

NOXMAN NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 27 JUNE AND 29 SEPTEMBER 2005

R Ndlovu for applicant
Miss B Wozhele for respondent

Bail pending extradition

CHEDA J: This is an application for bail pending extradition. Applicant is a Zimbabwean citizen and ordinarily resident in Zimbabwe. He was arrested on 11 May 2005 at his homestead in connection with a case of armed robbery and escaping from lawful custody in South Africa.

The National Prosecution Authority in a letter to the Attorney-General, Harare advised the Zimbabwean authorities that applicant is possibly facing one count of robbery and one of escaping from lawful custody. Further, they requested that the Zimbabwean authorities arrest and hold the applicant pending his extradition process.

Mr *Ndlovu* for applicant submitted that in terms of our law applicant is entitled to his freedom as he is facing allegations which have not yet been proved. This approach is no doubt correct as it is indeed a time honoured principle in bail applications. The presumption of innocence until proven guilty indeed operates in

favour of an accused person. This principle operates both during investigation and prosecution of the offender. Therefore, the presumption of innocence continues to apply in

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favour of the suspect until his guilt has been established by due process of the law. This, therefore, implies that the accused has a right to liberty which is his fundamental right.

As a general rule these courts will not easily depart from this principle. It should however, be understood that the legal process should be allowed to grind to a smooth halt and this can be achieved by ensuring that those who are facing allegations of wrongdoing should be allowed to have their day in court. The proper administration of justice should not be frustrated by suspects who when granted bail fail to stand trial. This approach was clearly stated in *S v Fourier* 1973(1) SA 100 at 101G-H where MILLER J stated;

“It is a fundamental requirement of the proper administration of justice that accused person stands trial and if there is any cognisable indication that he will not stand trial if released from custody the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused person and despite the presumption of innocence.”

Applicant awaits extradition to the Republic of South Africa where the alleged offences were committed. He submitted through his legal practitioner that he will abide by bail conditions

and will not abscond as he has no travel documents. It is not uncommon for people to travel to and from Zimbabwe to neighbouring countries without proper travel documents. Therefore the fact that one has no passport and/or travel document is not an assurance that he will not abscond to a country where he will be inaccessible.

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Indeed, there is an Extradition Treaty signed by Zimbabwe and the Republic of South African Governments to cater for situations as the present one. This treaty serves to ensure that a suspect is arrested by both countries in the event of the suspect running back to his country after committing offences in foreign countries. In fact the extradition process is the only lawful method which can ensure that where someone is wanted for a crime allegedly committed in a foreign country and has absconded to another state is returned to that country in order for him to appear before the courts.

These courts have both the power to extradite such persons and to admit them to bail. But such power must be exercised with extreme care and caution. The reason being that, applicant's interest and constitutional right must be balanced against the interests of a foreign state who only

has an allegation against him bearing in mind the presumption of innocence until proven guilty which operates in his favour throughout.

Against this principle, there is a positive identification by a photograph and finger prints of applicant in South Africa where he is known as Thulani Khumalo. The correctness or otherwise of this identification is to be verified in South Africa. Once applicant is released from custody he is unlikely to avail himself at the trial or at any other preparatory examination. If this occurs it will no doubt frustrate the proper administration of justice.

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For the above reason, this application is dismissed.

*James, Moyo-Majwabu & Nyoni applicants' legal practitioners
Criminal Division of the Attorney-General's Office, respondent's
legal practitioners*