THANDOLWENKOSI SIBANDA

Versus

THE STATE

HIGH COURT OF ZIMBABWE
DUBE MPOKISENG J
BULAWAYO 21ST & 27th AUGUST 2024

APPLICATION FOR BAIL PENDING TRIAL

Applicant in person
Mr B. Gundani for the State

DUBE MPOKISENG J

Introduction

The Applicant is facing a charge of murder in terms of section 47 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). He seeks to be released on bail pending his trial in terms of section 117A (1) of the Criminal Procedure and Evidence Act (Chapter 09:07). According to the Request for Remand Form 242, it is alleged that on the 12th April 2023 at Village 2, Badala, Inyathi, the Applicant and one Nhlalwenhle Sibindi assaulted the now deceased Vusa Tshili with a "bicycle lock key" leading to his death while admitted in hospital a few days after the attack. It is common cause that the cause of the vicious attack was suspicion that the Deceased had stolen gold ore from the mine pit where Applicant and Sibindi were mining.

The facts in Issue

The Applicant proffers a defence outline both in his written application and in his *viva voce* address to the court during his bail hearing. He is steadfast to his version. He states that on the day in question he and Nhlalwenhle Sibindi were underground mining. The now deceased and one Rodwell in the company of other unknown people attended and stole their gold ore. They traced the group only to discover that they had already milled the gold ore at one Matshuma's residence, and made good with the deduced precious metal. As Applicant and his accomplice returned home, they met the deceased on the way. Upon seeing them he bolted. They gave chase. Sibindi who was more fleet footed caught up with the now deceased at some secluded place. Applicant states further that he heard the now deceased screaming. He ran to the scene and found the now deceased on the ground with Sibindi repeatedly striking him with a jack hammer drill bit commonly known as "injombolo" in isiNdebele language. Applicant avers

that he did not join in but just stood there watching. In that process two men arrived in a Honda Fit vehicle and shouted "Vimba! Vimba!" which Applicant understood to be an instruction for some unseen people to capture him and Sibindi. It is for that reason that he claims he fled for his safety. In his written application he states that he was shocked to learn of Deceased's demise upon his arrest. This last statement is problematic as will be demonstrated later.

The State opposes Applicant's release on bail mainly on the following reasons:

1. That there is overwhelming evidence against the applicant.
2. Applicant is flight risk.

To support its stand point the State relies on an affidavit filed by the investigating officer who basically emphasises the State's fears. The State avers that Applicants admits being at the scene of crime. He admits tracking and chasing the now deceased with his accomplice. That three eye witnesses saw the Applicant and his accomplice assaulting the deceased. That before he succumbed to his injuries the deceased himself identified the Applicant as one of his assailants. For those reasons the State avers that there is a prima facie strong case against the Applicant to guarantee a conviction. Murder being a serious offence attracts very stiff penalties which may induce Applicant to abscond.

Expanding on its points in opposition; the State cited Applicant's own *viva voce* statement in support of his application, to the effect that seven days after the assault on deceased, he was arrested in Filabusi in Matabeleland South province yet the offence occurred in Inyathi in the Matabeleland North province. Further that despite the Applicant giving Mguzana village, in Tsholotsho as his fixed abode, before commission of the offence he was ordinarily resident at Village 2, Badala in Inyathi, but seven days thereafter he was arrested in Filabusi without even passing through his purported place of permanent residence. That his arrest was a result of police diligence as opposed to his will to hand himself over in co-operation with the police. The State further cited section 196(A) of the Criminal Code to emphasise that even if Applicant's version were to be accepted as it is; it does not amount to a defence since he can still be successfully convicted as a co-perpetrator.

Application of the law to the facts

The law relevant to bail applications was aptly cited by both parties, interestingly even by the Applicant despite him being a self-actor. Section 50(1)(d) reads as follows:

"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 has been highlighted in numerous other cases on this subject, that bail is now a fundamental right guaranteed by the Constitution in our jurisdiction. It follows therefore that where there are no compelling reasons a person in Applicant's stead ought to be released.

Section 115C (1) of the Criminal Procedure and Evidence Act (Chapter 9:07) lists compelling reasons that may justify continued detention of a person charged with an offence as follows:-

"*The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established*

a) Where there is a likelihood that the accused, if he or she were released on bail, will
  i) Endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
  ii) Not stand his or her trial or appear to receive sentence; or
  iii) Attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
  iv) Undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system
b) Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security."

In casu the State reiterates that Applicant has been living a nomadic life as an artisanal gold miner. That he is not shown to be attached to the address he gave as his ordinary place of abode. That despite his oral submission that he is a builder by profession and a part time miner, at Badala Village in Inyathi there is no evidence on record that he ever built anything. If anything, seven days after commission of the offence he is found in another province numerous kilometres away from the crime scene and/ or his given residential address. The fears of the State seem to hold water especially if viewed against Applicant's own submissions. In his written application he held that he was shocked to learn of the deceased's death at the time of his arrest. In other words, he wants to convince the court that when he sojourned to Filabusi, he did so without knowing of deceased's demise. He avers that he went there after securing some construction job. In other words, he wants the court to believe that he was not fleeing to evade arrest. What exercises the court's mind is; could it be sheer coincidence that a man who ordinarily was an artisanal miner, immediately after commission of a serious offence he lands a construction job. The court is mindful of the fact that he left the crime scene in at full tilt. He did not seek refuge in Tsholotsho at his parents' homestead. If anything, he does not seem to find rest until he lands in another province. Unfortunately, his oral submissions to court do not help matters. He states that in fact after deceased's death he went to meet his parents, apologised and paid some dues towards meeting the funeral expenses. If that is the case, how then does he claim in his written application that he only learnt of deceased's fate upon his arrest? Clearly the Applicant is not being truthful on his reasons why he found himself in Filabusi. The court can only conclude that he was fleeing in an effort to evade arrest. The State's argument that he is a flight risk therefore finds favour.

The State further avers that the strength of the State case against the Applicant coupled with the likely sentence it attracts is a great incentive for flight. Applicant admits that he tracked and searched for the deceased. When they met, he took part in giving chase. He was present when deceased was fatally assaulted. Even though Applicant denies taking part in the assault, he does not seem to have disassociated himself from the entire transaction leading to deceased's death. He qualifies squarely as a co-perpetrator in terms of section 196 (A) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. (See *State vs Thembelani Sibanda and Another HB 124/23*). See also *Sambo vs S SC-22/90*

The State avers that it has two independent witnesses. The Applicant admits to the existence of such witnesses i.e. the two men who came in a Honda Fit vehicle per his own testimony. He does not deny that the deceased himself identified him as one of his assailants before he succumbed to his injuries. From the above it is clear that there is overwhelming evidence against the Applicant. His conviction is highly likely. If convicted he is likely to be sentenced either to death, life imprisonment or a lengthy prison term. In the matter of *Lookout Moyo vs The State* HB-25-22 it was held as follows:

"*I am satisfied that the applicant in this matter does not have any real defence. His conviction is not in doubt. Upon conviction he will most likely receive a lengthy prison sentence. That on its own will provide sufficient inducement to abscond. There are compelling reasons for the applicant to be denied bail pending his trial."*

Conclusion

In casu the court finds that Applicant has failed to discharge the evidential burden placed on him to show on a balance of probabilities that it is in the interests of justice to release him on bail pending trial as envisaged by section 115 C (2)(a)(ii) of the Criminal Procedure and Evidence Act (Chapter 9:07). The State has overwhelming evidence against the Applicant. What he raises as a defence in fact does not exculpate him. He attempted to flee justice soon after commission of the offence. He has shown a propensity towards flight. It is for such reasons that Applicant is not found to be a proper candidate for bail. It is accordingly ordered as follows:

In the circumstances, the application for bail pending trial be and is hereby dismissed.

National Prosecuting Authority, Respondent's Legal Practitioners