

THE STATE
versus
TALK TAKE SIBANDA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 26 January 2021
Written reasons provided on 29 April 2021

Bail application

Mr K. Mabvuure, for the applicant
Mr E.Mbavarira, for the respondent

ZISENGWE J: On 26 January I delivered a brief *ex tempore* judgement dismissing applicant's quest to be released on bail pending his trial on a murder charge (i.e. contravening section 47 (1) of Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]). A request was subsequently made for me to furnish the reasons informing that decision, which I now proceed to do. No oral submissions were made by the parties and the application was decided solely on the papers filed by the parties in support of their respective positions. This followed the provisions of Practice Direction 02/21 permitting such procedure. The said Practice Direction was issued by the Chief Justice in response to the lockdown measures announced by the Government as a result of the COVID 19 pandemic.

Paragraph 4 of the said Practice Direction reads as follows:

" 4. *With effect from 22 January 2021, a judge may consider and dispose of any urgent chamber **or bail application** on the papers without calling the parties to make oral representations or arguments.*

Provided that in respect of bail applications, parties shall be at liberty to file heads of argument with or immediately after filing their applications or opposing papers." (emphasis added)

The allegations

The allegations are contained in section B of the "Request for Remand" from (i.e. the police form 242) and are to effect that on the 9th of August 2020 at Amaveni Shopping Centre, Kwe-Kwe, the applicant viciously attacked the deceased John Chibaya by stabbing him on the back with a knife and inflicting a deep cut wound in the process. The deceased succumbed to those injuries shortly thereafter.

According to the state the attack was precipitated by an argument over a prostitute (or a "commercial sex worker" to use more politically correct terminology) and that the applicant was at that time in the company of his friend identified as Alouis Sibanda (hereinafter referred to simply as "Alouis"). It was further averred by the state that the applicant was positively identified eye-witnesses him committing the offence.

Applicant's version

The applicant denies these allegations and, in a statement, submitted in support of this application he provided a fairly detailed account of what he claims transpired on that ill-fated night. In short, his version is that he was never involved in the altercation with the deceased, let alone stab him. According to him, the violent confrontation which culminated in the death of the deceased pitted the latter on the one hand and his (i.e. applicant's) young brother Alouis on the other. He professes ignorance on the cause of this altercation, suffice it to say that according to him when that brawl flared up and things got out of hand the deceased took to his heels with Alouis in hot pursuit clearly intent on attacking the deceased. He claims that he briefly followed the two protagonists but soon gave up and went home.

He further indicated that it was only later that he learnt of death of the deceased; and he therefore has absolutely no knowledge of the events immediately preceding the death of the deceased. He further averred that Alouis who can shed light on the same has since disappeared apparently without trace. He also denied having acted in common purpose with Alouis in attacking the deceased nor did he witness the attack. Although he did not say so in as many

words, he claimed that he was a victim of circumstances in being at the wrong place at the wrong time and was being punished for the sins of his brother.

Applicant's position therefore was that he deserved to be admitted to bail not least because not being the author of the deceased's demise he had absolutely no reason to abscond

The State's position regarding the application for bail

The application was opposed by the state and the reasons for such opposition were stated firstly in the aforementioned request for remand form, secondly in the statement by one Gideon Sibanda, a member of the Zimbabwe Republic Police and thirdly in the state's response to this application. Although in the first two documents, several reasons were advanced for such opposition, the state in response to the current application focussed attention on two reasons namely the risk of abscondment and the propensity on the part of the applicant to commit similar offences if admitted bail.

Regarding the risk of abscondment it was the state's contention that applicant's nomadic lifestyle was such as to militate against his release on bail as it could prove futile to track him down in the wake of such release. I pause here to observe that the applicant by his own admission is an artisanal gold miner, his itinerant lifestyle is such as to pursue wherever the lure of the precious metal beckons. It was further averred by the state that the applicant in the aftermath of the commission of the offence practically disappeared from Kwekwe area where the tragic incident took place only to be arrested in Shurugwi some two months later. This, according to the state constituted a clear manifestation of his intention to evade arrest and stand trial. The State pointed out that to compound matters the applicant gave his address as Unit "O" Chitungwiza thus rendering it virtually impossible to pin him down to a particular place of abode and therefore extremely difficult to track him down in the event of him absconding.

Aside from that, the state revealed that applicant so happens to be on a warrant of arrest issued by the court in Bindura after he defaulted court and breached the conditions of his release on bail. In this regard it is common cause that the applicant is facing two other counts of murder in Bindura (Case Number CRB 1088/19) and that he was granted bail by the court in Harare on 22 October 2019. It is further common cause that that pursuant to his release on bail, applicant failed to attend court on his next remand date which was the 31st of October 2019 resulting in a warrant of arrest being issued against him. It was the state's position therefore, that against the

backdrop of such apparent disregard and disdain of previous bail conditions applicant was patently unsuitable for release on bail.

The likelihood of applicant committing similar offences was also cited as one of the reasons justifying the refusal of bail. The State in this regard referred to the aforementioned murder cases for which he and his alleged accomplices are fugitives from justice. The contention here was that no sooner had applicant been released on bail in respect of the said two murder charges than did he find himself imperilled in of yet another one and therefore there was a real risk and possibility of him committing further violent crimes.

Applicant's position regarding the state's opposition to bail

As stated earlier, the applicant exhorted the court to release him on bail stating as he did that he harboured no intention whatsoever to abscond precisely for the reason that he did not commit the offence.

Regarding the Bindura cases, the applicant attributed his default to twin reasons namely that in the wake of his release from remand prison on those murder charges he fell seriously ill and upon his recovery he did not immediately report himself owing to his lack of knowledge of the law and related procedures. He indicated that he harboured no intention whatsoever to abscond.

Disposition

In arriving at the conclusion that I did, denying applicant bail, I remained cognizant of the main principles germane to a proper determination of bail. The overarching one, of course being that bail is regarded as an entitlement by operation of section 50 (1)(d) of the Constitution as amplified by section 117 (1) of the Criminal Procedure and Evidence Act, [Chapter 9:07] "the CPEA" and that bail can therefore only be withheld upon a finding of the existence of compelling reasons justifying such refusal.

Secondly, I was alive to the presumption of innocence operating in accused's favour until proven guilty which presumption is one of the pillars of the criminal justice system.

Thirdly, as adjuncts to the above two principles I remained mindful of the need to jealously guard an accused's liberty where that can be done without jeopardising the due administration of justice as it is often said that who loses his liberty loses all.

LIKELIHOOD OF APPLICANT ABSCONDING

Section 117 (2) of the CPEA, sets out the broad grounds upon which bail may be denied. More pertinently, Section 117 (3) (b) lists the factors relevant in determining the question of the likelihood of applicant absconding should he be released on bail, chief among them being the “...*nature and gravity of the offence or the nature and gravity of the likely penalty therefor*” as well as the “...*strength of the case for the prosecution and the corresponding incentive for the accused to flee.*” In this regard, GUBBAY CJ had the following to say in the case of *Aitken & Another v Attorney General* 1992 (1) ZLR 249 (S):

“THE RISK OF ABSCONDMENT

In judging this risk the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the strength of the state case; the ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial.”

Murder, particularly one committed in the circumstances described hereinbefore, undoubtedly constitutes a grave crime. Those facts (should they be ultimately proved at trial) portray a callous and brutal attack on a fellow human being and would in turn inevitably attract the imposition of a harsh term of imprisonment. There is therefore ample inducement on the part of the applicant to flee to avoid facing the dire consequences of his conduct. This does not in the least imply that sight was lost of the principle enunciated in several cases that the seriousness of the offence on its own seldom amounts to sufficient grounds for the refusal of bail (*S v Hussey* 1991 (2) ZLR 187 (S); *S v Kanoda & Ors* HH 200-90). All that is being said here is that it remains a relevant factor which if taken in conjunction with other pertinent considerations may tilt the balance towards the refusal of bail.

What largely convinced me of the relative strength of the state case was the averment to the effect that applicant was positively identified by persons who observed him committing the offence. I made that observation mindful of the fact that the trial court will ultimately be enjoined to apply the cautionary rule as it relates to identification and investigate circumstances under which the same was made including factors such as lighting and mobility of the scene,

opportunity on the part of the witnesses for observation, eyesight, as well as the extent if any of their prior knowledge of the applicant, etcetera. See *S v Mthetwa* 1972(3) SA 766 A.

Further, I made the observation that the applicant being on a warrant of arrest on the Bindura murder cases made his position even more precarious. As stated in the *Aiken* case (supra) the past response to being released on bail is an important factor in deciphering accused's intention to stand trial or abscond. Similarly, section 117 (3) (d) (iii) of the CPEA lists "*any previous failure by the accused to comply with bail conditions*" as a factor that may lead to the denial of bail. Although the full reasons for his failure to avail himself in Bindura will be ventilated by the appropriate court which will deal with issues related to the warrant of arrest, in my view the reasons advanced for failing to appear are lame and utterly unconvincing. Similarly, the reasons for not promptly reporting upon him having regained his health (that is if he was indeed indisposed in the first place) are equally untenable and in my view patently false.

As if that was not bad enough the intractable picture that emerged was that the applicant was nomadic and a fugitive from justice. One moment he was in Bindura, the next he was in Kwekwe and soon thereafter he found himself in Shurugwi. More tellingly, contrary to applicant's assertions, the Investigating officer stated in his affidavit opposing bail that in the wake of the commission of the offence the applicant literally fled from the scene before vacating his rented lodgings and practically vanishing into the thin air, figuratively speaking only to be apprehended in Shurugwi months later following a police raid. To cap it all applicant gave his permanent address as Chitungwiza lending credence to the apprehension by the state that would be extremely difficult to pin him down to any particular locality.

At each turn when he performed some disappearance act, applicant would conjure up some lame explanation to wriggle himself out. When he failed to attend court following his release on bail in the Bindura murder cases it was apparently as a consequence having been suddenly incapacitated by illness. When he failed to report himself in the wake of his supposed recovery, it was ostensibly because of his ignorance of court procedures (never mind that he did not even enquire from anyone on what steps to take). When he fled from the scene following the fatal stabbing of the deceased in the present matter, the explanation was supposedly that he had nothing to do with that stabbing hence there was no need for him to remain in attendance. When he relocated to Shurugwi in the aftermath of the said stabbing incident, the explanation appears

to be that he went there in search of the precious yellow metal. An unmistakable pattern clearly emerged for all to see, applicant clearly entertained intention to face trial for the murders attributable to him. On the whole therefore, I found that there was substance in the state's contention that applicant posed a serious flight risk and therefore an unsuitable candidate to be admitted to bail.

LIKELIHOOD OF APPLICANT COMMITTING FURTHER OFFENCES

As stated earlier, the second ground advanced by the state was the fear that if released on bail applicant could commit further violent crimes. In this regard the very fact that the applicant happens to be facing two murder charges in Bindura certainly did not help his cause. The current murder charge meant that this was the third life that applicant is alleged to have unlawfully taken. Further this was within a relatively short space of time. This naturally fed into the narrative of his proclivity to committing similar offences. I say this mindful of course, of the earlier stated presumption of innocence which operates in applicant's favour. It is trite however that bail may be refused notwithstanding such presumption of innocence. This is as it should be. The presumption of innocence does not provide an impregnable shield of protection against pretrial incarceration as it may be forced to yield to the more compelling reasons aimed at the protection of the public and the due administration of justice. In the case of *James Makamba v The State* SC30/04 ZIYAMBI JA had this to say in this regard;

*“It is a fundamental requirement of the proper administration of justice that an accused stands trial and if there is any cognizable indication that he will not stand trial, if released from custody, the court the court will serve the needs of justice by refusing to grant bail, **even at the expense of the liberty of the accused and despite the presumption of innocence.** (See *S v Fourie* 1973 (1) SA 100 at p10)1.”* [Emphasis added].

The overall picture that emerged from the totality of the facts at my disposal was that there was merit in the state's contention that applicant appeared not only to be an extremely dangerous individual (although they did not say so on terms) whom they insisted was accountable for three murders committed in at least two different parts of the country. Then there was his alleged association with marauding gangs of dangerous criminals running contrary to the picture of an upright citizen which the applicant was at pains to portray in this application. The Investigating Officer of this case, Gideon Banda deposed to an affidavit wherein he indicated that applicant belongs to what he described as “... fearful terror group (sic) (he obviously meant

“fearsome gang”) ...” going by the name “Anaconda” and further that applicant’s alleged accomplices in the aforementioned violent Bindura murder case fled in the aftermath of the commission of the same and are yet to be accounted for.

The invitation to the court by the applicant was therefore to essentially turn a blind eye to those facts and extend bail to him. However, I found the remarks in *Attorney General, Zimbabwe v Phiri* 1987 (2) ZLR 33 (H) regarding the likelihood of an accused person committing further offences instructive:

“The test, in my view, should be one of deciding whether or not there is a real danger, or a reasonable possibility that the due administration of justice will be prejudiced if the accused is admitted to bail. If this real possibility exists, then the public is entitled to protection from the depredations of the accused, and bail should be denied to him. In the absence of exceptional circumstances, I believe that it would be irresponsible and mischievous for a judicial officer to allow bail to a person who has given indication that he is an incorrigible and unrepentant criminal.”

In the final analysis from the panoply of facts at my disposal I was satisfied that the state had managed to present on the papers compelling reasons justifying the refusal bail and I accordingly dismissed the application.

*Mawadze & Mujaya Legal Practitioners; Applicants legal practitioners
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