

THE STATE
versus
WILLIAM PHIRI

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 26 January 2021 and 4 February 2021

Bail application

Mr Chakabuda, for the State
Mr Mbavarira, for the accused

ZISENGWE J: The applicant, a fifty-five year old medical doctor seeks to be admitted to bail following his arrest and subsequent detention on charges of murder and attempted murder (i.e. contravening section 47 of the Criminal law (codification and Reform) Act [Chapter 9:23] and contravening section 47 as read with section 189 of the same Act.)

The allegations as spelled out in the "request for remand " from (i.e. the police form 242) are that he brutally attacked his four children killing two (identified as Princess and Victor) in the process and critically injuring the other two (Ropafadzo and Themba). This attack came in the wake of a heated dispute between the applicant and his wife Loice Chakauya. It is alleged that in the heat of this altercation the latter took to her heels leaving the applicant and their four children. It was then that the applicant is alleged to have locked himself up with those children before embarking on what can only be described as a frenzied attack on the four young children.

In this regard it is alleged that the applicant fired a single shot from a firearm. It is not clear, however, from the papers at my disposal whether the shot was fired into the air as stated by Detective Sgt Collins Mbaura in his written statement opposing the granting of bail or it was

directed at one of the children as alleged in Section B of the request of the request for remand form.

Be that as it may, it is alleged that the applicant then viciously attacked the four children by striking each of them onto the floor resulting in two of them (aged 4 years and 7 months respectively) sustaining mortal injuries and the other two sustaining serious injuries.

In the aftermath of this attack, the applicant is alleged to have spiritedly endeavoured to end his own life. To this end he is said to have stabbed himself multiple times with a knife and thereafter doused himself in diesel before setting himself alight. Needless to say he survived the ordeal.

In this application the applicant exhorts the court to release him on bail pending trial contending as he does that he is a suitable candidate for the same. The court was once again reminded (and will indeed remain cognisant) of applicant's entitlement to bail in terms of Section 50(1) (d) of the Constitution unless there are compelling reasons warranting his continued pre-trial detention. Several cases were cited in this regard. According to applicant there are no such compelling reasons.

The applicant further implored the court to consider some of his personal circumstances. These include his desire to give his deceased children a befitting send off by allowing him the opportunity to make proper arrangements for their decent burial, the need for him to seek proper medical attention for his injured children as well as his quest to attend his late father's funeral who incidentally passed away recently. He also urged the court to permit his release on bail so that he can receive proper medical attention from a practitioner of choice for the injuries sustained when he made the attempt on his life.

The state is opposed to the application and bases its stance on three main premises namely firstly the need for applicant to undergo psychological examination given the circumstances under which the offences were allegedly committed, which examination can only be properly conducted while applicant is in custody, secondly the likelihood of applicant absconding in light of the gravity of the offence coupled with the strength of the case against him, and thirdly the risk of applicant interfering with investigations and /or witnesses.

The third ground above is in my view difficult to sustain. The mere fact that the offence was committed within a domestic setting, without anything further, hardly warrants an inference

that applicant may be inclined to exert influence on his wife and surviving children (who are supposedly the key witnesses for the state) to falsify their evidence to exculpate him. I also find it unlikely that the said witnesses would buckle under the applicant's influence as feared by the state, particularly in view of the nature and gravity of the charges. In any event, should the applicant be so inclined to prevail upon the witnesses to distort their accounts, he could very well do so indirectly (say through intermediaries) from his remand prison cell. Secondly the apprehension by the state in his regard may be allayed (should applicant be granted bail) by the imposition of appropriate conditions (that is if the applicant is granted bail). In short therefore, this particular reason for opposing bail can hardly carry the day for the state.

However, the other grounds advanced by the state in opposing bail are a different kettle of fish and it is to which that I now turn.

Likelihood of abscondment

Section 117 (3) (b) of the Criminal Procedure and Evidence Act, [Chapter 9:07] sets out some of the factors germane to a proper consideration of bail in instances where the risk of abscondment is in issue. It provides as follows:

3) In considering whether the ground referred to in

a.....

(b) subsection (2) (a) (iii) [risk of absconding] has been established, the court shall take 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 possession of or access to travel documents;*
- (iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefore;*
- (v) the strength of the case for the prosecution and the corresponding incentive of accused to flee;*
- (vi) the efficacy of the amount or nature of bail and enforceability of any bail conditions;*
- (vii) any other factors which in the opinion of the court should be taken into account.*

In the statement filed in support of this application, the applicant avers that the he harbours no intention whatsoever to flee the jurisdiction and become a fugitive from justice, nor does he have the wherewithal to sustain a new life abroad.

Further he implores the court to have regard to his co-operation with the police and prison officials in the aftermath of the tragic as being indicative of his commitment to stand trial. He also indicates that his ties to Zimbabwe are such as to obviate the risk of his abscondment. In this regard he points out that not only is he a registered and practicing medical doctor but is a sugar cane farmer of repute. So successful is the latter venture, so he avers, that his profession as a medical doctor plays second fiddle to it.

The state on the other hand maintains that gravity of the charges facing the applicant complied with the intractable evidence against the applicant at its disposal is likely to induce him to dismissal.

In *S v Jongwe 2002 (2) ZLR 209 (5)* the Supreme Court had occasion to address the principles relevant to the assessment of the risk of abscondment in an application for bail pending trial. Chidyausiku CJ had this to say.

"RISK OF ABSCONDMENT

In judging this risk the court ascribes to the accused the ordinary motives and fears that may 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 of flee to a foreign country and the absence of extradition facilities, the past response of being released on bail and the assurance given that is intended to stand trial.

It is a quite clear from the above that the critical factors in the above approach are the nature of the charges and the severity of the punishment likely to be imposed upon conviction and also the apparent strength and weakness of the state case. "

As indicated earlier; the state avers that its case against the applicant is solid rendering a conviction on the charges virtually certain. This, according to the state is borne out by the evidence at its disposal consisting of accounts by persons who witnessed the incident among them the applicant's wife and neighbours.

Regarding the applicants' attitude towards the allegations (it being relevant is a determination of the relative strength of the case against him), the applicant evades the all-important question of his version of the events that led to the death of the two deceased children and to the serious injuries sustained by the other two. Apart from some utterly superficial reference to the perceived weakness of the case for the state, applicant does precious little to confront the grave charges against him.

In paragraphs in (i) – (v) of his bail statement, an attempt is made at poking holes into the allegations by the state. To this end applicant points out that the incident having taken place behind closed doors, implies that no one can provide direct evidence on what exactly transpired therein. Secondly, applicant refers to the apparent absence of ballistic evidence to support the allegations of a firearm having been discharged as alleged. Thirdly, he queries the allegation of him having used a knife to attack the victims when in fact it is common cause that he stabbed himself with that very knife.

Conspicuous by its absence, however, is applicant's own explanation even it be a skeletal outline of what transpired. He does not in the least state whether or not it was him who caused the death of the deceased and injuries to the other two young victims. If so he does not state the reasons that led to that. This is the proverbial elephant in the room which the applicant consciously evades. He was expected to take the court into his confidence and give an explanation which at trial may amount to a defence to the charges. It has been said more than once that in an application for bail pending trial, the applicant should at the very least set forth a plausible defence to the charges. See *Makamba v S -3-04*.

Applicant appears to hinge his approach on the apparent absence of eye witnesses to the event. Even if that was the case, and one were to accept that only he and his two surviving children (assuming the latter are old enough to be legally competent to testify) are able to give first hand accounts on what transpired within the confines of the house after the applicants' wife took fight the events both before and after the event are equally invaluable in unravelling the same. In this respect the evidence of the applicant's wife regarding the nature and intensity of the altercation between her and the applicant will be critical. So too will be the evidence of what prompted her to take to her heels in the heat of their argument.

Most importantly, however, is the applicant's determination to take his own life in the immediate aftermath of the incident. The medical report attached to this application reveals that applicant sustained stab wounds on the left of the chest in the process. He also doused himself in some flammable liquid before setting himself ablaze with the result that he sustained some superficial burn wounds. He then fled the scene in the nude only for him to be apprehended some three hours later.

The grim picture that is painted from above facts justifies an inference (at least on a *prima facie* basis) that it was the applicant who, consumed by an uncontrollable rage, viciously attacked the four victims as alleged. It is perhaps only his state of mind that may fall for determination in the impending trial. I will advert to this particular issue shortly, suffice it, however, to state that the case for the prosecution, particularly in the absence of the applicant's version to gainsay it, appears to be quite firm.

Regarding the penalty likely to be imposed upon conviction, it is common knowledge that the consequences on an offender of a conviction of murder are quite dire. Such an offender faces a lengthy term of imprisonment or worse. A double murder of one's own offspring coupled with an attempt on the lives of the other two makes for same grim reading. There is merit therefore in the prosecution's contention that the combination of the strength of its case against the applicant coupled with the severity of the sentence likely to be imposed upon conviction are likely serve as an inducement for applicant to take flight.

Further, in my view the applicants' fierce determination to end his own life in such a gruesome fashion lends as invaluable window into his psyche and to his attitude towards the bleak future that awaits him. It negates the narrative that applicant is keen to face the consequences of his actions. To the contrary it is indicative of his determination to escape the same.

The need to undergo psychiatric examination

The state also opposes the granting of bail on the basis that there is need to conduct psychiatric examination on the applicant and that that can best be done whilst the applicant is in custody.

The applicant in his supplementary bail statement questions the *bona fides* of the state in making those assertions given that no evidence was availed by it suggestive of the imminence of such an examination.

That the alleged conduct of the applicant in killing his own children and attempting to kill two others would raise legitimate concerns of his mental stability is understandable. Such conduct is profoundly contrary to the innate parental instinct and so counter-intuitive that it may be explicable (wholly or in part) on some mental abnormality, transitory or otherwise. That the

state in the context of the allegations against applicant is considering a medical exploration into the applicants' state of mind is logically sound. It is far fetched to suggest, as the applicant does, that the state is not genuine about its intention to subject him to psychiatric examination.

Further, there are legitimate questions on whether the incendiary spark which ignited the explosion of rage has since been averted or whether it still lurks within the deep recesses of applicant's mind. If it does, releasing him on bail at this stage may prove calamitous not least on his wife and surviving children.

It is on the basis of the foregoing that I have come to the conclusion that applicant is not suitable candidate for bail and accordingly his application is hereby dismissed.

Order

Application for bail pending trial be and is hereby dismissed.

Chakabuda Foroma Law Chambers, Applicant's legal practitioners
National Prosecution Authority, Respondent's legal practitioners