LIFE SHUMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 26 July 2021.
Written reasons provided on 31 August, 2021

Bail application

Mr Musina, for the applicant
Mr Mbavarira, for the State

ZISENGWE J: The marauding highway robber has been dubbed the modern-day pirate. As with his yesteryear buccaneer counterpart, his *modus* is to target travellers, particularly those he believes to be in possession of valuable items or cash and use brute force to wrest those items from them. In the case of the highway robber he specifically targets travellers whether on board a bus or those driving their own private motor vehicles. He then forcibly stops them or ambushes those that may have stopped for one or other reason before viciously attacking and robbing them, (not infrequently at gun point) of their belongings. From a victim's perspective this is not an ordeal for the faint of heart and the prospect of such an encounter fills one with trepidation. Yet this is sadly a spectre that pervades the highways leading to and from the border Town of Beit Bridge. The reasons for the prevalence of this kind of robbery on the highways leading in and out of Beit Bridge are not too far to find; Beit Bridge is the gateway town to South Africa. Chances

are that any motorist on any of its feeder roads is in transit either to or from South Africa, hence it is a safe bet that they have a sizeable sum of money or quantity of recently purchased goods. To compound matters, some motorists travel late into the night either by choice or owing to other circumstances beyond their control. Such a traveller is therefore from the criminal's point of view, sitting duck and an ideal target for robbery. This is the species of robbery charges that the applicant in this bail application is facing. He is alleged to have not only participated in two such highway heists but to have also facilitated the same by providing transportation to fellow alleged robbers to and from the crime scenes.

The allegations

The request for remand form (i.e. the Police Form 242) gives a breakdown of sixteen individual counts of robbery committed between December 2020 and July 2021 by a band of armed robbers on various roads leading to Beit Bridge. However, from the evidence of the Investigating Officer who testified for the State during this application, it is apparent that the applicant is implicated in only some of those counts.

It is alleged that applicant's involvement is limited to count 1 and counts 6 – 14. It would appear that there is no implicatory evidence against him at the disposal of the police in respect of counts 2-5 as well as counts 15 and 16.

Count 1

The allegations here are that the applicant was part of a group of robbers who pounced on a motorist who had stopped at a point approximately 40 kilometres from Beit Bridge along the Beit Bridge – Masvingo Highway. The incident is said to have taken place at around midnight on the 24th of December 2020. When the complainant who was a motorist in transit alighted from his motor vehicle to relieve himself, he was attacked by a group of seven men which, according to the Investigating Officer, included the applicant. The applicant and his accomplices are said to have robbed the complainant of his motor vehicle, cash in the sum of US$300 and his mobile cellular phones among other valuables. After taking the complainant's motor vehicle the said robbers are said to have ransacked it before later on burning it, reducing it to a shell.

Counts 6 – 14

All these counts relate to the same incident wherein an Iveco Minibus with several passengers on board was attacked and raided by a gang of robbers. This incident took place on the

14th of May, 2021 also along the Beit Bridge – Masvingo road. The driver and each of the passengers alike were robbed of cash, mobile phones and various items of groceries and clothing.

Applicant's position

In his papers filed in support of this application, the applicant denied any involvement whatsoever in any of the robberies. His version was essentially that he runs an informal transport business in which he hires out his private motor vehicles to members of the public. He referred to an incident (whose relevance is questionable in the context of the charges) which took place on 23 December, 2020, i.e. the day immediately preceding the events in count 1, where he claimed to have been hired by two men he identified as Dhawu and Tawanda to ferry a team of football players for a match at around 11.00 hrs before subsequently dropped them after the match, some 1½ hours later. He also averred that the aforementioned Tawanda happens to be the same person who was identified as accused 2 in the Police Form 242 namely Hadson Tawanda Mhlanga. He therefore protested his innocence and denied any involvement in any of the series of robberies enumerated in the Form 242.

His contention, therefore, was that the interests of justice were best served by admitting him to bail pending his trial on those robbery charges. He reminded the court of the main principles germane to an application for bail not least the presumption of innocence which operates in his favour and the concomitant need to jealously protect the individual liberty of a suspect/accused. Needless to say, that emphasis was placed, as it should, on s 50(1) (d) of the Constitution which guarantees the release of any suspect or accused person on bail unless there are compelling reasons justifying the denial of bail.

The application was sternly opposed by the State and this was primarily on the basis of apprehension of abscondment. According to the State the twin combination of the seriousness of the charges (hence the likely heavy punishment upon conviction) and the strength of the case for the prosecution were such as to induce the applicant to take flight.

The State then led evidence from the Investigating Officer Sergeant Chipwazo of the Zimbabwe Republic Police based at Beit Bridge. It will not be necessary to repeat his evidence in *extenso* suffice it to say that it was to the effect that in count 1 the applicant was part of a gang of robbers who conspired and teamed up to target and rob people in transit along the highway leading

to and from Beit Bridge. More specifically it was his evidence that applicant's motor vehicle, a White Toyota Hiace Minibus was used to transport that gang of robbers to some place some 40 km Beit Bridge – Masvingo Road.

He testified that the information at his disposal reveals that in count 1, the group of robbers which was armed with a mean assortment of weapons consisting of a firearm, knobkerries and machetes pounced on the complainant, a motorist who had stopped to relieve himself. They attacked him and robbed him of his motor vehicle, cash in the sum of US$300, mobile cellular phones and other valuables. He further indicated that they then took the complainant's motor vehicle and loaded all of the complainant's belonging into applicant's motor vehicle.

They then drove the complainant's motor vehicle to a bushy and secluded area in the vicinity of a place called Mapai. It was then that complainant's motor vehicle was used to target and rob other motorists that same night which latter robberies constitute counts 2 and 3 of this case. The witness was candid enough to point out that information at his disposal reveals that applicant was not involved in those two robberies.

It was his further evidence that the complainant's motor vehicle (i.e. the complainant in count 1) was set ablaze and reduced to a shell at the instigation of the applicant upon his realisation that that motor vehicle was in fact fitted with a tracking system which could lead to their being traced and arrested.

As far as counts 6 – 14 are concerned, which all relate to the highway robberies of the driver and passengers aboard the Iveco minibus, he indicated that the applicant and his accomplices employed the same *modus operandi*. As with count 1 they are alleged to have similarly used the applicant's White Toyota Hiace Minibus to some point along the Beit Bridge - Masvingo Highway. He indicated that the information at his disposal (which according to him will be led at the main trial) is to the effect that the applicant's motor vehicle blocked the Iveco Minibus before the suspects pounced on the persons on board and robbed them of their valuables.

He further indicated that on both occasions (i.e. count 1 and counts 6-14) there was a firearm which was in the possession of the applicant, which firearm is yet to be recovered which was used to cow the victims.

During cross examination (which was quite detailed and prolix) the witness indicated that applicant's denial of the possession of a firearm was only calculated at misleading the court as the

information at his disposal counters such an assertion. More particularly, it was his evidence that one of the applicant's accomplices disclosed to him that the applicant is in fact possession of the firearm which was the same firearm used in the robberies.

The arrest of the applicant

The witness indicated that the police had to employ guile and subterfuge to arrest the applicant. To this end the police had intelligence to the effect that the applicant who is a resident of Beit Bridge was involved in the transportation of illegal border jumpers to points along the Limpopo river. They then lured him to them on the pretext that there were prospective clients to be so ferried to such illegal crossing points.

The question of the Toyota Hiace Motor Vehicle allegedly used to facilitate the robberies took centre stage in this application, it being repeatedly suggested to the Investigating Officer during cross examination that its description by the various witnesses who claim to have identified it, is not such as to exclude the possibility of false or erroneous identification. In particular, it was suggested that the failure by those witnesses to take note of the number plate in full renders such supposed identification tenuous and unreliable. In response the witness indicated that although the complainant in count 1 was only able to recall the three letters but somewhat mixed up the figures constituting the alphanumeric number plate, and although the number plate was not properly identified by the driver in the Iveco minibus, the applicant's motor vehicle was nonetheless positively identified by the said two victims of the robberies. In his opinion the identification of the motor vehicle by its other features, notably its make, type and colour constituted sufficient evidence of its identification.

Significantly, the Investigating Officer explained that apart from the applicant's motor vehicle having been positively identified as being present at the crime scene, the applicant was implicated in the commission of the offence by his accomplices. He conceded during cross examination that the alleged accomplices later retracted their statements upon their initial appearance at the Magistrates' Court suggesting that they had provided such statements under coercion. He however expressed confidence that those statements would ultimately be ruled admissible as no such duress was brought to bear upon the applicant's accomplices for them to furnish such implicatory statements.

Further, the Investigating Officer stated that the applicant also admitted to having committed the offences in question and evidence of such admission was such as to bolster the case against him.

It was therefore the Investigating Officer's position that the case against the applicant is quite firm and that his admission to bail could induce him to abscond to evade facing the consequences of his actions.

Over and above the risk of abscondment, he gave three additional reasons (which were challenged during cross examination) to the granting of bail. Firstly, he indicated that accused commands a fearsome reputation in the Beit Bridge and his release could cow or influence potential state witnesses. Secondly, he stated that applicant's release on bail could scuttle the spirited efforts of the police to trace and recover the firearm in the possession of the applicant which was used in the commission of the offence. Finally, he stated that the identification parade was yet to be conducted, it having been delayed by the current COVID - 19 pandemic induced national lockdown.

The Test

It is trite that in a bail application the court endeavours to strike that balance between two competing interests which consist on the one hand of the need to safeguard the legitimate interests of society (which in turn comprise the necessity of ensuring that the accused stands his trial and to prevent any undue interference with the administration of justice) and the need to protect the individual liberty of the accused on the other hand. See *Ndlovu* v *State* 2001 (20 ZLR 261 (H); *Madzokere and Others* v State 2011 (2) ZLR (H).

In refusing the applicant bail, I pointed out in my *ex tempore* judgment, as I do now, that the court remains cognisant of two primary considerations operating in accused's favour namely, his right to be presumed innocent until found guilty by a competent court of law. Secondly, that in terms of s 50(1) (d) of the Constitution bail is essentially regarded as a right unless there are compelling reasons justifying a denial of the same. The said section reads;

50. Right of accused and detained persons –

(1) 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*

(e) ----

I do not propose to "reinvent the wheel" by purporting to proffer some other interpretation to that section, different from or in addition to, what has been stated in many cases on this subject. This is well trodden ground. Neither is it necessary to regurgitate the various dicta strewn across the various case law authorities on the subject (see *Munsaka* v The State HB55/16); *S* v *Khumalo HB 243/15; Chikumbi & Anor* v *State* HH 90/14 among others, suffice to say that Section 50 (1) (d) can only be interpreted to mean that an accused has Constitutional right to continue his enjoying freedom despite the pendency of criminal charges against him or her. That freedom may only be taken away if there are compelling reasons for doing so. It is a Constitutional touchstone I was alive to and did apply in arriving at the decision as I did to deny applicant bail.

The enquiry that inevitably confronted me was whether the State had managed to establish compelling reasons justifying the refusal of bail.

In my *ex tempore* judgment, I enumerated (albeit in truncated form) the key reasons leading to that decision. All I will do now is to add flesh to that skeletal outline I set forth then.

Likelihood of absconding

Section 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (abbreviated herein "the CPEA") breathes life to section 50(1)(d) of the Constitution and juxtaposes a detained accused person's entitlement to bail on the one hand against those circumstances which may justify the refusal of bail on the other. More pertinently, subsection 2(a) (ii) provides that an accused may be denied bail should there be grounds supporting the belief of the likelihood of his abscondment.

Some of the factors warranting an inference of the likelihood of absconding are listed in subsection 3(b) of that section. These include the strength of the case against the accused and the severity of the penalty likely to be imposed on him or her upon conviction. In this regard in *Jongwe* v *State* 2002 (2) ZLR 209 (S) CHADYAUSIKU CJ referred with approval to a passage from the case of *Aitken & Another v Attorney General* 1992 (1) 249 (S) at 254 D-G where GUBBAY CJ said the following:-

"*The risk of abscondment:*

In judging this risk, the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the strength of the state case…

It is quite clear from the above remarks that the critical factors in the above approach are the nature of the charges and the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weaknesses of the state case."

In the present matter, there can hardly be any debate on the seriousness of the offense and the severity of the penalty that is likely to ensue should the applicant be convicted. What is contested terrain, however, is the relative strength of the State's case against the applicant. This explains the prolix cross examination which the Investigating Officer was subjected to. I pause here momentarily to reflect that what was probably lost to counsel, namely that a bail application is neither a dress rehearsal nor a substitute for the trial that will follow and one must guard against the temptation of converting a bail application into a trial on the merits, see *S* v *Viljoen* 2002(2) SACR 550 SCA.

Be that as it may the trial court will however ultimately have to grapple with several discrete pieces of evidence allegedly linking the appellant to the commission of the offence including the question of the alleged identification of both the applicant and his motor vehicle at the scenes of crime. I was alive to the pitfalls associated with identification and the need to exercise caution and the fact that the trial court will ultimately have to deal with the salient factors with a bearing on the same. In this regard the trial court will be enjoined to apply the well-known principles enunciated in the case of *S* v *Mthetwa* 1972 (3) SA 766 (A) where the following was stated;

"*Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight, the proximity of the witness; the opportunity for observation; both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress, the result of identification parades; if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are*

applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of totality of the evidence, and the probabilities …"

Similarly, I was cognisant in arriving at my decision denying applicant bail, that in the main trial, the alleged implicatory evidence of the applicant's accomplices will not only have to surmount the initial hurdle of its admissibility given that they (i.e. accomplices) apparently retracted the same citing duress but that it will also be subjected to the scrutiny of the cautionary rule. In a word, the cautionary rule as it applies to the evidence of accomplices enjoins a court to approach such evidence with some circumspection, see *S* v *Masuku and Another* 1969 (2) SA (N) 375 – 7 where the following was stated:

"1. caution in dealing with the evidence of an accomplice is imperative.

2. An accomplice is a witness with a possible motive to tell lies about an innocent accused, for example to shield some other person or to obtain immunity for himself.

3. Corroboration, not implicating the accused but merely in regard to the details of the crime not implicating an accused but merely in regard to the details of the crime not implicating the accused is not conclusive of the truthfulness of accomplice.

4. The very fact of his being an accomplice enables him to furnish the court with details of the crime which is apt to give the court the impression that he is in all respects a satisfactory witness, or as has been described "to convince the unwary that his lies are the truth.

5. Accordingly, to satisfy the cautionary rule, if the corroboration is south it must be corroboration directly implicating the accused in the commission of the offence.

6. Such corroboration may, however, be found in the evidence of another accomplice provided the latter is a reliable witness

7. where there is no such corroboration, there must be some other assurance that the evidence of the accomplice is reliable.

8. That assurance may be found where the accused is a lying witness or where he does not give evidence.

9. The risk of incrimination will also be reduced in a proper case where the accomplice is a friend of the accused.

10. Where the corroboration of an accomplice is offered by the evidence of another accomplice the latter remains an accomplice and the court is not relieved of its duty to examine his evidence also with caution. He like the other has a possible motive to tell lies.

> *11. In the absence of any of the aforesaid features, it is competent for a court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance and rejection of the accused is only permissible where the merits of the accomplice as a witness and the merits of the accused as a witness are beyond question."*

See also *Ncube v The State* 2016 (2) ZLR *S v Ngara* 1987 (1) ZLR 91 (S).

I conveyed in my brief *ex tempore* judgment the view that at face value the evidence against the applicant appeared to be quite firm. I further stated that although the applicant sought to poke holes into the individual pieces of evidence against him, it is however trite that ultimately when the trial court is called upon to determine the guilt or otherwise of the applicant, it will be required to assess the evidence as a whole instead of focussing too intently on each separate piece of evidence. This is because doubt may indeed arise when each piece of evidence (such as the question of the number plate, the impugned admissions or the implicatory evidence from alleged accomplices) is considered separately. However, when such evidence is viewed holistically, such doubt may be set to rest. I need to stress here that I made this observation in light of the spirited but untenable attempts by counsel for the applicant to insulate each piece of evidence against the applicant from the rest.

By stating the above, I did not in the least suggest that this court sitting as it did in a bail application had purported to determine the guilt of applicant. All that was I endeavoured to convey was that I found that a preliminary assessment of the evidence against the accused, (any perceived shortcomings notwithstanding), revealed a fairly solid case against him. That conclusion was premised upon an impression created by an assessment the following pieces of evidence, among others: the identification of his motor vehicle at both scenes of crime, the fact that applicant was implicated by alleged fellow accomplices, the fact that he was identified at the scene of the crime by the various complainants and the fact applicant allegedly made informal statements wherein he admitted having committed the offences.

Having found that the state's case against the applicant was fairly strong I concluded therefore, that there was a well-grounded risk of him taking flight.

I also found that the State, through the evidence of the Investigating Officer, had managed to establish additional good grounds for the denial of bail namely that the firearm used in the

commission of the offences which is believed to be in the possession of the applicant coupled with the fact that the intended identification parade was yet to be conducted.

It was for the above reasons that I came to the conclusion that there were indeed compelling circumstances as contemplated in section 50(1) (d) of the Constitution justifying the denial of bail and dismissed the application.

ZISENGWE J.

Garikayi & Company, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners