

SEKAI SIMANGO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 13 May 2021

Bail Pending Trial

T Musara, for the applicant
Mrs J Matsikidze, for the respondent

MWAYERA J: On 13 May 2021 after considering documents filed of record and oral submissions I orally outlined reasons for dismissal of the bail application, I undertook to avail written reasons for my disposition. These are they:

The applicant is facing allegations of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The brief allegations being that on 26 March 2021 at Mahachi Village, Chief Musikavanhu Chipinge the accused together with an accomplice her son assaulted the deceased several times on the head and all over the body using an iron bar. The accused persons assaulted the deceased who was selling curtains till he died. The accused suspected that the deceased had stolen their blankets hence they perpetrated the assault on him. The accused then pulled the body of the deceased and threw it in a disused well close to their homestead. Thereafter the accused partially filled the disused well with rubbles soil and tree branches. The deceased's body was only recovered on 7 April 2021 by the police who engaged help of local people.

In a bail pending trial the court is enjoined to strike a balance between the right to liberty of an individual on the other hand and the interests of administration of justice on the other hand. The right to liberty is a constitutionally guaranteed right which is premised on the time honoured presumption of innocence until proven guilty. Section 70 of our Constitution is instructive. It states on rights of accused persons s 70(1):

Any person accused of an offence has the following rights
(a) to be presumed innocent until proved guilty..."

Section 50 on Rights of Arrested and Detained Persons is quite elaborate and clear, in particular s 50(1)(d) which states:

“Any person who is arrested must be released unconditionally or on conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention...”

It is this right to liberty which has to be balanced against the interest of administration of justice which is anchored on the societal interests to ensure that administration of justice is done by prosecution of matters to their logical conclusion. In balancing the two the court dealing with a bail application has to holistically consider the circumstances of a particular case. There is need to conjunctively consider the personal circumstances of the applicant, the nature of the case, the strength of the state case, the brief outline of defence by the applicant and the likely sentence in the event of conviction. If there are no forceful or compelling reasons to further detain the applicant then the court ought to lean in favour of the individual liberty. Section 116, 117 and 117A of the Criminal Procedure and evidence Act [*Chapter 9:07*] provide useful guidelines on factors that the court has to consider in dealing with whether or not there are compelling reasons justifying the denial of bail. Section 117 has the following factors among others.

- i. Whether the accused if released on bail will endanger the safety of the public or any particular person or will commit an offence referred to in the first schedule.
- ii. Whether the accused will attempt to influence or intimidate witnesses or to conceal or distort evidence.
- iii. Whether the accused’s release will undermine or jeopardise the objective or proper functioning of the criminal justice system inclusive of bail system.

The applicant’s argument in support of the application is that the seriousness of the offence on its own is not good enough reason to deprive her of her right to liberty and admission to bail. This infact is now the settled legal position. See *S v Hussey* 1991 (2) ZLR 187 (S) and also *Putsai v The State*. It is also settled that the seriousness of the offence has to be conjunctively considered with other factors such as the nature of evidence and likely sentence in the event of conviction. A serious offence invariably attracts a stiff or heavy sentence in the event of conviction. The heavier the penalty the higher the inducement to abscond to avoid such sentence in the event of conviction. The state case in this case is strong considering the eye witnesses’ evidence of those who observed the applicant and her son who is at large assault the deceased with an iron bar. The deceased’s body was concealed in a disused well close to where the witness observed the assault. The nature of the charge and strength of the state case when viewed in conjunction with the likely sentence can act as an inducement to abscondment. The fears of abscondment are not farfetched when one considers

that the applicant's son fled and that the applicant's husband is in South Africa. The court further takes judicial notice of the porous nature of the Zimbabwe – Mozambique borders especially in Chipinge where it is common cause people stay in Zimbabwean side and cross over to their fields in Mozambique. Considering the nature of the alleged murder the evidence at the state's disposal and the likely sentence in the event of conviction, there is high temptation to abscond. The state's fears of likelihood of abscondment are real in this case. This is moreso when one considers that accused's possible defence to the charge which is just a bare denial with a suggestion that deceased might have fallen in the disused well. In stark contrast with state evidence of eye witnesses who observed iron bars being used to assault the deceased and also the deceased's body covered by rubbles, soil and branches.

In this case the fact that applicant is facing serious allegations involving loss of life in which the concealed body was only recovered about 2 weeks later denotes a serious allegation which will, in the event of conviction, attract a heavy penalty. That coupled with the evidence available is likely to incentivise the applicant to abscond and thus jeopardise the interest of administration of justice. See *S v Jongwe* SC 251/2002.

I am therefore, in the circumstances of this matter satisfied that there are compelling reasons justifying continued detention of the applicant. The admission of applicant to bail would undermine the justice delivery system and bail system.

In the result it is ordered that the application for bail pending trial be and is hereby dismissed.

Gonese and Ndlovu, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners