

GERALD RUTIZIRA
and
NEVERSON MWAMUKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 5 January 2021 & 16 February 2021

Bail Ruling Trial

K Makumbire, for the 1st applicant
E Mavuto, for the 2nd applicant
V Mtake, for the respondent

The two applications referenced B 152/21 and B 175/21 were consolidated for purposes of hearing because the applicants are co-accused in the case for which they seek to be admitted to bail pending trial. The reference to first and second applicants is for convenience and the applicants are not joined as first and second applicants as such. The first and second applicants are co-charged with alleged accomplices namely Calvin Musakwa, Tendai Zuze and Trymore Chapika. The first and second applicants were arrested in the early hours of 9 January 2021. They were formally brought before the magistrate at Harare Magistrate Court on 13 January 2021 for initial remand. They were remanded in custody. Consequent on the remand in custody they petitioned this court for bail pending trial.

The allegations against the applicant were that on 6 January 2021, them and three accomplices including a fourth accomplice who is still at large conspired to rob a ZB Bank cash in transit truck which was transporting cash amounting to US\$2 775 000.00 to the bank branches in Chinhoyi, Kadoma, Gweru, Bulawayo, Gwanda and Zvishavane towns. It was alleged that in pursuance of their plan, the two applicants and accomplices armed themselves with pistols, a knife

and they also arranged for three vehicles to be available. The vehicles would be used to stalk the cash in transit vehicle. The gang allegedly arranged that some of them would be picked up on the way to appear as if they were genuine passengers. The plan to rob the vehicle involved ZB Bank employees Fanuel Musakwa and Shadre was fick Njowa who were in the cash in transit vehicle as Bank representative custodians of the money. The cash in transit vehicle was a Toyota Hilux truck with canopy. It was fitted with a tracker and emergency panic button. The ZB bank employee Fanuel Musakwas was allegedly the one who was in communication with accomplices as the vehicle was being driven along Lomagundi road en route to Chinhoyi.

It was further alleged that at Inkomo tollgate, the crew members picked up a box with ZWL\$43 090.00 which was supposed to be banked at ZB Bank Chinhoyi branch. The motor vehicle was driven towards Chinhoyi before Fanuel Musakwa requested the crew driver to pick up three persons at Inkomo Barracks turn off under the guise that they were genuine passengers yet they were Fanuel Musakwa's accomplices. On reaching the 60 kilometer peg one of the "passengers" who had been picked up indicated that he had reached his destination and requested the driver to stop and drop him off. Upon the driver stopping, the other accomplice passengers also disembarked and produced pistols which they threatened the crew with. Other accomplices immediately arrived in two vehicles, a toyota passo and a Toyota lexus. Shots were fired in the air before the robbers disarmed the cash in transit crew and forcibly took their 9 mm Hama pistol and a SMLS rifle. They bundled the crew members in the canopy of the cash in transit vehicle and thereafter drove the vehicle some 900 km off the Harare-Chinhoyi highway where they offloaded seven boxes which contained the cash in transit of USD\$2 775 000.00 and the box contained ZWL\$43 090.00. They loaded the boxes into their Toyota twin cab vehicle which was also part of the robbery vehicles used as the gateway vehicle. The further allegations made were that the gang then drove to some farms to the West of Nyabira where they broke open the boxes and shared the stolen loot. The first Applicant herein Gerald Rutizira is alleged to have been the driver of the gateway toyota truck.

As regards evidence linking the first and second applicants to the offence, it was alleged that after his arrest the first applicant led police to the recovery of USD\$96 100.00 which was part of his share of the robbery proceeds. Police also recovered a white Toyota Hiace which was still to be registered. It was alleged that the first applicant further led to the recovery of the Toyota

hilux double cab used in the robbery. The robbery vehicle had recently been repainted from red to white. It had been originally white in colour before being repainted red and now back to white again a day after the robbery.

In the case of the second applicant, it was alleged that he led to the recovery of USD\$48 000.00 which was his share of the crime proceeds and had been given to him by his brother Fanuel Musakwa.

The police alleged that there was evidence of communications amongst the applicants as evidenced by geographical communications locations. It is in my view critical to record that the first and second applicants did not challenge their placement on remand on the allegations as outlined in the Form 242. Where an accused person is brought before the magistrate on allegations of having committed an offence, and does not challenge the factual allegations made with the result that he is placed on remand on the basis thereof, the accused must be taken as having admitted the allegations. See *Levi Nyagura v Tilola Mazanje and Anor* HH 227/18. Every subsequent remand must be justified by the State if challenged. The accused is also free to challenge before the magistrate the initial allegations on which he or she was placed on remand if facts arise which dilute the allegations and/or the reasonable suspicion that the accused committed the offence charged. In *casu*, without any such challenge having been made by both applicants herein, the correct approach must be to accept that the State established a reasonable suspicion that the applicants committed the offence charged.

There has developed a tendency on the part of legal practitioners in bail applications to mount a sustained challenge to the grounds or allegations on which the applicant applying for bail was remanded in custody. This is improper. The bail court does not determine whether or not the applicant ought to have been placed on remand. The bail court cannot order a removal of the applicant from remand. It is up to the applicant to challenge the continued remand before the magistrate or to either appeal against the decision to place the applicant on remand or apply for a review of that decision. The High Court can then consequent on the challenge being brought by way of appeal or review substitute its own decision if the applicants appeal or review challenge is successful.

Occasionally the investigating officer is called by the prosecutor as a witness to give evidence in opposition to a bail application. Applicant's counsel and sometimes the prosecutor

take the opportunity to ask the investigating officer to justify the arrest of the applicant and to provide evidence of the link between the applicant and the commission of the offence. Again it is in my view wrong to turn the bail court into a remand challenge court. Once the remand has been granted with or without challenge made by the accused, the order which is made to place the accused on remand is a judgment which if the accused is dissatisfied with he approaches this court by appeal or review. In this application there was a sustained challenge to the allegations on which the applicants were remanded. I cautioned counsel on the impropriety of doing so. In response counsel indicated that they were seeking to test the strength of the state case. There is a limit to this because the strength of the State's allegations must be challenged on remand because the dilution of allegations has a bearing on and in fact determines whether or not a reasonable suspicion is established that the applicant or accused committed the offence charged.

In this application, the investigating officer detective assistant Inspector Chipwazo testified in opposition to the bail applications. In relation to the first applicant he testified that the first applicant was arrested at a girlfriends' house in Amsterdam suburb, Harare. The sum of \$USD 96 1000.00 was recovered from the first applicant. The first applicant allegedly led to the recovery of the Toyota Hilux truck which the first applicant had repainted a day after the robbery to disguise its colour identity. Under cross examination the investigating officer admitted that the applicant did not have pending cases nor known previous convictions. He also agreed that the first applicant had two wives and two properties within the same Amsterdam suburb being house numbers 187 and 122. The investigating officer however maintained that the applicant could not be trusted to stay at his houses since he was arrested at a girlfriends' house around 0200 hours. The investigating officer also testified that the information gathered by police was that the gang members shared USD \$150 000.00 each and that more recoveries were anticipated including from the first applicant.

In regard to the second applicant the investigating officer testified that the applicant was arrested at the Goromonzi tollgate where police were waiting for him after gathering information that he was fleeing to Mozambique through Forbes border Post. Upon his arrest the second applicant was driving a motor vehicle from which upon search, the arresting details recovered USD \$74 844.00 and ZWL \$675.00. The money was recovered, some in his pockets, in the

monarch suitcase which he carried on him, inside a satchel, in a purse and onside his packed clothes and inside a blanket.

Under cross examination the investigating officer stated that the second applicant led to the recovery of a Honda Fit and Lexus. He clarified that upon his arrest the second applicant had USD \$500.00 in his vehicle and the USD \$74 844.00 was hidden amongst his luggage which included a monarch suitcase, satchel, purse and clothes. The investigating officer also corrected his evidence and agreed with the second applicant's counsel that the Honda fit and Lexus were recovered not through the second applicant's indications, but those of a co-accused Tendai Zuze. He also agreed that he made a mistake in the request for remand form and mistakenly recorded the address of the same Tendai Zuze as that of the second applicant. The investigating officer further testified that the second applicant had not been to his rented house for two days and police were checking for him there at number 2004-183 block 3, Mbare Harare. Police only arrested him upon a tip off that he was absconding to Mozambique. The police waylaid him at the Goromozi tollgate and nabbed him. The investigating officer also testified that the second applicant did not have a fixed abode and was a tenant at the residence where he stayed. The investigating officer opined that the second applicant could therefore just abscond the rented accommodation.

The first applicant in motivating his application averred that he was not a flight risk because he owned two houses where his two wives each stayed. He stated that he did not commit the offence and was not part of the gang that committed the robbery. He outlined his defence as that he was a victim of circumstances in that he was hired by one Dhewa under false pretences that Dhewa required a vehicle to carry game meat from Nyabira area. However upon arrival there was no game meat. There were "unknown men" who compelled him at gun point to carry the bags/boxes of money. He thus stated that he only came into the picture after the robbery. He stated in para 14 of the application as follows:

"It is trite for a conviction to ensure that the state must prove both the *actus reus* and *vaens ren*. The applicant did not participate in the commission of the robbery and had no intention to commit the robbery when he was hired by Dhewa-applicant had no knowledge that Dhewa and others planned to commit the robbery. The robbery had already been committed when he was directed to a spot about 900 metres form Chinhoyi Road.

Indeed, applicant became aware that a crime had been committed but did not participate in the commission thereof. Indeed; applicant can be guilty of theft as he received a sum of money which

was later recovered by the police. The money recovered from him was merely dumped at him when the robbers released him”

Although the bail court does not turn itself into a trial court to determine the merits of an accused persons’ defence, the court can express a *prima facie* opinion on the veracity of the defence. *In casu*, the applicant cannot be said to have any lawful defence because he admits complicit in the matter. The fact that he did not participate in the actual robbery does not absolve him because he becomes an accessory after the act in terms of the provisions of s 206, 207 and 208 of the Criminal Law (Codification and Reform) of the same Act. An accessory to a crime is liable to the same punishment as the actual perpetrator. The first applicant even conceded that he could be convicted of theft.

There is no doubt that the State case against the first applicant is very strong and the chances of a conviction are almost certain. The offence is very serious and the penalties provided for robbery are very stiff in that the first applicant upon conviction will be liable to life imprisonment or any definite period of imprisonment if the robbery was committed in aggravating circumstances set out in s 126 (3) of Criminal Procedure & Evidence Act. There was use of a firearm and threats to kill the victims of the robbery. It is an accepted approach of the court to reason that where the offence is very serious, carries a heavy sentence on conviction, the State evidence is strong and there is certainty of a conviction coupled with an untenable defence advanced by the applicant, the risk or likelihood of abscondment is adjudged to be very high. That principle is applicable in this case. The presumption of innocence is strictly speaking not apparent in this case. It remains a right which however will not likely be realized through a not guilty verdict because as I stated, on the facts of the case as alleged and taking into account the first applicant’s explanation, no plausible defence has been pleaded. The first applicant benefitted from the crime and bought cars. He tried to conceal the identity of the car which he had used by repainting it.

The risk of abscondment will not necessarily be cured by surrendering of a passport. Abscondment is not limited to abscondment to a foreign country but the accused can go into hiding within Zimbabwe. The passport does not stop a person from illegally crossing the borders without detection. Police are still to recover and outstanding money. I am also of the view that given the seriousness of the offence as shown by the brazen resolve to commit it and planning that went into it taken together with the first applicant’s admission of involvement and gaining financially

therefrom, the release of the first applicant on bail will undermine the objectives of both the criminal justice system and the bail system.

From the foregoing I am in agreement with Mr *Chesa* for the respondent that there are compelling reasons to deny the applicant bail. In any event the applicant bears the onus to show on a balance of probabilities that it is in the interests of justice to admit him to bail. He has not discharged such onus. The interest of justice will be served by denial of bail.

In regard to the second applicant, he indicated that he would deny involvement in the commission of the offence. He indicated that he was a passenger in a car which he had boarded in Harare enroute to Mutare. The car was a Toyota bubble and he was one of the five passengers excluding the driver. The vehicle was stopped by the five police officers at the Goromonzi tollgate. Upon a search of the vehicle a large amount of money was recovered. As I understood the explanation the second applicant pleaded that he was a victim of circumstances. As I indicated, in considering the first applicant's bail application, the bail judge can also express a *prima facie* view of the applicants proposed defence. The final decision on whether it stands if for trial court. The second applicant did not deny that his movements were already known and that it was not coincidence for the police to want to arrest him at the toll gate in question.

The first applicant spray painted his motor vehicle a day after the robbery. The state submitted that the spray painting was a ploy to conceal evidence. Such inference is not far-fetched. The motor vehicle was originally white. It was painted a red colour before being repainted white. No plausible explanation was advanced by the first applicant. The investigating officer testified that the second applicant was a tenant at 2004-183 Block 3 Mbare Flats, Harare and was unemployed. The second applicant did not demonstrate any permanent attachment to the residence. Police did not find him when they looked for him. He did not offer any surety regarding permanency of residence. His explanation that persons whom he did not know but had been commuters in the same vehicle with him; implicated him as the owner of the recovered money is somewhat fanciful because no motive was alleged for the occupants of the vehicle to implicate him. Further, I found the evidence of the investigating officer to be very credible when he testified that the arrest of the second applicant was not coincidental but planned by police after they received information of the applicant's intention to abscond to Mozambique.

I need to again express my concern that counsel use the bail court to sneak in a challenge to the remand allegations they were dealt with and accepted by the remand court. The second applicant consented to be placed on remand on the basis of allegations, *inter alia* that he was found in possession of USD\$74 844.00. The magistrates accepted the allegation as factually established. I have to accept that position. The second applicant now contradicts that consent by alleging that he was not in possession of the money. His *bona fides* are highly questionable and he did not impress me by prevaricating.

The second applicant has the onus to establish on a balance of probabilities that it is in the interests of justice that he be admitted to bail. The second applicant is a likely flight risk and will not stand trial. I have accepted the evidence of the investigating officer that the arrest of the second applicant was not a coincidence but part of a police operation. The second applicant has not been candid with the court in explaining his involvement in the commission of the offence he did not give sworn testimony which could have carried some evidential weight.

The second applicant is a demonstrated flight risk who was caught while in the process of leaving Harare. His denial that he was in possession of the money which was allegedly recovered from him as I noted appears to be fanciful and highly improbable. The applicant was not directed to address the factors in s 117 (3) (b) of the Criminal Procedure and Evidence Act which lists factors which the courts take into account when gauging the risk of abscondment. The applicant is not only a flight risk but his release on bail given the serious uncontroverted allegations which were not challenged upon his remand, will undermine the objectives and proper functioning of the criminal justice system and the bail institution.

Consequently I order that both applications be and are hereby dismissed. Copy of this judgement shall be filed in both case No. B 152/21 and B 175/21.

Muvirimi Law Chambers, 1st applicant's legal practitioners
Maposa and Ndomene, 2nd applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners