ALEX MATTHEW MURIRA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 18 March 2021 & 14 April, 2021.

Bail Pending Trial

N Chigoro, for applicant
B Murevanhema, for the respondent

CHITAPI J: The applicant has petitioned the judge of the High Court applying for his release from pre-trial custody on bail. The applicant appeared before the magistrate at Harare on initial remand on 25 November, 2020 on allegation that he committed two counts of the offence of robbery committed in aggravating circumstances (colloquially referred to as "Armed Robbery"). In the first count the allegations were that on 19 July, 2019 he committed the robbery at a house in Helensvale surburb, Harare around 18:30 hours. The applicant allegedly committed the robbery in the company of two accomplices namely Mbonisi Ndlovu and David Zingura. The robbery was committed through the use of fire-arms to threaten the complainant and induce his submission to part with his property. The applicant and his accomplices gained entry into the property by scaling the pre-cast wall that surrounds the property before entering the house through an unlocked door. The applicants and his accomplices ordered the complainant, his mother and grandmother to lie on the floor before they demanded that the complainant showed them where he kept his pistol. The complainant surrendered the pistol as demanded. The applicant and his accomplices were alleged to have stolen complainant's property comprising US$18 500 cash, a red satchel, a Samsung cellphone handset with a United Kingdom simcard. The applicant and his accomplices loaded the stolen loot in a gateway vehicle and sped away after firing three gun shots whilst in the complainant's yard.

In the second count, the allegations made against the applicant were that, on 3 August, 2020 around 18:30 hours the applicant and some unnamed accomplices said to be still at large committed a robbery at a house in Avondale, Harare. The gang was alleged to have entered the

yard where they found the complainant within the yard. The gang threatened the complainant with a firearm to induce the complainant's submission to accede to their demands. One gang member allegedly fired a gun shot in the direction of the house entrance door. The complainant was forced to part with his property after an unlawful demand of the same by the applicant and his accomplices. The complainant parted with US$1 800 a Huawei cellphone handset, a shotgun, a Lenovo laptop and brown jacket. It was alleged that police upon investigating the robbery recovered spent cartridges at the scene which matched test cartridges a fire-arm recovered from the applicant and his accomplices.

The applicant did not challenge the allegations against him before the magistrate. He sought to challenge them before me in this bail application filed consequent on the application for the applicant's placement on remand having been granted. A bail hearing is not intended to be a forum to challenge the placement of the applicant on remand. The bail judge should not be asked to engage in a review of the propriety of the placement of the applicant on remand. Where the applicant does not challenge the grounds or allegations for seeking his placement on remand before the remand court, the applicant must be taken to have accepted the correctness of the allegations as framed. See *S* v *Blumears 1991 (1) ZLR 118(S)*; *S* v *Hopewell Chin'ono HH 567/20*. The bail judge's function is to consider and determine on the suitability of the applicant as a candidate for admission to bail in the light of the allegations made against the applicant before the remand magistrate, if unchallenged, or in light of the determination of the magistrate where the allegation were challenged. The allegations are considered together with the usual factors which are appropriate to take into account in determining an application for bail.

In this application, Mr *Chigoro* attacked the allegations as set out in the Form 242, request for remand form, which formed the basis for the applicant to be placed on remand. It was submitted that there was no evidence to link the applicant to the offence since the applicant was only allegedly implicated by his accomplices yet the accomplices were denying making any implications. It was also alleged that nothing was recovered from him as would link him to the offence. Further it was alleged that the applicant did not make any indications. Simply put, the averments made by counsel should have been made before the remand court and if established, there would not have existed a reasonable suspicion that the applicant committed the offence charged. The applicant would not have been placed on remand. The above submissions made by Mr *Chigoro* in his application for

bail are out of place and if it is intended to persist in them, the applicant can do so before the remand court magistrate.

The state opposed the applicant's legal application on the basis that the applicant was facing two counts of 'Armed Robbery' being an offence that is regarded so by the courts and punishable with a lengthy custodial term of imprisonment. A point of correction here is that it is not a question of the court regarding the offence of "Armed Robbery" as a serious case. It is in fact the legislature which has provided in s 126 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] that the offence of robbery committed in aggravating circumstances is punishable by the imposition of the sentence of imprisonment. State counsel submitted that the applicant was likely to abscond to avoid the custodial sentence. Counsel argued that the more serious the charge against the applicant be, the greater was the temptation to abscond to avoid the likely penalty. As regard count one, counsel submitted that the evidence against the applicant was "overwhelming" because the applicant led police to the recovery of a Narinco pistol which was used in the commission of the robbery. In count two counsel submitted that the applicant was implicated by his accomplices.

The investigating officer was called to testify at the instance of the court. It was necessary that the investigating officer clears divergent accounts between the applicant's and the respondent's counsel on how the applicant was arrested. The investigating officer Allen Tafireyi testified that the applicant was arrested on 2 September, 2020 at a robbery scene near a house in Borrowdale where the applicant and his accomplice had planned to commit a robbery. They were not successful because the occupant of the house exchanged gun fire with the applicant and his accomplices as the occupant sought to repel the applicant and his accomplices. The applicant was unfortunately for him, shot. He managed to crawl from the place where he was shot which was four houses from the scene of the aborted robbery to the next house, where he was found after the shoot out. The applicant was then arrested. In the course of investigations, police then linked him to the two counts of robbery, subject of this bail application. The investigating officer testified that the applicant implicated his accomplice Mbonisi Ndlovu as the owner of the norinco pistol used in the commission of the offences in both counts. Police arrested Mbonisi Ndlovu and recovered the pistol from Mbonisi Ndlovu. Mbonisi Ndlovu in turn disowned or denied ownership of the pistol and alleged that he took possession of it at the scene of the aborted robbery where the applicant was shot. He reportedly stated that the applicant dropped the pistol after being hit by a

bullet fired by the occupant of the house whereat they had intended to commit a robbery, before Mbonisi Ndlovu ran away from the scene with the pistol.

The investigating officer testified that the norinco pistol was not registered. He also testified that the applicant had pending cases under investigation by CID Homicide. Three cases under investigation consisted of robbery scenes in Chitungwiza and Goromonzi. It must be noted that the cases were listed in the request for remand form as pending cases. Their references are Borrowdale CR 202/07/2019: Chitungwiza CR 261/07/20 and Goromonzi CR 80/07/20. The charges in the three cases are robbery committed in aggravating circumstances (Armed Robbery") In the cases aforesaid, spent cartridges recovered at the scenes, matched test cartridges fired from the norinco pistol allegedly used by the applicant and his accomplices and recovered from Mbonisi Ndlovu.

The investigating officer testified that the allegation that the applicant was found in possession of a fire-arm was incorrect because the fire-arm was recovered from Mbonisi Ndlovu who was arrested after being implicated by the appellant. The investigating officer averred that the applicant was not co-operative with police because he refused to have his blood samples taken to determine whether it matched the blood on the spoor seen at the arrest scene. Mr *Chigoro* however indicated that the applicant refused because he wanted his legal practitioner to be present when samples were being taken. Mr *Chigoro* submitted that the samples had since been obtained from the applicant. The witness also indicated that he was not aware that Mbonisi Ndlovu was granted bail.

I have considered the record for Mbonisi Ndlovu case number B 193/21 wherein he was granted bail by CHINAMORA J. That application related to the foiled robbery at 14 Dart Road, Vainona, Harare on 2 September, 2020. It was at this scene that the applicant herein was shot and subsequently arrested in the vicinity of the house where the foiled robbery occurred. The applicant is not in this application charged with the Vainona robbery case. It is therefore misleading for the applicants' counsel to suggest that the applicants' co-accused, Mbonisi Ndlovu was granted bail. The applicant is not a co-accused in case number B 193/21 Ref CRB HREP 8002/20. The argument that the applicant be treated in like manner as Mbonisi Ndlovu has no legal basis.

I must consider the question of onus in this application. The applicant is charged with a third schedule offence. In terms of the provision of s 115 c (2) (a) (ii) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*], the applicant bears the burden to show on a balance of

probabilities that it is in the interests of justice to release him on bail pending trial. Section 117 (2) (a) and (b) provides a list of the grounds which if established, are deemed as sufficient to deny the applicant admission to bail in the interests of justice. S 117 (3) then lists the individual factors which the court should consider in determining whether the grounds are established.

In *casu*, the states opposition to bail is based upon the fear of abscondment by the applicant. S 117 (2) (a) (ii) aforesaid provides that it will be in the interests of justice to deny the applicant bail if it is established that the applicant will not stand his or her trial or appear to receive sentence. S 117 (3) (b) lists the factors that the court is required to consider or take into account in lining a determination of abscondment. The factors are listed as:-

"(i) the ties of the accused to the place of trial
(ii) the existence and location of assets held by the accused.
(iii) the accused means of travel and his or her possession of or access to travel documents.
(iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefore.
(v) the strength of the case for the prosecution and the corresponding incentive of the accused to file.
(vi) the efficacy of the amount and nature of the bail and enforceability of any bail conditions
(vii) any other factor which in the opinion of the court should be taken into account".

The applicant in his application cursorily dealt with the factors listed above. For example, the applicant merely stated at he resided at farm 14 Bene vista, Goromonzi and that he was aged 23 years old, married with an expecting wife and was self-employed as a mechanic. Such allegations are hardly sufficient for the court to determine the ties of the applicant to his work place. The court is not placed in a position to determine the nature of the ties which the applicants has got to the place of residence, does he own the place, lease it and on what terms? If for example the applicant owns the place, he should also indicate the nature of the title and property value. Such indications will help in the determination of the ties to the place of trial factor. Although his salary was put at $10 000.00, no allegation was made in relations to assets he may have, their location and value. The applicant did not indicate whether or not he holds travel documents. This was left to the court to speculate upon. The applicant therefore did not establish those factors.

In *casu* the applicant stands accused of two serious offences of robbery committed in aggravating circumstances. The sentence provided for as punishment upon conviction is imprisonment for life or a definite period of imprisonment. There is no provision for the court to impose a fine. The prosecution evidence is arguably strong in that upon the applicant's arrest, he

implicated his accomplices, one from whom the norinco pistol used in the robberies charges herein was recovered. The applicant is said to have been the owner of the pistol which he dropped upon being shot. The court in a bail application is permitted in terms of s 117A (4) (b) to receive sworn and unsworn evidence including hearsay among other information that it may receive. It can also receive statements tendered by the prosecutor. It would be wrong at the stage of a bail application to hold that the applicant does not have a case to answer because evidence against him is given by an accomplice. An accomplice can be a competent State witness in terms of s 267 of the Criminal Procedure & Evidence Act.

The applicant has cases pending his appearance in court as already quoted herein. They are all robbery cases under investigation or already investigated by police where the norinco pistol was used in the commission of the robberies. It would in my view be inappropriate to release an applicant facing a number of serious cases albeit not yet brought before the court unless the cases have been checked and cleared. The investigating officer indicated that the cases were ready and just waited the opportunity to take the applicant to court for initial remand. A release of the applicant in such circumstances would undermine or jeopardise the functioning of the criminal justice system including the bail system. The purpose of bail is to ensure that the applicant enjoys his or her the liberty rights whilst awaiting trial. Where it is clear that the release of the applicant will not ensure that he enjoys his liberty because he will be back in court on the next day on pending charges, the interests of justice will not be served by admitting the applicant to bail. The interests of justice will be served by the continued detention of the applicant in custody, at least until such time that the cases are cleared without hindrance.

In the circumstances, the applicant has failed to show that it is in the interests of justice to admit him to bail pending trail. The applicant is a likely flight risk. He has not put forward factors for the court to consider as minimizing the risk of abscondment. Bail is refused.

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