

SIMBARASHE TAVENGWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 3 & 12 February 2016

Bail Application

Applicant in person
E. Nyazamba, for the respondent

MAWADZE J: The 37 year old applicant who resides at No. 1834 Mbizo 18 in Kwekwe seeks to be admitted to bail pending trial.

The applicant is jointly charged with 13 other alleged accomplices and are facing 16 counts. These are 8 counts of robbery as defined in s 126 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9 : 23*], 8 counts of Attempted Murder as defined in s 47 (1) as read with s 189 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9 : 23*], one count of possession of fire arms and ammunition as defined in s 4 (i) and s 4 (2) of the Fire Arms and Ammunition Act [*Chapter 10:09*] and one count of possession of explosives as defined in s 3 (1) and s 3 (2) of the Explosives Act [*Chapter 10:08*].

At the time of making this application for bail pending trial the applicant indicated that only 11 counts are now remaining as the other counts were withdrawn by the State. This was not disputed by the State. The remaining counts as per request for remand form 242 attached to the applicant's application are count 1 relating to possession of firearms and ammunition, count 2 relating to possession of explosives, count 4 of robbery, count 5 of attempted murder, count 7 of robbery, count 8 of attempted murder and count 11 of attempted murder. I am not able to understand how count 11 of attempted murder which is intricably linked to count 12 to 16 can be

separated from counts 12 to 16 as they arise from the same facts. The only inference I can draw is that the applicant may not have realised that counts 11 to 16 arise from the same facts.

In light of the issues which arise in this application which I shall revert to later it is desirable that I outline the facts alleged in each of the counts the applicant is facing.

Count 1 and 2 – Possession of fire arms, ammunition and explosives :- It is alleged that on 5 August 2015 detectives acting on information received picked up one Brighton Biniyosi for possession of a Nokia C2 cellphone stolen during a robbery at Trek Service Station in Chinhoi and that this Brighton Binigosi indicated that he had bought the cellphone from one Tinashe Nota. Tinashe Nota was picked up for questioning and he revealed that he bought the said cellphone from the applicant. This led to the arrest of the applicant who was the first of the 14 accused persons to be arrested in these cases. It is alleged that after the applicant's arrest he implicated an alleged accomplice Ngonidzashe Mutiba who upon arrest led the police detectives to a house at Subdivision A of Crebilly Farm in Darwendale where the other alleged accomplices Tinashe Chikara, Titus Chatukuta, Ray Shangari and Tinashe Matinyenya were arrested while sleeping in different rooms at the house. It is alleged that upon arrest these alleged accomplices led to the recovery of a Norinco pistol with empty magazine, Norinco pistol with erased serial numbers with 5 X 9mm of live rounds, Norinco pistol with erased serial numbers with 5 X 9mm of live rounds, a Lama pistol with erased serial numbers with 5 X 9mm live rounds, Norinco pistol with erased serial numbers with an empty magazine, a vector pistol with erased serial numbers with 5 X 9mm live rounds, 18 X 12 bore live ammunition, 4 detonator fuse cables, 3 megamite danger explosive dynamites, an AK 47 rifle with erased serial numbers with an empty magazine and a police drab cap. These firearms, ammunition and explosives form the basis of the charges in count 1 and count 2.

It is further alleged that this house where the other accomplices were arrested belongs to Tinashe Chikara an accomplice in these matters and that at this house the police detectives found a Toyota Hiace Omnibus Registration Number ACU 0314 and a Mercedes Benz Sedan Registration ACB 7397 parked outside. These two motor vehicles are alleged to have been used in committing these offences especially counts 11 to 16. A work suit and a rope were found inside the Mercedes Benz.

The State alleges that after the arrest of these accomplices at the house in Darwendale one of the alleged accomplices Tinashe Matinyenya implicated another accomplice Wilson Kanetsa who was then arrested at his house in Chinhoyi and was found in possession of a Toyota Harrier Station Wagon ADJ 7816 also allegedly used in the commission of other offences. It is further alleged that one of the accomplices Ngomadzashe Mutiba led to the arrest of other accomplices Khumbulani Ncube, Mgcini Ramachela, Charles Nyandoro, Rodwell Vanhukwavo and Takafa Vhumbunu all at house number 8 Dahwa Crescent, Zengeza 3 in Chitungwiza. It is alleged that Rodwell Vanhukwavo was found in possession of 12 X 9 mm live rounds of ammunition and a motor vehicle KB Isuzu 250 registration numbers ABY 8174 also allegedly used in the commission of the offences. Inside the Isuzu motor vehicle were 3 worksuits and that Khumbulani Ncube also helped in the recovery of the Isuzu motor vehicle stated above which was parked at a local car park in Zengeza 3.

The State further alleges that Tinashe Chikara implicated Doubty Mharadze and Happymore Muchenje who were also arrested.

It is further alleged that the alleged accomplices Tinashe Matinyenya and Rodwell Vanhukwavo later led the detectives to Crebilly farm house in Darwendale where police uniforms which include a trousers, drab shirt with metal title, pair of brown shoes, 2 pairs of handcuffs, 1 police special tactics unit cap written Force Number 0801955 were recovered together with a metal bar and 2 work suits. The said police uniform was also allegedly used in the commission of some of the offences.

It is the state case that the recovered fire arms were taken for forensic ballistic examination and that the report linked the recovered firearms to some of the offences committed allegedly by the applicant and his alleged accomplices.

Counts 4 & 5 – Robbery and Attempted Murder :-

It is alleged that the applicant and his accomplices on 13 July proceeded to Number 46 Robert Manyika in Harare in the afternoon at Merchant Man Properties Real Estate after they had gathered information that the managing Director of that company Kudakwashe Marufu had large sums of money. It alleged the applicant and his accomplices were using the Toyota Hiace referred to in count 1 and count 2 and that Rodwell Vanhukwavo was in full police uniform also

referred to in count 1 and count 2. It is alleged that Rodwell Vanhukwavo and Tinashe Matinyenya approached the complainant in his office pretending to be police officers who wanted to arrest the complainant for allegedly dealing in drugs but the complainant resisted. This caused the other accomplices to join in and subdued the complainant at gun point. It is alleged that when the applicant and his accomplices tried to take a safe which contained US\$20 000-00 the complainant fiercely resisted forcing one of the accomplices Rodwell Vanhukwavo to fire at the complainant but missed him. The other accomplice Ray Shangari fired twice at complainant but also missed and the applicant and his accomplices in panic fled with only US\$50-00 using the gate away motor vehicle. The police attended the scene and 3 x 9 mm spent cartridges were recovered. It is alleged that after the arrest of the applicant and his accomplices and the recovery of fire arms in count 1 and count 2 the said spent cartridges matched some of the fire arms the 9mm Vector pistol and the 9mm Llama pistol as per the ballistic report Annexure D to the state's response. It is further alleged that after the arrest of the applicant and his accomplices the complainant was able at the identification parade to identify Rodwell Vanhukwavo, Tinashe Matinyenya and Ray Shangari and that these accomplices voluntarily made indications at the scene of crime. The applicant and accomplice are therefore said to have successfully robbed the complainant in count 4 of only US\$50-00 and attempted to kill him by shooting at him thrice in count 5.

Cout 7 and 8 Robbery and Attempted Murder:

It is alleged that on 31 July 2015 at 0140hrs the applicant and his accomplices drove to Petrotrade Service Station in Muzari Suburb in Chinhoyi armed with an AK 47 rifle, several pistols (all referred to in count 1 and count 2) iron bars and a button stick. Upon arrival it is alleged that the applicant and his accomplices confronted the complainant a security guard one Terrence Mupinyuri who was on duty manning the premises and hit him on the head with iron bar and button stick rendering him unconscious after which they tied his hands, feet and sealed off his mouth with masking tape and shoved him into a toilet. The applicant and his accomplices then are alleged to have broken into the offices at the service station where they stole a desk top computer, 60 x 500ml of Engen motor oil, 384 x 500ml of premium motor oil, cell phone charger, watch, 7 425litres worth petrol of coupons, 3905litres worth of diesel coupons and a

safe which contained \$1 238-00. It is alleged that they loaded the stolen property in a Nissan Vannet motor vehicle which had been left by a customer parked at the service station, hot-wired it and drove away. At about 5 km from the scene of crime the applicant and his accomplices proceeded to blow up the safe and managed to take the US\$1 238-00 and burnt some of the fuel coupons. It is alleged that they later abandoned the Nissan Vannet motor vehicle after the botched up robbery and attempted murder charges in count 11 count 16 at Ayrshire Mine in Banket on 4 August 2015. It is alleged that the explosives used to blow the safe were part of the explosives recovered in count 1 and count 2 and that the rope recovered inside the Mercedes Benz in count 1 and count 2 had been stolen from the Nissan Vannet motor vehicle also stolen at Petro-trade Service Station. The value of property stolen in count 7 and 8 is US\$18 600-00 and property valued at US\$10 000-00 was recovered. The attempted murder charge in count 8 arise from the fact that the applicant and his accomplices tried to kill the security guard Terrence Mupinyuri.

Counts 11 – 16 Robbery and Attempted Murder

The complainant in the robbery charge is Safeguard Security Company and complaints in respect of attempted murder charges are the security guards employed by the same company which had been contracted by Ayrshire mine in Banket to transport gold bullion from the mine to Fidelity Printers in Harare on 4 August 2015.

It is alleged that on 4 August 2015 the applicant and his accomplices proceeded to Ayrshire Mine in Banket using 4 motor vehicles being the Mercedes Benz Registration No. ACB 7397 driven by Tinashe Chikara, Toyota Harrier Registration No. ADJ 7816 belonging to Wilson Kanetsa, a white Isuzu KB280 Registration No. ABY 8174 belonging to Khumbulani Ncube and a Nissan Vannette stolen at Petrotrade Service station in Chinhoyi in count 7 and 8 which was being driven by Titus Chatukuta. It is alleged that the applicant and his accomplices were armed with an AK 47 rifle referred to in count 1 and count 2, iron bars and spikes. It is alleged that the applicant and accomplices proceeded to way lay two armoured Safeguard Security motor vehicles some 2km from Ayrshire Mine which were transporting 6.2 kg of gold to Fidelity Printers in Harare.

It is the state case that when the two armoured motor vehicles arrived at scene where the applicant and accomplices were lying in ambush, they threw spikes at the motor vehicle deflating the tyres of one of the said motor vehicles forcing the Safeguard Security motor vehicles to retreat. The applicant and his accomplices are alleged to have also opened fire at the two motor vehicles and one of the motor vehicles hit a tree. The Safeguard Security guards exchanged gun fire with the applicant and his accomplices and in the process one of the accomplices Takafa Vhumbunu was shot and wounded and his injury was later confirmed as a gunshot wound after his arrest. The applicant and his accomplices were forced to retreat and were not able to take the gold. The scene of crime was later attended by police who recovered 3 x 7.62 mm of live rounds of ammunition, 8 x 7.62mm of spent cartridge, 8 x 9mm of spent cartridges, 2 metal spikes and 5 litres of petrol. The police obtained video footage from the cameras fitted on the Safeguard Security motor vehicles and the alleged accomplices Ngonidzashe Mutiba and Rodwell Vanhukwavo's images were clearly captured. The spent cartridges were sent for ballistic examination and they matched the firearms recovered after arrest of the applicant and accomplices in 1 and count 2 being the AK 47 rifles, Norinco pistol, and Llama pistol as per Annexure D. The State further alleges that tollgates records showed that the applicant and his accomplices had used the said motor vehicles proceeding for the scene of the crime in Banket and that telephone call records show that the applicant and the accomplices were near the scene of crime.

In his bail statement the applicant stated that he should be admitted to bail on account of the fact that his alleged accomplices in B 746/15, B 1102/15 and B 1149/15 were admitted to bail by this court. It is applicant's contention that he should be treated equally like his other accomplices Charles Nyandoro who was found with a fire arm and gave a warned and cautioned statement, Hapymore Muchenga who allegedly tipped the police of robbery in counts 11 to count 16 and Doubty Mharadze who is implicated in the robbery and attempted murder charge along R Manyika in Harare who were all granted bail by this court.

The applicant submitted that although he is facing serious offences that alone cannot be the basis to violate his constitutional rights as he is entitled to be admitted to bail. He further stated that the trial in respect of all these cases has not commenced since his arrest in August

2015 and that he believes the state is not ready to commence trial for lack of evidence against him.

The applicant denied that he has the propensity to commit similar offences stating that he is on bail pending appeal in a case or cases he was sentenced to 30 years imprisonment for robbery which appeal he is yet to prosecute.

The applicant submitted that although he is facing numerous offences he denies the charges and that the state case against him is very weak. The applicant's version is that he was arrested in connection with a Nokia cell phone allegedly stolen during one of the robberies at a service station in Chinhoyi. While the applicant admitted that he indeed sold the said Nokia cell phone he indicated that he had bought it from one Majarina whose further particulars he does not know but that one of the alleged accomplices Ngonidzashe Mutiba knows this Majarina. The applicant said the police were not willing to find this Majarina but decided to falsely implicate the applicant.

The applicant said there is no other evidence linking him to these offences and denied that he gave a warned and cautioned statement Annexure (C) freely and voluntarily. As a result the applicant stated that he is not a flight risk moreso as other offences he was allegedly facing, that is CRB 9225/15, CRB 9231/15 and CRB 1182/15 were withdrawn by the state for lack of evidence. The applicant is willing to abide by any bail conditions imposed by this court.

In terms of s 50 (1) (d) of our Constitution the applicant must be released unconditionally or on reasonable conditions pending his trial unless there are compelling reasons justifying his continued detention. The onus rests with the state to show or prove that there are such compelling reasons or to show that the applicant is not a suitable candidate for bail. In terms of 117 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:02*] some of the compelling reasons include *inter alia*;

- i) that the applicant would endanger the safety of the public if released on bail.
- ii) that the applicant has the propensity to commit similar offences especially those referred to in the 1st schedule.
- iii) that the applicant is not likely to stand trial if admitted to bail or would abscond.
- iv) that the applicant would attempt to interfere with evidence against him or her by influencing or intimidating witnesses or by concealing or distorting evidence.

- v) that the release of the applicant on bail would undermine or jeopardise the proper functioning of our criminal justice system and would put the whole bail system into disrepute.

It is clear from the allegations I have painstakingly outlined that the applicant is facing very serious offences for which if he is convicted he would spend the better part of the remainder of his life in prison. The alleged robberies were meticulously planned and mercilessly executed putting the lives of innocent and law abiding citizens in grave danger. However as was said in the often quoted case of *S v Hussey* 1991 (2) ZLR 187 (S) the seriousness of the offence on its own cannot be the basis to deny an accused person admission to bail pending trial. The presumption of innocence at this stage always weighs in favour of the applicant. It therefore becomes imperative for the court to establish whether there are other compelling reasons justifying the refusal to grant the applicant bail pending trial.

I am satisfied that there are indeed compelling reasons why the applicant should be denied bail.

In my view the state case against the applicant is very strong contrary to what the applicant has said. From the alleged facts I have outlined in much detail especially in count 1 and count 2 the police managed to make a breakthrough in all these cases after the arrest of the applicant in connection with the said Nokia cell phone. The applicant does not dispute that he was arrested initially in connection with the said Nokia cell phone. What flows from the applicant's arrest is that all the other accomplices in these cases were arrested as a result of being implicated by the applicant in one way or the other. Further, from the alleged facts the arrest of the applicant led, in the chain of events, to the recovery of various exhibits relevant to prove the state case which include motor vehicles, fire arms, ammunition, explosives and police regalia. All these recovered exhibits are pertinent in proving the offences alleged by the state. Whilst the applicant denies that he is responsible for the arrest of the other accomplices or the recovery of the said exhibits, the critical fact is that the arrest of the applicant in connection with the Nokia cellphone is critical to the state case despite the applicant's version of how he got the said cellphone.

The state case is also strong in that the state relies on the applicant's warned and cautioned statement in respect of counts 11 count 16 relating to robbery and attempted murder at

Aryshire Mine in Banket. In that statement Annexure C the applicant gives a very detailed account or explanation of his role and that of the other alleged accomplices in the execution of the offences in count 11 and count 16. This strongly links the applicant to those offences. While the applicant denied in his submissions that he freely and voluntarily gave the statement, I believe that the admissibility of that statement is at this stage food for the trial court. What is critical to the state case is that the Forensic Ballistic Report Annexure 'D' clearly shows that the firearms recovered upon the applicant and his accomplices' arrest were linked to the various scenes of crime in issue. The state case is therefore strong and as a consequence there is a high risk that the applicant would abscond court if admitted to bail see *S v Jongwe* 2002 (2) ZLR 2009(S).

While the applicant has denied that he has the propensity to commit similar offences, I believe I should not be detained by the dispute of whether the applicant is facing other charges under CRB 9225/15, CRB 9231/15 and CRB 1182/15 which applicant said were withdrawn. Suffice to say that by his own admission the applicant has a 30 year jail term hovering above his head for which he is on bail pending appeal for offences of a similar nature. In terms of s 117 A (5) (b) the applicant should have disclosed this in his bail statement.

It is common cause that the applicant's accomplices Doubty Mharadze, Charles Nyandoro and Happymore Mucheneje were admitted to bail pending trial by this court. It is also proper that the applicant should be treated equally by this court. See *S v Lotriet & Anor* 2001 (2) ZLR 225 (H). It however remains a fact that the applicant's accomplices one Mgcini Ramachela and Wilson Kanetsa were denied bail by this court in HH 976/15 by Zhou J and Tinashe Matinyenga in HH 108/16 by this court. At the end of the day each case must be treated on its merits and *in casu* the applicant is clearly linked to the offences charged.

After considering all the factors in his case I am satisfied that there are compelling reasons for refusing to admit applicant to bail pending trial. The continued detention of the applicant is in the interest of justice. I have no doubt that applicant has no motivation to stand trial. He is a flight risk.

In the result the application for bail pending trial is dismissed.

National Prosecuting Authority, respondent's legal practitioners