

JOANA PHIRI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 29 JUNE 2021 & 1 JULY 2021

Application for bail pending trial

T. Runganga, for the applicant
T. Maduma, for the respondent

DUBE-BANDA J: This is a bail application pending trial. Applicant and other persons are jointly charged with the crime 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 25 May 2021, at around 0100 hours, applicant with other co-accused persons armed themselves with a 303 rifle, two pistols, machetes, knives and iron bars and robbed three complainants of their vehicles, cash and cell phones after threatening to shoot them with their firearms.

This application was filed on the 9th June 2021. It was placed before me on the 20 June 2021, and I directed that it set down for 24th June 2021. At the commencement of the hearing it became clear that Mr *Runganga* counsel for the applicant had not familiarised himself with the statutory provisions upon which this matter turns. The applicant is facing a crime referred to in Schedule 3 Part 1 of the Criminal Procedure and Evidence Act [Chapter 9:07], being robbery, involving the use of a firearm. In terms of section 115C (2) (a)(ii) (A) of the Criminal Procedure and Evidence Act [Chapter 9:07] (C P & E Act) applicant bears the burden of showing, on a balance of probabilities, that it is in the interests of justice that she be released on bail. It then follows that the bar for granting bail in the crime of robbery where there has been a use of a firearm is lifted a bit higher by the legislature. This is what the applicant has to contend with. For her to discharge such an *onus*, she must place evidence before court. There was no evidence before court, but only submissions contained in the bail statement. On realising the futility of the route taken, Mr *Runganga* on reflection, requested for a postponement to enable the filing of an affidavit of evidence. The postponement was granted and the matter was subsequently argued on 28th June 2021.

In support of her bail application, applicant filed a bail statement and a supporting affidavit. In the bail statement, applicant contends that she was arrested on the 28th May 2021, appeared before the Magistrate's Court, Beitbridge, and advised to apply for bail before this court. Applicant argues she has a strong defence in this case, in that she did not commit the crime as alleged by the State. She attributes the cause of her arrest to the fact that she is married to one of the accused persons, she is jointly charged with. It is contended that there is nothing that links her to the commission of this offence, there is no proof that the groceries taken by the police from her home belong to the complaints, the weapons were not recovered from her. It is contended that she would not abscond. She is a mother of two minor children. In her supporting affidavit, applicant avers as follows:

1. I was arrested together with my husband who is the 1st accused person on the 28th of May 2021 at our homestead and the police allege that we had committed a robbery crime.
2. On the 25th of May 2021 the 1st accused came home together with the 2nd accused person around 0430 hours and I was asleep. The 1st accused awakened me and told me that he has been robbed of groceries he was carrying in the car and that he was pulling his 303 rifle from the gun cabinet that he reverts back to the scene of crime in a bid to recover them.
3. I remained home together with the kids and we surrendered back to the bed as it was still dark. (*Sic*).
4. I am a mother of four minor children and I was born and bred here in Zimbabwe and I have no means and capacity to abscond the jurisdiction of this court. It will be in the best interest of justice that I be granted bail as per the draft order attached hereto as there is no evidence directly linking me to the offence.

This application is not opposed. It is contended that there are no compelling reasons for the continued incarceration of the applicant pending trial. Further, in its written submissions filed with this court, respondent avers that:

1. Applicant was arrested three days after the alleged offence was committed. If indeed she was a flight risk she could have vanished in thin air. It is the respondent's view that applicant was simply arrested just because she is married to one of the 1st accused person and groceries were allegedly recovered from their home which what the police allege links her to the offence. Other than that, there is nothing that links applicant to

the commission of the offence. There is no tangible evidence which make the applicant to the commission of the offence (*sic*).

2. Whilst it is conceded that applicant is facing a very serious offence that alone cannot be a ground justifying her continued incarceration.
3. The respondent further submits that the applicant has so far managed to discharge the onus on her for she has managed to show on a balance of probabilities that her release on bail will not prejudice the interests of justice.
4. In light of the above submissions, respondent is of the view that applicant is indeed a proper and good candidate for bail pending trial.

The court hearing a bail application must express a balanced value judgment taking into account the factors mentioned in the empowering statutory provisions and the jurisprudence. In essence the principles and considerations underlying bail is that no one should remain locked up without good reason. Section 115C (2) (a)(ii) (A) C P & E Act places a burden or an *onus* on the applicant to satisfy the court by way of evidence that it is in the interests of justice that she be released on bail. In other words, the applicant had to prove on a balance of probabilities that it is in the interests of justice that she be released on bail. What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that it is in the interests of justice to release applicant on bail.

In section C of Form 242, the investigating officer states that applicant has a dual citizenship for Zimbabwe and South Africa. It is contended that on being released on bail she may abscond and flee to South Africa. This averment of dual citizenship is disputed by applicant. Mr *Runganga* submitted that such averment is incorrect. Counsel further submitted that applicant is neither a holder of a passport nor any other travel document. Mr *Maduma* counsel for the respondent did not support the contention that applicant is holding dual citizenship. I take the view that there is sufficient information or evidence at the disposal of the court, except the disputed and challenged *ipse dixit* of the investigating officer that applicant has dual citizenship. According to Mr *Maduma* applicant was arrested three days after the alleged offence was committed. If indeed she was a flight risk she could have used this window

of opportunity to escape. She did not. I agree with this submission. There is no evidence or indication that applicant is a flight risk.

Again, in section C of Form 242, the investigating officer contends that some stolen property has not been recovered; other accused persons involved in the robbery have not been accounted for; some weapons used have not been recovered. This suggests to me that the police are still conducting investigations in connection with the crime of robbery allegedly committed by the applicant and her co-accused persons. I take the view that in general, and in view of the constitutional imperatives, the State is not entitled to detain an accused person in custody in order to complete an investigation. Again Mr *Maduma* did not support this contention by the investigating officer.

The standard of proof required from the applicant is to establish on a balance of probabilities “that it is in the interests of justice for her to be released on bail”. According to Form 242 Section B, applicant is linked to the commission of this offence by groceries which were recovered from her home. This is the same home where a 303 rifle registered in the name of accused one (applicant’s husband) was recovered. Applicant is married to one of the accused. In her evidence, applicant says she was arrested with her husband at home on the 28th May 2021. She avers that on the 25th May 2021, her husband came home at around 0430 hours, took a 303 rifle from the gun cabinet and left. She remained home with the children. On the facts before me, it is clear that apart from the fact that applicant is married to one of the accused persons, and that certain groceries were recovered from her home, there is nothing more that connects her to the commission of this offence.

Respondent made a concession both in the written submissions and in oral argument that applicant is a good candidate for admission to bail pending trial. I agree. Applicant has discharged the *onus* of showing that it is in the interests of justice for her to be released on bail.

Disposition

In the result, I grant the following order:

1. The applicant is released on bail on the following conditions:
 - i. That she deposits an amount of RTGS \$10 000.00 (ten thousand dollars) to the Registrar of the High Court, Bulawayo.

- ii. That she resides at her homestead, situate at Mapolobele Village, Ward 5, Headman Chinoni, Chief Staudze, Beitbridge, until the finalisation of this matter.
- iii. That she does not interfere with state witnesses and/or police investigations in connection with this matter.
- iv. That she reports at Beitbridge Police Station every Monday and Friday between 6 am and 6 pm.

Tavenhave & Machingauta, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners