

**DERRICK NKOMO**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 10 FEBRAURY 2022 & 24 FEBRAURY 2022

**Application for bail pending trial**

*T. Muduma* for the applicant

*T. Runganga* for the respondent

**DUBE-BANDA J:** This is an application for bail pending trial. Applicant is being charged with two counts of robbery as defined in section 126 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. In count one it being alleged that on the 15<sup>th</sup> March 2021, at about 1520 hours the applicant in the company of his accomplices went to number 5 Coleridge Road, Malindela, Bulawayo armed with a firearm, handcuffs and a knife. Upon arrival the applicant and his accomplices kidnapped two children who were playing outside the yard and dumped them at Ascot shopping centre, Bulawayo. They returned to the house where they demanded cash and gold. They then robbed the complainants of the following property: cash US\$700.00, HP lap top, Iphone cellphone, Samsung A2 core cellphone, Samsung Tablet and some whisky.

In count two it being alleged that on the 22<sup>nd</sup> March 2021, at about 0030 hours the applicant in the company of accomplices went to Fools Mine, Hope Fountain, Bulawayo armed with a firearm. They threatened the security guard on duty and disarmed him of his service pistol, a 38 SPL Revolver serial number AA330959 which had no ammunition. The security guard was robbed of his cell phone. Another complainant was robbed of a cellphone, Lenovo lap top, two pairs of formal shoes, a formal trousers and cash ZWL 1000.00.

In support of his bail application applicant filed a bail statement and adduced evidence by means of a supporting affidavit. Applicant contends that it is in the interests of justice that he be released on bail pending trial. He denies the allegations levelled against him, and contends that he is not a flight risk as he presented himself to the police, his defence is an *alibi*, there was no identification parade which was held, nothing was recovered from him, and that

there are no compelling reasons to refuse him release on bail pending trial. Further applicant avers that he is prepared to abide by any bail conditions which this court may deem necessary.

Respondent filed a written response in support of its opposition to this application. In the response it is contended that applicant is likely to abscond in light of the seriousness of the offence and the likely penalty on conviction. In Form 242 on evidence linking applicant to the commission of these offences, it is averred that he is admitting to the commission of these offences, he was implicated by his accomplices, his motor vehicle that was used as a getaway car during the commission of these offences was recovered. It is said that the value of property stolen was ZWL 191 880.00 and value of property recovered was ZWL 34500.00. On the reasons for opposing bail, it is averred that applicant is likely to abscond in that he is facing serious offences of which if convicted will face a lengthy prison term and this might induce him to abscond; he is likely to interfere with witnesses as some of his accomplices are still at large and the fire arm they were using has not been recovered; and that he is likely to commit other offences as he has several cases of armed robbery and if released on bail, he might continue in his armed robbery spree.

This application was set down for hearing on the 9 February 2022, and during the hearing Mr *Runganga* counsel of the applicant submitted that he stands by the bail statement and the affidavit filed of record, however he emphasised two issues, these are: that applicant's co-accused one Dalubuhle Ndlovu was released on bail by this court. Counsel tended bail order in HCB 245/21 and an Extract from the Criminal record Book to show that further remand was refused in respect of Dalubuhle Ndlovu and Bongani Mpofu, whom he submitted were jointly charged with applicant. Counsel further submitted that applicant surrendered himself to the police. Counsel submitted that the general practice is that where accused persons are jointly charged and one is released on bail, the other must also be released unless there are circumstances that justify treating them differently. Counsel further argued that the act of surrendering himself to the police shows that he is not likely to abscond and therefore a good candidate for bail pending trial.

In his submissions Mr *Muduma* counsel for the respondent asked for a postponement of the hearing for the purposes of calling the evidence of the investigating officer. The postponement was not opposed and the matter was postponed to the 10<sup>th</sup> February 2022.

On the 10<sup>th</sup> February 2022, Mr *Muduma* called the evidence of the investigating officer. The officer testified that in this case applicant is jointly charged with Bongani Mpofu and Fortune Ndlovu. Bongani Mpofu is in custody at Khami Prison and Fortune Ndlovu who is a member of the Zimbabwe National Army is detained by the military. Dalubuhle Ndlovu is not charged with applicant in this matter, although they are jointly charged in respect of other armed robbery cases not investigated by this officer. The officer explained that in CRB Byo. 1542/21 in a matter involving Dalubuhle Ndlovu and Bongani Mpofu further remand was refused, and he is not investigating that case and applicant is not charged in that case. In cross examination the investigating officer testified that in August 2021 he informed applicant's wife that he was looking for applicant. Applicant handed himself over to the police on the 24 January 2022.

After hearing the evidence of the investigating officer, Mr *Runganga* submitted that the bail order and the Extract from the Criminal Record Book be expunged from the record because they are not relevant to applicant's case. There is no reason to expunge these from the record, however what is clear is that there have no relevance in this case, and no further reference shall be made to them.

Counsel argued that there is no evidence that applicant is facing other armed robbery cases. It was submitted that it is in the interest of justice that applicant be released on bail pending trial. In his final submissions Mr *Muduma* contended that applicant must be credited for having handed himself over to the police. Counsel submitted that it is in the interests of justice that applicant be released on bail with stringent reporting conditions.

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. In order to curb the serious escalation of crime and the escalation of accused persons evading the course of justice by absconding 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 and this court must give full effect to such legislative provision.

In bail proceedings the State must show that there is evidence in its possession which will prove the guilt of the accused. In *casu* applicant is facing two counts of armed robbery. The police allege that there is evidence linking applicant to this crime in that he was implicated by his alleged accomplice and that he admitted to the charges to the police. Further that the motor vehicle that was used as a getaway car was recovered by the police. This means that there is *prima facie* proof that the accused is implicated in the commission of the offences charged, though much will depend at the trial on how that evidence fits with the other pieces of the jigsaw.

The fact that there is no evidence at this stage of an identification parade is inconsequential. It is not being alleged that he was identified at the scene, but that he was implicated by his accomplices and he admitted the charges. I do not see what purpose the evidence of an identification parade will serve in such a case at this stage of the proceedings. The fact that nothing was recovered from him does not detract from the fact that there are facts linking him to the commission of these crimes.

On the facts of this case the fact that he surrendered himself to the police is inconsequential. These crimes were allegedly committed on the 15 March 2021 and 22 March 2021, and in August 2021 the investigating officer informed his wife that he was looking for him. He only presented himself to the police on the 24 January 2022, i.e. approximately six months from the time the investigating officer notified his wife that he was looking for him. It is for these reasons that I attach no weight to the fact that he presented himself to the police, and I still consider him a flight risk.

Applicant is facing very serious charges. 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 thereof and the strength of the case for the prosecution and the corresponding incentive of the accused to flee. The State has a strong *prima facie* case against him. In the event of a conviction he is very likely to be sentenced to a severe term of imprisonment. I take the view that the prospect of a long prison term will motivate applicant 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. In this case applicant will not stand his trial if released on bail. He will just abscond. In my opinion, there is nothing to keep applicant to stand trial and there would be a strong incentive to flee if released on bail. His *ipse dixit* to the contrary in his bail

statement and affidavit carries little weight given the facts of this case and the evidence of the investigating officer.

On the facts of this case and for the purposes of this bail application my thinking is that applicant has a propensity to commit armed robbery cases. I accept that he is facing several armed robbery cases, and even in this case he is facing two counts of armed robbery and in both instances a fire arm was allegedly used to subdue the complainants. If he is released on bail he will continue his armed robbery spree. It cannot be in the interests of justice to release such a person on bail pending trial. Releasing him would be tantamount to approving his deeds and giving him a green light to continue his armed robbery spree. On these facts releasing on bail will undermine the objective and proper functioning of the criminal justice system and the bail institution. It will bring the criminal justice system into serious disrepute.

Mr *Muduma* submitted that applicant must be credited for having surrendered himself to the police and be released on bail on stringent reporting conditions. Stringent bail conditions may only work where the release on bail itself will not jeopardise and undermine the objective and proper functioning of the criminal justice system and the bail institution. Not where such release will bring the criminal justice system into serious disrepute. I have made a finding that releasing applicant on bail will bring the criminal justice system into disrepute and no bail conditions can change this position. Having considered the applicant's circumstances, I do not agree with the concession made by Mr *Muduma* and I find that it was not properly taken.

I find that the applicant failed to show on a balance of probabilities that it is in the interest of justice that he released on bail. Instead, my view is that the interest of justice will be best served if this application is refused.

In the result, the application for bail be and is hereby dismissed and applicant shall remain in custody.

**It is so ordered.**

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