SHADRECK NDHLOVU CHIDUZA MATARE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 24 December 2013 and 9 January 2014

R Murambatsvina, for the applicant
S Fero, for the respondent

BAIL PENDING APPEAL RULING

MATANDA-MOYO J: The application before the Court is for bail pending appeal. The applicant was convicted of contravening s 126 (3) of Criminal Law Codification and Reform Act [*Cap 9:23*] Armed Robbery. He was sentenced to 10 years imprisonment of which 4 years was suspended on the usual condition of future good conduct, effective is 6 years. The State opposed the application.

The position in handling applications of this nature is fairly settled. The Court has to consider the following factors:-

1. The likelihood of abscondment.
2. The prospect of success on appeal.
3. The potential length of delay before the appeal is heard.
4. The right of an individual to liberty.

A perusal of the record of proceedings in the court *a quo* clearly shows that the State witnesses narrated a coherent story of how the four accused attacked them on 13 January 2010 around 7:30 pm. One was armed with an iron rod which he threw at Farisai Lilian Chivaura the first witness and injured her little finger. The two accused who got in first announced they were robbers from Harare and demanded 1 ½ kg gold and money or they would kill everyone. There was only a candle lit as there was no electricity. Farisai Lilian never identified or recognised any of the four. Her husband got up and charged at them and was assaulted and was left for dead.

Another State witness Godfrey testified that after he had served the complainants with tea, dogs barked outside. Byson a security guard went out to investigate. In the kitchen Godfrey met a man with a pistol and two others who were masked. He was taken back into the dining room followed by Byson Sande and all were ordered to lie down. Sande was taken to complainant's bedroom, Farisai was taken there later, followed by Godfrey who was made to lie under a bed. He heard them calling out the names of robbers Tau and Shaddie during the robbery.

Byson Sande testified that when he arrived at Chivaura's place he asked for his gun to carry out his guarding duties Mr Chivaura told him to wait and eat first. During this discourse dogs barked outside and he went to check what that could be. In the corridor he met a man who hit him and he fell. While on the ground he felt the barrel of a pistol on his cheeks. He was throttled and was told to be silent. The three men dragged him into the dining room where everyone else was lying on the ground Mr Chivaura and himself were the only ones being assaulted. He was led into the bedroom of complainant where at the door he was slammed against it and it opened. They searched the room and later they called complainant whom they threatened to rape if they found no money. When they left they took two guns from the house, a long range riffle serial no. 410G and a short range riffle serial number 26457A. He was called to CID Norton where he identified the long range riffle by its serial number 4107G and its lockable bullet chamber which if locked no bullets would be admitted therein. While at the crime scene after looting guns one of the robbers retorted that either Robbie or Shaddies should come and collect them.

The gun was produced in court as an exhibit; it had its serial number engraved on two areas. Two gun certificates were also produced.

The fourth witness Nyabutho Mkandhla was the investigating officer for another robbery which had been perpetrated at Sengu shop in Norton. It was established after arrest of the applicant that he had two guns at his home used in the Sengu robbery. This witness and his team took applicant to his home and with his assistance he recovered a CZ pistol from applicant under his bed in his bedroom. His wife witnessed that applicant led them in the night to his field where with his assistance they unearthed, the riffle with serial 4107G which had been stolen at Chivaura farm the complainants *in casu*.

Accused two sought to exonerate the applicant saying it was his rifle and pistol. Nevertheless this was rebutted by the investigation officer who stated that they were led to

the two guns by the applicant and not accused two. Further groceries stolen from Sengu were found in possession of applicant's wife by the police.

The court a quo and the trial prosecutor were alive throughout proceedings to the need to follow the procedural requirements regarding extra-curial statements and indications which were attributed to the applicant. Indeed I am inclined to find favour in the respondent's findings that pages 71, 76-77 and 79 of the record of proceedings indicate consciousness to procedure on the part of the court *a quo*.

The recovery of the firearms itself in the applicant's field and house respectively was not challenged by both the applicant and his co-accused. It was thus properly admitted into evidence as an exhibit. In this regard s 258 (2) of the Criminal Procedure and Evidence Act [*Cap 9:07*] is instructive it reads:-

> "…… It shall be lawful to admit evidence that anything under trial or that any fact consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial."

See also *S* v *Nkomo* 1989 3 ZLR 117 @ 131G

The interpretation of this section is indeed literal to mean that it was not incumbent *in casu* to have a trial within a trial as clearly the prosecutor did not want extra-curial statements admitted in evidence. This tatters the applicant's counsel contention that the applicant was assaulted before he made indications.

Further the applicant's name was mentioned twice in the course of the robbery, that fact and the fact that he was found in possession of the firearms stolen and used during the robbery could not be attributed to coincidence.

In sentencing the applicant the court judiciously exercised its discretion and applied its mind to both the aggravatory and mitigatory factors which were outweighed by the aggravatory factors.

In light of the above it is my finding that applicant has no prospects of success. Accordingly the application for bail is dismissed.

Murambatsvina and Associates, applicant's legal practitioners