1. TRYMORE CHAPFIKA B 93/21
versus
THE STATE

2. CHARLES CHIRARA B 107/21
Versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE 2 February 2021 and 26 February 2021.

Bail Pending Trial

N Chigoro, for the 1st Applicant
L Mandiveyi, for 2nd applicant
B Murevanhema, for the respondent

CHITAPI J: The above two applications were consolidated by consent of counsel on application by the prosecutor Mr *Murevanhema*. Mr *Murevanhema* submitted that the two applicants were co-accused in the matter in regard to which they have applied for bail pending trial. The prosecutor had summoned the Investigating Officer to give evidence on both applications in regard to the bail applications. It was thereof convenient for the investigating officer to give evidence in regard to both applications instead of giving evidence in each application separately. The consolidation was for purposes of hearing and judgment.

The back ground to the applications was as follows:

In regard to first applicant, he appeared before the magistrate at Harare for initial remand on 13 January, 2021 and was remanded in custody. The magistrate advised the applicant to apply for bail before the High Court if minded to seek bail. The applicant was remanded in custody together with four other accused persons, namely Gerald Rutizira, Kelvin Musakwa, Tendai Zuze and Neverson Mwamuka, on allegations of Armed Robbery as defined in s 126 (1) (a) (b) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]

The brief details of the facts alleged against the first applicant were that, him and his co-accused and accomplices who included others said to be still at large waylaid a ZB Bank cash in transit vehicle on 6 January, 2021 and robbed the vehicle crew of USD$2 775 000 by using fire-

arms to induce fear and submission in the crew members. The applicant and his accomplices then drove the cash in transit crew vehicle to some secluded place where they offloaded the cash boxes which contained the money from the cash in transit vehicle into one of their gateway vehicles which was being driven by co-accused Gerald Rutizira. The applicant and his accomplices were alleged to have then driven the gate away vehicle with the cash boxes to some farming area to the west of Nyabira where they broke open the cash boxes and shared the money. The cash in transit vehicle and the vehicle were abandoned at the place where the cash boxes were transferred from the cash in transit vehicle into the gateaway vehicle. The robbery was committed at the 60 kilometre peg along the Harare, Chirundu highway around 11:30 am.

In relation to evidence linking the first applicant to the offence, it was alleged before the magistrate as it was recorded on the remand form 242 that there was witnesses evidence to identify him and his accomplice. It was also alleged that the first applicant led police to the recovery of USD38 900 which was his share of the robbery proceeds. It was further alleged that there was evidence of geographic physical communication amongst the applicant and his accomplices whereby a run through of their cellphones showed that they were communicating within the same locality the locality coincided with the areas of the robbery. It is important to record that the first applicant did not challenge the grounds alleged at the remand. The magistrate was satisfied that the allegations disclosed a reasonable suspicion that the applicant committed the offence charged.

In regard to the second applicant, the same allegations made against the first applicant as I have briefly outlined them herein were alleged against the second applicant. He was an alleged accomplice with the first applicant and others in the commission of the robbery.

In relation to linking the second applicant to the commission of the offence, it was alleged that the second applicant was implicated by his co-accused persons. Additionally he was alleged to be owner of a Toyota passo motor vehicle which was used in the robbery as part of gate away vehicles used by the second applicant and accomplices who included the first accomplice. It was further alleged that the second applicant made indications of how the robbery was committed and that the indications were video recorded. The Toyota passo motor vehicle was also recovered. Evidence of communication between the second applicant and accomplices was gathered by police.

The second applicant like the first applicant did not challenge the allegations against him before the magistrate. The allegations were therefore accepted by the magistrate who determined

that they established a reasonable suspicion that the second applicant committed the offence charged. It is necessary to record that the decision to place an accused on remand is reached after application by the prosecutor to have the applicant placed on remand. The magistrate will only agree to place an accused person on remand if the state alleges facts from which a reasonable suspicion is established that the accused committed the offence. The accused if he does not agree with the allegations should challenge them before the magistrate. A failure to do so implies that the accused agrees with the allegations. The challenge should not be made before the bail court because the bail court is not an appeal or review court for decisions on applications for the remand of the accused. The approach of the bail court must be to make a determination whether or not the applicant is a good candidate for bail due regard being had to the uncontroverted allegations accepted by the remand court.

The prosecutor led evidence from the investigating officer Detective Assistant Inspector Chipazwo during the bail hearing. He testified in relation to the first applicant that the first applicant was implicated in the offence by an accomplice Fanuel Musakwa. Following that implication and the subsequent arrest of the first applicant in Mbare, police recovered USD6 000 on his person. He led police to his tuck shop where he had hidden USD23 000 in a hole dug in the floor of the tuck shop. He also led police to a house in Mbare where his mother stayed. The sum of USD9 000 was recovered from the mother where the first applicant had left it for safe keeping. The first applicant alleged that the money had been given to him by his brother, one Alfred Shumba who had gone to Murehwa. Alfred Shumba is on the run and police did not find him when they followed on him to Murehwa. The investigating officer testified that the first applicant's sources of livelihood was through operating the tuck shop.

In relation to the second applicant, the investigating officer testified that the second applicant was a soldier in the Zimbabwe National army based at 5.2 Infantry Battalion situated at Battlefields. Police arrested him in Kwekwe with assistance of military police after the second applicant had resisted arrest by the police and attempted to escape. The second applicant's workmate also a serving soldier called Artwell Chitera jumped over a durawall and escaped arrest. Following the first applicant's arrest, the second applicant told the police that he left USD50 000 with his brother for safe keeping at his house in Ushewokunze. The investigating officer testified that the second applicant interfered with investigations in that he instructed his wife and his sister to dig out a hole in which he had hidden the money on the floor of the house. He allegedly also

told the two to relocate to some other place. The two then abandoned the house in Ushewokunze and rented another house in Bluff hill. Police arrested the second applicant's sister and wife and recovered from them USD67 500 which the second applicant had given them for safe keeping. The investigating office testified that the second applicant had told them that his share was USD150 000 and of that only USD67 500 had been recovered.

The investigating officer testified that police were opposed to the grant of bail because their investigations had established that the robbery was committed by an organized gang of armed persons some of whom were yet to be accounted for. About five alleged accomplices were still on the prowl. Police had yet to recover outstanding money and in the case of the first applicant police had only recovered USD38 000. The investigating officer also testified that the state case was strong because apart from recovery of the money believed to be part of the robbery proceeds, the first applicant made indications at the scene on how the robbery was committed and the indications were video tapped. Additionally police recovered the first applicant's Toyota passo motor vehicle which was alleged to have been used during the commission of the offence. Lastly the investigating officer testified that an accomplice, Wellington Chirara was alleged to have been given USD50 000 for safekeeping. The first applicant was likely to team up with Wellington and likely abscond.

In relation to first applicant the investigating officer under cross examination by the first applicant's counsel testified that the money recovered from the first applicant was part of the robbery proceeds because it was in USD100 denominations like the stolen money. The investigating officer testified that additionally, there was evidence of implication by co-accused and that it was not coincidence that after implication the applicant was found to be in possession of a large amount in the denominations as the money subject of robbery. The investigating officer denied that the applicant had explained that the money was his.

Under cross examination by counsel for the second applicant, the investigating officer maintained his evidence and the court noted that the cross examination was not eventful. Nothing new came out of it. The investigating officer repeated his evidence that the second applicant attempted to escape arrest but was apprehended with assistance of military police whilst the accomplice Artwell Chitera escaped. He maintained that the second applicant ordered his wife and sister to relocate from their Ushewokunze house and they dug out the hidden robbery proceeds therefrom and rented a house in Bluff hill. The second applicant according to the investigating officer was the driver of the Toyota passo which the second applicant now alleged to belong to his

brother. The ownership itself was therefore not important but the use to which the vehicle was put and the user thereof. The user was alleged to be the second applicant. The investigating officer disagreed with the suggestion by the second applicant's counsel that the amount of USD67 500 recovered from the second applicant's wife and sister belonged to one Tozivepi. He testified that Tozivepi was arrested in possession of USD70 000 which was his share of the robbery proceeds.

The first applicant in support of his application for admission to bail submitted through his counsel that he did not harbor any intention to endanger the safety of any person or the public generally. He claimed that he co-operated with the police in the investigations upon arrest. He claimed further that the allegations against him were a fabrication. It was submitted that the first applicant had an *alibi* in relation to his defence in that he was at his work place when the robbery was committed. He claimed to be a businessman who operates a market stall at Magaba Mbare where he sells steel products and owns two trucks which he hires out for money. He admitted that police recovered USD28 900 following a search at his hose. He stated that he has as a man of means and realized the money from his business operations. In regard to the money from recovered his mother, he explained that it belonged to his half brother Alfred Shumba who police still have to arrest. The second applicant also averred that he would not interfere with evidence or state witnesses. He stated in the same vein that if he fell foul of bail conditions, police could always arrest him. The rest of the written application dealt with bail jurisprudence and the presumption of innocence including purposes of bail, the attitude of the police and of the Prosecutor General.

In passing it is well to comment that little purpose is served in a bail applications before a judge of the High court by the applicant engaging in seeking to school the judge on the law relating to bail applications. Unfortunately counsel are known to do that. The law I think is very clear. What must be emphasized upon in a bail application should be adducing facts which conduce to a finding that the applicant is a good candidate for bail to be granted to him or her. It is not of much use for the applicant to file an application for bail which concentrates on the principles and law on bail unless an issues on what the law is or the application of the law are issues to be determined in the application. If there is no issue, then counsel are guided to concentrate on profiling the applicant as a suitable candidate for bail in the circumstances of the allegations made against him.

Section 117 (2) and 117 (3) of the Criminal Procedure and Evidence Act, [*Chapter 9:23*] provides the guide on what bail applications should cover. Section 117 (2) lists the grounds which if any of them is established to exist in any given case where bail is applied for, the determination that it is

not in the interests to grant bail may be made. Subs (3) of s 117 lists the factors which the judge or magistrate dealing with a bail application is required to take into account. Therefore a bail application must deal with the basis or reasons for opposing bail as submitted by the state. If for example the reason for opposing bail is the risk of abscondment, the application should relate to factors which the court must consider in determining whether or not a likelihood that the applicant may abscond has been stablished. The first applicant's application did not deal adequately with the factors which the judge is required to take into account. For the avoidance of doubt, s 117 (2) (ii) of the Criminal Procedure and Evidence Act, provides that

> "the refusal to grant bail and the detention of an accused shall be in the interests of where one or more of the following grounds are established-
> (i) ……..
> (ii) not stand his or her trial or appear to reserve sentence
> (iii) ……..
> (iv) …….
> (b) ……

Subsection (3) (b) of s 117 then provides in para (b) that in determining whether or not it has been established that the accused is likely not to stand trial, the court shall (own underlining) take into account

> "(i) the ties of the accused to the place of bail
> (ii) the existence and location of any 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 factors which in the opinion of the court should be taken into account."

It is therefore imperative that the above factors are directly addressed by the applicant in the bail application. In *casu* the applicants were expected to deal with the matters listed above and produce documentary proof where applicable of ownership of assets, savings and such other proof even by affidavit on the said factors. Again as an example the first applicant made a bold allegation that he is of fixed abode and will reside at the "given address". However the court is required to consider the ties of the applicant to the place of trial. The allegations that the first applicant is of fixed abode is not enough. Consideration must had to the nature of the ties of the applicant to the fixed abode. Is it owned with title deeds or rented and so forth. Full details with supporting documentation should be attached where available and if not available, an explanation for the non-availability should be given. The listed factors to be considered by the court may be split into

subheadings and dealt with individually for good order. The first applicant had the onus to show that it is in the interests of justice to grant him bail. The onus cannot even on a balance of probabilities be discharged through bold allegations being made.

In regard to the second applicant, the application was far worse than that of the first applicant in its failure to be guided by the provisions of s 117 (2) (a) (ii) as read with subs (3) (b) of the Criminal Procedure and Evidence Act. The application did not address the factors that the court is required by law to consider in determining whether or not the second applicant was likely to abscond. The application was structured to address the law on bail generally and in relation to abscondment. Reference was made to the cases of *S* v *Jongwe* SC 62/02 and *S* v *Ndlovu* 2001 (2) ZLR 261 (H) to emphasize on how the risk of abscondment is assessed. The cases do not make specific reference to s 117 (3) which lists the factors which the court is directed to take into account. Some of the factors in these cases dovetail with the ones listed in s 117 (3). However the second applicant left it at that. He did not allege facts which relate to the factors necessary to be considered. The task of the court is to determine whether or not it is in the interest of justice to grant an applicant bail. The applicant must place the court into his confidence and make supported factual allegations to establish the applicants' suitability for bail. This cannot be done by counsel taking the judge through a lecture on bail law and principles. Although it may sound as a dressing down of counsel for ineptitude, I find myself unable to describe the second applicant's bail statement otherwise than as an example of how not to prepare a bail statement. There is virtually nothing in the application to build or support the profile of the second applicant as a suitable candidate for bail.

The second applicant came nowhere near discharging the onus reposed upon him by the provisions of s 115 C (2) (ii) (A) of the Criminal Procedure and Evidence Act to show on a balance of probabilities that it is in the interests of justice for the applicant to be granted bail. The failure to address the pertinent factors which the law requires that they be considered meant that the bail application had no foundation to support it and consequently it could not succeed.

The state had in the form 242 raised other grounds to oppose bail namely that the applicants are likely to interfere with the recovery of the outstanding money, subject of robbery. It was alleged therefore that there was a risk of interfering with investigations which also included the recovery of fire arms used in the commission of the robbery. It is not necessary to interrogate the rest of the grounds in view of the finding I make that on the facts alleged and the circumstances of the

commission of the offence and the applicants' bare denials of involvement in the commission of the offence by advancing unsubstantiated *alibis* which are not clothed by any facts or proof, and the failure to address the factors listed in s 117 (3) the applicants are a flight risk. There is a likelihood that they will abscond especially so given the gravity of the offence and the likely penalty upon conviction which ranges from life imprisonment to a definite term of imprisonment given the circumstances of aggravation which are alleged to be present in that firearms were used in the robbery.

The two applicants have failed to discharge the burden to show that it is the interests of justice to grant them bail. Indeed apart from the risk of abscondment, the circumstances of the commission of the offence going by the uncontroverted allegations of how the robbery was committed and sharing of proceeds of which large amounts of money were recovered from the applicants and such possession requiring explanation, the grant of bail to the applicants as matters stand will undermine the objectives of bail and the criminal justice system. The grant of bail will in such circumstances lead to the public losing confidence in the bail system.

It is therefore ordered that:

1. The bail applications in regard to Trymore Chapfika B 93/21 and Charles Chirara B 107/21 are both dismissed.
2. Copies of this composite judgment must be filed in each of the two records B 93/21 and B 107/21.

Chigoro Law Chambers, 1st and 2nd Applicants' legal Practitioners
National Prosecuting Authority, respondent's legal practitioners