

LAST NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 1 & 7 JUNE 2018

Bail application

V. Ndlovu for the applicant

Miss N. Ndlovu for the respondent

MAKONESE J: The applicant is facing a charge of contravening section 131 of the Criminal Law Codification and Reform Act (Chapter 9:23); unlawful entry into premises and another of contravening section 65 (1) of the Criminal Code, rape. The allegations against him being that on the 23rd April 2018 he broke into complainant's house as she was asleep, threatened her with an okapi knife, tied her hands together and raped her once. He then stole some property belonging to the complainant and fled.

The applicant is seeking bail pending trial. The state is opposed to the application. In terms of section 116 of the Criminal Procedure and Evidence Act (Chapter 9:07), the court is empowered to admit an applicant who is in custody to bail pending trial. In terms of section 50 of the Constitution of Zimbabwe (Amend No. 20) 2013, an arrested person is entitled to be released on bail either unconditionally or on conditions pending charge or trial unless there are compelling reasons justifying the arrested person's continued detention.

In terms of section 50(1) (d) of the Constitution, the release of an accused person on bail is now a fundamental human right and freedom, rendering incarceration until the charge or trial an exception which is only justifiable if compelling reasons exist for the denial of bail. 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 pending trial. The state has to demonstrate one of the following:

- (a) the risk and likelihood of the applicant absconding and not attending trial;
- (b) the likelihood to interfere with witnesses, investigation and evidence;
- (c) applicant's propensity to commit further offences.

In this matter, the court has to consider amongst other factors, the seriousness of the offence and the surrounding circumstances relating to the commission of the offence. In this regard, the allegations levelled against the applicant are that whilst complainant was asleep and around 2300 hours, she felt a hand touching her and she woke up. She then saw the applicant directing a knife at her neck and she got frightened. The applicant demanded money and complainant advised him that she had no money. Applicant continued making threats and demanding money. Complainant handed two mobile phones to the applicant, a Samsung gold in colour and a Blackberry. Complainant proceeded to the sitting room where he took US\$120, a DVD player and discs. Applicant returned to complainant's bedroom where he cut one of the bed sheets and tied the complainant's hands. The applicant switched off the solar light and lit a torch. He then proceeded to rape the complainant.

The applicant then took complainant's small khaki handbag and made away with the two mobile phones and the rest of the loot. Applicant jumped out through a window and disappeared into the darkness. Upon applicant's arrest he claimed to have been in love with the complainant after the police had quizzed him about the possession of the two mobile phones, DVD player and discs. The okapi knife was also recovered from the applicant.

In the case of *S v Jongwe* 2002 (2) ZLR 209 (S), the Supreme Court held that in judging the risk of abscondment the court ascribes to an accused "the ordinary motives and fears that sway human nature." It was further held that the critical factors the court must take into consideration when assessing the risk are:

- (a) the nature of the charges;
- (b) the severity of the punishment likely to be imposed upon conviction;
- (c) the apparent strength and weakness of the state case.

In this matter the applicant is facing serious charges. The state case against the applicant is strong. These factors taken into consideration with other factors indicate that there is a danger of abscondment. See; *State v Moyo* HB-23-05. It would appear that from the statement of the Investigating officer, one Wonderful Nhopi and that of the complainant the state case is strong. That on its own will be a motivation for the applicant to abscond and not stand trial. The applicant has not proffered any defence to the allegations in his bail statement thereby leaving the state case against him unshaken. In the case of *State v Ndhlovu* 2001 (2) ZLR 261 (H), it was held that it is desirable for an accused person to lay before the court hearing his bail application what his defence will be at the trial as such has a bearing on his assurance that he will indeed stand trial. It is trite that accused persons are presumed innocent until proven guilty however, the court must in granting or refusing bail ensure that the interests of justice will not be compromised if applicant is released on bail.

In the circumstances, of this case, I am satisfied that it is not in the interests of justice for the applicant to be released on bail at this time.

In the circumstances, the application is hereby dismissed.

Mweli Ndlovu & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners