

OLIVER MAHLANGU

And

VUSUMUZI MGUNI

And

MACDONALD T. MAJAYA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 17 & 26 MAY 2022

Bail Application

G. Sengweni for the applicants

G. Nyathi for the respondent

MAKONESE J: The applicants filed 3 bail applications in this court on the same date. These applications relate to the same facts and hence I decided to combine the applications. I have dealt with the application in one single judgment for the sake of convenience. The applicants are facing charges of armed robbery in violation of section 126 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). Applicants deny the allegations and aver that they have been wrongly implicated. The state opposes the application for bail on the grounds that there are compelling reasons for the denial of bail. The state relied to a large extent on the affidavit filed by the Investigating Officer.

On 11th of April 2022 at around 0200 hours the complainant who is employed as a security guard at Council for the Blind a charitable organisation, situated at corner 15th Avenue and Fife Street, Bulawayo was on duty. He was seated in a motor vehicle when he was confronted by four assailants. The applicants are alleged to have been amongst the assailants. The suspects were armed with a bolt cutter, metal bars and axes. The assailants threatened to inflict injury upon the complainant. The complainant was pulled out of the motor vehicle and was assaulted all over the body. The suspects demanded keys for the offices. The complainant handed over the keys. Four of the suspects gained entry into the

offices. One of the suspects remained outside the offices guarding the complainant. The suspects stole a safe containing US\$24 028; Pula18 610; ZAR49 060; ZW\$9 650 and a green canvas bag which contained a pistol. A Del laptop and an Acer laptop were also stolen from the premises. Before leaving the premises the suspects tied the complainant's hands behind his back. The suspects loaded their loot in a white Toyota Land cruiser motor vehicle registration number ADX 0444 belonging to Council for the Blind before driving away.

Submissions by the applicants

The applicants aver that there are suitable candidates for bail and that they have been wrongly implicated. They contend that they are not a flight risk. They are of fixed abode and would not seek to interfere with investigations. Applicants contend that the state case against them is weak and there is no evidence linking them to the offence. Applicants argue that Kelvin Njabulo Dube who is alleged to be one of the assailants in the alleged robbery has already been granted bail by this court. It is argued on behalf of the applicants that the law demands equality in dealing with the applicants. Applicants rely on the case of *S v Lotriet & Anor* 2001 (2) ZLR 225 (H) for this proposition.

Applicants aver that the averments filed in the affidavit of the Investigating Officer, Detective Sergeant Madhoro have been contrived and fabricated. In particular the applicants allege that they have no pending cases and the crime reference numbers furnished to this court relate to entirely different individuals. At my direction I instructed the state and defence to investigate these cases and provide the court with accurate information. It was established that these matters, ZRP Khumalo CR 164/11/19; Hillside CR 159/10/19 and Tredgold CRB 4022/14 related to different individuals who are not connected in any way to the case before me. As regards the allegation that applicants are involved in pending cases M under Bulawayo CRB 800/20, it was established that in these cases, further remand was refused on 30th April 2021. The relevant extracts of the court records have been filed with this court.

All applicants deny that they were at the crime scene as alleged by the state. 1st applicant avers that he never committed the alleged offence. He was arrested because he is a tenant at the house where one of the suspects only known as Smally was residing at the relevant time. The property allegedly recovered was in Smally's room. 1st applicant insists that when the offence was committed he was at a mine in Shangani. He was arrested at

Northend shops, Bulawayo in the company of his girlfriend Tracy, 2nd and 3rd applicants. Applicants submit that nothing was recovered from the applicants as alleged by the state. They submitted to DNA tests and had their finger prints taken. Up to date the forensic results have not been produced to indicate whether or not applicants are linked in any way to the robbery.

Submissions by the state

In opposing bail the state alleges that the applicants are facing serious allegations as outlined on the Form 242, Request for Remand Form. The state argues that there are compelling reasons for the denial of bail in respect of all the applicants. The state avers that applicants are facing serious allegations which upon conviction will result in a lengthy prison sentences. The state argues that there is a strong *prima facie* case against the applicants. The state argues that some of the stolen property was recovered at one of the applicants' residences. In that respect the state contends that there are high prospects of a conviction. In addition, the applicants have shown a propensity to commit similar offences and have committed similar offences whilst on bail. I have already indicated that some of the crime reference numbers supplied by the Investigating Officer do not relate to the applicants whatsoever. It has been established by the state and defence that in one of the matters referred to by the state there are no pending allegations against the applicants. In one by the records the state has withdrawn allegations before plea. I must pause to comment here that the police must furnish accurate details in applications of this nature. The court takes a dim view of Investigating Officers who provide false information to the court. The public will lose confidence in the courts where decisions are made as a result of false and misleading information. Investigating Officers are officers of the court and as such they owe a duty to place before the court correct, credible and accurate information.

Analysis

Section 117(2) of the Criminal Procedure and Evidence Act, (Chapter 9:07) provides that the refusal to grant bail and the detention of an accused in custody shall be done in the interests of justice where one or more of the following grounds are established.

- (a) Where there is a likelihood that the accused if he or she is released on bail will;

- (i) Endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule or;
- (ii) Not stand trial or appear to receive sentence or;
- (iii) Attempt to influence or intimidate witnesses or to conceal or destroy evidence or undermine or jeopardize the objections or proper functioning of the criminal justice system including the bail system.

In this matter no evidence has been placed before the court to show that the granting of bail to the applicants will endanger the safety of the public. There has been no allegation that the applicants have the propensity to flee or to abscond to evade justice. The state has not argued that the applicants have attempted to interfere with state witnesses. Applicants have asserted that the property said to have been recovered was found in a room belonging to one Smally . There does not appear to be a direct link between any of the applicants and the crime scene. In applications for bail pending trial the onus on the applicants is to show on a balance of probabilities that their release on bail will not prejudice the interest of justice. In the case of *S v Makamba* 2004(1) ZLR 367 the court held that on applicant can discharge this onus by either denying the allegations or telling the court such information as would establish his innocence or show that even if they were convicted the likely penalties were not such as to present a temptation for him to abscond. The applicants deny any involvement in the robbery. The overriding principle in this application is whether the release of the applicants on bail pending their trial would prejudice the interests of justice. In terms of section 50(d) of the Constitution of Zimbabwe (Amend No. 20), 2013 an accused person should be released unconditionally or on reasonable conditions unless there are compelling reasons justifying his continued detention.

Disposition

From the foregoing, I conclude that the state has not shown that there exists a strong *prima facie* case against the applicants. I have observed that the evidence furnished to the court by the Investigating Officer is contrived and calculated to mislead the court. I am not satisfied that a proper link has been established between the applicants and he alleged offence.

In the result, there are no compelling circumstances for the applicants to be denied bail pending trial. Accordingly the following order is made:

1. Applicants be and are hereby admitted to bail pending trial on the following conditions;
 - 1.1 That applicants each deposit the sum of RTGS\$30 000 with the Registrar of the High Court, Bulawayo
 - 1.2 That first applicant resides at 27 Biden Powel Road, Northend, Bulawayo, until the finalization of this case.
 - 1.3 That 2nd applicant resides at house number E253 Njube, Bulawayo until the finalization of the case.
 - 1.4 That 3rd applicant resides at 1745 Mbundane, Bulawayo until the finalization of the case.
2. The applicants are not to interfere with state witnesses.
3. Applicants to report at Bulawayo Central Police Station once every week on Mondays between the hours of 6am and 6pm.

Sengweni Legal Practitioners, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners