BLESSMORE SHATEI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 21 & 24 July 2015

Bail application

I. Mabulala, for the applicant
T. Kasema, for the respondent

ZHOU J: The applicant is facing a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations against him are that on 26 April 2015 at around 1820 hours and at Manyame Airbase Bomb Dump Area, Manyame, he approached the deceased, a fellow employee of the Airforce of Zimbabwe, and tried to rape her. During the process the applicant shot the deceased once on the left side of the face with an AK47 rifle. After that the applicant is alleged to have dragged the deceased's body to a secluded area and covered it using some dried gumtree shrubs. He then stole the deceased's black Huawei cellular phone which had a Net-One line in it.

The applicant was arrested on 27 April 2015, and is presently detained at Harare Remand Prison. He has instituted the instant application for admission to bail pending trial in terms of s 117A of the Criminal Procedure and Evidence Act [*Chapter 9:07]*. The application is contested by the respondent.

The entitlement to bail of a person who is detained in connection with an offence is provided for in s 117(1) of the Criminal Procedure and Evidence Act, which says:

> "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."

The above right is now constitutionally guaranteed. Section 50(1)(d) of the

Constitution of Zimbabwe provides that any person who is arrested is entitled to be released unconditionally or on reasonable conditions pending a charge or trial, unless there are compelling reasons justifying their continued detention. The Constitution in s 70(1)(a) equally provides that a person accused of committing offence is, *inter alia*, entitled to be presumed to be innocent until proved guilty. The two fundamental rights referred to above have to be balanced against the fundamental precept of the proper administration of justice that an accused person must stand trial, and if there is any properly founded suggestion that he will abscond if released from custody, then the court should uphold the demands of justice by refusing to grant bail even at the expense of the liberty of the accused person and the presumption of innocence. See *S* v *Fourie*1973 (1) SA 100(D) at 101.

The Criminal Procedure and Evidence Act provides as follows in s 117(2):

> "(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 is released on bail will –
> (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
> (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; or
> (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system including the bail system; or
> (b) . . ."

In this case the release of the applicant is opposed on the basis of the seriousness of the charge against him which, according to the state, is backed by strong facts linking him to the offence. The respondent also contends that the conduct of the applicant after the commission of the offence demonstrates an inclination to interfere with witnesses or evidence. As was held in the case of *Mahata* v *Chigumira NO & Anor* 2004 (1) ZLR 88(H) at 92D-E, the attitude of the police to an application for bail, though not necessarily decisive, is a relevant factor to be considered, together with the other relevant factors. In *S* v *Jongwe*2002 (2) ZLR 209(S) at 215B-C, CHIDYAUSIKU CJ held that:

> "In judging the risk that an accused person would abscond the court should be guided by the following factors:
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> (i) The nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction;
> (ii) The apparent strength or weaknesses of the State case;
> (iii) The accused's ability to reach another country and the absence of extradition facilities from the other countries;
> (iv) The accused's previous behaviour;
> (v) The credibility of the accused's own assurance of his intention and motivation

to remain and stand trial."

The charge of murder which the applicant faces is a very serious one, and may attract the ultimate penalty of capital punishment or a long term of imprisonment upon conviction. When consideration is given to the allegation that the murder was committed during an attempt to rape the deceased, the suggestion that the applicant will abscond if released on bail becomes very real. As for the strength or weaknesses of the State case, the court is required to assess the allegations set forth in the State papers and the extent, if any, to which the applicant has rebutted those allegations. See *S* v *Makamba (3)* 2004 (1) ZLR 367(S) at 375A-D; *S v Ncube* 2001 (2) ZLR 556(S). It is alleged that the applicant was seen at the Technical Area gate heading towards the Bomb Dump area by an officer who was manning the gate. Shortly after a gun shot was heard coming from the direction of the Bomb Dump area the applicant was observed coming from that direction by the same person who had seen him proceeding in that direction. Despite being notified in the affidavit of the investigating officer as to the witness who saw him, the applicant makes a bald assertion that he was never at the scene of the murder without explaining where he was at that time. He does not suggest why the witness would implicate him. Also, both the Form 242 and the affidavit of the investigating officer state that the applicant's blood stained army combat jacket and a torn green army jersey were recovered from his room. Those were the very same clothes which he was seen wearing by his roommate Tawanda Makokova when he left his place of residence going for duty at the Bomb Dump area. The applicant does not explain why his own roommate would lie against him. He suggests that the blood stained jacket does not belong to him but does not suggest where the one he was wearing was, since the blood stained one was recovered from his room. He says nothing about the jersey. It is clear to this court that the applicant has not rebutted the allegations against him. That makes the case against him very strong.

The covering of the deceased's body using gumtree shrubs and the placing of the blood stained jacket and jersey in his room illustrate the applicant's attempt to conceal the evidence against him. That is a factor which also weighs against his release.

All in all, given the manner in which the offence was committed from the facts alleged, admitting the applicant to bail would jeopardise the proper functioning of the criminal justice system including the bail system. The evidence against him is overwhelming. The motivation to abscond and temper with evidence or interfere with witnesses is clearly established.

In the premises, the application for bail must be, and is hereby dismissed.

Mabulala & Dembure, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners