**FORGET MLEYA**

**versus**

**THE STATE**

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 19 & 25 JUNE 2020

**Bail pending trial**

*T. Tavengwa,* for the applicant
*T. Muduma,* 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 11 June 2020, applicant appeared before the Gwanda Magistrate's 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 his bail 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 25th May 2020 and at the now deceased's homestead in Gungwe area, Gwanda District, the applicant stabbed the now deceased who was his second wife using a knife and she died at Manama Hospital as a result of the injuries sustained.

According to Form 242, there is evidence linking the accused to the commission of the offence. First, it is alleged that the accused was found putting on blood stained shoes; second, he left the switch which he had cut from a mopane tree inside the house where he stabbed the now deceased; third, he hid the blood stained knife in a shrub and later retrieved it and handed it over to the police.

In support of the application, the following facts have been placed before court; applicant is 42 years old, he is employed at Mapula Transport headquartered at 1001 Medium Density, Beitbridge. He is married in a polygamous union, the deceased being his second

wife. He has five children, four with the first wife and one with the deceased. It is said he has a functional homestead, thirty two heads of cattle and several goats.

Applicant cites a plethora of case authorities, in some instances quarter page quotations from judgments of this court are included. However, what is conspicuous about its absence is his defence to the charge. He says absolutely nothing about this in his fourteen page bail statement.

Initially the prosecution filed a notice in which the applicant's prayer to be admitted to bail pending trial was opposed. The opposition was anchored on the following grounds:

1. In *casu*, the accused person is facing murder which is an offence specified in the Third Schedule.
2. The offence he faces is very serious such that in the event of a conviction he faces a long term of imprisonment up to life imprisonment or death.
3. In *casu* the evidence against the accused is overwhelming and the state has a strong case which the accused is aware of.
4. The seriousness of the offence, the likelihood of a long term of imprisonment upon conviction and the fact that the evidence is overwhelming against the accused are factors which act as an inducement for the accused to abscond and avoid trial.

At the commencement of the bail hearing, State Counsel, Mr *Muduma* stood up and said,

> "I have gone through the response filed by my brother prosecutor, *Gundani*, and my view is that applicant is a good candidate for admission to bail pending trial. I make this concession on the basis of his personal circumstances. My view is that he is not likely to abscond."

Mr *Tavengwa*, applicant's counsel, did not even want to argue applicant's case, he kept referring to the concession made by the prosecution. The court advised counsel to argue his case, as if there was no concession, notwithstanding this advice, he kept anchoring his argument on the concession made at the hearing by Mr *Muduma*.

Section 116 (1) of the Criminal Procedure and Evidence Act [Chapter 9:07] empowers a court to admit an accused person to bail pending trial. The murder allegedly committed by the applicant, does not fall with the ambit of Part 1 of the Third Schedule to the

Criminal Procedure and Evidence Act, therefore, the *onus* is on the prosecution, to show that there are compelling reasons to allow this court to refuse to admit the applicant to bail.

To discharge the *onus* of showing that an accused is not a good candidate for admission to bail pending trial, the prosecution can rely on one or more of the grounds specified in section 117 of the Criminal Procedure and Evidence Act.

The contention by the prosecution is that the applicant is a flight risk, therefore, this application turns on the risk of abscondment by the applicant. Section 117 (2) (a) (ii) of the Criminal Procedure and Evidence Act [9:07] 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— (*a*) 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. Section 117 (3) (b) (iv) and (v) of the CPA Act provides, 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; and the strength of the case for the prosecution and the corresponding incentive of the accused to flee.

In 1991, the High Court of Namibia in the case of *S v Acheson*1991 (2) SA 805 Nm, set out some factors to which regard must be had when dealing with the question of bail. The key consideration is whether or not the accused will return to court if released and ultimately whether they will stand trial. For this purpose, regard must be had to how deeply the accused is attached to this jurisdiction. If for instance he or she has a home, assets of substantial value or family ties, he or she may be considered less likely to flee unlike a person with no ties in the jurisdiction. This includes an assessment of whether or not it would be practically possible to trace the accused and return them to custody in the event of them fleeing. For this purpose, regard is had to the nature of our national borders and how effectively they are policed.

In light of the principles of the presumption of innocence and the right to liberty, pre-trial incarceration is an exception rather than the norm. It is within the context of that exception that the law accepts that persons suspected of having committed crimes may forfeit their personal freedom pending trial. Therefore, the *onus* is on the prosecution to show that there are cogent reasons that support the contention that applicant is not a good candidate for admission to bail pending trial. The prosecution must show that the release of applicant on bail, will jeopardise the interests of justice and the proper functioning of the criminal justice

system, which demands that a suspect reasonably suspected to have committed an offence known at law, must appear and stand trial to answer to the charge and allegations levelled against him.

In this jurisdiction and other enlightened jurisdictions, the seriousness of the charge, standing alone, is not a cause to refuse to admit an accused person to bail pending trial. This is so, because, no matter the seriousness of the charge, the presumption of innocence still operates in favour of the accused. See *Mlilo v The State* HB 49 / 18. There must be something more than the mere seriousness of the charge, for the court to refuse to admit an accused to bail. In *S v Acheson*1991 (2) SA 805 Nm, the court said the key consideration is whether or not the accused will return to court if released and ultimately whether they will stand trial.

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.

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 *casu*, the allegations against the applicant are very serious. According to Form 242, there is evidence linking the accused to the commission of the offence. First, it is alleged that the accused was found putting on blood stained shoes; second, he left the switch which he had cut from a mopane tree inside the house where he stabbed the now deceased; third, he hid the blood stained knife in a shrub and later retrieved it and handed it over to the police. All the applicant is content of saying is that "it is him who took the deceased to Manama hospital to be attended to after the scuffle."

The prosecution, according to Mr *Gundani*, who filed the written response to the bail application, says:

> "the offence he faces is very serious such that in the event of a conviction he faces a long term of imprisonment up to life imprisonment or death; the evidence against the accused is overwhelming and the state has a strong case which the accused is aware of; and the seriousness of the offence, the likelihood of a long term of imprisonment upon conviction and the fact that the evidence is overwhelming against the accused are factors which act as an inducement for the accused to abscond and avoid trial".

I agree.

In *Simplicity Ndlovu v The State* HB 75 / 07 this court said the practice has shown that in some bad cases, stringent bail conditions may be sufficient to allay the court's fears of the possibility of the accused compromising the ends of justice by failing to avail himself for trial. However, this obviously well informed and rich practice is not full proof that guarantees a determined accused from avoiding trial if he chooses to.

Our country's borders are so porous that one can almost move in and out of the country without detection, if one were to exit through unrecognised points scattered all over our borders. See *Simplicity Ndlovu v The State (supra).*

This court accepts that the accused is a family man. He has ties to this jurisdiction. However, this court is empowered to factor into the equation, when considering the likelihood that the accused, if he or she were released on bail, will not stand his or her trial or appear to receive sentence, the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; and the strength of the case for the prosecution and the corresponding incentive of the accused to flee.

Applicant is facing a charge of murder. He is alleged to have used a dangerous weapon. He has not told the court whether he has a defence to the charge. That is his constitutional entitlement. Yet his exercise of this right does not 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*). Where there is the slightest indication that applicant's release on bail might prejudice the interest of justice the court must not opt for that route.

It is recognised that the prosecution assumes its *dominus litis* status in criminal related matters and it must therefore be in extremely rare situations where the court would go against representations made by the prosecution. I am satisfied beyond doubt that this is one such case where the court is satisfied that the concessions made by the prosecution, Mr *Muduma*, was not well made.

**Disposition**

I am satisfied that it is not in the interests of justice to admit Mr *Forget Mleya* to 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.

*Mutuso, Taruvinga & Mhiribidi*, applicant's legal practitioners
*National Prosecuting Authority*, respondent's legal practitioners