

OBED NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 18 NOVEMBER 2015 & 11 FEBRUARY 2016

Bail Application

MAKONESE J: The applicant was arrested on 19th October 2015 on a charge of murder in contravention of section 47 of the Criminal Law (Codification and Reform) Act (Chapter 9:23), it being alleged that on 18th October 2015 at Bemba Primary School, Tsholotsho, applicant who is employed as a school teacher assaulted and hit deceased several times with an axe handle and sjambok on suspicion of infidelity. The deceased was accused's girlfriend at the material time. The deceased died on the spot as a result of injuries sustained in the assault.

In terms of section 117 (1) of the Criminal Procedure and Evidence Act (Chapter 9:07) bail is granted at the discretion of the court where it is satisfied that the release of the applicant will not jeopardize or prejudice of the interests of justice. It is trite that an accused person is presumed innocent until proven guilty.

The applicant denies the allegations of murder. He admits that she assaulted her with fists and open hands all over the body. He claims in his bail statement that he only became aware of the death of the deceased the following day when he was alerted by a fellow teacher.

Bail is opposed by the state and an affidavit of Patrick Mbengo, the investigating officer sets out the basis upon which bail is being opposed. The affidavit is in the following terms:

- “1. I am a duly attested member of the Zimbabwe Republic Police currently stationed at ZRP Tsholotsho doing investigation duties.

2. I am the investigating officer in a case of murder which occurred at Bemba Primary School, Tsholotsho on the 18th October 2015 in which Obed Ncube assaulted Sarudzai Mutuma to death.
3. Allegations are that accused assaulted the now deceased with open hands several times on the face, with a sjambok and axe handle after accusing the now deceased of having an affair with an unknown boyfriend.
4. I wish to oppose bail being that:-
 - (a) the accused person may interfere with state witnesses. The accused works at the same school with witnesses and investigations are still under way.
 - (b) he is likely to abscond given that he escaped from the scene after committing the offence.
 - (c) he is facing serious allegations which go with a severe sentence upon conviction.”

In *S v Makamba* SC 30/04 the court stated that the primary considerations in a bail application are:-

1. Whether the applicant will stand trial in due course (likelihood to abscond)
2. Whether the applicant will interfere with investigations of the case against him or tamper with prosecution witnesses (likelihood to interfere with witnesses)
3. Whether the applicant will commit other offences while on bail (propensity to commit further offences)
4. Others considerations which the court may consider good and sufficient.

With regards the first ground (the likelihood to abscond) it has been recognized in our law that it is a fundamental requirement for the proper administration of justice that an accused person should stand trial. If there is an indication that the accused will not stand trial if released on bail, the court will secure the needs of justice by refusing to grant bail. See the case of *S vs Fourie* 1973 (1) SA at page 101.

It is not disputed that upon committing the offence, the accused fled the scene. The investigating officer explained in a supplementary affidavit that when he attended the crime scene the accused could not be located. The accused was called on his mobile and indicated to the investigating officer that he was in the vicinity of the school premises and was coming to

hand himself over. The accused did not turn up as promised and was arrested later in the day by villagers who included members of the Neighbourhood Watch Committee some 15-20 kilometres from the school. It is my view that the conduct of the accused indicates that he was absconding from the scene. It were the villagers who apprehended the accused and handed him over to the police. There exists therefore a strong possibility that the accused if granted bail pending trial is likely to abscond to avoid standing trial. The applicant had the tenacity to mislead the police by informing them that he was going to surrender himself and yet in reality he was attempting to flee.

In the Form 242 (Request for Remand Form) the applicant gave his address as house number 16065 Nkulumane, Bulawayo. In his bail statement he states that "... he ordinarily resides at house number 1611 New Magwegwe and only went there to visit as the property was owned by a cousin. With regards the Nkulumane address, the investigating officer was told by the owner, one Florence Sithole that applicant used to reside there but moved out in 2013, purportedly to Pumula suburb. It stands to reason that the applicant has not been candid with the court. He is facing a serious offence and his conduct soon after the commission of the offence clearly shows that he is a flight risk. It is my conclusion that the applicant is not a suitable candidate for bail pending trial.

It is for the above reasons that the application for bail pending trial was dismissed.

Mcijo, Dube & Partners, applicant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners