NQOBILE MOYO

Versus

THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 19 MAY 2020 AND 28 MAY 2020

Bail pending trial

T. Nyathi, for the applicant
B. Gundani, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is being charged with the crime of murder as defined in section 47 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23]*. On the 2 January 2020, applicant appeared before the Nyamandlovu Magistrates Court, whereupon he was placed on remand and detained in custody. Since the applicant is facing a murder charge, an offence specified in the Third Schedule, the magistrate had no jurisdiction to entertain hisbail application. This is so in terms of section 116 (c) (iii) of the Criminal Procedure and Evidence Act [Chapter 6.09], (the Act) which provides that a magistrate shall not, without the personal consent of the Prosecutor-General, admit a person to bail or alter a person's conditions of bail in respect of an offence specified in the Third Schedule.He was then advised to make his bail application before this court.

The allegations from which the charge of murder arises are set out in the Police Form 242, commonly called a Request for Remand Form. It states that:-

> "On the 20 January 2020 at stand 16, Village 2B, Stanhope North, Nyamandlovu, the accused had sexual intercourse with *Rumbidzai Mkhwananzi* his cousin sister without her consent. He then strangled the now deceased *Rumbidzai Mkhwananzi*, dragged the body for about 300 metres, left the body to go home and collect paraffin and matches. He came and carried the body with his shoulders and went to the bush where he dug a shallow grave. Accused put the body and lit it. He then buried the body in a shallow grave. The body was identified by *Misheck Moyo* when the police exhumed it."

According to Form 242, there is evidence linking the accused to the commission of the offence. First, it is alleged that he is admitting to have killed the now deceased after raping her. Second, it is alleged that a piece of a plastic tent which was partly burnt was

recovered from the shallow grave. Third, the shovel which was used to dig the shallow grave by the accused was recovered.

Applicant anchors his bail application on section 50 (1) (d) of the Constitution of Zimbabwe Amendment (No. 13) Act 2013, which says 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. I am of the view that anchoring a bail application on this constitutional provision is incorrect. I say so because this provision does not appear to deal with accused persons who have been charged. It deals with arrested person, those who are still in the custody of the police. It enables such persons to seek their release before the expiry of the 48 hours or before they are taken to court for their initial appearance. Such persons may apply to court for their release, and the court can only refuse to release them from police custody if they are compelling reasons justifying their continued detention. Such an arrested person may invoke section 50 (1) (d) of the Constitution to advance his cause for release from police custody. In fact the whole of section 50 (1) deals with pre-initial court appearance. See *Vincent Kondo and Edmore Marwizi Mapuranga v The State* HH 99-17.

In my view this section 50 (1) (d) gives an arrested and detained person, who has not appeared in court, certain rights, first, a procedural right to approach a court to determine the lawfulness of pre-initial appearance detention, second, a substantive right to have the lawfulness of the detention determined, and third, a remedy to be released when there are no compelling reasons justifying their continued detention.

I take the view that the appropriate provision that must anchor a bail application, is section 50 (4) (d) which says any person who is arrested or detained for an alleged offence has the right— at the first court appearance after being arrested, to be charged or to be informed of the reason why their detention should continue, or to be released. This is the provision that deals with those persons who have made their initial court appearance. At theinitial court appearance they have a right to be informed of the reason why their detention should continue, or to be released. In adjudicating whether the detention of the accused should continue or he be released, the court then can factor into the equation the constitutional right to liberty, the right to be presumed innocent, as read with the provisions of the Criminal Procedure and Evidence Act [Chapter 6.09] relating to bail applications.

I therefore take the view that section 50 (1) (d) of the Constitution is arrested person driven, i.e. an arrested person who seeks release prior to having been brought to court for

initial appearance. Once he has been brought to court and charged, the applicable provision to anchor a bail application is section 50 (4) (d) of the Constitution.

Nothing really turns of the fact that I take the view that this application is anchored on what I consider to be an incorrect provision. This is so because this issuewas not argued before me. The State did not take issue with the citation of section 50 (1) (d) of the Constitution as the empowering provision to anchor a bail application for a person who has appeared in court.

In this jurisdiction section 116 of the Criminal Procedure and Evidence Act empowers a court to admit an applicant who is in custody to bail pending trial. Section 115C(2) provides that if the applicant is charged with the offence specified in Part 1 of the Third Schedule, the applicant in such a case, bears the burden of showing on a balance of probabilities that it is in the interests of justice for him to be released on bail. The applicant is charged with the crime of murder. It is alleged that the death of the victim was caused by the applicant after committing the offenceof rape. This is an offence listed in Part I of the Third Schedule and section 115 C (2) (ii) A of the Criminal Procedure and Evidence Act. The Respondent argues that the *onus* is on the applicant to show that it in the interests of justice that he be admitted to bail pending trial. I agree. *Ms Nyathi*, for the applicant conceded that indeed the *onus* is on the applicant.

I need to make the point in passing that my view is that the constitutionality of the provisions that cast the burden of proof on the applicant have not been tested. On the principle of the presumption of constitutional validity and the notion of legal certainty they are valid and enforceable provisions until such time that a court rules to the contrary. The procedure of declaring legislative provisions constitutional invalid is clearly set out in the Constitution. Until such time, if it ever happens,that the provisions that reverse the bail *onus* are declared constitutionally invalid, courts must give full effect to them.

It is necessary therefore to set out the provisions of s 117 (6) (a) of the Criminal Procedure and Evidence as it deals with bail applications relating to Third Schedule Offences. Section 117reads as follows;

> "(6) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in—
> (*a*) Part I of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a

> reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice permit his or her release;"

The burden of proof refers to the obligation of a party to persuade the trier of facts by the end of the case of the truth of certain propositions. The law specifically places the burden of such proof on the applicant.

When one speaks of the need to discharge an *onus*, it immediately becomes clear that there is an evidentiary burden that must be met. Such burden cannot be discharged by submissions contained in a bail statement. There must be evidence placed before court. Applicant must adduce evidence. The evidence must show that it is in the interests of justice that he be admitted to bail. Such *onus* is discharged by evidence not bold statements. In such an application, an applicant may place evidence before court by way of an affidavit. *In casu*, there is no evidence, just bold and statements which save no useful purpose.

Bail applications relating to Parts I of the Third Schedule offences are not a walk in the park. The court is required to be satisfied by the applicant, who must adduce evidence, that it is in the interests of justice that he be released on bail. See *Vincent Kondo and Edmore Marwizi Mapuranga v The State (supra). In casu,* there is no *aorta* of evidence placed before court.

Section 115C of the Criminal Procedure and Evidence Act states that a court may rely on the grounds specified in section 117(2) to find that it is in the interests of justice that an accused should be detained in custody until he has been dealt with in accordance with the law. In this regard section 112(2) (a) (ii) provides that 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— where there is a likelihood that the accused, if he or she were released on bail, will— not stand his or her trial or appear to receive sentence. According to section 117(3) (b) in considering whether the ground referred to in—subsection (2) (*a*) (ii) has been established, the court shall take into account— the nature and gravity of the offence or the nature and gravity of the likely penalty therefore;the strength of the case for the prosecution and the corresponding incentive of the accused to flee.

The applicant is facing the crime of murder. This murder is alleged to have been committed after the rape of the now deceased person. The seriousness of the sentence, standing alone is no bar to the admission of the accused to bail. This is so because of the presumption of innocence that operates in favour of the accused at this stage.See *S* v *Hussey* 1991 (2) ZLR 187 and *Tavonga Shava* v *The State* HMA 8-16.

According to the respondent, applicant admits the commission of the crime. *Ms Nyathi,* in her very brief submissions conceded that applicant has no defence to the charge. She contended that applicant is likely to be sentenced to a very long term of imprisonment.

It has repeatedly been held that in assessing the risk of flight, courts must take into account not only the strength of the case for the prosecution and the probability of a conviction, but also the seriousness of the offence charged and the concomitant likelihood of a severe sentence. The obvious reason of this approach is that the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the applicant to abscond. In *S v Nichas*1977 (1) SA 257 (C) 263G-H, the court said if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. In *S v Hudson* 1980 (4) SA 145 (D) 164H, the court held that the expectation of a substantial sentence of imprisonment would undoubtedly provide incentive to the accused to abscond and leave the country. In *S v C* 1995 SACR 639 (C) 640H, it was said that whilst the possibility of absconding is always a very real danger, it remains the duty of the court to weigh up carefully all the facts and circumstances pertaining to the case.

This application turns on the risk of abscondment by the applicant. In *Aitken & Another v Attorney-General* 1992 (1) ZLR 249 (S,) the court set out how the court should assess the risk of abscondment. It was held:

> "In judging this risk the court ascribes to the accused the ordinary motives and fears that 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 to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial.
>
> It is quite clear from the above remarks 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 strengths and weaknesses of the State case."

See *S v Jongwe* SC 62/2002.

In the present case, there is no doubt that the offence with which the applicant is charged is very serious. Murder is a very serious offence. In the event he is convicted, as required by law, he shall be liable to a very long term of imprisonment. The evidence against the accused is very cogent, if not, overwhelming. The State contends that applicant raped and murdered the now deceased. In his bail statement nothing is said about his defence to the

charge, if any. His legal representative concedes that he has no defence to the charge. He raped and murdered, put the body in a shallow grave and set it on fire.

The applicant contends in his bail statement that the State failed to prove compelling reasons warranting his pre-trial incarceration and keeps recycling section 50(1) (d) of the Constitution. I take the view that it is applicant who has to place evidence before court to show that it is in the interests of justice that he is admitted to bail pending trial.

In this case nothing much turns on the seat of the *onus*. My view is even if the *onus* was on the State to show that applicant is not a good candidate for bail, on the facts of this case, it would have easily discharged it. There is just too much against applicant, and very little in his favour.

What is in his favour is the presumption of innocence. The law presumes that he is innocent until he is proved guilty by a court of law. The other point in his favour is the right to liberty. Which is one of the most fundamental human rights, which should not be lightly interfered with. The facts of the case warrant that the presumption of innocence and the right to liberty be interfered with in the interests of justice.

Applicant has not shown that it is in the interests of justice that he be granted bail. No defence at all. The State's case is very strong.

I accept that he chose not to place evidence before court. It is his constitutional entitlement. Yet his exercise of that right does not remove the *onus* on him or suspend the operation of ordinary rational processes.

I am satisfied that because the prospects of conviction and upon conviction the imposition of a long prison term are real, the temptation for the appellant to abscond if granted bail is irresistible. See *S v Jongwe* (*supra*).

Disposition

I am satisfied that the applicant has not discharged the *onus* on him of showing, on a balance of probabilities, that it is in the interests of justice for him to be released on bail pending trial. Wherefore, the application for bail pending trial must fail, and accordingly, I order as follows:

The application for bail is accordingly dismissed.

Shenje& Company, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners