SIHLASELWE SIBANDA

Versus

THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 11 February 2021

Bail pending trial

P. Ngulube, for the applicant
K Jaravaza, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. This application was determined on written submissions only.[1]Applicant is being charged with the crime of robbery as defined in section 126 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23]*. On the 10 January 2021, applicant and his co-accused appeared before the Esigodini Magistrates Court, whereupon he was placed on remand and detained in custody. It is alleged that on the 9th November 2020, applicant, in the company of six other persons, five who have not been accounted for, robbed complainants of their property, namely USD $87 000.00, ZAR 38 000.00, four Samsung tablets, a Samsung laptop and two spare keys of two motor vehicles.

In support of the application, applicant has placed the following facts before court: he will plead not guilty to the charge; he did not assault and rob the complainants, he did not go to the house of the complainants; at the time of his arrest he was driving a motor vehicle registered in his wife's name; he is a businessman; at the time of his arrest he had USD $400.00 in his possession; the Form 242 does not link him to the offence, as it does not indicate how he participated in the commission of the offence and what role he played during the robbery; he will deny ever owning a machete and a small rope, which the State is linking to the commission of the crime. Applicant denies that if admitted to bail, he will abscond and not stand trial; he is not a

[1] Paragraph 4 of Practice Directive 2 of 2021 Part III: Hearing of urgent chamber and bail applications: 4) With effect from 22 January 2021, a Judge may consider and dispose of an urgent chamber or bail application on the papers without calling the parties to make oral representations or arguments. Provided that in respect of bail applications, parties shall be at liberty to file Heads of Arguments with or immediately after filing their applications or opposing papers.

holder of any travel document; he denies that he attempted to flee at the time of arrest; he is of fixed abode; and he will not interfere with witnesses.

This application is opposed. In the main, the opposition is anchored on the ground; that applicant is likely to abscond and not stand his trial. In support of its opposition to admit applicant to bail, the State relies on the affidavit of the investigating officer. In his affidavit, the investigating officer says:

1. On the 18th November 2020, I was allocated to investigate a case of robbery, which occurred on the 9th November 2020, around 2200 hours where it is alleged that about six unknown male adults who were armed with a bolt cutter, a cycle chain, a paper spray, two machetes proceeded to 19 Acres farm, Red Rose, Esigodini, where they used pliers to cut the fence securing the yard. The accused persons then proceeded to the sitting room window which is north facing and cut the burglar and four of them gained entry into the house.
2. Whilst inside the house they assaulted the two complainants with a bolt cutter and electric code threatening to rape them if they did not surrender gold and cash they had.
3. The complainants gave in and showed the accused persons where the safe keys were. The accused persons opened the safe and took USD $ 87 000.00, ZAR 38 000.00 and spare keys of two Honda CRV.
4. The accused persons also took four Samsung tablets cell phones, a Samsung laptop and other various properties and went way leaving complainants tied.
5. The complainants sustained some injuries due to the assault.
6. The accused persons were arrested at Zimtiles in Bulawayo, where they tried to run away and were arrested after a chase of about fifty metres from the shop.
7. Most of the stolen property has not been recovered. Four of the accused persons are still at large.

The contention by the prosecution is that the applicant is a flight risk. In terms of section 117(2) (a) (ii) of the Criminal Procedure and Evidence Act [9:07], the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where there is a likelihood that the accused, if he or she were released on bail, will not stand his or her trial or appear to receive sentence. The important considerationis that there has to be a likelihood, i.e. a probability that

such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such likelihood is a factor, to be weighed with all others, in deciding what the interests of justice are. See: *S v Dlamini*1999 (2) SACR 51 (CC) *para*. 53. The court must not grope in the dark and speculate: a finding on the probabilities must be made. See: *S v Dial and Another*2013 (2) SACR 665 (GNP).

Section 117(3)(b) of the Criminal Procedure and Evidence Act, says in considering whether the ground referred to in subsection (2)(*a*)(ii) (not stand his or her trial or appear to receive sentence) has been established, the court shall take into account; the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account.

It has repeatedly been held that in assessing the risk of flight, courts must take into account not only the strength of the case for the prosecution and the probability of a conviction, but also the seriousness of the offence charged and the concomitant likelihood of a severe sentence. The obvious reason of this approach is that the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the applicant to abscond. In *S v Nichas*1977 (1) SA 257 (C) 263G-H, the court said, if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. In *S v Hudson* 1980 (4) SA 145 (D) 164H, the court held that the expectation of a substantial sentence of imprisonment would undoubtedly provide incentive to the accused to abscond and leave the country. In *S v C* 1995 SACR 639 (C) 640H, it was said that whilst the possibility of absconding is always a very real danger, it remains the duty of the court to weigh up carefully all the facts and circumstances pertaining to the case.

In his written submissions, applicant argues that refusal of bail is not a means which should be employed to deter offenders. In terms of the law, the purpose of committing an accused to jail before trial, is not to deter offenders, not to punish him, but to secure his presence in order that he may be tried. In *S v Acheson*1991 (2) SA 805 (Nm) at 822 A – B, at para [14], the court said an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his

guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.

In *casu,* according to Form 242, there is evidence linking the applicant to the commission of the offence. It is alleged that the applicant was positively identified by witnesses; he and his co-accused where found in possession of some of the stolen property; the weapons used, two machetes were recovered through the indications of the applicant and his co-accused; two pieces of wire and two pieces of rope were recovered from the scene; and the applicant and his co accused made indications at the scene on how the offence was committed. In view of the above, I find that the state has a strong *prima facie* case against the applicant. He is facing a serious charge of robbery. If convicted, he is most likely going to be sentenced to a lengthy custodial term, thus he will be tempted to abscond and not stand trial. The temptation for the applicant to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002.

Furthermore, the fact that applicant attempted to run away from the police before arrest and before charges were formally put to him is a factor that this court will have to consider in deciding what the interests of justice are. Where there is a cognisable indication that an accused person would evade his trial if released from custody, the bail court would be serving the interests of justice by refusing bail. The liberty of an accused person would have to be compromised under those circumstances. See: *S v Dial and Another*2013 (2) SACR 665 (GNP).

Disposition

Therefore, upon careful consideration of all the facts and the circumstances based on the facts and evidence before me, weighing up the interests of justice against the right of the accused to his personal freedom and any potential prejudice because of his detention, I am satisfied that interests of justice do not permit his release from custody. There is a likelihood that he will attempt to evade his trial.

I, therefore order as follows:
The application for bail is accordingly dismissed.

Sengweni Legal Practitioners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners