

LOOKOUT MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 13 AND 27 JANUARY 2022

Bail application

P Butshe, for the applicant
K. M. Guvheya, for the respondent

MAKONESE J: The applicant appeared at Tredgold Magistrates Court, Bulawayo for an initial remand on 1st December 2021 facing a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). Applicant was remanded in custody pending trial. This application is motivated by the applicant's desire to secure his release on bail pending his trial. The application is opposed by the state.

FACTUAL BACKGROUND

On 28th November 2021 and at 2200 hours the applicant and his colleague Bekithemba Dube were drinking beer with the deceased person at Hope Valley Bottle Store, Kensington at Umguza. A misunderstanding arose between Bekithemba and the deceased. The deceased had insulted Bekithemba by uttering the words "musatanyoko", which is translated to mean "your mother's privates". Bekithemba assaulted the deceased with open hands on the face. Deceased fled the scene. The applicant intervened and pursued the deceased and caught up with him. Applicant produced an okapi knife and stabbed the deceased once in the chest. The deceased succumbed to injuries sustained in the attack and died. Applicant denies the allegations and states in his bail statement as follows:

"At some point the deceased had a misunderstanding with Bekithemba Dube after he (deceased) had stamped on Bekithemba's foot. The two then got involved in a fist fight and Bekithemba was overcoming the deceased. The deceased then produced a knife and lifted it, directing it to stab Bekithemba. Some people screamed and it was at that moment that the applicant stabbed the deceased in order to defend Bekithemba Dube who was then under attack from the deceased who was about to stab him."

Submissions by Applicant

Applicant contends that he is a suitable candidate for bail. He has no previous convictions. He has no pending criminal charges in any court. He is of fixed abode and there is no danger of abscondment. Applicant avers that he did not abscond after committing the offence but remained at his workplace up to the day after the stabbing when he was arrested by the police. Applicant argues that the Investigating Officer in this matter is speculating that applicant is likely to escape if granted bail. Applicant states that he has not conducted himself in any manner to suggest that he may abscond. On the assertion by the Investigating Officer that applicant and his colleagues who are artisanal miners are nomadic persons who can move from one mining area to another and that if granted bail they may abscond, applicant denies that he harbours any intention to flee and abscond.

Submissions by the State

The state opposes the granting of bail on the grounds that applicant faces serious allegations and that if granted bail the applicant may be tempted to skip bail and avoid standing trial. The state contends that the applicant admits stabbing the deceased once in the chest with an okapi knife. The fact of the stabbing is not denied by the applicant. The state indicates that if convicted he faces a lengthy prison sentence. The state attached an affidavit deposed by the Investigating Officer in this case who indicated that the applicant was seen by witnesses sharpening an okapi knife prior to the stabbing.

Application of the law to the facts

An applicant in a bail application is entitled to bail as a right. This is provided for in terms of section 50 (1) (d) of the Constitution of Zimbabwe, 2013. An accused facing allegations in a criminal court is entitled to bail pending his trial unless there are compelling reasons justifying his continued detention. In terms of section 115 c (2) (a) (i) of the Criminal Procedure and Evidence Act (Chapter 9:07) an applicant charged with an offence specified in Part 1 of the Third Schedule to the Act, 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, unless the court determines, that in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden. In terms of section 117 (6) (a) of the Criminal Procedure and Evidence Act, the court is empowered to detain an

applicant in custody until their matter is dealt with in accordance with the law. The section also affords the applicant the opportunity to adduce evidence with a view to persuade the court to release him on bail pending his trial.

Applicant is facing one count of murder. The offence is specified under Part 1 of the Third Schedule to the Criminal Procedure and Evidence Act. Applicant admits that he caused the death of the deceased by stabbing him once in the chest with a knife. The court may only release an applicant facing such serious allegations where the interests of justice will not be compromised. It is trite that the seriousness of an offence on its own is not sufficient grounds to deny an applicant bail pending his trial.

The granting or refusal of bail is matter of discretion for the court. The court must balance the interests of the applicant against those of the state. In the case of *Aitken & Anor v Attorney General* 1992 (1) ZLR 249 (S) the Supreme Court reviewed a long line of cases and laid down certain guiding principles for determination of bail applications. In judging the risk that an accused person would abscond the court laid down the following factors:

- (a) the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction;
- (b) the apparent strength of the state case;
- (c) the ability of the accused's ability to reach another country and abscond.
- (d) the accused's behaviour.

In *Jongwe v The State* SC 62-02, the court took the view that where the evidence against the applicant was overwhelming and the prospects of a conviction were a certainty, the temptation to flee was real.

I am satisfied that the applicant in this matter does not have any real defence to the charge. His conviction is not in doubt. Upon conviction he will mostly likely receive a lengthy prison sentence. That on its own will provide sufficient inducement for the applicant to abscond. There are compelling reasons for the applicant to be denied bail pending his trial.

In the circumstances, the application for bail pending trial is hereby dismissed.

Mathonsi Ncube Law Chamber, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners