LINCOLYN TENDAI MUBAKI

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 30 NOVEMBER 2011 AND 8 DECEMBER 2011

Mr T. Muganyi for the applicant
Ms A Munyeriwa for the respondent

Bail Application

MATHONSI J: The applicant and his co-accused Mcniel Mbombi are facing a charge of robbery in breach of section 126 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] it being alleged that on 20 December 2010 at around 0230 hours they robbed Total Garage in Entumbane Bulawayo.

It is alleged that they attacked the two security guards who were on duty using logs and iron bars, over powered them and tied their hands and legs using pieces of wire. Having accounted for the guards they are said to have broken into the premises and used explosives to blast open a safe from where they stole US$15000-00 and ZAR 10 000-00 in cash. They allegedly escaped in a gateway motor vehicle, a Toyota Hiace minibus registration number AAZ 9823 belonging to the applicant.

The applicant was only arrested following the arrest of his co-accused, Mcniel Mbombi on 18 October 2011, some 10 months later. It is said that Mbombi implicated the applicant which then led to his arrest. The applicant has now applied for bail pending trial arguing that he is a family man with two (2) minor children, is of fixed abode and has no previous or pending cases. For that reason he submits that he is a good candidate for bail.

The state strongly opposes the application and has filed an affidavit by Detective Assistant Inspector Noel Mpofu of CID Homicide in Bulawayo, the investigating officer. The

basis for opposing the application is that there is a very strong case against the applicant and if he is admitted to bail he will not be motivated to stand trial but will instead abscond.

According to the sworn statement of the investigating officer, the applicant made a statement to the police implicating himself in the commission of the offence. Explosive devices similar to those found at the scene were recovered from the applicant after his arrest. The applicant was picked out by witnesses in an identification parade held by the police.

In addition to that, the state alleges that following indications made by the applicant, a Toyota Hiace roof and tail gate purchased from the proceeds of the robbery were recovered.

Ms *Munyeriwa*, for the respondent submitted that because of the gravity of the offence and the strength of the case for the prosecution there was a very high risk of abscondment. She stated that in addition to the explosive devices recovered from the applicant, he is the one who led the police to the recovery of the vehicle used during the robbery. This, together with the fact that two witnesses fingered the applicant in an identification parade, means that a conviction is almost guaranteed and for that reason the applicant is unlikely to wait for the trial whose conclusion would be against him.

Mr *Muganyi* for the applicant disputed that explosive devices were recovered from the applicant. He argued that the contents of the affidavit of the investigating officer are not true. Unfortunately for him, he could not back up his argument by evidence. Although Mr *Muganyi* says the applicant's wife was present when recoveries were made, he did not file an affidavit by the wife or the applicant to challenge the allegations made by the investigating officer. The entire case of the applicant is premised upon a bail statement which says nothing about those allegations.

In the result, the allegations made against the applicant by the investigating officer remain unopposed and I have no reason to disbelieve him.

I am of the view that the case against the applicant is very strong and the applicant faces serious charges. This application then turns on the risk of abscondment. In *S v Jongwe*

2002(2) ZLR 209(S) at 215 B – C the Supreme Court stated as follows on judging the risk of abscondment;

> "--- in judging the risk that an accused person would abscond the court should be guided by the following factors:
> (i) the nature of the charge and the severity of the punishment likely to be imposed;
> (ii) the apparent strength or weaknesses of the state case;
> (iii) the accused's ability to reach another country and the absence of extradition facilities from the other countries;
> (iv) the accused's previous behaviour;
> (v) the credibility of the accused's own assurance of his intention and motivation to remain and stand trial."

See also *Aitken and Another v Attorney General* 1992(1) ZLR 249 at 254 D-G.

I have already stated that the case against the applicant is very strong and that he faces a serious charge. If found guilty he is likely to be sentenced to a lengthy term of imprisonment. These considerations are more than likely to motivate the applicant to abscond.

In light of the foregoing, I come to the conclusion that the applicant is not a good candidate for bail. Accordingly the application is dismissed.

Dube-Banda, Nzarayapenga and partners, applicant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners