K a JUVENILE
versus
THE STATE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 1, 3 and 4 June 2009

Bail Application

T Mpofu, for the applicant
R Chikosha, for the respondent

UCHENA J: The applicant a 17 year old juvenile was indicted for trial before this court on two counts of murder. It is alleged that he shot his father at the back of the head before going upstairs to his parents' bedroom where he shot his mother on the bridge of the nose. Both parents died from gun shot wounds.

The applicant applied for bail pending trial, before he was asked to plead to the charges. This in my view was not the best time for a bail application as what ever bail the accused maybe granted at this stage may be affected by his plea of not guilt which is unavoidable in terms of s 271 of the Criminal Procedure and Evidence Act [*Cap 9:07*], which I will refer to as the CP&E Act. In terms of s 271 (1) of the CP&E Act the court cannot enter a plea of guilty on a murder charge, as evidence must be lead before an accused person can be convicted of murder. The bail application at this stage, is ill advised because in terms of s 169 of the CP&E Act, any bail granted before the accused tenders his plea will lapse when he pleads not guilty to the indictment. Section 169 of the CP&E Act provides as follows:

> "If the accused is indicted in the High Court after having been admitted to bail, his plea to the indictment shall, unless the court otherwise directs, have the effect of terminating his bail, and he shall thereupon be detained in custody until the conclusion of the trial in the same manner in every respect as if he had not been admitted to bail."

This means the court will have to again consider the question of bail after the accused's plea. The defence may have good reasons for making the application at this stage. This would in most cases be due to the parties not being ready for trial. In this case the applicant's counsel

explained the need for an application at this stage by pointing out the need for the applicant to be examined by a psychiatrist before the trial. See p 6 of the applicant's application where he said:

> "The applicant has only recently secured the services of counsel who is working flat out on the preparation of his defence. The preparation has not as yet been completed. There is need for investigations to be carried out, in particular for the applicant to receive proper and meaningful psychiatric evaluation".

The need for psychiatric evaluation is confirmed by the applicant's seemingly purposeless shooting of his own parents. I am therefore satisfied that there was need for the applicant to apply for bail before pleading to the two counts of murder, but the application should have been preceded by an application for postponement..

Mr *Mphofu* for the applicant submitted that the accused should in terms of s 117 (1) of the CP&E Act be granted bail as he has been previously granted bail thus proving that he is a good candidate for bail. He submitted that he was thereafter brought back into custody in circumstances under which he was to lead oral evidence, but he thereafter shied away from leading such evidence. Mr *Chikosha* for the respondent submitted that the applicant should not be granted bail because he is a danger to himself the family and society. He was however not opposed to the applicant being remanded into the custody of North Court Children's Remand Home. He led evidence from Vimbai Mvundura the applicant's elder sister. She is the Executrix of their parent's estate, which Mr *Mphofu* had said has a duty to accommodate the applicant at one of the estate's properties different from where Vimbai stays.

It is trite that a parent's estate has a duty to support the deceased's minor children. The estate's duty includes the provision of food, accommodation and other necessities of life. Sections 10 (1), 11 and 12 of the Deceased Persons Family Maintenance Act [*Cap 6:03*], provides for the deceased's children's rights, when they terminate, and the consequences of a parent's attempt to terminate those rights before his death. Section 10 (2) and (3), provides for the prosecution of any one who interferes with those rights The fact that interference with the maintenance of the deceased's family leads to prosecution, and the prevention of the squandering of the estate by the deceased to avoid the maintenance of his family by his estate, means the applicant as the deceased's child has a very strong and unavoidable right to support from his parents' estate.

Vimbai told the court that as the applicant's sister and executrix of their parents's estate she initiated the bail application which resulted in the applicant being released on bail. She had to convince other family members that the applicant had to be assisted. On his release

on bail she stayed with him at the Ruwa home where the applicant shot and killed their parents. She arranged for his medical and psychiatric examinations. He refused to take the later examination, but was medically examined after initially refusing to undergo that examination. He thereafter refused to go to school opting to be involved in the family business. He participated in the family business for one week and started leaving home on the pretext of going to work but never arriving. He started coming home at midnight or after midnight. He took keys to all rooms, resulting in anyone wanting anything from rooms like the pantry having to go through him. He became moody and started avoiding Vimbai in the way he had been avoiding his father before the fateful day. He had previously told her that he could not stand their father. He demanded use of family cars even though he was not a licensed driver. She said the licence the applicant presented to the police was a fake one. He demanded US$100-00 per day. Vimbai on the advice of elder members of the family gave in to these demands fearing that a refusal would trigger the applicant into the state he was in before he gunned down his parents. Vimbai fearing for her life, that of family members, and the public at large decided to renounce her guardianship of the applicant. She deposed an affidavit in which she details her fears, leading to the applicant being remanded in custody.

The issues before the court are:

1. Whether or not the applicant is a good candidate for bail, and
2. Whether or not the estate is able to accommodate and provide for the applicant if he is released on bail.

The answer to the second issue is obvious. The applicant's parents' estate is able to look after and accommodate him. It did so when he was in remand prison for nine months before he was released on bail in January 2009. Vimbai used to bring him food everyday. It provided for the bail application which led to his being granted bail in January 2009. When he was released on bail, the estate accommodated him and made available to him the necessities of life plus the luxuries of family cars and an allowance of US$100-00 per day.

The Estate has four immovable properties, the family home at number 494 Nzou Crescent Ruwa, the business premises, from which the family business is conducted, a vacant stand in Seke, and number 6351 Mutunduru Road Zimre Park. These properties are in Harare and three of them can if the applicant is a suitable candidate for bail, be used to accommodate him. Vimbai said there are tenants at number 6351 Mutunduru Road. From the impression

given of the means of the estate it can even afford rented accommodation for the applicant. I am therefore satisfied that the estate of the applicant's parents can accommodate him if he is a good candidate for bail.

The evidence placed before the court confirms that the applicant indeed gunned down his parents on 19 April 2008. The *actus reas* is not in dispute. The applicant alleges mental disability at the time he gunned down his parents. The issue for trial will therefore be on whether or not he had the necessary *mens rea* at the time he fired the fatal shots. The fact that the shooting is not in dispute and that the applicant's mental state is in issue calls for a careful consideration of whether or not the applicant is not a danger to those he will stay with if he is released on bail. The applicant's entitlement to bail is subject to certain conditions stipulated in s 117 (2) (a) (i-iv) of the CP&E Act which provides as follows:

> **"117 Entitlement to bail**
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> (1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.
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> (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 —
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> (*a*) where there is a likelihood that the accused, if he or she were released on bail, will —
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> (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
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> (ii) not stand his or her trial or appear to receive sentence; or
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> (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
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> (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system;
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> or
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> 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."

The relevant provision in this case is s 117 (2) (a) (i), which deals with the applicant for bail being a danger to the safety of the public or a particular person. In this case the respondent produced a report by a doctor who examined the applicant and found that he is suicidal and a danger to himself and others. Vimbai his sister, who initiated the previous bail application, testified that the applicant while on bail exhibited traits similar to those he exhibited before he gunned down his parents. The combination of the doctor's comments and Vimbai's observations establish a good reason for fearing that the applicant is not only a danger to himself but also to Vimbai, members of his family and the public. He while on bail took all the keys to the house. This can if his condition is triggered lead to his being able to endanger anyone who will be in the house. He exhibited signs that he resents the presence of Vimbai. He walked out of any room he would be in whenever Vimbai entered that room. That is the behaviour he exhibited before he shot his father. The resentment may have been intensified by the fact that he now is aware of the fact that Vimbai renounced his guardianship leading to his being remanded in custody. He heard her testimony against his bail application. He is also now aware of the people who will testify against him. Some of them stayed with him when he was released on bail, but he then did not know that they were going to testify against him. He however became aware when he was served with the state's summary of the evidence to be led at his trial.

In considering whether or not an applicant for bail is a danger to society the court should in terms of s 117 (2)(*a*)(i) take into account the following factors:

(i) the degree of violence towards others implicit in the charge against the accused;
(ii) any threat of violence which the accused may have made to any person;
(iii) the resentment the accused is alleged to harbour against any person;
(iv) any disposition of the accused to commit offences referred to in the First Schedule, as evident from his or her past conduct;
(v) any evidence that the accused previously committed an offence referred to in the First Schedule while released on bail;
(vi) any other factor which in the opinion of the court should be taken into account.

The charge the applicant is facing establishes that he shot his father for no apparent reason, before going up to his parents' bedroom to again shoot his mother for no apparent

reason. This conduct exhibits a condition within the applicant which if triggered can cause him to react violently towards others. This proves him to be a danger to others if released on bail.

The court can in terms of s 117 (3) (vi), consider any other factor which in its opinion should be taken into account. The applicant has not yet received a meaningful psychiatric examination. According to Vimbai's evidence he refused to be subjected to such an examination. In my view such an examination and possible treatment would ensure his safe reintegration into society. It is in my view risky to release the applicant into society when he has not been properly examined, and or treated, for the condition which triggered the events of the fateful day. The cumulative effect of the doctor's finding that he was suicidal, and a danger to others, the possibility of his having within him a condition which makes him resort to violence and the resentment he habours towards Vimbai, makes him an unsuitable candidate for bail. His application for bail must therefore be dismissed.

The respondent's counsel conceded that the applicant should not be kept in remand prison but be transferred to North Court Juvenile Remand Home. The applicant's counsel said he would be comfortable with the applicant being remanded into the custody of North Court Remand Home, if his bid for bail fails. I agree that it is undesirable for a juvenile to be kept in a remand prison. That is contrary to the provisions of s 84 (1) of The Children's Act [*Cap 5:06*], which provides as follows:

> "(1) A child or young person who is charged with an offence shall not before conviction be detained in a prison or police cell or lock-up unless his detention is necessary and no suitable remand home is conveniently available for his detention."

Mr *Chikosha* for the respondent advised the court that the applicant was previously remanded in remand prison because North Court Juvenile Remand Home could not receive him due to lack of food. While s 84 (1) allows a remand in prison in such circumstances I consider it unfortunate that the applicant was kept in remand prison for such a long time, when options in terms of s 86 (1) (b) and (2) of the Children's Act and the applicant's family, could have provided a relief for the none availability of food at North Court Remand Home and insured an earlier transfer of the applicant from remand prison to North Court Remand Home. Section 86 (1) and (2) provides for Government and Local Authorities grants to certified institutions like North Court. It was therefore desirable for the State to constantly review the availability of food at North Court Remand Home. Alternatively the applicant's family which

according to Vimbai's evidence gave him food daily at remand prison could have been asked to do so at North Court Juvenile Remand Home. The inability to provide food by North Court should have been, meet by inquiries on the possibility of that institution being assisted or the applicant being feed by his family while at that institution.

In view of my finding that the applicant is not a suitable candidate for bail, and that he should not be remanded in the custody of a remand prison, I will order that he should be transferred to North Court Juvenile Remand Home.

In the result, the applicant's application for bail is dismissed. The applicant shall be removed from Harare Remand Prison, and be placed into the custody of North Court Juvenile Remand Home.

Mawere & Sibanda Legal Practitioners, applicant's legal practitioners
Attorney General's Criminal Division, respondent's legal practitioners