HERBERT MAPURISA

And

ROBSON TALKMORE MAPURISA

And

TIMOTHY MACHEMEDZE

And

ADMIRE CHIHAMBAKWE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 4 AND 11 MARCH 2010

R Ndlovu for the applicants
K Ndlovu for the respondent

Bail Application

NDOU J: The applicants are applying for bail pending trial. The applicants are jointly charged with aggravated robbery as defined in section 126 of the Criminal Law (Codification and reform) Act [Chapter 9:23]. The allegations are that the applicants together with two other persons still at large went to the complainant's residence at Khayalethu Hampden Plot E, Gwanda. They were armed with pistols. They proceeded to rob the complainant one John Dicey of ZAR90 000,00 cash, jewellery and over 2 kilograms of gold valued at US$100 000,00. The respondent is opposing the granting of bail to all the applicants. The opposition is premised on two grounds, *viz,*

(a) Likelihood of abscondment, and
(b) Likelihood of commission of similar offences.

The investigating officer Detective Sergeant Mpunzi testified in support of the respondent's case. The applicants did not give *viva voce* evidence but were content with their written statements filed in support of the application. After their arrest, the police conducted

an identification parade and applicants 1, 2 and 3 were positively identified by the complainant. This is beyond dispute. What the applicants challenge is the manner in which the identification parade was conducted. They allege flaws in its conduct. A Toyota Hilux motor vehicle registration number 542-506E used as a getaway car was also recovered from one of the applicants. The pistols used in the alleged robbery were also recovered. Detective Mpunzi testified that the applicants gave each two sets of extra-curial statements. The first set was in the presence of their erstwhile legal practitioner. The second set was in the absence of their legal practitioner. According to Detective Mpunzi this was after they had dispensed with the services of their legal practitioner and disowned the statements they had made in his presence. Strangely and indeed disturbingly Detective Mpunzi said he destroyed the first set of statements made in the presence of their legal practitioner. That this conduct was unwise and wrong is beyond dispute. Its lack of wisdom is evinced by their necessity because of the turn of events. The Detective on the one hand says these statements contained partial admissions. The applicants on the other hand say they contained complete denials of the crime. If the statements were not torn by the detective, there would be no such dispute. The applicants allege that the latter set of statements was a product of assault and torture. Indeed, after medical examination at the behest of the magistrate who presided over their remand, two of the applicants had traces of minor injuries. The procedural aspects of the investigating officer are less than ideal. But are these weaknesses sufficient to entitle the applicants bail?

This is a factor I will take into account in striking a balance between the liberty of the applicants and respondent's need to ensure that the applicants stood trial and do not interfere with the course of justice. On the likelihood of abscondment, the offence charged here is very serious and upon conviction is likely to attract severe punishment – *S* v *Ndlovu* 2001 (2) ZLR 261(H) and *S* v *Biti* 2002 (1) ZLR 115 (H). Even without the extra-curial statements there is evidence of the identification parade and the recovered getaway Toyota Hilux motor vehicle linking the applicants with the offence. With such calibre of evidence in support of the respondent's case the expectation of a substantial custodial sentence upon conviction provides an incentive for the applicants to abscond – *S* v *Lulane & Anor* 1976(2) SA 204 (N). The next question is the risk of commission of further crimes. It is trite that bail is non-penal in character, but in bail applications the court is empowered to refuse bail in instances where it considers it likely that if the applicant is admitted to bail he would commit an offence – see section 116(7) of the Criminal Procedure and Evidence Act [Chapter 9:07] and *Attorney-General* v *Phiri* 1987(2) ZLR 33 (H) at 39H-40B. *In casu* the applicants were not acting alone, but in association with others still at large. The outstanding accomplices are said to be armed. Such an association with others who are still at large is a relevant factor in this application – *S* v *Vankathathnam & Ors* 1972(2) PH, H 139 (N) and *S* v *Biti, supra,* at 119. Looking at the totality

of the above facts I am of the view that the applicants failed to show on a balance of probabilities that if admitted to bail they will:

(a) Not abscond and/or
(b) Commit further crimes.

Based on the facts placed before me the applicants are not suitable candidates for bail. Their application for bail is dismissed.

R Ndlovu and Co. applicants' legal practitioners
Office of the Attorney General, respondent's legal practitioners