

NQOBILE MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 20 AUGUST 2021 & 30 AUGUST 2021

Application for bail pending trial

T. Ndlovu, for the applicant
T.M Nyathi, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is being charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 24th May 2021, at Heathfield Mine, Collen Bawn applicant had a misunderstanding with Reason Ngwenya (deceased) and he armed himself with a kitchen knife. He then stabbed deceased once on the chest resulting in his death on the spot.

In support of the application, applicant filed a bail statement and placed the following facts before court: he contends that he has a plausible defence to the charge. His version is that in the company of his two work colleagues they confronted their employer (deceased) because he had not paid them for months. During the confrontation a misunderstanding arose, one of his colleagues armed himself with a knife and stabbed the deceased. Applicant contends that he was drunk and does not know who between the two of his colleagues stabbed the deceased. He contends that there was neither an agreement to stab the deceased nor was it foreseeable that one of them would stab the deceased. The agreement was just to go and demand money from the deceased and no more. His two colleagues are on the run. Again he avers that he is not a holder of a valid passport; and he has no other travel document and has no intention of leaving the country.

The application is opposed. The basis of the opposition is that if released on bail applicant is likely to abscond and evade his trial. It is contended that the State has a strong *prima facie* case against the applicant. Again it is argued that applicant attempts to mislead this

court in respect of how the deceased met his death. It is argued that it is not in the interests of justice to release applicant on bail pending trial.

The law and the facts

Mr *Nyathi*, counsel for the respondent contends that applicant is charged with the crime of murder referred to in Part II of the Third Schedule of the Criminal Procedure and Evidence Act [Chapter 9:07] (Act). I did not hear Mr *Ndlovu*, counsel for the applicant controverting this submission. I agree that applicant is charged with a crime of murder referred to in Part II of the Third Schedule.¹ Section 115C (2) (a)(ii) B of the Act casts the burden on an applicant charged with the crime of murder referred to in Part II of the Third Schedule of showing that exceptional circumstances exist which in the interests of justice permit his or her release on bail.²

According to Mr *Ndlovu* the legislative provision that casts the burden on an accused to show that exceptional circumstances exist which in the interests of justice permit his release on bail is constitutionally invalid. He indicated that he had case law in support of this submission, which he undertook to avail to the court. At the time of writing this judgment he had not availed such case law and I am not aware of any case law on this point.

The constitutionality of the provision that cast the burden of proof on the applicant has not been ruled constitutionally invalid. Such provision is valid and enforceable. The procedure of declaring a legislative provision constitutionally invalid is clearly set out in the Constitution. Under the Constitution, the Constitutional Court is the only tribunal with the power to make a final and binding decision on the question of the constitutionality of a legislative provision. See: *The State v Chokuramba & Ors* CCZ 10/19. Therefore the legislative provision that cast the burden of proof on a bail applicant charged with the crime of murder to show that

¹ Murder otherwise than in the circumstances referred to in paragraph 1 of Part I.

² Section 115C(2)(a)(i)(ii) B of the Criminal Procedure and Evidence Act [Chapter (9:07)] says: where an accused person who is in custody in respect of an offence applies to be admitted to bail—

(a) before a court has convicted him or her of the offence—

(i) the prosecution shall bear the burden of showing, on a balance of probabilities, that there are compelling reasons justifying his or her continued detention, unless the offence in question is one specified in the Third Schedule;

(ii) the accused person shall, if the offence in question is one specified in—

A.

B. Part II of the Third Schedule, bear the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail.

exceptional circumstances exist which in the interests of justice permit his release on bail are constitutionally valid and the courts must give full effect to them.

Mr *Ndlovu* argued that section 50 (1) (d) of the Constitution of Zimbabwe (Amendment No. 20) Act (Constitution) entitles any person who has been arrested to an unconditional release on reasonable conditions pending a charge or trial except where there are compelling reasons justifying continued detention. I agree. However this constitutional provision provides a broad framework within which a bail application should be considered. While section 117(2) of the Criminal Procedure and Evidence Act [Chapter 9:07] defines compelling reasons and provides the basis upon which it may be in the interests of justice to refuse to release an accused on bail.³ Lastly section 117(3) of the Act provides practical guidelines which a court may consider in deciding whether any of the grounds set out in section 117(2) a-d of the Act have been established.⁴

In this application respondent relies on the strength of the case for the prosecution and nature and gravity of the likely penalty and the corresponding incentive of the applicant to flee. In its opposition to the granting of bail the State placed its reliance on affidavits deposed to by the investigating officer and other four other witnesses. It is argued that applicant is clearly

³ Section 117(2) of the Criminal Procedure and Evidence Act says: The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—

(a) where there is a likelihood that the accused, if he or she were released on bail, will—

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or

(b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

⁴ Section 117(3) of the Act provides that:

In considering whether the ground referred to in—(b) subsection (2) (a) (ii) has been established, the court shall take into account—

(i) the ties of the accused to the place of trial;

(ii) the existence and location of assets held by the accused;

(iii) the accused's means of travel and his or her possession of or access to travel documents;

(iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor;

(v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee;

(vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;

(vii) any other factor which in the opinion of the court should be taken into account.

linked to the crime of murder. He was seen by the witnesses stabbing the deceased, which stab wound is said to have caused the death of the deceased. Applicant was apprehended at the scene of crime by members of the public. The applicant's confirmed warned and cautioned statement to the police reads as follows:-

I admit to the allegations levelled against me that I stabbed Reason Ngwenya with a kitchen knife once on the chest resulting in his death. What prompted me to stab the deceased is that he had fired me and my friends from his mine after my friends had stolen some explosives thereafter he did not pay us for the days we had worked for.

It is quite clear from the legal authorities that the critical factors the court has to factor into the equation in deciding whether a bail applicant is a flight risk are the nature of the charges; the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weaknesses of the State case. On the facts and evidence before court, I find that the prosecution has a strong *prima facie* case against the applicant. Applicant is facing a serious charge of murder, where a lethal weapon was used to inflict the fatal wound.

It is trite that the seriousness of the offence charged standing alone, cannot be a ground to decline to release an applicant on bail pending trial. This is so because no matter the seriousness of the offence, the presumption of innocence still operates in favour of the accused. There must be something more than the mere seriousness of the offence, for it to be in the interests of justice to refuse to release an accused on bail. In *S v Acheson* 1991 (2) SA 805 Nm, the court said the key consideration is whether or not the accused will return to court if released and ultimately whether he will stand trial.

In this case the evidence against the appellant is very cogent. In his confirmed warned and cautioned statement applicant admits inflicting the stab wound that caused the death of the deceased. I am satisfied that the prospects of a conviction for an offence involving the death of the deceased are very high indeed. I am also satisfied that the prospects of the applicant receiving a long prison term if convicted of murder, are real.⁵ I am equally satisfied that the temptation for the applicant to abscond if granted bail is irresistible and real. See: *S v Jongwe* SC 62/2002.

⁵ Section 117 (3) (b)(iv) and (v) of the Criminal Procedure and Evidence Act.

The burden of proof in this application is on the applicant to show that exceptional circumstances exist which in the interests of justice permit his release on bail.⁶ The applicant is facing a crime referred to in Part II of the Third Schedule of the Criminal Procedure and Evidence Act [Chapter 9:07].⁷ In terms of section 115C (2) (a)(ii) (A) of the Act applicant bears the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his release on bail. It then follows that the bar for granting bail in the crime of murder has been lifted a bit higher by the legislature. This is what applicant has to contend with. For him to discharge such a burden he must adduce evidence before court. There is no evidence before court. Applicant has not adduced evidence i.e. orally or by means of an affidavit which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release on bail. A bail statement not on oath does not constitute evidence.

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, in such circumstances have to give-way to the proper administration of justice. See: *S v Dial and Another* 2013 (2) SACR 665 (GNP). Furthermore, the applicant is not only a flight risk but his release on bail given the serious allegations against him of stabbing his employer to death will undermine the objective and proper functioning of the criminal justice system and the bail institution. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

Disposition

On a conspectus of the facts and all the evidence placed before court, I am of the view that applicant has not discharged the burden of showing that exceptional circumstances exist which in the interests of justice permit his release on bail.


⁶ Section 117 (6) of the Criminal Procedure and Evidence Act says:
Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in—

(a).....

(b) Part II of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that the interests of justice permit his or her release. (My emphasis).

⁷ Murder otherwise than in the circumstances referred to in paragraph 1 of Part I of the Third Schedule.

In the circumstances, the bail application is hereby dismissed.

A handwritten signature, possibly 'J. S.', followed by the date '30/08/2021'.

Sansole and Senda, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners