MDUDUZI NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 26 FEBRUARY & 9 MARCH 2021

Application for bail pending trial

Applicant in person
T. Muduma, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. This application was considered on the papers filed by the parties without oral argument, in accordance with *paragraph* 4 of Practice Directive 2 of 2021 issued by the Chief Justice of Zimbabwe.[1]Applicant is being charged with the crime of rape as defined in section 65(1) (b) of the Criminal Law [Codification and Reform] Act [Chapter 9:23].It being alleged that; on a date unknown, but during the period extending from June to October 2020, applicant unlawfully and knowingly had sexual intercourse with a female aged 13 years several times on different occasions without her consent and knowing that she had not consented to it or realising that there is a real risk or possibility that she may not have consented to it.

In support of the application, applicant has placed the following facts before court: he is 31 years old; married with four minor children; he resides at his own homestead, at Village One, Mamboweni, Insuza. The matter has been allocated to Regional Court "B", Tredgold, Bulawayo, for trial. On two previous set down dates, the witnesses were unavailable for the commencement of trial. Applicant contends that he did not commit the crime, the case is fabricated by his wife to settle a score concerning a previous misunderstanding. He contends that he will not interfere with state witnesses.

[1]**Part III: Hearing of urgent chamber and bail applications** 4) With effect from **22 January 2021**, a Judge may consider and dispose of an 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 Arguments with or immediately after filing their applications or opposing papers.

This application is not opposed. Respondent concedes that there are no compelling reasons for the continued detention of the applicant. In its written submissions filed with this court, respondent avers that:

1. The primary consideration in an application for bail pending trial is whether there are compelling reasons or grounds justifying his continued detention.
2. In essence if there are compelling reasons the release is peremptory.
3. It is trite law that in an application for bail pending trial, the presumption of innocence is in favour of the applicant until proven guilty.
4. Furthermore the court should always grant bail where possible and should lean in favour of liberty of the applicant provided the interests of justice will not be prejudiced.
5. In the case of *S* v *Malunwa* 2003(1) ZLR 275 (H), it was held by NDOU J that, "the court should not refuse bail on the bare assertion of the state, there must be enough reason for such a conclusion. In either words, grounds for refusal of bail should be reasonable substantiated."
6. Furthermore the respondent is of the considered view that applicant is unlikely to abscond and interfere with state witnesses.
7. In the light of the above submissions respondent is of the view that applicant is indeed a good and proper candidate for bail pending trial.

In conclusion, respondent concedes that it is in the interests of justice that applicant be released on bail pending trial.

The grant or refusal of bail is a judicial function. It is the court that admits, or declines to admit an accused to bail. It is the court that must be satisfied that the concession put forward by the state, factors into the equation the law on bail and the particular facts of the case. The court must be satisfied that the concession has been properly made, before it admits an accused to bail. In terms of section 117 (2) (a) (iii) and (iii) of the Criminal Procedure and Evidence Act [Chapter 9:07], the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where it is established that he may attempt to influence or intimidate witnesses or to conceal or destroy evidence, and where the release on

bail may undermine or jeopardise the objectives or proper functioning of the criminal justice system,including the bail system.

In terms of section 117(3) (c) of the Criminal Procedure and Evidence Act [Chapter 9:07], in considering whether the applicant may attempt to influence or intimidate witnesses or to conceal or destroy evidence, the court shall take into account *inter alia*, the following factors; whether the accused is familiar with any witness or the evidence; the accused's relationship with any witness and the extent to which the witness may be influenced by the accused. In *S v Hlongwa* 1979 (4) SA 112 (D) 113 H the court pointed out that bail should be refused to an accused "if, on all the evidence, there is a possibility that he would tamper with one or more state witnesses if he were released." A likelihood that the accused will interfere with the state witnesses, must have some factual support and must not be based on speculation. See: *S v Kock*2003 (2) SACR 5 (SCA) 13c. In *Ex parte Nkete* 1937 EDL 231, bail was refused where witnesses feared the accused, and had been threatened.

In *casu*, the complainant is a 13 year old daughter of the applicant. The applicant accuses his wife, mother to the complainant of fabricating these allegations for the purposes of settling a previous misunderstanding. The papers before court show that the crime of rape was allegedly committed at his homestead, where he resides with the complainant, his wife and other three minor children. If admitted to bail, applicant will have to return to his homestead and reside with the complainant and his wife, whom he accuses of fabricating these allegations. I fail to see what effective and enforceable bail conditions can be put in place to prohibit communication between the applicant, on one hand, and the complainant and his wife on the other. In assessing the risk of interference, the court is entitled to consider the relationship between the accused and the state witnesses. I take the view that, on the facts of this case, there is a real likelihood and possibility that applicant would tamper with one or more state witnesses if he were released on bail.

In terms of section 117(3) (c) of the Criminal Procedure and Evidence Act [Chapter 9:07], in considering whether to admit or refuse to admit an accused to bail, the court may take any other factor which in its opinion should be taken into account. In *casu*, I take into account that the matter is ready for trial. The applicant says he matter has been set down on two previous occasions, and the trial could not commence due to the unavailability of

witnesses. The state has to ensure that, in the next set-down date, the witnesses are available for trial.

Disposition

Where there is a cognisable indication that the release on bail would prejudice the interests of justice, the right to liberty must give way to the interests of justice. Therefore, upon careful consideration of all the facts and the circumstances based on the facts and evidence before me, weighing up the interests of justice against the right of the accused to his personal freedom and any potential prejudice because of his detention, I am satisfied that interests of justice do not permit his release from custody. There is a likelihood that he will interfere with state witnesses.

I, therefore order as follows:

The application for bail is accordingly dismissed.

National Prosecuting Authority, respondent's legal practitioners