DENNIS MUGUZUMBI

Versus

THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 23 July 2020 and 30 July 2020

Bail Pending Trial

T. Runganga, for the applicant
B. Gundani, for the respondent

DUBE-BANDA J: This is a bail application pending trial. Applicant is jointly charged with one Juliet Isaka with one count of robbery as defined in section 126 of the Criminal law [Codification and Reform] Act Chapter 9:23. The applicant appeared before the Beitbridge Magistrates Court, whereupon he was placed on remand and detained in custody. He was advised to make his bail application before this court.

The applicant, a 27 year old male was arrested on the 26 May 2020 and charged with the crime of contravening section 126 Criminal law [Codification and Reform] Act "Robbery committed in aggravating circumstances." The allegations are that the applicant was part of a conspiracy to rob the complainant, who was attacked after having been lured to Mashavire Business Centre, Beitbridge. It is alleged that applicant and his accomplices attacked complainant by pointing a fire at him. By means of threats and violence, applicant and his accomplices then allegedly took and robbed the complainant of cash he had on his person amounting to 53 000.00 South African rands (ZAR). It is alleged that as applicant and his accomplices were fleeing from the scene of crime, complainant gave chase and got hold of the applicant. Applicant allegedly took out a knife and stabbed complainant on the head. Compliant held onto him and overpowered the applicant and handed him over to the police.

According to the Form 242 the evidence linking the applicant to the commission of the offence is that he was arrested at the scene of crime and the knife which he used to stab the complainant was recovered from the scene.

This bail application is not in proper form. It is not guided by the High Court of Zimbabwe (Bail) Rules S.1 109/91 (Bail Rules). It is important to strictly comply with rule 5 of the Bail Rules. The application does not state the date of the applicants' first appearance at

court, the criminal record book number, the police station and name investigating officer. These are peremptory requirements.

To merely attach Form 242 to the application and hope that the issues referred to in rule 5 of the Bail Rules appear therein, e.g. the police station and the name of the investigating office is inadequate. The court must not be made to look for Form 242 to get to know the police station, the C.R. number and the C.R.B. number etc. These must be clearly stated in the application. Rule 5 demands no less. See *Kondo v The State* HH 99/17. In terms of rule 4 of the Bail Rules, I condoned the want of compliance with the Rules. In doing so I factored into the equation that this is a matter that involves the liberty of an individual, and that some of the issues required by rule 5 appear in the Form 242 attached to the application.

Although not specified in the Bail Rules, it is important for the application to state whether this court is approached for the first time; or whether it is being approached on the basis of changed circumstances in terms of section 116 (c) (ii) of the Criminal Procedure and Evidence Act. See *Kondo v The State* (*supra*). I also take the view that in a case like this, the application must show that applicant understands that he bears the *onus* of showing that it in the interest of justice that he be admitted to bail pending trial. These issues must be succinctly stated in the bail application.

Applicant contends that it is in the interest of justice that he be admitted to bail pending trial. It is argued that despite the evidence implicating him in the commission of the crime charged, he is by operation of law presumed innocent until proven guilty. It is contended that nowhere in Form 242 has it been alleged or shown that applicant utilised a fire arm in the commission of the offence. It is argued that in any event the seriousness of the offence standing alone is not enough to refuse to admit the applicant to bail. It is argued that there is no evidence before court showing that applicant is a flight risk, it is said further that a strict reporting regime may be put in place to allay the fears of the prosecution that applicant may abscond. It is said that applicant has no previous convictions, therefore the allegation that if admitted to bail he may commit further offences has no merit. It is contended that the knife the applicant is alleged to have used to stab the complainant is in the possession of the police, therefore there is no way applicant may interfere with an exhibit that is in the hands of the police. It is argued that it is not clear when the police will conclude the investigations, it is said it would be unfair to keep applicant in custody indefinitely while the police are investigating.

The prosecution alleges that applicant conspired with three other persons to rob complainant at gun point, and applicant further attacked complainant with a knife. It is argued

that in terms of section 115 C 2(a)(ii) A of the Criminal Procedure and Evidence Act, the *onus* is on the applicant of showing on a balance of probabilities, that it is in the interests of justice for him to be released on bail., unless the court directs otherwise.

It is argued by the prosecution that in terms of para. 3 (a) and (b) of Part 1 of the 3rd Schedule which provides that robbery involving the use by the accused or any co-perpetrators or participants of a firearm; or the infliction of grievous bodily harm by the accused or any co-perpetrators or participants is specified in terms of the Criminal Procedure and Evidence Act. This means that the *onus* is on the applicant to show that it is in the interest of justice that he should be admitted to bail pending trial.

The burden of proof refers to the obligation of a party to persuade the trier of fact by the end of the case of the truth of certain propositions. The law specifically places the burden of such proof on the applicant. When one speaks of the need to discharge an *onus,* it immediately becomes clear that there is an evidentiary burden that must be met. Such burden cannot be discharged by submissions contained in a bail statement. There must be evidence placed before court. Applicant must adduce evidence. The evidence must show that it is in the interests of justice that he be admitted to bail. Such *onus* is discharged by evidence not bold statements. In such an application, an applicant may place evidence before court by way of an affidavit. See *Kondo & Another v The State* HH 99/17 and *Moyo v The State* HB 99/20. In *casu*, there is no evidence before court, all that is there are bold statements and legal submissions contained in the bail statement. This is inadequate.

I agree that in terms of the legislation currently in force, the *onus* is on the applicant to show that it is in the interests of justice that he be released on bail pending trial. See *Mloyi v The State*HB 123/20 and *Kondo & Another v The State* HH 99/17.

The facts before court show that the applicant allegedly participated in the commission of a robbery where a fire arm was used. He attempted to flee arrest. He was arrested on the scene. It is alleged that he stabbed the complainant in an attempt to escape an arrest. It is alleged that the medical condition of the complainant is being monitored and it may turn fatal.

I find that the prosecution has a strong *prima facie* case against the applicant. On conviction of robbery committed in aggravating circumstances he is very likely to be sentenced to a long prison term. The strength of the prosecution case and the likelihood of a long prison term on conviction may induce applicant to abscond and not attend trial. The facts before court which he has not disputed are that at arrest he attempted to flee, and even used deadly force to secure his freedom to enable him to flee. In terms of the legislative provisions of the Criminal

Procedure and Evidence Act, to ascertain whether the accused is a flight risk, the court may factor into the equation the nature and gravity of the offence or the nature and gravity of the likely penalty therefor; and the strength of the case for the prosecution and the corresponding incentive of the accused to flee. The offence is serious. The prosecution has a strong *prima facie* case against the applicant. He was apprehended on the scene. He attempted to escape. Upon conviction the sentence is likely to be severe. I find that the applicant is a flight risk. These are strong barriers against admitting applicant to bail. See *S v Jongwe* SC 62/2002.

Applicant has not placed evidence before court to show that it is in the interest of justice that he be admitted to bail pending trial. He has not discharged the *onus* of showing that he is a good candidate for bail at this stage. On the facts of this case, even if the *onus* was on the prosecution, it could have discharged it, by showing that the applicant is not a good candidate for bail.

In this case nothing much turns on the seat of the *onus*. My view is even if the *onus* was on the State to show that applicant is not a good candidate for bail, on the facts of this case, it would have easily discharged it. There is just too much against applicant, and very little in his favour.

Disposition

I am satisfied that the applicant has not discharged the *onus* on him of showing, on a balance of probabilities, that it is in the interests of justice for him to be released on bail pending trial. He is a flight risk. Wherefore, the application for bail pending trial must fail, and accordingly, I order as follows: - The application for bail is accordingly dismissed.

Tavenhave & Machingauta t/a Tanaka Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners