NORMAN KONDWANE
and
SHEPHERD KATIYO
and
JOSEPH GANYANI
and
RUSSEL MHUKAYESANGO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 17, 28 April 2014

Bail Application

D. Ngwerume, for the applicants
I. Muchini, for respondent

CHIGUMBA J: This is an application for admission to bail pending trial, brought in terms of s 117 of the Criminal Procedure and Evidence Act [*Cap 9:07*] (hereinafter referred to as the CPEA). The four applicants are facing eleven counts of robbery, as defined in s 126 of the Criminal Law (Codification and Reform Act [*Cap 9:23*], it being alleged that, on divers occasions between 6 February and 20 March 2014, one or other or all of them, picked up passengers in a white commuter omnibus which had no registration number plates and proceeded to search the passengers under threats of violence, using a metal bar, a knife, and robbed them of their property, ranging from, laptops, mobile phones, cash, handbags, and a pistol. Various complainants reported these incidents to different police stations in the greater Harare area. On the request for remand form 242, the respondent averred that some of the stolen property was recovered from the applicants' places of residence, and that, the applicants were positively identified by the complainants, and other witnesses, as the perpetrators of the various robberies.

The first applicant is thirty two years old and resides at 1693- 142nd Close, Budiriro 1 Harare. The second applicant is twenty two years old and resides at number 9973-1st Crescent Glen View 3, Harare. The third applicant is aged eighteen, and resides at number 738 Old Canaan, Highfield, and Harare. The fourth applicant is aged twenty-five and resides at number 751 Tingini Street, Old Mabvuku, and Harare. The applicants were placed on initial remand on 25 March 2014. The respondent is opposed to the admission of the applicants to bail, and the Investigating Officer, Detective Sergeant Pearson Manyere of the Criminal Investigations Department stationed at CID Homicide Harare, deposed to an affidavit on 25 March 2014. In that affidavit, he averred that he was opposed to the admission of the applicants to bail for the following reasons:

1. The applicants were tenants who were likely to move to unknown places if admitted to bail.

2. Some of the stolen property has not been recovered, and the likelihood of the applicants interfering with investigations and making the recovery of that property difficult, was high.

3. The applicants were likely to team up and commit similar offences.

4. The possibility of a lengthy custodial sentence on conviction was likely to induce the applicants to abscond.

At the hearing of the matter, the respondent led evidence from the current investigating Officer, Detective Assistant Inspector George Kachidza, also stationed at CID Homicide Harare. He told the court that the first applicant was arrested by a crack team from CID homicide after they had received a tip off from a suspected robber named Mudziye. Mudziye had been hospitalized after he was involved in a car accident. He implicated his accomplices from his hospital bed. The Investigating Officer (the I.O.) told the court that two laptops were recovered from the first applicant's place of residence, and that, no explanation has been preferred, to date, as to how the applicant came to be in possession of those laptops. The I. O. told the court that, investigations are still ongoing and that no one has come forth to claim ownership of the laptops so far. No previous convictions have so far

been identified in respect of the first applicant. It is common cause that he was positively identified by one of the complainants in an identification parade.

The I. O. told the court that the second applicant and fourth applicant were arrested together after a tip off. One Tichaona Katsama, who was in police custody, received a telephone call from the second applicant who advised him that he had secured a commuter omnibus and was ready to go on 'a job'. They arranged to meet at the Budiriro 5 turnoff. The second applicant was driving the commuter omnibus which had no licence plates, in the company of the fourth applicant. The second applicant spotted an unmarked police vehicle near to the meeting point with Tichaona Katsama, and he sped off at high speed. There was a movie style high speed chase. Warning shots were fired. The second applicant continued to flee at high speed. The second applicant was shot in the abdomen. He was subsequently positively identified by two complainants in an identification parade as being the person who robbed them. He is on an outstanding warrant of arrest for a robbery which he committed in Kwekwe. He has been on the police wanted person list since 2013. The I. O. told the court that, the fourth applicant was also positively identified by one complainant after he was arrested at the Budiriro 5 turnoff together with the second applicant.

The third applicant allegedly led the investigating team to the recovery of fake licence plates that the gang would use intermittently on the commuter omnibus in order to avoid detection and to evade arrest. The recovered number plates, ABP 1639 were well known to the police, who had been searching for the commuter omnibus with those numbers for some time. The applicant was arrested at his home. The I. O. told the court that, on average, the police were receiving eight reports every day that offences of this nature had been committed, and that, since January 2014, about 200 (two hundred) similar offences had been committed in Harare alone. He testified that the applicants were the first group to be arrested in connection with these offences, which now represented a menace on society. Finally the I.O. told the court that, since the applicants were arrested, there have been no reports of offences of a similar nature being committed.

Under cross examination, the I.O. conceded that he was not the arresting officer and that all the evidence which he had given in connection with the applicant's arrest was hearsay. He conceded that none of the applicants had given false addresses to their places of residence, and that he had verified all the addresses and was satisfied that the applicants resided at those addresses. He conceded that the police set a trap at Budiriro 5 turnoff where the second and the fourth applicants were arrested, and that, the police were waiting in an unmarked vehicle. He conceded that the request for remand form did not mention that two laptops and number plates for commuter omnibuses were recovered from the first and the third applicant.

It was submitted on behalf of the applicants that, in determining whether accused persons will stand trial if admitted to bail, the court ought to be governed by the following principles:

1. Whether the applicants are likely to stand trial
2. Whether the applicants are likely to interfere with witnesses or investigations.
3. Whether the applicants are likely to commit similar offences if admitted to bail
4. Other good and sufficient considerations. See *S* v *Chiadzwa* 1988 (2) ZLR 19(S), *James Chafungamoyo Makamba* v *The State SC 20-04, Aitken & Anor* v *Attorney General* 1992 (1) ZLR 249.

It was submitted on behalf of the respondent in opposing the admission of the applicants to bail that, s 117A (4) (b) (i) provides that, in bail proceedings, the court may, receive evidence on oath, including hearsay evidence. This is a correct statement of the law, and it disposes of the applicants' objection to the evidence given on behalf of the respondent by the I.O. Courts are guided in their consideration of the suitability of any candidate for bail pending trial, by the provisions of s 117(1) of the Criminal Procedure and Evidence Act, [*Cap 9:07*], hereinafter referred to as the CPEA, which provides that:

"**117 Entitlement to bail**

(1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody."

The question that the court must determine in this matter is whether it is in the interests of justice that the applicants be detained in custody because the concerns raised by the state have merit, that they are likely to interfere with witnesses, and or that they are likely to abscond and not stand trial, and or that they are likely to commit similar offences if admitted to bail. In other words, the court must consider the evidence tendered on behalf of the state, to substantiate these allegations, and it is only where the court makes a finding that the state's allegations are well founded, and the applicants fail to discharge the onus on them to establish that they are good candidate to be admitted to bail, that a finding can be made that it is in the interests of justice that the applicants be detained in custody pending trial. Some of the factors that the court ought to consider in establishing whether the state's allegations are well founded are set out in s 117 of the CPEA. In considering whether it will be in the interests of justice to detain the accused in custody on the basis of cogent evidence that if released on bail he is not likely to stand trial, or that he will attempt to influence and intimidate witnesses, the court is enjoined to consider the following factors:

Where it is alleged that accused will abscond and not stand trial:

> " (i) the ties of the accused to the place of trial; (ii) the existence and location of assets held by the accused; (iii) the accused's means of travel and his or her possession of or access to travel documents; (iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor; (v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee; (vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions; (vii) any other factor which in the opinion of the court should be taken into account;".

The applicants have supplied addresses in Highfield, Budiriro, GlenView and Mabvuku where they propose to reside until their trial is finalized. The state has raised fears that since the

applicants do not own these places of residence, the transient nature of their occupation raises an inference that they are likely to abscond and find accommodation as lodgers elsewhere. With respect, I disagree with the inference made by the respondent. The average Zimbabwean is a lodger. What is material is whether the respondent verified the given addresses and found the information given by the applicants to be correct, that they reside at those addresses. If home ownership was made a pre-requisite to admission to bail, that would be tantamount to a declaration that the average Zimbabwean is not a suitable candidate for admission to bail. The I.O. confirmed that all the addresses supplied by the applicants were verified. That is the end of the matter. Unfortunately, the applicant's statement in support of their application for bail is deficient in its omission of the applicants' personal circumstances. We are not told whether all of them are married, have children, are gainfully employed, own any assets, have any savings. It becomes difficult in these circumstances to assess the applicants' ties to their communities.

The offence that applicants are charged with is a grave one, with a penalty of imprisonment for life or any shorter period, if the crime was committed in aggravating circumstances or, in any other case, to a fine not exceeding level fourteen or not exceeding twice the value of the property that forms the subject of the charge, whichever is the greater; or to imprisonment for a period not exceeding fifty years; or both: Some of the allegations against the applicants contained averments that an iron bar was used, and or a knife, which constitutes aggravating circumstances, and attracts a possible life sentence. The gravity of the offence and the likely penalty are factors which a court can consider in determining whether an applicant for bail is likely to abscond, especially where the prosecution case is strong, such as in this case. All the applicants were positively identified by the complainants in identification parades. No evidence was placed before the court, by the applicants, to rebut the presumption raised against them by these positive identifications. It was not suggested that the complainants were mistaken, or that the parades were not conducted in a proper manner. In fact the applicants failed to discharge the onus incumbent on them in bail applications, on a balance of probabilities, that the identification parades are of no probative value. They offered to explanations at all as to how all of them could have been positively identified as robbers by the complainants. This is the most

damning evidence against them, which links them to the commission of the offences, and they offer no explanation as to how this possibly came about.

All the applicants were arrested in the course of ongoing police investigations. The I.O. told the court that the police were tipped off by the applicants' accomplices. The applicants did not comment on this averment or attempt to discredit it except to question the circumstances in which the police discharged a firearm at the Budiriro 5 turnoff. Applicants made a bald denial of any involvement in the commission of the offences, which does not suffice to meet the requirement that they discharge the onus on them by adducing proof on a balance of probabilities. Section 117A (5) of the CPEA provides that:

> (5) In bail proceedings the accused is compelled to inform the court whether—
> (*a*) the accused has previously been convicted of any offence; and
> (*b*) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.
> (6) Where the legal representative of an accused submits the information referred to in subsection (5) the accused shall be required by the court to declare whether he or she confirms such information.

The I.O was cross examined extensively on whether his investigations had revealed any previous convictions on the part of any of the applicants. He replied that he was still cross checking. Section 117(5) of the CPEA places the onus squarely on the applicants to inform the court about pending cases.

The applicants did not discharge this onus incumbent upon them. Instead they sought to shift the onus to the respondent to prove this. Having failed to discharge the onus, applicants fail, in their quest to convince the court that they are suitable candidate to be admitted to bail pending trial.1st applicant was arrested at his home, after a tip off. Two laptops were recovered at his home. No explanation has been given as to the presence of these laptops or their ownership. A reasonable explanation could have exculpated the first applicant. The second and fourth applicants were arrested after a tip off and a high speed chase with the police at Budiriro 5 Turnoff. No explanation was given by the second applicant as to why he sped off and refused to stop after warning shots were fired. No explanation was given by the second applicant as to why he was caught in the police dragnet after calling an alleged accomplice who was in police

custody and inviting him to meet for purposes of committing robberies. The fourth applicant's attempt to pose as an innocent passenger in the commuter omnibus was simply not believable, in light of the absence of number plates on the commuter omnibus, of the second applicant's phone call to the accomplice in custody, and to his positive identification by a complainant.

The fourth applicant was also arrested after a tip off by an alleged accomplice, and he led the police to the recovery of the number plates that the gang used intermittently to escape detection and avoid arrest. Police were on the lookout for a commuter omnibus with those licence plates. No explanation was proffered as to how the fourth applicant, also subsequently positively identified by a complainant, knew the hiding place of the number plate. It has not been suggested that the fourth applicant was abused or tortured or otherwise induced to provide this information to the police. None of the applicants denied that they knew the accomplices who were in police custody and who implicated them and assisted the police to arrest them. The prosecution case is strong. It has been held that the more serious the charge the greater will be the temptation to abscond regard being had to the likely penalty upon conviction. Coupled with the strength of the state, and on examination of all the circumstances of the case, the court finds that applicants are likely to abscond, if admitted to bail. In *S* v *Hudson (supra)* at p 149, the court stated that*:*

> "Where an accused applies for bail and confirms on oath that he has no intention of absconding due weight has of course to be given to this statement on oath. However, since an accused that does have such an intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say-so of the accused. The court should examine the circumstances."

Where it is alleged that the accused will attempt to interfere with witnesses or tamper with the evidence, or interfere with investigations, the court must consider the following factors set out in s 117 of the CPEA:

> "(i) whether the accused is familiar with any witness or the evidence; (ii) whether any witness has made a statement; (iii) whether the investigation is completed; (iv) the accused's relationship with any witness and the extent to which the witness may be influenced by the accused; (v) the efficacy of the amount or nature of the bail and enforceability of any bail conditions; (vi) the ease with

> which any evidence can be concealed or destroyed; (vii) any other factor which in the opinion of the court should be taken into account".

It is this court's view that the state's fears that the applicants will attempt to interfere with witnesses is baseless and without foundation. This is so because insufficient evidence was placed before the court to establish the likelihood of this happening. We are told that all the applicants were positively identified by some of the complainants. The complainants were not identified by name. There is no evidence that the applicants know the complainants, or will be able to have access to them. We are told that investigations are ongoing, yet we are not told whether trial is imminent. We are told that some of the stolen property has not been recovered. Yet we are not told whether the applicants are in a position to obstruct police investigations and how they will be able to do so. This court finds therefore, that, there is no real risk that applicants will interfere with witnesses. See *S* v *Bennett* 1976 (3) SA 652 (C). This court also finds that, the imposition of bail conditions in this case is not likely to deter the applicants from absconding, for reasons which the court has already canvassed above.

The court is entitled to consider any relevant factor in considering the suitability of the applicants to be admitted to bail pending trial. One of those factors is consideration of whether the admission of the applicants to bail will undermine or jeopardize the public confidence in the criminal justice system {s 117 (3)(e)(v)}. The public expects that people arrested on serious charges be kept in custody pending their trial. Sometimes, such people may also be kept in custody for their own protection, to avoid lawlessness, where their release may tempt members of the public to mete out instant justice. The evidence before the court that these offences are now prevalent, that two hundred reports have been made to the police since January this year, that eight people a day are preyed upon by robbers posing as providers of public transport is a cause for concern. This factor coupled with the surrounding circumstances of the applicant's arrests after tip offs by their accomplices, their alleged positive identification by the complainants, the recovery of the stolen property, and the fake number plate, the failure to discharge the onus incumbent on them on a balance of probabilities, the strength of the prosecution case, all these factors combined point to the interests of justice not being served by the admission of the applicants to bail pending trial.

The court must weigh the interests of justice against the right of the accused to his personal freedom, with particular emphasis on the likely prejudice he would suffer were he to be detained in custody. The court finds that the interests of justice would be prejudiced by the admission of the applicants to bail, because there is cogent evidence that the prosecution case against them is strong, and that the likely the penalty severe, because the offences were allegedly committed in aggravating circumstances. The applicants have failed to discharge the onus on them, to place sufficient evidence before the court, to satisfy the court that, on a balance of probabilities, they will stand trial if released on bail. This means that they are not a suitable candidate for admission to bail.

The application for bail is dismissed for these reasons.

Hamunakwadi, Nyandoro, & Nyambuya, applicants' legal practitioners
Prosecutor General, respondent