

TINASHE MATINYENYA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 3 & 5 February 2016

### **Bail Application**

Applicant in person  
*E. Nyazamba*, for the respondent

MAWADZE J: This is an application for bail pending trial.

The applicant is facing one count of Armed Robbery as defined in s 126 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and six counts of attempted murder as defined in s 47 (1) as read with s 89 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

In brief all the charges arise from the following facts;

It is alleged that on 4 August 2015 the applicant who is jointly charged with 12 other persons went to Ayshire Mine in Banket using four get away motor vehicles. It is alleged that the applicant who is 28 years old and his accomplices were armed with 6 pistols, an AK rifle, axes, an iron bar and spikes. At about 2km from the mine the applicant and his accomplices are said to have waylaid two mine motor vehicles which were transporting 6.2. kg of gold to Fidelity in Harare. These armored motor vehicles had security guards who were armed. The state alleges that as the motor vehicles arrived at scene where applicant and his accomplices were lying in ambush, the applicant and his accomplices threw spikes forcing the two mine motor vehicles to stop and reverse. The applicant and his accomplices are said to have thrown more spikes at the back of the motor vehicles thus deflating the tyres of one of the motor vehicles. The applicant and his accomplices are then said the have emerged from their ambush position and started to fire at the said motor vehicles smashing windows of the deflated motor vehicle. The state alleges

that one of the motor vehicles managed to drive away but the other hit a tree. The security guards who were in these motor vehicles exchanged gunfire with the applicant and his accomplices. In the process one of the applicant's accomplice was shot forcing the applicant and his accomplices to flee without having able to take the gold which was in one of the motor vehicles. The applicant is said to have abandoned his residence at Farm Number 28 Chitomborwizi in Chinhoyi and was arrested while allegedly hiding at one of the accomplice's place in Norton where some fire arms and ammunition were recovered. According to the state the applicant has been on the police wanted list since 2013 for various serious offences and is believed to have fled to South Africa. The charges of attempted murder arise therefore from the allegation that the applicant and his accomplices shot at the security guards who were in the two Ayshire Mine motor vehicles.

The applicant in his bail application denies the charges and implored this court to admit him to bail as he is of fixed abode and not a flight risk. The applicant submitted that at the time of his arrest he had not abandoned his place of abode in Chinhoyi but had been called by his alleged accomplice Tinashe Chikara in Norton who happens to be his uncle who wanted the applicant to fix Tinashe Chikara's motor vehicle as the applicant is a mechanic. While the applicant admits that and the time of his arrest fire arms and ammunition were recovered at Tinashe Chikara's residence in Norton the applicant disassociates himself with the said firearms and ammunition alleging that Tinashe Chikara should explain the recovery of such fire arms and ammunition at his residence. It is the applicant's contention that he has not been on the police wanted list at all because after his arrest for these offences he had been in custody for 6 months and has not been told of any other offences by the police or charged with any other offences. The applicant submitted that he has been languishing in remand prison for 6 months and that on the date the trial commenced he just gave his defence outline before one of his alleged accomplices Tinashe Chikara collapsed as he is diabetic. The applicant said this had stalled the trial to enable Tinashe Chikara to seek treatment in prison and the applicant pointed out that he is not even sure if the trial would proceed on 5 March 2016 as suggested by the trial court. Lastly, the applicant submitted that he should be treated equally with other alleged accomplices Doubt Mharadza, Happymore Muchenje and Charles Nyandoro who were granted bail pending trial by this court who face similar allegations.

It is trite that in dealing with an application for bail pending trial the court should always endeavor to strike the desirable balance between the liberty of an accused person and the interests of justice.

In terms of our constitution any person who is arrested must be realised unconditionally or on reasonable conditions pending charge or trial unless there are compelling reasons justifying the continued detention.

Section 50(1) of the Constitution of Zimbabwe provides as follows;

“Any person who is arrested.....

(a) .....

(b) .....

(c) .....

(d) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention”

Section 117 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] outlines some of the compelling reasons where the continued detention of an arrested person may be justified. Some of the considerations include the following:

- i) whether the release of an accused person would endanger the safety of the public.
- ii) whether the released accused person will commit any offence referred to in the first schedule
- iii) whether the accused will stand trial.
- iv) whether the accused will attempt to influence or intimidate witnesses or to conceal or distort evidence.
- v) whether the release of an accused person would undermine or jeopardise the objective or proper functioning of the criminal justice system inclusive of the bail system.

It is clear from the facts outlined that the applicant is facing very serious offences for which if he is convicted he is likely to face a very lengthy custodial term. However the seriousness of the offence on its own cannot be the basis to deny an accused person admission to bail pending trial see *S v Hussey* 1991(2) ZLR 187 (S). It should be noted that at this stage the presumption of innocence operates in favour of the applicant hence the court should consider other factors which militate against the granting of bail pending trial.

The state is opposed to the admission of the applicant to bail for basically two reasons which are that the applicant is a flight risk and that he has the propensity to commit similar serious offences.

In the case of *S v Jongwe* 2002 (2) ZLR 2009 (S) the court outlined some of the factors to be taken into account in judging the risk that an accused person would abscond court if admitted to bail. These include inter alia;

- (a) the nature of the charge and the severity of punishment which is to be imposed on the accused person upon conviction
- (b) the apparent strength or weakness of the case against the accused
- (c) the accused's ability to reach another country and the absence of extradition facilities from other countries
- (d) the accused's behaviour
- (e) The credibility of the accused's own assurance of his intention and motivation to remain and stand trial.

After considering the above factors I am satisfied that there is a very high risk that the applicant would abscond the court if admitted to bail. As already said the applicant is facing a multiple of very serious offences which invariably would attract a very lengthy custodial term if convicted. The alleged conduct of the applicant and his accomplices although sounding like a movie style operation smacks of meticulous planning, courage and determination. If provoked to be the case then the applicant and his accomplices would be deemed to be some of the very dangerous criminals in our midst whose only place of safety would be in prison for a very long time.

It is clear from the facts alleged that the state case is strong against the applicant. According to the state the applicant was identified during the commission of these offences through surveillance cameras mounted on the said motor vehicles from Ayshire Mine. In addition to that when the police started to look for the applicant he had left his residence and was holed up at Tinashe Chikara's residence in Norton whom he alleges is his uncle but is an accomplice in this case. Further to that firearms and ammunition linked to the commission of the offences were recovered at the residence of Tinashe Chikara where the applicant was then

arrested. This links the applicant with the offences and makes the state case against the applicant very strong.

I agree with Mr *Nyazamba* for the respondent that the applicant has not been candid with this court in making the application for bail pending trial. It is not in issue that the applicant is facing other robbery cases at the magistrates court for which he was remanded in custody. Needless therefore to state that even if I was to admit the applicant to bail on these charges, I am dealing with, he would not be released from custody. These other robbery offences were allegedly committed in Chinhoyi, Kwekwe, Zaka and Harare. The applicant himself conceded that he was facing 17 counts and that besides these offences I am dealing with he is still facing other 6 counts of robbery.

I am left to wonder therefore why the applicant chose to make this application for bail pending trial when he fully appreciates that such a victory would be pyrrhic! Further, the failure by the applicant to disclose the other offences he is facing falls foul of the provisions of s 117 A (5) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The fact that the applicant is facing other numerous serious offences shows that he has the propensity to commit such similar offences.

The conduct of the applicant to be found holed up at Tinashe Chikara's residence in Norton does not inspire confidence that he would stand trial if admitted to bail. This is coupled by the fact that the state alleges that he has been on the police wanted list for a very long time. At this stage I am not persuaded by the submissions made by the applicant in a bid to explain such conduct.

It is not in dispute that some of the applicant's accomplices Doubt Mharadza, Happymore Muchenje and Charles Nyandoro were granted bail by this court pending trial. It is also trite that the accused person who is facing similar offences should be treated equally by the court see *S v Lotriet & Anor* 2001 (2) ZLR 225 (H). The rationale for this is the need for justice to be seen to be administered evenly to avoid any perception of discrimination.

The applicant again has not been candid with the court in this regard as he failed to disclose that some of his alleged accomplice Mgcini Ramachela and Wilson Kanetsa (B 908/15 & B 913/15) were denied bail pending trial by my brother Zhou J in HH 976/15 on 16 December 2015.

I am also totally in agreement with the submissions made by Mr *Nyazamaba* for the respondent that clear distinction can be made between the applicant and his accomplices who were admitted to bail pending trial. The distinction made by the respondent is that the applicant's alleged accomplices who were granted bail by this court were not facing numerous counts as the applicant. They did not have pending cases like the applicant and that the state case against them was not very strong. These factors therefore distinguishes the applicant's circumstances from those admitted to bail pending trial.

Given the circumstances I have outlined, I am satisfied that there are good grounds or compelling reasons for refusing to admit the applicant to bail pending trial. It is in the interest of the proper administration of justice that the applicant remains in custody.

In the result the application for bail pending trial is dismissed.

*National Prosecuting Authority*, respondent's legal practitioners