

THE STATE
versus
TERRENCE CHIMWALILA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 26 September 2022

Bail pending trial

L Chirenje, for the applicant
Ms R S Mushonga, for the respondent

MUREMBA J: I heard this matter on the 26th of September 2022, and dismissed the application for bail pending trial *ex tempore*. I have now been asked to furnish the written reasons thereof and these are they.

The accused is facing a charge of murder as defined in s 47(1) of the Criminal Law Code. The allegations are that on the 4th of June 2022, at around 1900 hours the accused person and his accomplice Farai Chikukutu waylaid the deceased Courage Muzarawetu at Seke Flyover along Seke Road, Harare and hit him on the head with a half brick and he fell down and died. The accused person and his accomplice then took the deceased's Huawei Honor 7 cellphone, an Econet line 0774 357 074 and a pair of shoes. The two then left the deceased lying dead near the flyover.

In response to the bail application the State furnished the investigating officer's affidavit which was to the following effect. In investigating the case he obtained a warrant of search and seizure at the magistrates court. The warrant was to enable him to check for continued use of the deceased's cellphone. On 20 June 2022, the search results from Econet showed that the cellphone was being used by one Russelle Malcom Chiweshe. When Russelle was located and interviewed, he said that he bought the cellphone from Richard Shambare. Richard was also located and he said that he bought the cellphone from Sean Tofirei Chizhanje. When Sean was located and interviewed, he said that he bought the cellphone from Farai Chikukutu. Farai was located and he

implicated the accused. When the accused was located and interviewed, he indicated that he had given Farai Chikukutu the cellphone at OK grand challenge Borrowdale Race Course on the night the deceased was murdered, almost at the same time the deceased's body was discovered at Seke flyover by the informants.

I denied the accused person bail because there was overwhelming circumstantial evidence against him. Of all the people who were traced to have handled the deceased's cellphone, he is the only one who did not tell the police where he obtained it. He simply said that he had given the cellphone to Farai Chikukutu at OK grand challenge. Coincidentally, the deceased was murdered on that day. To make matters worse, the body of the deceased was discovered at about the same time the accused said he gave the deceased's cellphone to Farai Chikukutu. On the basis of the foregoing, I was satisfied that the State's case against the accused was strong. In his bail application the accused had indicated that he bought the cellphone from one Farai Rapoza who resides in Tynwald South near Mother Touch Primary School sometime in June 2022, when the OK grand challenge was conducted. This averment alone was not sufficient. The accused needed to give the physical address of where the said Farai Rapoza could be located or to lead the police to him. The accused needed to explain whether he had furnished this information to the police during investigations. Further, he needed to explain what the police had done about it considering that the investigating officer did not say anything about this Farai Rapoza in his affidavit. In the absence of a full explanation by the accused in his bail application, I was not satisfied that the accused had told the investigating officer about this Farai Rapoza. I concluded that the issue of the accused having bought the deceased's cellphone from Farai Rapoza was an after-thought. I did not see why the investigating officer would have failed to track down Farai Rapoza seeing that he had tracked down each and every person who had handled and had been implicated in the cellphone right from the first person down to the accused who was actually number five in line.

In denying the accused bail I also considered that the accused is facing a very serious offence of murder which was committed during a robbery. Murder is one of the most serious crimes, and it involves the unlawful killing of another person. The gravity of this offence cannot be overstated. Committing murder during a robbery indicates a high level of violence and disregard for human life. The court considers the severity of the crime when deciding whether to

grant bail. In considering the severity of the crime, I also considered the risk to public safety. In terms of s 117(1)(a)(i) of the CPEA [*Chapter 9:07*], the court must consider the risk to public safety. An accused person who has allegedly committed murder during a robbery poses a significant risk to public safety. If released on bail, there is a possibility that they may harm others or interfere with witnesses or evidence, although in the circumstances of the present case nothing showed that there was a risk that the accused would interfere with witnesses or evidence.

Considering the accused person's alleged *modus operandi* of waylaying the deceased at a flyover in the evening and robbing him and killing him, the interests of justice require protecting the public from potential harm. The *modus operandi* of waylaying people at a flyover in the evening in order to rob them poses several dangers. Waylaying involves lying in wait for victims, often in an unexpected location. The element of surprise increases the danger to the victims. Committing murder during a robbery indicates a willingness to use violence to achieve one's goals. Victims may face physical harm or even death as what happened to the deceased. A flyover is a public place where people pass through. Waylaying people in such spaces makes them vulnerable. The robber exploits the victim's lack of awareness and vulnerability. The evening is a time when visibility decreases due to fading daylight. Darkness provides cover for criminal activities. People may be less alert, making them easier targets. Robbery can escalate into murder if the victim resists or if the situation becomes tense. If an accused has committed similar crimes before, their *modus operandi* may indicate a pattern. Repeat offenders are more likely to pose a danger to society.

Although in the present matter there was no evidence linking the accused to similar offences in the past, I still considered him a danger to public safety because of the nature of the crime he is alleged to have committed, murder during a robbery. Such a violent act indicates a willingness to harm others. Even without prior similar offences, the severity of the alleged crime raises concerns. The absence of a criminal record or pending criminal cases does not guarantee future behaviour. The court must assess the likelihood of reoffending based on the current case. The accused's alleged involvement in robbery suggests financial desperation or criminal intent. If financial desperation persists, chances of the accused repeating his alleged conduct cannot be ruled out. Courts prioritize public safety. The court's duty is to prevent harm to potential victims. Even without a history of similar offences, the accused's alleged actions coupled with the

overwhelming evidence against him pose a threat to society. I considered that releasing the accused could endanger others. Society needs to trust the justice system. Ensuring public trust in the justice system requires cautious decision-making. Balancing individual rights with public safety is essential.

The foregoing discussion shows that while prior criminal history informs risk assessment, the specific circumstances of the case such as the alleged crime, the accused's behaviour and the strength of the State case against the accused play a crucial role in determining danger to public safety. In *casu* the accused's alleged *modus operandi* combines elements of surprise, violence, and vulnerability, making it dangerous for potential victims. I considered it unsafe for the public to release the accused.

I also considered the risk of flight. S 117(3)(b)(iv) of the CPEA provides that the risk of flight may be influenced by the nature and gravity of the offence or the nature and gravity of the likely penalty. S 117(3)(b)(v) of the CPEA further provides that the risk of flight may also be influenced by the strength of the case for the prosecution. Murder crimes committed during a robbery are among the most heinous offences. The combination of violence, theft, and disregard for human life makes them particularly grave. The act of taking another person's life during a robbery demonstrates a callousness that shocks society. While the severity of crimes can vary, murder during a robbery ranks high in terms of its impact on victims, families, and communities. The legal system treats such an offence with utmost seriousness, recognizing the devastating consequences it brings. This is why it carries severe penalties, including life imprisonment or even the death penalty in this jurisdiction, although there are now considerations to have the death penalty repealed. An accused person facing such charges may be tempted to flee to avoid prosecution. Severe penalties, motivate flight. The risk of flight impacts public safety and the integrity of legal proceedings. I concluded that the nature and gravity of the offence, the nature and gravity of the likely penalty, and the overwhelming evidence against the accused could tempt the accused to flee to avoid prosecution.

While the Constitution recognizes bail as a right, the right is not absolute. The court must weigh the interests of justice against the risks posed by releasing an accused person charged with murder during a robbery. In terms of s 115C (2)(a)(ii)(A) of the CPEA, the accused who is alleged to have committed murder during a robbery, an offence which falls under Part 1 of the

Third Schedule of the CPEA, had a duty of showing, on a balance of probabilities, that it is in the interests of justice for him to be released on bail. He failed to discharge this duty. His failure to explain to the investigating officer the origin of the deceased's cell phone taken against the seriousness of the alleged crime, his risk of flight and the interests of public safety dissuaded me from granting him bail. He did not show that it was in the interests of justice for him to be granted bail. He did not present a compelling case for bail. It is in this view that I considered that it was not in the interests of justice to grant the accused bail. Besides, public perception often views suspects of murder committed during a robbery negatively, regardless of the presumption of innocence. The granting of bail to the accused would have undermined public confidence in the justice system.

In the result, I dismissed the application for bail pending trial.

Makuku Law Firm, the applicant's legal practitioners
National Prosecuting Authority, the respondent's legal practitioners

