XANDER SIASAYI

And

DANIEL PEYANI

Versus

THE STATE

HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 28 JANUARY 2021

Bail Pending Trial

T Razemba, for the applicants
T Muduma, for the respondent

KABASA J: This is an application for bail pending trial. The application was filed on 25th January 2021. I then advised the parties of my intention to dispose of the matter on the papers. To that end I invited them to file heads of argument, if they were so inclined, by 27th January 2021. Counsel for the applicants filed heads of argument on the 28th January and none were filed by the respondent.

Cognisant of the urgency of bail applications I concluded that the state did not intend to file any more papers and thus proceeded to determine the matter.

The applicants are Police Officers who were based at Z.R.P Tuli, Zezani in Beitbridge. They are aged 33 and 32 years respectively.

On 7th January 2021 the two were arrested on allegations of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. It is alleged the two arrested the now deceased, Blessing Nare following a report of unlawful entry and theft which was allegedly committed at Kiliboni Mbedzi bar at Toporo Business Centre.

The now deceased was arrested on 27th December 2020 but the report was not recorded in the Report Received Book. The deceased was interrogated and in the process

assaulted in a bid to extract a confession. On realising that the deceased could no longer stand or walk the applicants left him by the roadside. They later checked on him and on realising that he was dead proceeded to dismember his body before burning the remains. The dismembered body parts were later discovered by a member of the search party which had been organized to try and locate the deceased.

Investigations ensued resulting in the arrest of the two applicants.

In the request for remand Form (Form 242) the state linked the applicants to the murder based on the following grounds:-

(i) The deceased was last seen in the custody of the two applicants.

(ii) The two applicants were observed assaulting the now deceased in a bid to extract a confession.

(iii) After their arrest the applicants made indications at the scene of crime.

(iv) Sticks and an axe were recovered at the applicants' indications.

Bail was opposed on 3 grounds *viz*

(a) The offence is of a serious nature and carries capital punishment and so the applicants are likely to abscond.

(b) The applicants are likely to interfere with state witnesses as the witnesses are locals from the applicants' policing area.

(c) The other missing body parts are yet to be recovered.

The applicants contend that they are innocent until proven guilty. The presumption of innocence therefore operated in their favour.

They have also given an explanation professing their innocence. It is their contention that the deceased led them to his girlfriend and to a friend after telling the Police Officers that he had given the stolen money to these individuals. Follow-ups yielded no positive result. The deceased then explained that he had hidden the money in the bush. The applicants had decided not to pursue this third story but for the complainant's insistence who was desperate

to recover his money. The third explanation also proved to be untrue and by then the deceased complained that he was tired and could no longer walk. The applicants decided to remove the hand cuffs they had used to restrain the deceased, whereupon the deceased fled. Attempts to give chase failed and that was the last time the applicants saw the deceased.

The allegations that the deceased died as a result of injuries inflicted by the applicants are mere suppositious and speculative as there was no post mortem conducted. They never made indications as they were tortured and merely taken to the place where the body parts had been recovered. Nothing was recovered as a result of indications made by them.

Both applicants have alternative places to stay, away from the area where the offence was allegedly committed. There is therefore no danger of interference with evidence or state witnesses.

The fear of abscondment can be addressed by the imposition of suitable conditions. They have not exhibited any intention to abscond however and are desirous to stand trial and clear their names, so they argued.

From the foregoing can it be said there is good reason to interfere with the applicants' right to liberty by denying them bail?

Section 49 of the Constitution provides that:-

(1) "Every person has the right to personal liberty, which includes the right –

(a) ….

(b) not to be deprived of their liberty arbitrarily or without just cause."

Section 49 is to be read with section 50 (1) (d) of the same Constitution, which provides that:-

(1) "Any person who is arrested –

(a) ….

(b) ….

(c) ….

(d) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention."

The Supreme Court in *Ncube v State* 200 (2) ZLR 556 (S) underscored the importance of the presumption of innocence. It is because of this presumption that a Judicial Officer should grant bail where possible.

Bail should only be denied where the interests of justice will be prejudiced.

A balance has to be struck between the liberty of an individual and the proper administration of justice. *State v Biti* 2002 (1) ZLR 115)

Under what circumstances can one be deprived of their liberty? Section 50 of the Constitution says where there are compelling reasons justifying refusal of bail. The use of the word "compelling" is not to be glossed over.

"Compelling has the following synonyms:-

(a) forceful

(b) convincing

(c) persuasive

(d) undeniable

(e) gripping

Section 115 C of the Criminal Procedure and Evidence Act, Chapter 9:07 provides that:-

(1) "In any application, petition, motion, appeal, review or other proceedings before a court in which the grant or denial of bail or the legality of the grant or denial of bail is in issue, the grounds specified in section 117 (2), being grounds upon which a court may find it is in the interests of justice that an accused should be detained in custody until he or she is dealt with in accordance with the law, are to be considered as compelling reasons for the denial of bail by a court."

What are these compelling reasons? These are to be found in s117 (2) (a). I do not propose to look at all the factors enumerated in s117 (2) (a). I will limit myself to those that are relevant *in casu.*

These are:

Section 117 (2) "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) ……

(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.

(iv) …."

I propose to look at each of the compelling reasons proffered by the State in turn:-

1) **Fear of Abscondment**

It is the State's argument that the offence is of a serious nature and the likely penalty upon conviction is either capital punishment or a lengthy term of imprisonment. These factors present a temptation to abscond and not stand trial.

There is no doubt the charge is of a serious nature and the possible penalty upon conviction is equally the harshest possible penalty for any infraction of the law.

If there are grounds for believing that the applicants will remove themselves from the jurisdiction of our courts then bail ought to be refused. (*Hussey v State* 1991 (2) ZLR 187 (S).

However a mere assertion that the applicants are likely to abscond, without more, does not suffice. Such an assertion must be clothed. Such can be done where there is evidence that such an attempt was made or any other evidence showing such a predisposition.

There is nothing on record to show that the two applicants exhibited such a disposition either by action or utterances.

It can hardly be regarded as a compelling reason to deny bail on unsubstantiated fears of abscondment.

In *Jongwe v State* 2002 (2) ZLR 209 (S) the Supreme Court set out guidelines on what a court should consider in assessing the risk of abscondment. These factors are: the nature of the charges, the likely penalty upon conviction, the strength of the state case, the accused's ability to flee to a foreign country, past responses to being released on bail and the assurances given of the intention to stand trial.

In casu the evidence is circumstantial. Whilst in such an application the court is not enjoined to go further and make definitive pronouncements on the possibility of a conviction, it can however comment on the strength of the state case based on the evidence as articulated in Form 242.

Can it be said the fact that the deceased was last seen in the custody of the applicants, the report of unlawful entry and theft was not recorded and the applicants were observed at some stage assaulting the deceased clearly call for the drawing of only one reasonable inference and that being that the deceased died as a result of an assault perpetrated by the applicants?

I would say that is debatable and that being so it cannot be said the state case is so strong and the likelihood of a conviction for murder equally strong so much so that the applicants will be induced to flee from justice.

This, coupled with the fact that there is nothing to show that the applicants exhibited such an intention tends to work in favour of the applicants.

The two applicants are Police Officers with the usual family responsibilities. The second applicant is a holder of a passport but the first applicant has no travel documents. There is nothing to show that they have the means to flee to some foreign land, one where there are no extradition facilities.

They both appear to have strong family ties in Zimbabwe and with the current travel restrictions due to the Covid 19 pandemic, the likelihood of them fleeing, even if they desire to, is well nigh impossible or very difficult.

The applicants are "first offenders" and so the issue of past responses to release on bail does not arise. They both proffered an explanation regarding their innocence and their desire to stand trial.

That said, the only factors that are against them is the seriousness of the offence and the gravity of the possible penalty should a conviction ensue.

However the seriousness of the offence on its own is no reason to deny bail unless there are other factors.

2) **Interference with Witnesses/Evidence**

The offence allegedly occurred in Beitbridge where the two Police Officers were based. Applicants have provided alternative addresses where they are to stay and these addressed are not in Beitbridge. The first applicant gave a Bulawayo address and the second applicant a Gwanda address. Both have intimated that should reporting conditions be imposed, the respective Police stations would be where each one will be able to report.

This to me allays the fear of interference with witnesses or investigations. A suitable condition barring them from visiting the area where the offence was allegedly committed will also allay fears of interference with investigations.

The facts on Form 242 however appear to suggest that the body was burnt after some body parts had been hacked off and these are the body parts which were recovered when one member of the search party stumbled on them. What body parts are yet to be recovered then? I get the impression that the issue of recovery of body parts was thrown in just so as to make a strong case for the denial of bail.

There has not been any suggestion tending to show the possibility of interference. In *Hussey v State* (*supra*) the Supreme Court made it clear that there has to be more than just a bald assertion that the applicant is likely to interfere with witnesses. Such an assertion must be well grounded; it is not so grounded *in casu*.

I do not lose sight of the fact that it is said the body was burnt but this must be looked at in light of the explanation given by the applicants. To hold that because the body was burnt it means the applicants have exhibited an intention to interfere with evidence gives the impression that it has been factually proven that it was the applicants who burnt the body. To hold so negates the principle relating to the presumption of innocence.

Counsel for the applicants cited *State v Bennet* 1976 (3) SA 652 where the court said:-

> "It appears to me that, as an applicant has thus far not interfered with state investigations, the proper approach should be that, unless the state can say that there is a real risk that he will, not merely may interfere, there does not appear to me to be a reasonable possibility of such interference."

Given the recovery of the body parts and the fact that the body was burnt, what possible interference can be attributed to the applicants should they be released on bail.

Sight must not be lost of the issue I have already alluded to, relating to the nature of the evidence and the explanation proffered by the applicants.

Granted the offence the applicants face is listed in Part II of Third Schedule and Section 115 C (2) (a) (ii) B states that the accused shall bear the 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. Without delving into the constitutionality of this reverse onus, the point is the applicants have shown that they are good candidates for bail. I will however say this much. It does not make much sense to say bail is a constitutionally guaranteed right whose qualification is where there are compelling reasons to deny it and in the same breath argue that the applicant must prove that there are no such compelling reasons, albeit on a balance of probabilities. He who says that constitutional right should be abrogated ought to prove why that is so.

Bail ought not to be used as a punitive sanction and I am of the considered view that to deny bail in the circumstances of this case would be tantamount to penalizing the applicants before their guilt is established.

I have not found compelling reasons to deny the applicants their right to liberty. It is only fair that they be allowed to prepare for their trial whilst coming from home.

The presumption of innocence tips the scales in favour of the applicants' liberty.

The Draft Order captured all the possible conditions which allay the fear of interference and abscondment. It is however important that the applicants be barred from visiting Toporo area, Zezani, Beitbridge. This is the area where the offence is said to have been committed and whatever evidence that is yet to be unearthed should not suffer the risk of interference from those it is alleged are responsible for the murder of the deceased.

That said, the application for bail pending trial is granted in terms of the amended Draft Order.

Nyawo Ruzive Legal Practice, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners