to me that the applicant's version when juxtaposed against the allegations of the respondent is extremely weak. In regards to the attempted robbery and murder charges, he will have arrayed against him the evidence from the five bank employees and the closed circuit television. He did not dispute the allegations regarding his haste retreat from the banking hall. The respondent appears on the allegations to possess an unassailable case against the applicant on all three counts.

In bail applications pending trial the onus is on the applicant to establish on a balance of probabilities that he is a suitable candidate for admission to bail[2]. The Constitution in s 50 (6) recognises the inevitability of detention in prison custody pending trial. Section 117 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] underscores the admission to bail as a fundamental right whose refusal is predicated on the interests of justice. In the present application the applicant relied on the provisions of s 117 (2) (a) for the submission that he was a suitable candidate for admission to bail. The application was opposed by the respondent mainly on the ground that there was a real likelihood that the applicant would abscond. Bail was also opposed on the additional grounds that the applicant was likely to interfere with both investigations and state witnesses given that the investigations were still in infancy.

The applicant contended that he is firmly rooted in Zimbabwe and lacks the inclination, means and ability to abscond. It seems to me that there are two cognisable factors that evince an inclination on his part to abscond. The first is that he ran away from

[2] *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S) at 253D

the scene of crime and only surrendered himself when he "heard" that the police were hot on his trail. Obviously, had this information not filtered through to him, he would not have surrendered to the police. The second is that the respondent's case is so strong that there is a real possibility that he will be convicted of all three offences. These are all serious offences. They may attract individual sentences in the region of 5 years imprisonment. At the time the applicant surrendered himself to the police he was unaware of the strength of the respondent's case against him. At his remand he became aware that his shenanigans had all been captured on closed circuit television and his identity known. The strength of the respondent's case and the possible punishment that may be meted out against will most likely prompt him to abscond. After all, until he heard that he was on the police wanted list, he had for an innocent victim acting in self-defence and in defence of his property, beat a haste retreat from the scene of crime. His vacation was inconsistent with an innocent mind. Thus while he is off course, presumed innocent until proved guilty, if the facts alleged by the respondent are proved at his trial, his conviction and comeuppance will be a foregone conclusion. Accordingly, I am satisfied that he is unlikely to attend his trial if granted bail. Thus while I agree with the applicant that the additional grounds for opposing bail constitute bald and unsubstantiated claims, the real likelihood of abscondment militates against his admission to bail.

Accordingly, the application for admission to bail is dismissed.

Mutandiro & Associates, applicant's legal practitioners
National Prosecuting Authority, the respondent's legal practitioners