

NGONIDZASHE MUTIBA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 27 JANUARY 2005

J Mutsauki for the applicant
A V Mabande for the respondent

Application for Bail pending trial

NDOU J: This is an application for bail pending trial which application is opposed. I dismissed the application on 15 December 2004 and indicated that my reasons for doing so will follow. These are my reasons. The applicant is facing one count of theft of a motor vehicle and two counts of housebreaking with intent to steal and theft in stores. Briefly, on 17 June 2004 and at corner 3rd Avenue and Main Street, Bulawayo, the accused, in the company of four others allegedly stole a Mazda motor vehicle registration number 677-926A which was locked and parked. They used an instrument unknown to the prosecutor to break the left front door window and used their own keys or other means to ignite the engine. They took the vehicle to 107 Harrisvale, Bulawayo. On 5 July 2004 two of the accused persons drove the stolen vehicle to Harare where they met the applicant who had gone to Harare driving his own BMW vehicle. They then tried to sell the stolen vehicle to one Munyikwa. The latter observed some anomalies in the registration papers and particulars in the vehicle and alerted the police resulting in the arrest of the applicant and his co-accused persons.

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In the other charges it is alleged that on 29 June 2004 after stealing the above mentioned Mazda vehicle the applicant and his accomplices robbed, i.e. they used firearms to subdue security guards on guard. In both instances they produced pistols and ordered security guards to sit down and cover their faces with threats to the effect that non-compliance would result in their being shot dead. Using this *modus operandi* they robbed N T Marketing situate in 13th Avenue between Basch and Lobengula Streets and Simpson Electrical. They broke the doors of these shops using iron bars and bolt cutters wherein they stole various electrical goods. The total values stolen is \$26 050 000,00 and only property worth \$1 500 000,00 was recovered through indications by the applicant and his accomplices. The state opposes the application on three grounds, namely-

- (a) that the applicant is most likely to abscond;
- (b) that he may interfere with evidence and witnesses against him; and
- (c) that the applicant may commit other offences.

Likelihood of abscondment

I agree that the three charges are very serious which invariably could lead to lengthy imprisonment. This amounts to inducement to abscond. This is a factor which has to be taken into account in determining the application – *Dube v S* HB-93-03; *S v Fourie* 1973 (1) SA 100 at 101G-H; *Hussey v S* 1991 (2) ZLR 187 at 191G; *S v Chiadzwa* 1988 (2) ZLR 19 (SC) at 22F and *S v Ndhlovu* 2001 (2) ZLR 261(H) at 264 H-265B.

Risk of commission of further offences

In terms of section 116 (7) (C) of the Criminal Procedure and Evidence Act [Chapter 9:07], the court is specifically empowered to refuse bail in instances where

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the court considers it likely that if the applicant is admitted to bail he would commit an offence. A propensity to commit similar offences is a factor that may be taken into account – *Attorney General, Zimbabwe v Phiri* 1988 (2) SA 696 9ZH). In *casu*, the applicant has similar charges. His past record, his actions immediately prior to the application and particularly when out on bail in respect of the other charges may be relevant factors to indicate propensity to commit further crimes – *S v Patel* 1970(3) SA 563.

Interference with evidence and state witnesses

A greater portion of the stolen goods in the robbery charges have not been recovered. The applicant's accomplice has evaded arrest. The firearm used in the robberies has not been recovered – *S v Vankathathnam* 1972(2) PH H 139 (N).

There is a really risk of interference with the evidence.

Looking at the totality of the credible allegations by the state, the applicant has failed to discharge the onus, on a balance of probabilities that, if admitted to bail he will not abscond, commit further offence and/or interfere with state witnesses and evidence. Accordingly, I find that he is not a suitable candidate for bail.

Marondedze, Nyathi, Majome and Partners, applicant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners