

PARDINGTON KOTI

AND

KHULEKANI ROBERTSON KOTI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 7 AUGUST 2012 AND 9 AUGUST 2012

Mr Siphuma for the applicants
Mr L. Maunze for the respondent

Bail pending trial

MAKONESE J: The Applicants are facing two counts of contravening section 126 of the Criminal law (Codification and Reform) Act [Chapter 9:23]. The allegations against the Applicants are that on the 27th April 2012 at approximately 2040 hours the Applicants in the company of two other persons who are on remand proceeded to TZ Supermarket, Emakhandeni, Bulawayo. Upon arrival at the supermarket they fired a warning shot and ordered the complainants to lie down whilst the Applicants remained on guard outside the shop. They demanded cash and ordered the cashier to place the cash in a plastic bag. The Applicants headed to the bottle store section of the same shop and collected some more cash which they placed in the plastic bag. All in all the Applicants and his co-accused stole a total of US\$600-00 before they vanished into the night.

On the second count, it is alleged that on the 1st of May 2012 the Applicants and their co-accused persons proceeded to Macy Line Lodge along First Avenue, Bulawayo. They pretended to be clients looking for overnight accommodation. They produced a pistol and threatened the employees and ordered them to lie down. They stole cash amounting to US\$311-00 and four mobile phones. They locked the employees in a room then fired one shot.

They got into a taxi which was parked outside the lodge and tried to get away. They failed to start the vehicle and then fled on foot.

The Application for bail has been opposed by the State. After hearing oral argument in chambers I dismissed the application and indicated that my reasons would follow. These are my reasons.

The Applicants have both stated that they are commuter omnibus drivers who are married and have no travel documents. They deny the allegations and state that they have been wrongly implicated. In support of their application they have tendered an affidavit sworn to by Michael Bhekinkosi Ndiweni. The contents of the said affidavit are as follows:

- "1. I am the 1st accused in the matter being heard at the Bulawayo magistrates' court under cover of CRB 1768-71/12.*
- 2. That I deny the charges as outlined. That after being arrested on 8 May 2012, I was thoroughly assaulted by the police using among other things baton sticks and iron bars together with my wife who is pregnant and forced to admit that I had committed the offences. That I only admitted to having committed the said offences to save both my wife and myself from further assaults.*
- 3. That I only implicated Khulekani Robertson Koti and Pardington Koti who are my brothers in law as a result of the beatings by the police and being forced to state that I had committed the offences with them.*
- 4. That on my initial appearance I complained to the magistrate about the assaults I received at the hands of the police."*

It is on this basis, that Applicants say they have a defence to the allegations against them. The Applicants do not venture to explain why Michael Bhekinkosi Ndiweni only chose to implicate them and no other person. They do not proffer any other defence to the serious allegations against them.

It is my view that the affidavit of Ndiweni is of little weight and value because it is clearly intended to exonerate his co-accused persons.

The State represented by Mr *Maunze* produced a sworn Affidavit by Detective Sergeant Sam Takawira, in which he confirms that they are opposed to the Applicants being granted bail in that that there is evidence linking them to the offence in that:-

- "1. Accused 1 was found in possession of a star pistol which after being sent to ballistics offices matched the spent cartridges that were recovered from both scenes.*

2. *Accused 2 and 3 had the same firearm in their possession at Number 13439 Pumula South during the period that the two armed robberies were convicted.*
3. *Accused 2, 3 and 4 are being implicated by accused 1.*
4. *Accused 1 was positively identified by witness in count 2.*
5. *Accused 1 voluntarily made some positive indications at both scenes.*
6. *Accused number 2 and 3 once used the firearm that was used to commit these armed robberies to threaten the in-laws of accused number 2.”*

Detective Sergeant Sam Takawira goes on to state in his sworn statement that bail is opposed because of the seriousness of the offence and that the Applicants if granted bail are likely to abscond and not stand trial.

Mr *Siphuma*, who appeared for the Applicants, was unable to controvert the assertions by the police in so far as there seems to be evidence that clearly links the applicants to the crime scene and to the offence.

In determining whether or not the applicants are likely to abscond, the Criminal Procedure and Evidence Act [Chapter 9:07], provides the court with the following indicators in section 117 –

- (i) the nature and gravity of the offence
- (ii) the strength of the case for the prosecution.

In the case of *S v Jongwe* 2002(2) ZLR 209 (S) it was held that in assessing the accused's risk of absconding the court will be guided by these critical factors in tandem with the character of the charges and the resultant penalty should applicant be convicted.

There can be no doubt that robbery is a serious crime and that if applicants are convicted they are likely to be sent to prison for lengthy periods. In *casu*, the applicants used firearms and violence and there are facing multiple counts. There is a real likelihood that if granted bail the applicants will abscond and not stand trial.

In the case of *Attorney General v Mapanga Nhachi* 2009(2) ZLR 150(S), the learned Judge SANDURA JA (as he then was) held that bail proceedings are different from proceedings in a criminal trial. In bail proceedings the court has a wide range of information, including hearsay evidence, as the basis on which to determine whether or not to grant bail to the accused. Accordingly, in terms of section 117A (4) of the Criminal Procedure and Evidence Act,

[Chapter 9:07] the court may consider evidence on oath, including affidavits and written reports which may be tendered by the prosecution or the defence, written statements by the prosecutor, and statements not on oath made by the accused.

In the circumstances, taking into account the nature of the defence that has been advanced by the applicants, which in my view is a bare denial of involvement in the commission of the offence, and the evidence that has been tendered by the State, it is clear that the Applicants are indeed not suitable candidates for bail pending trial.

I concluded that it was extremely unsafe to grant the application for bail pending trial and accordingly dismissed it, and the above are my reasons.

Sansole and Senda applicant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners