BHEKILIZWE NDLOVU

And

PHILANI LUNGA

And

BONGANI MPOFU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 18 MACRH 2021

Bail application pending trial

T. Runganga, for the applicant
Ms N. Ngwenya, for the respondent

DUBE-BANDA J: This is a bail application pending trial. Applicants are jointly charged with two counts of robbery as defined in section 126 (1) (a) of the Criminal law [Codification and Reform] Act Chapter 9:23. It being alleged that, on 5 February 2021, at Warmaley Stamping Mill, Mpoengs area, Plumtree applicants used violence by arming themselves with knives and machetes in order to induce complainants to relinquish their various properties, which included a grinding machine, welding machine, 12v generator battery, fuel, airtime, cellphone, car radio, car registration book, brown wallet, cash in the sum of R17 600, 14 grams of gold ore, one vodaphone cellphone, 2 nokia cellphones and R250.

In support of the application, applicants have placed the following facts before court:that they will plead not guilty to the charges. Nothing was recovered from the applicants, the recoveries were made from the motor vehicle which none of the applicants was driving. No one was identified at the scene of crime. Applicants were arrested at a police manned roadblock, because they were in the motor vehicle found with the stolen loot. The

applicants were offered transport in the suspect motor vehicle and paid a fare of US10 each. They were travelling from their gold panning sites to Bulawayo. It is alleged that applicants have no previous convictions, there have no pending cases. It is contended that the chances of absconding and not standing trial are non-existent, applicants were born in this country and grew up in this country. It is contended that this is not a serious offence, it is not armed robbery, it is just 'plain robbery,' no life was lost. It is argued that it would be impossible to secure a conviction in this matter. Applicants will not interfere with known state witnesses.

This application is opposed. In the main, the opposition is anchored on the ground that applicants are a flight risks. Respondent relies for its opposition on the affidavit deposed to by the investigating officer, in the main, the officer contends as follows:

1. Allegations are that on the 5th February 2021, the accused persons who were in the company of five unknown accused persons who are still at large, connived and hatched a plan to rob a total of three complainants.
2. They proceeded to the stamping mill using a Nissan Navara vehicle registration number ADF 522 being driven by Onasis Sithole also being jointly charged with the accused.
3. The accused acting in common purpose produced machetes, knives and robbed the complainants of various property including electric goods, tools, fuel, gold and cash all valued at ZWL 3 836 481.00.
4. One of the complainants, Justice Moyo, identified the Nissan Navara vehicle which the accused used as a getaway car and alerted the police manned roadblock along Bulawayo-Kezi highway and intercepted the vehicle leading to the arrest of the accused at the roadblock site.
5. Upon arrest, police recovered a car battery, grinding machine, spanners, car radios, while some of the accused persons managed to escape arrest and are still at large.
6. It is against this background that I intend to oppose bail basing on the reasons that:
    i. The accused persons are likely to abscond if given bail due to the gravity of the offence which normally attracts a deterrent sentence once convicted.
    ii. Accused persons are likely to abscond if given bail as evidenced by the fact that when they saw the police manned roadblock, they immediately

bolted out of the getaway car and ran away prompting the police to give chase and arrested them.

iii. The accused persons are likely to commit similar offences once freed on bail as they committed this offence while on bail for similar offence currently pending trail at Esigodini Magistrates Court under CRB ESG 661-3/20.

iv. After the arrest of the accused persons, an informal parade was conducted and they were positively identified and so was the recovered property.

v. The accused persons are most likely to interfere with witnesses through threats to instil fear as evidenced by the nature of the injuries they inflicted on the victims during the robbery.

vi. The outstanding accused persons are yet to be accounted for hence if the accused persons are freed on bail they are most likely to assist them to go into hiding to derail the smooth flow of the case.

vii. Most of the stolen property is yet to be recovered for which once the accused persons are freed they are likely to have ample time to dispose of it.

In his brief oral submissions, *Mr Runganga*, counsel for the applicants, contended that, it is the first applicant – Bhekilizwe Ndlovu - who has a pending case at Esigodini Magistrate's Court. The other two applicants – Philani Lunga and Bongani Mpofu - are not involved in the Esigodini case. It is further contended that the state has withdrawn charges against the applicants' co-accused persons – Onasis Sithole and Othis Sithole. Ms *Ngwenya*, counsel for the respondent, confirmed that indeed it is only Bhekilizwe Ndlovu who has a pending case at Esigodini. She further confirmed that charges have since been withdrawn, before plea, as against Onasis Sithole and Othis Sithole. Onasis Sithole was the driver of the getaway car. It is the intention of the state to use these two as state witnesses in the case against the applicants. *Ms Ngwenya* informed the court that the trial of the applicants has been set down for the 31st March 2021, at Plumtree Regional Court.

The contention by the prosecution is that the applicants are a flight risk. In terms of section 117(2) (a) (ii) of the Criminal Procedure and Evidence Act [9:07], the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where there

is a likelihood that the accused, if he or she were released on bail, will not stand his or her trial or appear to receive sentence. In *S v Dlamini* 1999 (2) SACR 51 (CC) *para*. 53 the court said the important consideration is that there has to be a likelihood, i.e. a probability that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such likelihood is a factor, to be weighed with all others, in deciding what the interests of justice are. The court must not grope in the dark and speculate: a finding on the probabilities must be made. See: *S v Dial and Another*2013 (2) SACR 665 (GNP).

Section 117(3)(b) of the Criminal Procedure and Evidence Act, says in considering whether the ground referred to in subsection (2)(*a*)(ii) (not stand his or her trial or appear to receive sentence) has been established, the court shall take into account; the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account.

It has repeatedly been held that in assessing the risk of flight, courts must take into account not only the strength of the case for the prosecution and the probability of a conviction, but also the seriousness of the offence charged and the concomitant likelihood of a severe sentence. The obvious reason of this approach is that the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the applicant to abscond. In *S v Nichas* 1977 (1) SA 257 (C) 263G-H, the court said, if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. In *S v Hudson* 1980 (4) SA 145 (D) 164H, the court held that the expectation of a substantial sentence of imprisonment would undoubtedly provide incentive to the accused to abscond and leave the country. In *S v C* 1995 SACR 639 (C) 640H, it was said that whilst the possibility of absconding is always a very real danger, it remains the duty of the court to weigh up carefully all the facts and circumstances pertaining to the case.

In *casu*, it is alleged that the motor vehicle applicants used as a getaway car was identified by the witnesses. Applicants werealso positively identified by witnesses. The getaway

car was intercepted at a police manned roadblock, applicants attempted to escape, however they were apprehended, though some of their colleagues managed to evade arrest. Upon arrest, police recovered a car battery, grinding machine, spanners, car radios, which items were identified by the complainants. In view of the above, I find that the state has a strong *prima facie* case against the applicants. They are facing a serious charge of robbery. If convicted, they are most likely going to be sentenced to a lengthy custodial term, thus they will be tempted to abscond and not stand trial. The temptation for the applicants to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002.

Furthermore, the fact that applicants attempted escape from the police before arrest and before charges were formally put to them is a factor that this court will have to consider in deciding what the interests of justice are. Again, in respect of the first applicant – Bhekilizwe Ndlovu–this case was allegedly committed while he was on bail for a similar case which is pending at Esigodini Magistrate's Court. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

Where there is a cognisable indication that an accused person would evade his trial if released from custody, the bail court would be serving the interests of justice by refusing bail. The liberty of an accused person would, in such circumstances have to give-way to the proper administration of justice. See: *S v Dial and Another* 2013 (2) SACR 665 (GNP). On the facts of this case, admitting applicants to bail will undermine the objectives of bail and the criminal justice system, it will lead to the public losing confidence in the bail system.

Therefore, upon careful consideration of all the facts and the circumstances based on the facts and evidence before me, weighing up the interests of justice against the right of the applicants to their personal freedom and any potential prejudice because of their detention pending trail, I am satisfied that interests of justice do not permit their release from custody. There is a likelihood that they will attempt to evade trial.

Disposition

In conclusion, I find that there is a likelihood that the applicants, if released on bail, will not stand their trial.

In the result, I order as follows: the application for bail is dismissed.

Tanaka Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners