GIFT BLESSING
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 May, 2017 and 2 June 2017

Bail Pending Trial

Applicant in person
B. Murevanhema, for the respondent

CHITAPI J: The applicant seeks to be admitted to bail pending his trial on a charge of murder as defined in s 47 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. He is alleged to have struck or assaulted the deceased on the head with a scrap pellet barrel and wooden stick thereby inflicting injuries from which the deceased succumbed to his death. The assault took place at Belvedere Shopping Centre at about 2045 hours on 2 February, 2017. The deceased Zebediah Morris Matibvu died on 6 February, 2017.

When the applicant initially appeared in court following his arrest, he was charged with attempted murder. However, after the deceased passed on, the charge was altered to the substantive offence of murder. The State counsel opposed the application on the basis that the applicant was facing a serious offence, in respect of which there was overwhelming evidence to which the applicant had no "plausible" defence. Further, bail was opposed on the basis that the applicant was of no fixed abode and had no identity particulars which would make it difficult for the authorities to trace him if he were to abscond.

The State counsel filed a comprehensive affidavit deposed to by the investigating officer, Assistant Inspector Mutemi Munyaradzi, the In Charge Crime at Milton Police Station. Reading through the affidavit provided the court with a breath of fresh air. Rarely does the court get the benefit of comprehensive affidavits from police to justify pre-trial detention of a suspect. The standard of work commitment and manner of paying attention to detail exhibited by this officer is to be commended. I considered it proper given some

shoddily prepared police affidavits that I have come across in bail court to comment on the good and exemplary work.

The facts of the case as expounded in the affidavit aforesaid reveal that the deceased was assaulted by the applicant in the course of a drunken brawl. The applicant was allegedly very drunk on the night in question. He charged towards the deceased whom he accused of using "mubobobo" on his wife. According to my research on www.futurescopes.com/love-and-sex/2015/mubobobo which I accessed on 1 June, 2017, "mubobobo" is a Shona term used to describe a charm which a man possesses for the purpose of having sexual intercourse with a woman without her consent or contact. It is colloquially referred to as "blue tooth sex" or "wireless sex". It is said to be a form of witchcraft. It follows that it is demeaning, provocative and defamatory to accuse another man of having or using "mubobobo."

The applicant allegedly demanded monetary compensation from the deceased for the deceased's "mubobobo" sexual escapades on the applicant's wife. The deceased denied the allegations made against him and refused to pay any compensation as demanded. The accused then assaulted the deceased in the manner I have herein before indicated. Security guards manning the shopping centre who had witnessed the assault then intervened. The applicant who was holding the deceased with one hand and striking him on the head and face with the other hand using a stone threatened and dared the guards to intervene at the risk of him assaulting them also. The guards however managed to disarm the applicant and rescued the deceased who had fallen to the ground. The deceased was bleeding profusely from the head and his eyes were swollen.

The deceased passed on 4 days later as a result of injuries caused by the assault. In the post mortem report compiled upon an examination of the applicant by the pathologist, the pathologist concluded that the deceased died due to complications of subdural haematoma and blunt force head injury.

When I initially heard the bail application, I directed the state counsel to confirm with the police whether the address given by the applicant, 92 Zata Street, Mbare, was authentic since the remand form had indicated that the applicant had no fixed abode. The State counsel had advanced the fact of the applicant not having a fixed abode as a reason for opposing bail amongst others.

In the police affidavit already referred to, the deponent states that following instructions for the State counsel to check on the address given by the applicant, he proceeded to 92 Zata Street, Mbare. The applicant had alleged that the residence was occupied by his

relatives namely Kudzai and Heather Chitukutuku. At the residence, the police officer found one Charleen Kawaza present. Charleen Kawaza is the wife to Tawanda Chitukutuku. The officer established that Heather Chitukutuku had migrated to South Africa some 15-20 years back. Tawanda Chitukutuku who now resides at the place was telephoned as well as Kudzai Chitukutuku who is employed by the Zimbabwe National Army and stationed at 4-2 Brigade, Gutu. The persons contacted denied knowledge of the applicant and refused to accommodate him in the event that he was admitted to bail.

I asked the applicant to supply the court with details of his national registration or any such document as would identify him officially. I asked him to do so because the remand form was endorsed N/R (not registered) in the space where the National Registration number should have been endorsed. The applicant stated that he was an orphan and had not taken a national registration document. He did not have any other document of identification. What this essentially meant was that the applicant, save for his physical presence was not officially a person who could be accounted for.

It is a statutory requirement that every citizen, alien or refugee should register a national identity card under National Registration Act, [*Chapter 10:17*]. The minimum age for acquiring a national identity card is 16 years. The applicant is 33 years old. Statutory Instrument No. 140/2009 provides for modalities of *inter-alia*, acquiring a national identity document. One of the steps involved in the registration process is the taking of finger prints which are then kept as a record of identification. The applicant in this case is just a moving human being. He cannot be accounted for so to speak. He cannot be connected to any information or data base which registration seeks to achieve. He can just disappear without trace.

In terms of s 50 (6) of the constitution of Zimbabwe (No. 20) of 2013, a person who is detained pending trial for an offence, if not tried within a reasonable time should be unconditionally or conditionally released from detention on reasonable conditions to ensure that after release, the person will attend trial, will not interfere with evidence to be given at the trial and will not commit offences before the trial begins. I need to pause here and observe as I did in *Vincent Kondo and Anor* v *State* HH 99-17 that there appears to be some confusion in the interpretation of the operative constitutional provisions relating to applications for bail pending trial. Section 50 (1) (d) in my interpretation of the whole of s 50 (1-9) applies to arrested persons who are detained by police or a detaining authority pending such persons appearance in court within 48 hours as provided for in s 50 (2). Once brought before a court

following arrest and the court orders the detention of the person pending trial, then s 50 (6) comes into play and should be read together with s 116 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides for the right of every detained person to apply to be admitted to bail after such person has appeared in court on a charge and / or before sentence.

The grounds for denial of bail set out in s 117 (2) of the Criminal Procedure and Evidence Act include or are additional to the grounds set out in s 50 (6 (a) – (c)) of the Constitution. Section 115 C of the Criminal Procedure and Evidence Act has now provided that the grounds set out in s 117 (2) of the Criminal Procedure and Evidence Act constitute compelling reasons for denial of bail by a court. I have already indicated that the grounds set out in s 117 (2) aforesaid are in line with s 50 (6) of the Constitution.

Section 115 (C) (2) (a) of the Criminal Procedure and Evidence Act casts the onus on a balance of probabilities upon the State to show the existence of compelling reasons for pre-conviction detention of an incarcerated person in respect of offences other than those specified in the Third Schedule. Simply stated, for bail to be denied to an accused who has not been convicted in respect of any offence other than a Third Schedule offence, the State bears the onus to justify such detention by showing compelling reasons which warrant the detention. The State does so on a balance of probabilities. The common denominator of "compelling reasons" therefore permeates through the criminal justice system from pre-court appearance when a suspect is arrested to subsequent appearances in court. In my view therefore, although the end result may be the same in that compelling reasons have to exist to justify the detention of a person to bail who has been detained following arrest or detained following appearance in court, it is misleading for counsel to seek to rely on s 50 (1) (d) of the Constitution as the provision which obliges this court to admit a person who has been detained in custody by a lower court unless there are compelling reasons not to release the suspect. The section aptly relates to an arrested and detained person who has not yet appeared in court. After appearing in court s 50 (6) applies

The position is otherwise different in respect of Third Schedule offences. In regard to offences listed under Part 1 of the Third schedule, the applicant bears the onus to show on a balance of probabilities that it is in the interests of justice that the applicant be released on bail pending trial. The court hearing the application can however shift the incidence of onus on any particular allegation which may arise, upon the prosecution.

In respect of Part II Third Schedule offences the applicant is required to show on a balance of probabilities, the existence of exceptional circumstances which in the interests of justice permit such applicants release on bail.

What constitutes "interests of justice" is not defined and in any event is relative or circumstantial to each case. However s 117 (2) (a) provides that the existence of one or more of the factors listed therein, if established, justify a finding that the interests of justice, justify the denial of bail. Thus, where the onus is on the applicant to demonstrate that the interests of justice justify the applicants' release in relation to a Part 1, Third Schedule offence, such applicant should show that there is no likelihood of him committing the acts listed therein. But again, the factors listed constitute compelling reasons as provided for in s 115 C of the Criminal Procedure and Evidence Act. Therefore it would not be incorrect to hold that in respect of Part 1 Third Schedule offences, the applicant bears the onus on a balance of probabilities to prove or to show compelling reasons why the applicant should be admitted to bail.

Exceptional circumstances referred to in s 115 C (2) (ii) (B) for purposes of Part 11, Third Schedule offences have not been defined. I have not been able to, save for what I observed in *Vincent Kondo*'s case (*supra)* to lay my hands on a decided case in this jurisdiction defining exceptional circumstances in bail applications. I have however considered s 60 (ii) of the Criminal Procedure Act of South Africa 51 of 1977. The provision is similar in wording to the local provision. The definition of exceptional circumstances fell for definition in *S* v *Bruintijies* 2002 (2) SACR 575 (SCA) at 577 F where the Learned Acting Judge of Appeal SHONGWE AJA said

> "what is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of Schedule 6 offences."

The learned judge continued at p 577 l;

> "If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which consistent with the interest of justice, warrant his release, the appellant must be granted bail"

See also *S* v *D & Ors* 2012 (2) SACR 492; *S* v *Rudolph* 2010 (1) SACR 262; *Nkambule* v *S* (2013). ZAGPJHC 112, *Dhlamini & Anor* v *S* (2013) SZCS 2.

In *R* v *Zgambo* (1999) MWSC 5, the Honourable Chief Justice of Malawi, BANDA CJ held that in bail applications, where the issue of exceptional circumstances falls to be determined, no hard and fast rule can be laid and each case is determined on its merits. I respectfully agree with the Chief Justice because to lay a hard and fast rule would fetter the discretion of the court.

All having been said, I would hold that what is beyond debate, is that Third Schedule offences are viewed very seriously by the legislature and should be so viewed by the courts. This is why there is a reverse onus placed upon the applicant to satisfy the court that it is justiciable that he be admitted to bail. The decision whether or not to admit the applicant to bail is a discretionary one arrived at after a consideration of all the circumstances of the case relevant to the institution of bail. The grant or refusal of bail in every case is a process managed under judicial control. In respect of Third Schedule offences, notwithstanding the serious view which the court must take of the offences, the court must still be flexible and consider the circumstances of each case which impact on the effect and purport of the seriousness which weigh against the grant of bail. Therefore, in my view, despite the legislative interventions classifying serious offences under the Third Schedule and shifting the onus upon an applicant or accused person to show that his release on bail is in the interests of justice, this should not detract from the principle laid by the superior courts that the seriousness of an offence per se does not, standing alone, justify the denial of bail to a suspect see *S* v *Hussey* 1991 (2) ZLR 187, which has been followed as good law to date.

In this case the applicant faces a Part II, Third Schedule offence. He has not advanced circumstances out of the ordinary which individually or cumulatively amount to exceptional circumstances to warrant his admission to bail in the interests of justice. The applicant as I indicated is just a moving human being who can vanish into thin air without trace. The evidence against him of complicity in the murder is very strong. He admits that he assaulted the deceased resulting in injuries which caused the death of the deceased. Granted, the applicant was intoxicated. The intoxication was however voluntary. Voluntary intoxication does not amount to a full defence to the offence. It may ground a strong circumstance of mitigation but the penalty likely to be imposed remains heavy. The prospect of an inevitably heavy penalty would induce the applicant to abscond. The fear of abscondment is compounded by the fact that the applicant is unemployed and of no fixed abode. The persons to whom police were directed to confirm if the applicant would be welcome thereat if

admitted to bail refused to give him sanctuary. This is worsened by the fact that the applicant is not registered and has no identification particulars. He can't be traced easily if he absconds.

Under the circumstances, the applicant has failed to discharge the onus of showing exceptional circumstances to warrant his admission to bail in the interests of justice. It is hoped that the State will expedite the set down of the trial as there appears to be no difficult investigation to be done. The application is dismissed.

Lastly, in view of the comments I have made commending the standard of work and commitment exhibited by the In-Charge Crime, Milton Park, Police, it is only fair that the commendation is brought to the attention of his superiors. The Registrar shall accordingly forward a copy of this judgment to the office of the Deputy Commissioner General of Police In-Charge of Crime for him to note the good example set by his officer in discharging his police duties and in consequence, assisted the court to determine this matter on full and adequate facts. .

National Prosecuting Authority, respondent's legal practitioners