CRB B353-5/03

JOYCE NYAMBUYA
and
MODYNE NYAMBUYA
and
BRIAN RWATA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 24 and 28 March 2003

Bail Application

Ms *Nyamusamba*, for the applicants
Mr *Godzi*, for the respondent

MAKARAU J: The applicants were arrested on 12 March 2003, on a charge of murder. It is alleged that on 8 January 2003, at no 11 St Lucia drive, Marlborough, the accused murdered Kenneth and Hillary Allanson, ("Kenneth" and "Hillary" respectively).

The background facts to the allegations are as follows:

The first applicant is a single mother and mother to the second applicant. The third applicant is a cousin to the two applicants. The first and second applicants were employed by the deceased as domestic workers. All three applicants were staying at no 11 St Lucia drive, Marlborough, Harare.

On 8 January 2003, the deceased came back from work during the lunch hour. Hillary remained at home while Kenneth went to play golf. Prior to the return of Kenneth from golf, the applicants murdered Hillary by striking her on the back of the head with an axe. She died instantly. The applicants then took her remains and put them in a metal trunk that the accused had placed in a disused and empty swimming pool for that purpose. On the same day, when Kenneth returned from golf, the

applicants murdered him by striking him on the back of the head with an axe. He died instantly. The applicants placed his remains in the same metal trunk where they had placed the remains of Hillary. The applicants then poured petrol on the two bodies and set them alight and burnt the two bodies, using the petrol and some firewood. After burning the bodies, the applicants scattered the ashes near a wall at Marlborough Primary School. They then realised that there were some bones in the ashes. They took these and the axe used to commit the murder and hid them in a bush somewhere in the neighbourhood.

The applicants also burnt the travel documents of the deceased, as well as Hillary's handbag and Kenneth's briefcase. On 9 January 2003, they made a report to the police that the deceased were missing, after having been collected by friends.

The three applicants then took occupation of the residence of the deceased and started selling some of the property in the residence. On 12 March 2003, they were then arrested.

The accused now apply for bail, pending trial.

The State has opposed the application. Attached to the notice of opposition are copies of the warned and cautioned statements made by the applicants, in which they detail the murder of the deceased and the role that each one played in the gruesome incident. When the statements were recorded, the applicants' legal practitioner was present.

While the warned and cautioned statements by the applicants have not been confirmed, they can hardly be termed shaky evidence as submitted by their counsel. The applicants were allegedly found in possession of some of the property of the deceased, including the deed of transfer in respect to the deceaseds' immovable property.

There is no indication in the bail application that the warned and

cautioned statements will be denied or challenged. The statements thus offer strong *prima facie* evidence against the applicants at this stage. There is no denial in the application that the applicants were found in possession of some of the property belonging to the deceased. This again strengthens the *prima facie* case against the applicants that the murder was committed to steal.

The allegations against the applicants are very serious. The case against them appears very strong as I have indicated above. The applicants have not, in the application for bail, protested their innocence even though the procedural presumption of innocence operates in their favour.

It is trite that at bail stage, the court is not to prove the guilt of the applicants but simply to assess the strength of the evidence proffered against the applicants. In my view, there is a substantial *prima facie* case against the accused. They murdered the Allanson's to steal. The murder was well planned. If convicted, the applicants are likely to be sentenced to death or to very long custodial sentences in the event that extenuating circumstances are found. In such circumstances, the likelihood of the applicants avoiding trial if released on bail becomes quite high.

This court and the Supreme Court have held in a line of cases that the seriousness of the offence facing the applicant is not on its own sufficient to deny an applicant bail. However, where the applicants are likely to be sentenced to death, and are not protesting their innocence, granting the accused bail will not be in the interests of justice. (See *Justine Sandras v The State* SC 81/2000).

Mr *Godzi* has urged me to deny bail on the basis that it will be against the interests of the community that bail be granted in this matter. In view of the conclusion that I have come to, it does not appear necessary that I deal with the issue of whether or not, the interests of

the community is a factor that a court should take into account when considering bail in his matter.

In the result, I make the following order:

Bail is denied.

Gula –Ndebele & Partners, applicants' Legal Practitioners.
Office of the Attorney-General, legal practitioners for the respondent.