

NKOSANA NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 27 AUGUST AND 3 SEPTEMBER 2021

Application For Bail Pending Trial

Ms D Ncube, for the applicant
B Gundani, for the respondent

KABASA J: This is an application for bail pending trial. The applicant is facing a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. It is alleged the applicant with 3 others were hired by one Mlamuleli Ncube to kill the deceased and Nomalanga Sibanda as they were an unwelcome competition in a gold buying enterprise. They were paid US\$250. On 16th January 2021 at around 1600 hours the applicant and his 3 accomplices followed the deceased and Nomalanga Sibanda who were on their way from Ncema river and caught up with them at Mzingwane river. They proceeded to assault the 2 with machetes, axes and a crow bar before taking thirty grams of alluvial gold, US\$900, ZWD 3000, an ITEL cellphone and Nomalanga's personal identity documents. Nomalanga survived the attack but the deceased, Remember Moyo was not so lucky. He succumbed to his injuries the following day at Mpilo hospital.

The application for bail is opposed. The Investigating Officer deposed to an affidavit and so did Nomalanga Sibanda and Bongani Mkwanzani. Bongani is one of the assailants and has already been denied bail. The import of these sworn statements is that the applicant who was in the company of the assailants, was now staying in the bush in order to evade arrest. Efforts to arrest him at his father's home proved fruitless until word was received on 7th May 2021 that the applicant was sleeping at one Francisca Chapadera's homestead. A raid was conducted thereat at around 2345 hours. On realising that members of the CID had managed to locate him so as to effect an arrest, the applicant fled into the night. Gun shots fired into the air did not deter him until he tripped over a fence and fell. Only then was he arrested. He is therefore a flight risk.

The seriousness of the offence and the likely penalty should he be convicted will induce him to abscond should he be granted bail.

The state has a strong *prima facie* case as the applicant was placed at the scene of the crime by Nomalanga, his co-accused and from his own 'confession'.

In addressing the state's concerns the applicant submitted that his co-accused are the ones responsible for the deceased's death. He had no prior knowledge that they were going to assault the deceased and Nomalanga and the attack on the two shocked him. His only folly was that he did not report the matter to the police but this was due to fear as he had been threatened with death. He is married with four minor children, the youngest of whom is only a month old. He is desirous to fend for his family as he is the sole breadwinner. His incarceration incapacitates him from providing for his family. He also wishes to clear his name and is therefore a suitable candidate for bail.

At the hearing of this application, *Ms Ncube* urged the court to consider that Nomalanga Sibanda in her sworn statement mentions that one of the assailants was standing at a distance and imploring the others not to kill but just to take the property. This person was the applicant and this goes to show that he was not involved in the murder. Bongani Mkwanzani who also deposed to an affidavit and was involved in the murder does not say applicant participated in the assault and this confirms the applicant's explanation that he was not involved in the assault although he was present.

His fleeing from the police on the day of the arrest was only because he was scared of the threats issued out by those who killed the deceased.

Counsel urged the court to find that the applicant is a good candidate for bail and there are no compelling reasons to deny him such bail.

The applicant is facing an offence covered by Part I of the Third Schedule of the Criminal Procedure and Evidence Act, Chapter 9:07. Section 115 C (2)(a)(ii) of the same Act provides that: -

(2)"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) ...

- (ii) the accused person shall, if the offence in question is one specified in –
 - A. Part I of the Third Schedule bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail ...”

In looking at this provision the court must not lose sight of s 50(1)(d) of the Constitution. The Constitution provides that a person arrested or detained must be released unconditionally or on reasonable conditions pending a charge or trial unless there are compelling reasons justifying their continued detention.

Section 117 of the Criminal Procedure and Evidence Act equally speaks to the entitlement of a person who is in custody to bail unless the interests of justice dictate otherwise.

The question therefore is whether there are compelling reasons to deny the applicant bail and whether the applicant has shown, on a balance of probabilities, that it is in the interests of justice that he be admitted on bail. The state’s main contention is that the applicant is a flight risk. If granted bail, he will not stand trial thereby jeopardising the interests of justice.

It is however well to remember that in every case where an applicant seeks bail pending trial, the presumption of innocence operates in his or her favour.

In *S v Ncube* 2001 (2) ZLR 556 (S), the Supreme Court stated that a court considering an application for bail pending trial must be aware of the presumption of innocence which operates in favour of the applicant. Bail should therefore be granted where possible.

In *S v Biti* 2002(1) ZLR 115 (H) the court equally underscored the need to respect the interests of a person’s liberty whenever possible. The court held that where possible the court should lean in favour of the liberty of the applicant whenever the interests of justice will not be prejudiced. (See also *S v Ndhlovu* 2001 (2) ZLR 261 (H) and *S v Mwonzora and Others* HH 72-11).

There is therefore need to balance the interests of society which are that an accused stands trial and the interest of the right to liberty of the individual. It is a balance that is not always easy to achieve but one that should be struck with a view to guard against the denial of bail working as a punitive measure.

With that said, are the state's fears that the interests of justice will be jeopardised well founded? I think they are.

The offence *in casu* was committed in January 2021. The deceased succumbed to his injuries a day after the brutal assault which occurred in the course of a robbery. The police were able to account for one of the assailants a month later and this was because, as shown in Bongani's affidavit, the assailants had fled from that area.

The applicant was only arrested in May, about 5 months later. The delay in accounting for him was not for want of trying on the part of the police. Efforts to arrest him commenced immediately following the report made by Nomalanga. The applicant could not be located at his father's homestead and it stands to reason that had the father been aware of his whereabouts that would have been communicated to the police.

There were numerous raids conducted with the assistance of ZRP Support Unit to no avail, until May 2021 when the police received information of the applicant's whereabouts. A raid was conducted at almost midnight. The applicant managed to flee and gun shots did not deter him. He was determined to flee until a fence halted his flight.

Counsel submitted that such conduct was due to fear of applicant's co-accused's threats. This raid occurred at midnight and none of these co-accused were in that area. Even if they were, is it suggested that they were lurking in the darkness watching the applicant and would therefore have seen him being arrested? I must say the explanation does not make much sense. The applicant said he did not report the offence due to fear. One can give him the benefit of the doubt and accept that he did not want to be the one reaching out to the police in order to report the matter. However the police then sought to arrest him not so as to get information but to hold him to account over the offence. He however was determined to flee and would have made good his escape were it not for the fence which tripped him.

The state's fear is well grounded. The fear of abscondment is not just a bald unsubstantiated assertion. (*State v Hussey* 1991 (2) ZLR 187 (S)).

In *S v Jongwe* 2002 (2) ZLR 209 (S) CHIDYAUSIKU CJ set out guidelines to be considered when assessing the risk of an applicant absconding before trial.

In casu the charges are undoubtedly of a serious nature and the likely penalty upon conviction will be a lengthy term of imprisonment if not worse. The state's case is strong. The applicant placed himself and was placed at the scene and his conduct before and on the day of arrest are all factors which weigh against him.

Granted, where conditions can be imposed to allay fears of abscondment, the court should consider imposing such conditions and grant bail. However the circumstances of each case must be considered in deciding whether the imposition of suitable conditions suffices. In a case where the applicant, as *in casu*, was so determined to flee, even risking being shot, I do not see reporting conditions allaying the well grounded fear of abscondment.

The applicant is indeed innocent until proven guilty but such guilt or innocence must be established and that can only be done if the applicant allows the wheels of justice to turn unimpeded. Where there is a real likelihood that the applicant may not avail himself for trial, it is not in the interests of justice to lean towards his liberty.

I therefore come to the conclusion that the applicant is not a good candidate for bail. The interests of justice demand that he be incarcerated so as to ensure he attends trial. He has not shown, on a balance of probabilities, that it is in the interests of justice for him to be released on bail pending trial. I must hasten to add that such incarceration is not meant to be anticipatory punishment but to ensure applicant stands trial.

In the result the application for bail pending trial be and is hereby dismissed.

Job Sibanda and Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners