

THE STATE
versus
JEALOUS NEMARINGA
and
PATRICK MARUFU

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 3, 12 & 17 October 2016

Criminal trial – application for bail pending continuation and completion of trial

Assessors: Messrs Dhauramanzi & Mushuku

E. Chavarika, for the State
J.G. Mpoperi, for the first accused
M. Mureri, for the second accused

MAFUSIRE J: This was an application for bail by Accused 2 pending the resumption and completion of trial.

Accused 2 was jointly charged with Accused 1 with murder as defined in s 47[1] of the Criminal Law [Codification and Reform] Act, [Cap 9: 23]. The allegations against them were that on 28 September 2015, in rural Bikita, Masvingo, one or other of them unlawfully caused the death of one Farai Manyanga [hereafter referred to as “*Deceased*”] by hitting him with logs on the head multiple times thereby inflicting a depressed skull fracture and cervical spine subluxation, with the intention of killing him or, despite realising the real risk or possibility that their conduct might cause death, continued with it.

The State’s case was that on the day in question, Deceased had been drinking a traditional brew at some homestead in the company of several other villagers. The two accused were not part of that party. But from time to time Accused 1 would come with a 5 litre container to buy beer. The two accused were drinking in the comfort of Accused 1’s homestead, some distance away. Later on at night, Deceased left the beer place for his homestead. He passed through Accused 1’s homestead. The two accused were there. Acting

in concert they attacked Deceased with logs several times on the head causing him severe injuries. Sometime before that, there had been an altercation between Accused 1 and Deceased.

Deceased bled from the attack. He lost consciousness. The two accused carried him from the scene and dumped him in his kitchen hut at his homestead. Deceased was bleeding all the way. He left a trail of blood. He was discovered the following morning. He was lying unconscious in his kitchen hut. Neighbours and relatives were alerted. Deceased was ferried to clinic and later on to hospital. A post mortem examination concluded that the cause of death was head injury and cervical spine subluxation. Spine subluxation was explained to mean a partial dislocation of the bones of the neck which had led to depressed breathing.

Both accused pleaded not guilty. In his confirmed warned and cautioned statement Accused 1 admitted striking Deceased on the head with a log during a fight that had ensued between them over an unresolved dispute. In his defence outline he also admitted fighting with Deceased but made no mention of the log.

Accused 2, in both his warned and cautioned statement and the defence outline, completely dissociated himself from Deceased's death. He denied having fought with him or having assisted Accused 2. He stated that it was Accused 1 who had struck Deceased four times with a log on the head as they fought over an unresolved dispute.

The State intended to call seven witnesses. The defence accepted the outlines of the evidence of some of them. Over two days the court heard the *viva voce* evidence of three witnesses. One of them was Simbisai Nemaringa [**“Simbisai”**]. He was one of the villagers that had been at the beer drink the previous day. He said he had passed through Accused 1's homestead the following morning as he was going back to the beer place for the dregs. At Accused 1's homestead he noticed that the sand was sodden with blood and water. The trail started in some shed at the compound and led away from the homestead. He enquired of the blood from Accused 2 who was at the scene at the time. Accused 1 was inside the kitchen. Accused 2 professed ignorance. Accused 1 then came out. He started covering the spoor of blood using his booted feet. Accused 2 advised Accused 1 to use a tree branch instead. In the process several other villagers arrived. First to arrive were two men. One of them was Thulani Bvekwa [**“Thulani”**] whom the State had lined up as a witness. The other was Lawrence Masuka [**“Lawrence”**].

According to Simbisai, Thulani and Lawrence had trailed the spoor of blood from Deceased's homestead right up to where everybody else was now gathered at Accused 1's homestead.

Unfortunately for the State, by the time of the trial Thulani was no longer available. He was reported to be in South Africa. The State then intended to switch over to, and rope in Lawrence. He was reported to be still in the country but in some farming area somewhere in Rusape. The matter was stood down to give the police time to trek him down. Eventually the matter was postponed for a week as the police needed more time.

When the matter resumed after the week the police had still not located Lawrence. Their leads had drawn a blank. Logically, the State applied for a postponement of the matter *sine die* as there was no telling how long the police would take to trace Lawrence. The defence had no objection to the postponement. Therefore it was granted. But Counsel for Accused 2 immediately launched an application for bail pending the resumption and continuation of trial. His argument was that at all times after his initial remand, Accused 2 had been on bail. It had been a year exactly. It was only after he had been indicted for trial that his bail had been terminated in terms of s 169 of the Criminal Procedure and Evidence Act, [Cap 9: 07] [hereafter referred to as "***the CP & E Act***"].

Further submissions on behalf of Accused 2, as I understood them, and in my own words, were that despite his facing a serious charge, and despite the long wait, Accused 2 had religiously complied with his bail conditions and had ultimately attended trial when it had begun. He was still going to go through the trial. He had no intention to abscond. However, given that there was no longer any assurance that the trial would be concluded any time soon owing to the unavailability of a witness, or witnesses, that the State considered important for its case, it was in the interests of justice that he be released on bail so that he should not be severely prejudiced by the delay that inevitably was to ensue.

Counsel also argued that the evidence against Accused 2, in relation to the commission of the offence, was weak. Even though he had been present during the incident, he had not made any common cause with Accused 1. He had not been part of the altercation between Accused 1 and Deceased. He had not been part of the unresolved grudge between the two. On the contrary, when they had fought on the night in question, he had tried to restrain them. Unfortunately he had failed. He had shouted for help from the neighbours. He

had even left the two as they were fighting to go and alert a Bvekwa. However, and unfortunately, the fatal blow had already been delivered. In those circumstances, Counsel's argument concluded, Accused 2's prospects for an acquittal were quite bright. As such, there was no inducement for him to abscond.

Mr *Chavarika*, for the State, opposed the application. His argument, again in my own words as I understood it, was that the application had to be considered in the light of the fact that evidence had now been led against the accused persons. The position had altered from the situation that they had been in when bail had initially been granted before trial. Now the accused had had a glimpse of the weight of the evidence against them. That was inducement enough for them to want to abscond.

Of the quality of the evidence against Accused 2 in particular, Mr *Chavarika* conceded that there was no direct eye witness. However, the evidence that had been led, particularly from Simbisai, was so damning as to make Accused 2, at the very least, an accessory after the fact. Among other things, he had participated in, or given guidance on, how the evidence of the commission of the offence, i.e. in the form of the spoor of blood from Accused 1's homestead to that of the Deceased, could effectively be obliterated. The sole purpose had been to conceal the crime. Furthermore, Accused 2 had been in the company of Accused 1 throughout. He must have had common purpose with Accused 1 in assaulting Deceased. It was that assault that had eventually led to Deceased's death. Thus, State Counsel concluded, given the evidence led already, there was a strong inducement for Accused 2 to want to abscond, if released on bail, as he now appreciated the peril awaiting him.

That, basically, was the case for bail before the court.

In my view, in an application for bail pending trial, the starting point is to consider the dispensation brought about by the new Constitution in May 2013. Section 50[1][d] of that Constitution says that any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention. It is now a fundamental human right and freedom that an arrested person be charged or tried out of custody. That he or she may remain incarcerated until the charge or trial is rather the exception. There ought to be some compelling reasons justifying it. This, in my view, is an exceptionally high burden. And it is now provided for in no less a law than the Constitution.

The Constitution does not say directly on who this onerous burden lies. But manifestly, it must be the State. That, in my view, and from a purposive approach, is clearly the spirit of the Constitution. But the CP & E Act has recently been amended, effective 17 June 2016¹. Section 115C has been inserted. It first states that in any application, etc. where, among other things, the grant or denial of bail is in issue, the grounds specified in s 117[2], being grounds upon which a court may find that it is in the interests of justice that an accused person should be detained in custody until he or she is dealt with in accordance with the law, are to be considered as the compelling reasons for the denial of bail by a court.

In terms of s 117[2] the grounds upon which a court may deny bail are the likelihood that if released on bail:

- 1 the accused will endanger the safety of the public, or of any particular person; or
- 2 the accused will commit an offence referred to in the First Schedule [i.e. an offence at common law other than bigamy, compounding, contempt of court, etc., or a statutory offence the minimum penalty for which exceeds six months without the option of a fine, and any conspiracy, incitement, attempt or being an accessory after the fact, to commit those crimes]; or
- 3 the accused will not stand his or her trial or appear for his sentence; or
- 4 the accused will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- 5 the accused will undermine or jeopardise the proper functioning of the criminal justice system, including the bail system; or
- 6 in exceptional circumstances, there is a likelihood that the release of the accused will disturb the public order or will undermine public peace or security.

As Mr *Chavarika* correctly points out, these factors have been the traditional grounds for denying bail. But the amendment has reversed the onus of proof from the State to the accused in respect of certain crimes. In terms of s 115C[2][a][ii]B:

“Where an accused who is in custody in respect of an offence applies to be admitted to bail ... before a court has convicted him or her of the offence ... the accused person shall, if the offence in question is one specified in ... Part II of the Third Schedule, bear the

¹ See the Criminal Procedure and Evidence Amendment Act, No. 2 of 2016

burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail.”

Murder tops the list of the Third Schedule offences in respect of which the power to admit persons to bail is excluded or restricted.

Mr *Chavarika*, whilst not directly addressing the provisions of s 50 of the Constitution aforesaid, argued or insinuated that, *in casu*, the stage at which Accused 2 was making his bail application was no longer that of pre-charge or pre-trial. The accused had already been charged. Their trial had already commenced. The accused now knew, or ought to be appreciating, the danger of conviction given the weight of the evidence against them. At the very least, Accused 2 was an accessory after the fact. If convicted, he would be liable to the same punishment as Accused 1, the actual perpetrator. That punishment would be no less than a term of imprisonment.

However, the weight of the evidence aside, Mr *Chavarika*'s argument seemed to me to run counter to the ethos or principle or spirit of the new Constitution. In terms of it the emphasis is on the right of accused persons to personal liberty. Among other things, one should not be deprived of one's liberty without just cause [s 49[1][b]]. Once arrested and not released, a person is entitled to be brought to court within forty-eight hours or else he or she must be released immediately, unless a competent court has authorised his or her continued detention [s 50[2]]. It does not matter that the forty-eight hours may lapse on a Saturday, Sunday or a public holiday.

Probably to emphasise the importance of the right to personal liberty, parts of s 50 empower anybody to bring an application for a *habeas corpus* in respect of someone who, among other things, is being detained illegally, so that they may be released or brought before the court for the lawfulness of their detention to be justified. To cap it all, any person who has been illegally arrested is entitled to compensation from whosoever might have been responsible, except if there is a law that has been passed to protect judicial officers or other public officers acting reasonably and in good faith.

But sub-section [6] of s 50 speaks directly to the situation of Accused 2 herein. It says any person who is detained pending trial for an alleged offence, and is not tried within a reasonable time, must be released conditionally or unconditionally. Furthermore, in terms of s 70[1][a], an accused person is presumed innocent until proved guilty.

In casu, Accused 2 may now have been charged. His trial may now have begun. Certain evidence may now have been led against him. Some of that evidence might be incriminatory. But in the eyes of the law he is still innocent. And given the provisions of the Constitution, there must exist compelling reasons why his right to liberty, which was terminated by the indictment for the very trial which he was patient enough to wait for, must not be restored.

In this matter, the constitutionality of s169 of the CP & E Act, and the aforesaid amendment [s 115C], was not raised, let alone argued. So I express no further view. But Mr *Mureri*, for Accused 2, stressed something in s 169. The section reads:

“169 Termination of bail on plea to indictment in High Court

If the accused is indicted in the High Court after having been admitted to bail, his plea to the indictment shall, **unless the court otherwise directs**, [*Counsel’s emphasis*] have the effect of terminating his bail, and he shall thereupon be detained in custody until the conclusion of the trial in the same manner in every respect as if he had not been admitted to bail.”

Counsel’s point was that even after an accused’s person trial has commenced and the bail has been terminated, the court is still reposed with the discretion to release them from detention conditionally or unconditionally. That has always been the case. It is the task of the court to strike a balance between the interests of the accused, should they remain in detention until the trial is concluded, and the administration of justice, should they be released on bail.

In considering whether, if released on bail, there is a likelihood that an accused will not stand trial, s 117[3][b] of the CP & E Act directs the court to take the following factors into account:

- [i] the ties of the accused to the place of trial;
- [ii] the existence and location of assets held by the accused;
- [iii] the accused’s means of travel and his or her possession of access to travel documents;
- [iv] the nature of the offence or the nature and gravity of the likely penalty;
- [v] the strength of the case for the prosecution and the corresponding incentive of the accused to flee;
- [vi] the efficacy of the amount or nature of the bail and enforceability of any bail conditions;

- [vii] any other factor which in the opinion of the court should be taken into account;

These factors are considered conjunctively, not disjunctively. In the present case, none of them was canvassed by Counsel to any extent. But I am not about to plough the same field as ploughed by this court before when Accused 2 was released on bail pending trial a year ago. The same factors were necessarily considered then. The court must have been satisfied that in spite of the risk involved, Accused 2 was a proper candidate for bail. That decision has been vindicated. The accused has waited patiently for his trial.

Probably the one major difference between now and then is that amendment, in terms of which, instead of the State showing that there are compelling reasons for denying an accused person bail, the onus is now on him to prove, on a balance of probabilities, that exceptional circumstances do exist to grant him the bail, even if he may be facing a Third Schedule offence.

The other major consideration is that at this stage the accused have now had a glimpse of the weight of the evidence against them. Paragraph [v] above refers to the strength of the case for the State and the corresponding incentive on the accused to flee.

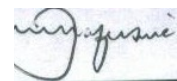
However, in this case, where Accused 2 has shown that soon after his initial remand, a year ago he was released on bail; that he has religiously complied with the bail conditions; that but for the indictment for this trial he would have still been out of custody; that the reason why the trial may now not be completed expeditiously is that the State cannot locate one or other of its witnesses; that the only evidence led against him so far does not implicate him directly, but merely places him at the scene of the offence – something not in issue but was common cause – and finally, that the evidence of being an accessory after the fact seems tenuous, I am satisfied that, on a balance of probabilities, he has proved that exceptional circumstances exist which, in the interests of justice, permit his release on bail.

There is one other detail. Thulani was the State's first choice witness between him and Lawrence. It is only because he is now out of the country that Lawrence is now being preferred. In his defence outline, Accused 2 indicated, and his Counsel clarified during argument, that on the night in question, it was in fact to Thulani that Accused 2 had run to

report the raging fight between Accused 1 and Deceased. This aspect is still to be tested. It may never be tested, if Thulani does not come to testify. This may affect the overall quality of the evidence in the whole trial.

In the circumstances, Accused 2 shall immediately be released on bail pending the resumption and completion of his trial. The bail conditions shall be the same as those previously imposed when he was released on bail pending trial.

17 October 2016

A handwritten signature in black ink, appearing to read 'M. J. J. J.', written over a horizontal line.

National Prosecuting Authority, legal practitioners for the State;
Saratoga Makausi Law Chambers, legal practitioners for the first accused
Matutu & Mureri, legal practitioners for the second accused