GARIKAI SAKALA
and
KUFAKUNESU KEMBO
and
VENGAI SAKALA
and
JIMMY KANOKORA
and
SHINE CHIMUGANU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 05 FEBRUARY 2013

F. Murisi, for the applicants
C. Manhiri, for the state

Bail Application

MWAYERA J: The applicants are facing a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The allegations being that they caused death of the now deceased by striking him all over the body using weapons such as knobkerries chains, booted feet and open hands. The applicants were indicted for trial in the High Court in terms of the Criminal Procedure and Evidence Act for their trial to commence on 23 March 2013. Following the indictment they were removed from bail in terms of section 66 (2) of the Criminal Procedure and Evidence Act.

At the hearing after considering oral and written submissions from both applicants and respondent counsel, I dismissed the application. I pronounced orally reasons for my decision but nonetheless through a letter dated, 12 February the applicant's counsel requested for written reasons for denial of bail and a transcribed copy of the record of

proceedings. The request for a transcribed record from the Judge is obviously misplaced and the applicant's counsel is directed to request for such transcript through the proper channels. The reasons for dismissal of the application which were furnished orally in open court are as follows below:-

The applicants are entitled at law prior or during trial and before sentence to apply for bail pending trial. The fact that upon entering a plea of guilty bail is terminated in terms of section 69 does not preculede the applicants from applying for bail if they so wish. The provisions of section 169 are clear and pertinent. It reads;-

> "Termination of bail on plea to indictment in High Court
>
> 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".

The court can still exercise its discretion to grant or not to grant bail. The fact that for expedience purposes once a trial has commenced as a matter of policy it is desirable that bail application be entained by the trial court for the obvious reason that the trial court is seized with the matter and thus being informed about the circumstances, does not in any manner take away the applicant's right to apply for bail pending trial and even for bail during trial.

The state presented argument that the applicants ought to apply for bail in the trial court because the plea on trial date would terminate bail as a matter of law cannot be sustained because such termination of bail at trial stage does not take away the court's discretion to determine bail prior to plea. In any event for the present applicants they have not yet tendered their plea They were remanded in custody upon being indicted to the High Court for trial. The applicants are as of right properly before the bail court in their application for bail pending trial.

Now turning to the suitability or otherwise of the applications for bail. The following settled principles for bail pending trial are worth noting. In applications of this nature as has been expounded in countless cases the court has to consider the right to

individual liberty which is premised also on the criminal hall mark of the presumption of innocence. The right to individual liberty has of necessity to be juxtaposed with the interest of administration of justice which takes into account the societal interest of availing of individual for prosecution of the matter to its logical conclusion.

Once it is established that the interest of justice will not be prejudiced by admission of the applicant to bail and that the latter is a suitable candidate for bail then the court should be inclined to admit the applicant to bail.

Having perused the bail statement and having been addressed orally by Mr Murisi for the applicants it is apparent that all the applicants place themselves at the scene and in the vicinity of the crime. From the submissions the only aspect disputed is the degree and manner of assault. This when viewed with the state's argument that the state case is strong and that the case the applicants are facing is a serious one which can be sanctioned by lengthy imprisonment in the event of conviction or even capital punishment, can induce the applicants into absconding.

Imprisonment moreso given the reality of trial commencing. These factors cumulatively looked at buttress the state fears of likelihood of abscondment which if left to occur would prejudice the interest of justice.

Another interesting factor raised by the state is that the applicants are facing a serious offence under part 1 of the Third schedule of the Criminal Procedure and evidence Act. As such the applicants are enjoined to comply with the mandatory provisions of section 117 (6)(b) of the code which is to the effect that;- They are as a matter of fact supposed to adduce evidence which satisfies the court that exceptional circumstances exist which the interest of justice permits their release on bail. It is my well considered view that the relevant section requires a higher standard of proof to be adduced in evidence by the applicants to show their suitability as candidates for bail. The applicants have to show extra ordinary circumstances that is special circumstances that they should be admitted to bail.

The adducement of such evidence of extraordinary nature can be done in affidavit form, orally or just writing detailing same in the statement. Adducement of evidence is

simply placing evidence before the court. In this case the evidence to be placed before the court has to be extraordinary to show entitlement to bail.

It is apparent from the bail statement that no such extraordinary evidence albeit it would call for value judgment was laid and adduced before the court orally or in affidavit warranting the placement of the applicants on bail. The higher stand of onus has not been satisfied and it remains the onus of the applicants to show the court that they are suitable candidates for bail. Given that the state case is very strong and that the likely sentence would be from lengthy imprisonment to capital punishment the temptation to abscond is high moreso given the reality of the trial commencing in the wake of induction to High Court and the provision of the summary of the state case. It is against this background that upon weighing the right to individual liberty on the one hand and the interest of administration of justice on the other hand that the likelihood of abscondment has been viewed as a great factor likely to frustrate the administration of justice, Accordingly the application for bail pending trial is dismissed.