RONALD MODA
and
THE STATE

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 17 February & 24 May 2023

Bail pending trial

B Vengai, for the applicant
B Murevanhema, for the respondent

MUNGWARI J: On 17 February 2023, the applicant applied for bail pending trial before me. I dismissed the application after seeking oral clarifications from both the applicant's and the state's counsels. I gave extempore reasons for the dismissal which were based on the applicant's ability to avail himself for trial. I found that the applicant had demonstrated a propensity to flee, as he fled the scene soon after commission of the offence. In essence I held that the applicant is a flight risk.

On 29 March 2023, the legal practitioners for the applicant through the registrar of this court requested me to furnish them with a written judgment for my decision as they wanted to appeal against that decision. The letter only found its way to me on 19 May 2023 whereupon I directed the registrar to investigate into the cause of the delay. It turned out that the Registrar sat on the letter in total disregard of the urgency that is inherent in bail applications. I caused the said, to author a letter to the applicant's legal practitioners explaining and apologizing for the delay. The position needed to be corrected so that we correct the wrong message that had been sent and what might be perceived as deliberate inaction on the part of this court. That notwithstanding here are the reasons:

Background Facts

The applicant a male adult aged 22 years is facing a charge of murder in contravention of s47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He applied for his release on bail pending trial in this court. The state opposed the application sought.

It alleged that on 2 September 2022 the 3 year old deceased who was residing with the applicant and his family, messed herself up without telling the applicant or his wife that she wanted to use the toilet. Angered by this, the applicant assaulted the deceased using a leather belt all over her body. He also banged her head against the cabin walls after which she sustained injuries from which she later succumbed to.

The applicant, an uncle to the deceased, denied the allegations and contended that there was no nexus between the cause of death and his conduct. He stated that in the brief period in which he had lived with the deceased, he had noticed that she would exhibit signs of a strange illness and then mess herself up. Concerned about this behavioural problem in the deceased, he informed the deceased's mother of this development. The deceased's mother granted him permission to chastise the deceased as a way of toilet training her. He admits having moderately chastised the deceased with a leather belt days before her demise. He however denies ever hitting the deceased against the cabin walls. He said on 3 October 2022 the child started behaving strangely, hallucinating and showing him non-existent things. She died on the same day due to some underlying health condition totally unrelated to the assault.

SUBMISSIONS BY THE APPLICANT

The applicant contended that he was entitled to bail as a matter of right. His argument was that the Constitution of Zimbabwe, 2013 (the Constitution) in s50 (1) (d) conferred the right to bail with constitutional status. That section provides that:

> (1) Any person who is arrested—
>
> (*a*)…
>
> (*b*)…
>
> (*c*) …
>
> (*d*) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention;

On the strength of that Constitutional provision, the applicant stated the following:

> "The state thus has a very heavy onus to demonstrate that there are cogent reasons supported by evidence, justifying the denial of bail. To discharge the onus on it, the state must show that the applicant is not a good candidate for bail"

The applicant's understanding was therefore that in all bail applications it is the state which bears the onus to prove the existence of compelling reasons justifying the continued detention of an accused.

In addition to this the applicant also stated that he is a suitable candidate for bail in that, upon his arrest he did not resist arrest and proceeded to assist the police in their investigations. He admitted to having relocated soon after the death of the deceased child and stated that he did so because he was shocked and could not comprehend what could have caused the death of the child. He feared being wrongly implicated, victimised and wrongly prosecuted for the death of the child. He also wanted time to escape perceived possibility of wrong persecution by the close relatives of the deceased. He confirmed that the alleged crime occurred on the 2 September 2022 and that he was arrested on 19 October 2022. Applicant claimed that he had no intention to abscond and that had he wanted to do so, he would have done so in the period before his arrest .He had relocated to a place close to the Zimbabwe/South African border and could have easily crossed over to the neighbouring country to evade prosecution. He did not leave the country because he is an innocent man and has the interest to stand trial and clear his name. Applicant insisted that his conduct was not indicative of a person that will abscond if granted bail pending his trial and consequently submitted that he was not a flight risk.

In addition to this applicant contended that the risk of interference with state witnesses was so minimal and that he had not shown an indication to do so. In support of this assertion, the applicant cited the case of *State* v *Maharaj* 1976(3)SA 205(D) where the court held that, the argument that there is a likelihood of interference with evidence will obviously be strong if the state can show that there have already been attempts to do this.

Applicant argued that if stringent bail conditions are imposed to allow him to be admitted to bail, the interests of justice would still be safeguarded.

SUBMISSIONS BY THE STATE

The state argued that the applicant was a flight risk, who had already demonstrated his propensity to flee and this warranted his incarceration pending his trial. According to the state, the applicant fled his residence after the commission of the offence and did not inform anyone that he was relocating to Bikita. He did not surrender himself to the police despite being aware of his conduct that led to the death of the deceased. There is no justification of why he fled the scene and his failure to cooperate with the police was indicative of his unwillingness to stand trial. The police had to apply for a warrant of search and seizure to locate him through his cellphone. Investigations revealed that he was in Bikita. The applicant was not going to surrender himself had he not been tracked by the police. The state placed reliance on the

affidavit of the Investigating Officer, Roselyn Nangisayi Chirimuta. It drew the courts attention to the fact that, the applicant admitted in his application statement that he left the scene soon after the commission of the offence. The reasons for relocating without notice were all linked to the death of the deceased. The relocation was therefore not as innocent as the applicant wanted it to seem. The state contended that this was sufficient indication that if given a chance applicant would abscond and flee from the jurisdiction of the court to avoid trial.

In its oral arguments, the state argued that s 117 (2) (a) (ii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that it will be in the interests of justice to deny an accused bail if there is a likelihood that he may abscond if he is released on bail. Further, that s 117 (3) (b) provides that in determining whether or not there is a likelihood to abscond on the part of the accused, the court may take into account the nature and gravity of the offence charged and the likely penalty upon conviction and the strength of the prosecution case.

Against this, background, the state alleged that the applicant is facing very serious charges of murder. They stated that the seriousness of the offence and the strength of the case for the prosecution could lead to the applicant absconding for fear of the evidence that would certainly be adduced against him during trial and the likely conviction and lengthy custodial sentence that are likely to ensue.

The state contended that it has a strong *prima facie* case against the applicant part of which the applicant himself had in his application admitted to .The applicant had in his application admitted having hit the deceased prior to her death as a way of chastising her. This admission according to the state took away the issue of the applicant not having caused the death of the deceased as on the face of it a reasonable suspicion had been raised and a causal link established.

THE LAW

Where an applicant is charged with an offence falling under Part I of the Third Schedule to the Code. S115 C (2) (a) (ii) of the Code provides that: -

> "(2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail – (a) before a court has convicted him or her of the
>
> (i) …….
>
> (ii) the accused person shall, if the offence in question is one specified in –Part I of the Third Schedule bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail …" (emphasis is mine)

The applicant in this case faces a charge of murder. This offence falls squarely into the category where the applicant bears the onus to prove, on a balance of probabilities that it is in the interests of justice for her to be admitted to bail. Even without losing sight of s 50(1) (d) of the Constitution there can be very little debate if any at all that s 115C (2) (a) (ii) of the Code creates a reverse onus from the ordinary position which is understood to mean that all that the accused person is expected to do is simply apply for bail and sit back. That position only relates to all other offences except those prescribed in the Third Schedule to the Code.

In this case therefore, the burden lies squarely on the shoulders of the applicant. He was mistaken to argue that the state had not advanced any compelling reasons justifying his continued detention. The law does not require the state to allege any such reasons where an applicant faces a Third Schedule offence. The issue was decisively settled in *S* v *Ndou* HB 103/17, where this court held in relation to offences in the Third Schedule that:

> "… it is not correct in this particular case for the applicants to state that the burden of showing the existence of compelling reasons why they should not be admitted to bail lies on the prosecution. Quite to the contrary the new regime dealing with consideration of a bail application pending trial places the burden upon the applicants to show that, not only is it in the interests of justice for them to be released on bail but also that there are exceptional circumstances which in the interests of justice permit their release on bail pending trial."

APPLICATION OF THE LAW TO THE FACTS

Having made the above conclusions the question which arises is whether the applicant has a made a case for his admission to bail. His explanation of the charges appears to be a fabrication. It is certainly implausible. To illustrate the point, I enumerate the inadequacies in his account.

1. The applicant admits to having assaulted the deceased with a leather belt after she had messed herself up. The deceased succumbed to the injuries sustained barely a day later. The applicant alleges that the assaults he perpetrated upon the deceased did not cause her death. The onus was on him to provide evidence that something else may have caused the death of the deceased. He did not do so. He alleges in his papers that the child was suffering from an infirmity of the mind as the 3 year old would hallucinate and point at non-existent things. He however omitted to tell the court why he had not sought for medical assistance of the said and showed this court the proof of the ailment since he was the custodian of the deceased at the time. Because he failed to discharge this onus I am inclined to believe that this is nothing but a story without any substance.

2. The accused fled the scene soon after the death of the deceased. He does not deny that. Instead he attributes his abrupt "relocation" to fear, of being wrongly implicated, victimised and wrongly prosecuted for the death of the child and that he wanted time to escape perceived possibility of wrong persecution by the close relatives of the deceased. Clearly this is self-contradictory. His absurd claims of having assisted the police and cooperated with them then do not hold water in light of the fact that he was running away from them and the police had to enlist the assistance of Econet service provider through a court order so that they could locate him. He never wanted to stand trial for this matter and that is why he ran away. He should have availed evidence before this court that he did not flee. He did not. Instead he tried to give it all sorts of names including relocating when in actual fact he inexplicably left the scene without informing anyone. He admitted that his reasons for fleeing were linked to the issue of the murder of the child and how other people would react including prosecuting him. If it was as innocent as he wanted the court to believe he would have relocated for other reasons other than the offence of murder and then told his wife and relatives and neighbours of his plan to relocate. He clearly did not want to take the court into his confidence over why he chose Bikita instead of his rural home if it was to innocently get some breathing space. He equally did not think it prudent for the court to know why if he says he wants to clear his name he had to wait to be arrested and yet he could have handed himself over and by so doing cooperated with the police. One would not be faltered for believing that had the police not used the ingenious method of cellphone service providers the accused would not have availed himself. In any case more than a month had lapsed before he was then apprehended and it is clear that he was not going to hand himself over to the police.

Given the above discrepancies, the allegations by the applicant that he did not flee and that the state case is weak is preposterous. His actions and explanation indicates that he deliberately fled the scene in a bid to avoid standing trial. In addition to this, there are numerous pieces of evidence which directly link him to the commission of the offence. If anything, the evidence available shows that the state case is very strong against him. His explanation of the evidence which links him to the commission of the offence is damning against him.

Further, s 117 of the Code prescribes the grounds to which a court must look when refusing to grant bail to an applicant. It provides as follows:

"**117 Entitlement to bail**

(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.

(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—

(*a*) where there is a likelihood that the accused, if he or she were 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) …

(iv) …

(emphasis is mine)

Clearly one of the grounds which a court must consider to determine whether it is in the interests of justice that an applicant be admitted to bail is whether the person will stand trial. *Incasu,* for the reasons provided herein I believe that the applicant will not stand trial if released on bail.

Disposition

The applicant's failure to appreciate that the onus was on him to demonstrate that it was in the interest of justice for him to be admitted to bail proved to be his biggest undoing in this application. Ultimately, he failed to convince me on a balance of probabilities that it was in the interest of justice to grant him bail. The state has a strong *prima facie* case against the applicant and he is facing serious charges. Furthermore, the applicant fled the scene after the commission of the offence indicating that he is a flight risk and increasing the chances of him absconding. In light of these factors, the applicant is not a suitable candidate for bail.

The application for bail pending trial is hereby dismissed.

Alex F & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners