

MAHLULI MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 16 MARCH AND 7 APRIL 2022

Bail Application

P. Sibanda, for the applicant

Ms N. Ngwenya, for the respondent

MAKONESE J: This is an application for bail pending trial. The application is opposed. The applicant is facing allegations of contravening section 189 as read with section 47 of the Criminal Law Codification and Reform Act (Chapter 9:23) that is attempted murder. Applicant faces a second count of malicious damage to property in contravention of section 140 of the Code. He faces a third count of unlawful entry into premises in violation of section 131 (2) of the Code and a fourth count of assault as defined in section 89 of the Code. Applicant denies the allegations and avers that he was not present at the scene of the crime as alleged by the state. Applicant contends that this was a case of mistaken identity and that he has been wrongly implicated.

Background Facts

The state alleges that on 2nd January 2022 the applicant and four other accomplices proceeded to the complainant's homestead under Chief Marupi, Tshanyangwe, Gwanda around 0300 hours armed with machetes, iron bars, spears, knobkerries, logs, axes and stones. Upon arrival the applicant and his associates started shouting advising the complainant one Elfes Dube to come out of his bedroom as he was a traitor who supplied information to the police regarding cattle rustling operations in the area. The applicant and his accomplices threw stones at the complainant's windows and used axes to break down the doors in order to gain entry into the rooms. Complainant's two sons who were in one of the rooms managed to escape through a window and ran away. Applicant and his colleagues entered complainant's room and switched on a light. Complainant was asleep with his wife. Applicant and his gang assaulted complainant and his wife with knobkerries and logs indiscriminately. Complainant was struck three times on the head with a machete resulting in him bleeding profusely. Complainant's wife managed to hide under a bed. The complainant was dragged out of the house and the assaults continued. Complainant's daughter who was sleeping in a separate bedroom came to the scene to find out what was happening. She positively identified the applicant. She pleaded with applicant not to assault her father to no avail. Complainant fell unconscious and was left lying in a pool of blood. He sustained three deep cuts on his head, lacerations all over the body and a swollen back. Complainant's daughter knew the applicant as a former classmate and when she pleaded with him not to continue with the assault she was threatened with assault if she persisted in disturbing them in what they were doing. Providence Dube, complainant's daughter was not mistaken about the identity of the applicant as she was known to him prior to the commission of the offence.

SUBMISSIONS BY THE APPLICANT

The applicant contends that he is a suitable candidate for bail in that upon his arrest he never attempted to flee. He did not resist arrest as alleged by the state. The alleged crime occurred on the 2nd of January 2022. He was arrested at his homestead on the 6th of January 2022. Applicant avers that had he had an intention to abscond he would have done so in the four days before his arrest. Applicant avers that he stays close to the Zimbabwe/Mozambique border and could have easily crossed over to neighbouring Mozambique to evade prosecution. Applicant did not leave the country because he is an innocent man. Applicant avers that his conduct is not indicative of a person that will abscond if granted bail pending his trial. Applicant submits that it would be in the interests of justice if he were granted bail.

Applicant avers in his Heads of Argument that the state has not sufficiently proved its allegations that granting the application would endanger the public or that he could interfere with witnesses. Applicant further indicates that there are no compelling reasons for the denial of bail as provided for in section 50 (1) (d) of the Constitution (Amnd No. 20) of 2013. In support of this assertion, the applicant cited the case of *S v Kuruneri* 2004 (1) ZLR 2004, where the learned Judge stated as follows:

“... there was no basis for the view that the accused person has an onus to discharge to enable him to be admitted to bail. The presumption of innocence operates fully in bail applications made before the accused has been found guilty, and the court is expected and required to lean in favour of the liberty of the accused.”

Applicant argues that stringent bail conditions may be imposed to allow him to be admitted to bail. The interests of justice would still be safeguarded.

SUBMISSIONS BY THE STATE

The state argues that there are compelling reasons warranting the incarceration of applicant pending his trial. The state placed reliance on the Affidavit of the Investigating Officer, Ronald Chizutu. The state concedes that in terms of our law an accused person is entitled to his release pending trial unless there are reasons as to why their detention has to continue. It is argued that section 117 (2) (a) (ii) of the Criminal Procedure and Evidence Act (Chapter 9:07) provides that it will be in the interests of justice to deny an accused bail if there is a likelihood that he may abscond if he is released on bail. Further, section 117 (3) (b) provides that in determining whether or not there is a likelihood to abscond on the part of the accused, the court may take into account the nature and gravity of the offence charged and the likely penalty upon conviction and the strength of the prosecution case. The state avers that it has a strong *prima facie* case against the applicant as he was positively identified at the scene by Providence Dube, a former classmate of the applicant. Providence is said to have actually conversed with the applicant pleading with him to stop the assault upon her father. The issue of mistaken identity therefore falls away. In any event, it is the Investigating Officer's sworn testimony that applicant was raided at around 0300 hours at his homestead and attempted to flee but was apprehended. The state avers that this is sufficient indication that if given a chance applicant may abscond and flee from the jurisdiction of the court to avoid trial. Applicant is facing very serious charges in particular attempted murder. It is trite that the seriousness of the offence and the strength of the case for the prosecution can lead to applicant absconding for fear of attending trial that would certainly be against him and result in a lengthy custodial sentence.

THE LAW

The law regarding bail pending trial is now well established in this jurisdiction. In *S v Jongwe* SC 62-2002 the court denied bail on the grounds that the accused was facing a very serious offence which would attract a lengthy custodial sentence upon conviction. In the present case the state has a strong *prima facie* against the applicant. In the event of a conviction he is likely to be sentenced to a lengthy custodial sentence. This fact alone may induce the applicant to abscond if released on bail pending trial. In *Aitken & Anor v Attorney General* 1992 (1) ZLR 249 (S) the court laid down the following guiding principles in the determination of bail applications:

- (a) the courts ought to strike a balance between the liberty of the accused and the administration of justice.
- (b) The accused must show on a balance of probabilities that it is in the interests of justice that he should be freed on bail.
- (c) In assessing the risk of the accused absconding, the nature of the charge and the severity of the sentence must be examined. The apparent strength or weakness of the state case must be assessed.

CONCLUSION

In assessing bail in this matter the court must consider that the applicant was positively identified at the scene of the crime. The state has a strong *prima facie* case against the applicant. The applicant is facing serious charges. The applicant attempted to flee during this arrest. He is a flight risk. The chances of abscondment are high. It is my view that the applicant is not a suitable candidate for bail.

For the foregoing reasons, the application for bail pending trial is hereby dismissed.

Masawi and Partners, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners