BLESSING LUZHI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 29 DECEMBER 2021 & 6 JANUARY 2022

Application for bail pending trial

G. Sengweni, for the applicant
K. M. Guveya, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is being charged with the crime of robbery as defined in section 126 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 25th November 2021, using fire arms applicant and some accomplices robbed a cash in transit Fawcet Security vehicle travelling from Bulawayo to Harare. It is contended that US$305 290.00, three cell phones with buddie and net one lines, CZ pistol HO8 with a magazine of six rounds valued at USD$450 00 were stolen during the robbery.

In support of his bail application applicant filed a bail statement and three supporting affidavits. In the bail statement he contends that it is in the interests of justice that he be released on bail pending trial. Applicant avers that he is a businessman and he runs a wholesale grocery shop at Renkini, Bulawayo. He does not have any travel documents and does not have relatives abroad. He has not been outside Zimbabwe. He neither has a previous conviction nor a pending case. He denies the allegations against him.

Further applicant contends that it is in the interests of justice that he be released on bail pending trial. He argues that he is not a flight risk, he is of fixed abode, he will not interfere with witnesses, and the state case against him is weak and the evidence linking him to the commission of the offence is weak and would be easily rebuttable.

Applicant filed two affidavits deposed to by one Endevour Mavhunduse. In the first affidavit the deponent avers that he is employed at Blue Lagoon wholesale and retail shop

located a Renkini, Bulawayo (Blue lagoon). He says applicant is a manager and owner of Blue Lagoon. He says on the 26th October 2021, they were advised that applicant's relative died. As a result of the bereavement applicant was hardly in the shop from morning, he would only show up here and there to see if all was in order. It is said applicant got to the shop at around 4 pm. The deponent says he left the shop at around 6 pm and at that time applicant was still at the shop.

In the second affidavit the deponent repeats that applicant is manager and owner of Blue Lagoon. Deponent is a cashier at the shop. He says on the 25th October 2021 they were advised that there was a bereavement i.e. applicant's relative had passed on. On this day it is averred that applicant opened the shop at 6 a.m. and left at around 11 a.m. to attend the funeral of his relative. He returned to the shop at around 4 p.m.

At the commencement of the hearing Mr *Sengweni* counsel for the applicant informed the court that the first affidavit was filed in error. He requested that the matter be postponed to enable him to get the correct affidavit which he said was at his office. I stood down the matter to the end of the roll. When he returned Mr *Sengweni* submitted the second affidavit referred to above and requested that the first affidavit be expunged from the record. I declined this request.

What is clear is that the first affidavit was meant to provide an *alibi* for the applicant. It was then realised that it related to the events of the 26 November 2021, when the offence is alleged to have been committed on the 25 November. Then second affidavit was meant to say such events occurred on the 25th November. I take a dim view of this attempt to mislead this court. Mr *Sengweni's* role in all this is disconcerting. It is important to remind counsel that he is not a mere agent of his client but an officer of court and that his duty is to ensure that applicant gets a fair hearing and to ensure the efficient and fair administration of justice. Crozier B.D. *Legal Ethics* 14.

The release of the applicant on bail is opposed. It is contended that applicant is charged with an offence specified in Part 1 of the Third Schedule to the Criminal Procedure and Evidence Act [Chapter 9:07], and in terms of section 115 C (2) (a) (ii) of the Act he bears the burden of showing on a balance of probabilities that exceptional circumstances exist which in

the interests of justice permit his release on bail. It is argued that no exceptional circumstances have been shown to warrant his release on bail pending trial. It is argued that applicant is facing a very serious offence and the likely penalty on conviction can induce him to abscond once released on bail.

In his affidavit opposing the release of the applicant on bail, the investigating officer makes the following averments: the applicant and his accomplices are facing a serious offence with a possible deterrent penalty if convicted, hence this may ignite a motive for them to abscond. Their four accomplices are still on the run hence if released may join them and continue committing other offences. Most of the stolen property has not been recovered including the service pistol stolen from the Fawcet Security guards.

It is important to highlight that applicant is facing a crime referred to in Part 1 of Schedule 3 of the Criminal Procedure and Evidence Act [Chapter 9:07], being robbery, involving the use by the accused or any co-perpetrators or participants of a firearm. In terms of section 115C (2) (a)(ii) (A) Criminal Procedure and Evidence Act applicant bears the burden of showing, on a balance of probabilities, that it is in the interests of justice that he be released on bail. It then follows that the bar for granting bail in the crime of robbery involving the use of a firearm is lifted a bit higher by the legislature. This is what the applicant has to contend with. This court must give effect to this legislative provision.

It is contended for the State that there is a strong *prima facie* case against the applicant. In the event of a conviction, and the possible penalty, this may motivate applicant to abscond and not stand his trial. The *prima facie* strength of the state's case against an accused is a factor a court may consider, in determining whether there is a likelihood that that the accused, if released on bail, he or she will attempt to evade his or her trial. Our courts have over the years accepted that where there is a strong *prima facie* case against an accused, this is a factor which the court has to take into consideration in deciding whether it is in the interests of justice for an accused to be released on bail. However, this does not mean that the strength of the State's case is the all decisive factor. It simply means that it is a factor that has to be considered together with others.

What the court is called upon to do is an examination of all the relevant factors, not individually, but as a whole, in determining whether an accused has established that the interests of justice permits his or her release on bail. In the evaluation of the relative strength of the State's case in a bail application, a court must caution itself against making a provisional finding of guilt and turning the hearing into a dress rehearsal for the trial. See: *S v Viljoen* 2002 (2) SACR 550 (SCA) *para* 25.

The evidence linking applicant to this crime is that he was implicated by his alleged accomplice. It is alleged that applicant's alleged accomplice Bongani Mapfumo was arrested in connection with this case and confessed that he together with his other accomplices hatched a plan to rob the complainant. It is this accused who is alleged to have implicated the applicant, and led police to Bulawayo where applicant was arrested. It is contended that upon interview with the police applicant admitted to have robbed Fawcett Security and led to the recovery of cash amounting to USD $18 750. 00. This evidence is admissible in bail proceedings and it is admissible in this case.

Applicant is facing a serious crime of robbery, where fire arms were allegedly used to subdue the victims. It is trite that the seriousness of the offence charged standing alone, cannot be a ground to refuse to release an applicant to bail pending trial. This is so, because, no matter the seriousness of the offence, the presumption of innocence still operates in favour of the accused. There must be something more than the mere seriousness of the offence, for the court to refuse to admit an accused to bail.

In *S v Acheson* 1991 (2) SA 805 Nm, the court said the key consideration is whether or not the accused will return to court if released and ultimately whether he will stand trial. For the purposes of a bail application there are facts that link the applicant to the crime he is charged with, though much will depend at the trial on how that evidence fits with the other pieces of the jigsaw.

There are certainly many features in the facts put up by the State that make out the basis of a strong *prima facie* case against the applicant. It is alleged that he was implicated by an accomplice. It is contended that upon investigations applicant admitted to have robbed Fawcett

Security and he the police led to the recovery of cash amounting to USD $18 750. 00. For the purposes of this application I accept these facts.

I am of the view that the applicant has failed to show that it is in the interest of justice that he be released on bail pending trial. The Criminal Procedure and Evidence Act [Chapter 9:07] clearly provides that the interests of justice do not permit the release from detention of an accused where one or more of the grounds referred to in the subsections of section 117(2) of the Act are established. In considering whether a bail applicant will abscond, this court is entitled to take into account the nature and gravity of the offence or the nature and gravity of the likely penalty therefor and the strength of the case for the prosecution and the corresponding incentive of the accused to flee.

The effect of the State's evidence constitutes a strong *prima facie* proof of applicant's involvement in the crimes preferred against him. In the context of the public interest considerations related to the serious nature of the crime with which he stands charged and the potentially negative effect his release might have on the investigation and prosecution thereof, the facts and arguments put up by the applicant in support of his application are, in my view, not sufficient to tip the balance in his favour.

On the facts of this case, if convicted, applicant is most likely to be sentenced to a lengthy custodial term, thus he will be tempted to abscond and not stand trial. The temptation for the applicant to abscond if granted bail is real. See: *S* v *Jongwe* SC 62/2002. Furthermore, the applicant is not only a flight risk but his release on bail given the serious allegations against him of use of a fire arm in the alleged commission of the offence of robbery where large sums of money were stolen will undermine the objective and proper functioning of the criminal justice system and the bail institution. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

Disposition

On a conspectus of the facts and all the evidence placed before court, I am of the view that it is not in the interests of justice that applicant be released on bail pending trial. In the result, the application for bail be and is hereby dismissed and applicant shall remain in custody.

It is so ordered.

Sengweni Legal Practice, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners