HB 212-18
HCB 137/18
XREF PT 325/18

BONGANI WILLARD DUBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 23 JULY 2018 AND 9 AUGUST 2018

Bail Application

A. Ndebele for the applicant
Ms N Ndlovu for the respondent

MABHIKWA J: The applicant is facing a charge of murder. It is alleged in the brief allegations by the state in the Request for Remand (Form 242) that on 23 June 2017, at Ndutshwa General Dealer's shop, Madlambuzi, the applicant had a misunderstanding with the deceased after the deceased had attempted to pickpocket from him. The accused then assaulted the deceased with fists and a knobkerrie all over his body until the deceased collapsed and applicant was restrained by other patrons. Deceased succumbed to his death due to the assault on 20 July 2018.

Detective Seargent Philip Ncube, who is the investigating officer in the case also states in annexure B to the application, being an opposing affidavit, that he has recorded witnesses statements from Sehlepi Tshuma, Noel Ndlovu, Isaac Sibanda, Mazi Mlotshwa and Manager Dube who said they saw the applicant assaulting the deceased with a knobkerrie. After the death, applicant's wife had told him that applicant had taken his belongings and absconded to South Africa.

Accused's version is that he was drinking beer at the business centre and was probably dozing only to work up to see the applicant attempting to pick-pocket from and asked him what he was doing. He says the deceased was the aggressor as he struck him first and a fight ensued. At paragraphs 9 and 10 of his bail statement, applicant states that the deceased punched him with

a fist after he was asked what he was up to. This led to a fist fight and he maintains that the deceased was the aggressor after being caught pick-pocketing. Applicant goes on to say that what ensued is a fist fight and he did not use a knobkerrie as he had none. After he floored the now deceased with a punch, he kicked him on the ribs and head about twice, and left the scene.

The applicant cited section 50 of the Constitution of Zimbabwe, amendment (No. 20) Act, 2013 which provides that a person arrested must be released unconditionally unless there are compelling reasons justifying continued detention. Applicant also quoted the case of *S* v *Kachigamba and another* – HH 358/15 where the court commented that where a litigant applies for bail, the presumption is that he is entitled to bail unless the state has proven otherwise by showing compelling reasons for the applicant to be denied bail.

The above legal provisions must of course not be read in isolation but must be read and understood together with other provisions like section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07] which provides that:

> "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 between sentence is imposed unless the court finds that it is in the interests of justice then he or she should be detained in custody."

Section 117 (2) 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 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 jeorpardise the objectives or proper functioning of the criminal justice system including the bail system."

The state conceded in its response that the deceased attempted to pick pocket the applicant at Ndutshwa General Dealer Shop, Madlambuzi on 23 June 2017. Applicant then assaulted him with fists and a knobkerrie indiscriminately leading to his death on 20 July 2017 at Mpilo Hospital.

The state also confirms in its response to the bail application that the matter is likely to be reduced to culpable homicide but in court, both counsel could no longer commit themselves to confirm this fact stating that the police had earlier promised/indicated that the charge could be reduced to culpable homicide but have since reneged on that point.

Ultimately though, both counsel agreed that the issue that remained was whether the applicant was likely to attend trial and not abscond. In this regard, the state still had to show compelling reason(s) why applicant should remain in custody whereupon the onus would shift to the applicant to rebutt the reason(s) and show that he is in fact a suitable candidate for the granting of bail.

The state contended that although it is common cause that applicant went to South Africa before the deceased's death, applicant was fully aware that the deceased had been ferried to hospital unconscious after the deadly attack. The state further contended that with the knowledge that his victim of assault was admitted in hospital, he would go to South Africa, stay in Bulawayo and return to South Africa without surrendering himself to police in Bulawayo since he alleges he was afraid to go to Tsholotsho because tensions were still high. Even after hearing of the deceased's death he did not surrender himself.

The state ultimately contended that from the conduct of the applicant after the deadly assault and only surrendering himself a year after he skipped the jurisdiction to South Africa, applicant is "a man who expects the wheels of justice to grind at his whims and pace". Bail pending trial being a right granted on the basis of trust, applicant had shown himself to be a person who cannot be trusted.

In response, the counsel for the applicant re-iterated the fact that applicant had surrendered himself when he could have simply stayed away. He stated that accompanied by a lawyer, applicant took the trouble to travel all the way to Plumtree where they waited whilst Plumtree Police phoned for the docket at Madlambuzi police. Applicant waited patiently until his appearance in court and for that show of co-operation, *Mr Ndebele* contended that applicant should not spend a day more in custody.

The court noted that it was indeed a factor in applicant's favour that he had handed himself to the police at Plumtree in the company of a legal practitioner. The court would

normally want to give the benefit of doubt and trust an accused who surrenders himself to the police either on their own or with the advise of a lawyer otherwise an impression should not be given that surrendering oneself has no benefit after all.

In *casu* however, the court had misgivings and fears considering the facts and circumstances of the applicant's escape and ultimate surrender a full year and four days after the deadly assault.

According to the applicant, the sole reason why he ran away from the scene of assault and from Tsholotsho in general is that some young men from Ndutshwa village were baying for his blood, seeking revenge.

However in paragraph 13 of his bail statement, applicant says when he could not hid anymore he opted to go to Bulawayo first and then crossed to South Africa fearing for his life.

In paragraph 14, he states that he was in South Africa when he heard that Stanford Ndlovu (deceased) had passed on. He however would come to Zimbabwe and get to Bulawayo and return to South Africa but never go to Tsholotsho.

In paragraph 15 of the same statement he states:

> "Around December 2017, he contacted a relative's lawyer about his intention to come to Zimbabwe and clear his name instead of remaining a fugitive."

Whilst in is application generally and in submissions in court the impression given is that applicant had merely escaped from Tsholotsho young men baying for his blood and that he did not know he could surrender himself to any police station in Zimbabwe, these paragraphs in his bail statement betray him.

Applicant knew his attack on Stanford Ndlovu had caused his death. He learnt of the death whilst in South Africa. It is clear from those paragraphs that at the time, he knew he was a fugitive from justice and chose to remain so, occasionally sneaking into Zimbabwe, Bulawayo and going back to South Africa. It is also clear from paragraph 15 that he obtained legal advise from a lawyer about seven (7) months before he ultimately handed himself in.

This is where sections 117 (2) (a) (ii) and (iv) become pertinent. A reading of section 117 (2) (a) (ii) will show that the applicant must not simply be shown to have been honest to surrender himself and thus prepared to stand the commencement of his trial. He must be shown

to be a person trustworthy that he would be capable of standing the whole trial and still come back to receive sentence if any. The same goes for section 117 (2) (2a) (iv). Applicant must show that he is not going to abuse the bail system at some stage thereby jeorpadising or undermining the objectives or proper functioning of the criminal justice system. He simply had to discharge this onus on a balance of probabilities. The issue to deal with is whether the surrender of one's self to the police is necessarily enough to entitle him to bail? Does applicant's surrender in this case necessarily make him a proper candidate for bail? Has the surrender allayed fears of the risk of absconding?

Unfortunately, applicant presents himself as a person who, even if granted bail is likely to keep his eyes open and his ear on the ground so that should things turn for the worse for him at any stage, he just skips into South Africa or any other neighbouring country and recoils into a shell like a snail whilst out of reach of the court's jurisdiction. Counsel for the state could not have put it more aptly than the submission that the problem with applicant is that "he wants the wills of justice to grind according to his whims and at his own pace."

In *S* v *Jongwe* -2002 (2) ZLR 209 (H) at 215G, the Supreme Court held about the risk of abscondment, that in judging this risk, the court ascribes to the accused the ordinary motives and fears that sway human nature including the ability to flee to a foreign country and the absence of extradition facilities.

In the circumstances of this case, I will agree with the reasoning in *S* v *Moyo* HB 307/17 that the Constitutional provision(s) on the accused's right to liberty and entitlement to bail must not be read in isolation but must still be balanced with the fundamental principle that the proper administration of justice demands assurance that an accused person will indeed avail himself for trial when the time comes. The risk of abscondment became central to the determination of this application and applicant failed to rebut it.

For the aforestated reasons, applicant remains a flight risk and I will not exercise my discretion in his favour. Accordingly the application is dismissed.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners