

ANDREW QHUBEKANI NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 29 March 2023 & 6 April 2023

Application for bail pending trial

The applicant in person
Ms. *D.E. Kanengoni*, for the respondent

DUBE-BANDA J

[1] This is a bail application pending trial. The applicant is charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 09:23]. It is alleged that on 24 October 22 he had sexual intercourse with Tahana Sibanda without her consent (deceased) and thereafter caused her death by strangulation. The pathologist who examined the remains of the deceased opined that she was sexually violated and died of asphyxia and strangulation.

[2] In support of his application the applicant contends that the interests of justice permit his release on bail pending trial. He avers that if released on bail he will not abscond because following the discovery of the body of the deceased in a bush area, his photograph was circulated in newspapers and social media platforms which led to his arrest in Botswana. And if he is released on bail and tries to flee, he will be easily identified and apprehended. Again, he avers further that when he was arrested and before his deportation the Botswana police warned him that should he again cross into their country without proper travel documents he will be shot dead. As a result, he has no intentions of crossing to Botswana, and he cannot travel to any other country because he has no travel documents. The applicant repeated and repeated that his photograph was widely circulated in Botswana and that should he attempt to abscond to that country, he will easily be identified and re-arrested. Therefore, he is not a flight risk.

[3] The applicant argued that the State does not have a strong *prima facie* case against him. He contended that the now deceased was his girlfriend. When he informed her that he intended to travel to Botswana in search of employment, the now deceased opposed the move. Her reasoning being that she was pregnant and the applicant was now abandoning her. To assure her that he was going to return to Zimbabwe he then left his clothing with her. He denies that he caused the death of the deceased, and intimates that she might have committed suicide.

[4] This application is opposed. The thrust of the opposition is that it will not be in the interests of justice to release the applicant on bail because he is a flight risk. In support of its opposition the respondent relied on the affidavit of the investigating officer. According to the investigating officer, the applicant was employed as a heard boy at the homestead where the now deceased resided. He was dismissed from employment and he left the homestead on 22 October 2022. He left carrying a traveling bag with clothes and his documents.

[5] The now deceased a Form 3 learner, on 24 October 2022 at around 0700 hours left home going to school. She did not reach the school and she did not return home. On 25 October 2022 her remains were found in a bush area about 100 meters from the homestead where she was residing. Her underwear was removed. Her school neck tie was pulled and tied to her right leg. The applicant's trouser was tied around the deceased's neck. The applicant's traveling bag containing his clothes and his documents i.e., birth certificate etc. was found in the vicinity of the body of the deceased.

[6] After the commission of this crime the applicant fled to neighboring Botswana. He was arrested in Botswana for contravening that country's immigration laws, in that he entered the country without proper travel documents. He was deported into the country. Upon arrival in Zimbabwe, he was then arrested. He made a statement and indications at the scene of crime.

[7] Ms. *Kanengoni* for the respondent argued that the State has a strong *prima facie* case against the applicant. Upon conviction he is likely to be handed a heavy sentence, and this realization might incentivize him to abscond and not stand his trial. Counsel argued further that the applicant will abscond as he absconded after the commission of this offence, and enter Botswana without travel documents. This time around he might be lucky and evade arrest. Counsel submitted that it is not in the interest of the administration of justice that the applicant be released on bail.

[8] It is trite that the court should always grant bail where possible and should lean in favor of the liberty of the subject provided that the interests of justice will not be prejudiced. See: *S v Smith* 1969 (4) SA 175 (N) 177E-F; *S v Hlongwa* 1979 (4) SA 112 (D) 113G-H; *S v Bennet* 1976 (3) SA 652(C). The prime consideration in a bail application is the question whether the accused will stand his trial. See: *S v Vermaas* 1996 (1) SACR 528 (T). In considering whether the likelihood of an accused evading trial has been established the court may take the following grounds into account: the nature and the gravity of the charge on which the accused is to be tried; the strength of the case against the accused and the incentive that he may have to evade his trial; and the nature and the gravity of the punishment which is likely to be imposed should he be convicted on the charge against him.

[9] It has repeatedly been held that in assessing the risk of flight, courts may properly take into account, though not decisive, the seriousness of the offence charged and the concomitant likelihood of a severe sentence. See: *S v Nichas* 1977 (1) SA 257 (C) at 263. The applicant is undoubtedly facing a very serious charge. This might qualify as murder committed in aggravating circumstances. I say so because when the body of the deceased was discovered the under wear had been removed, and the pathologists who examined the body found that penetration was confirmed as there was presence of haemorrhagic infiltrate in the vagina as well as tear in the perine region. This suggests murder committed in the course of rape, which if proved might amount to murder committed in aggravating circumstances. Murder committed in aggravating circumstances carry heavy sentences, which could even be escalated to capital punishment.

[10] The State has a strong *prima facie* case against the applicant. I say so because the applicant's traveling bag containing his clothes and documents was discovered in the vicinity of the body of the deceased, and his pair of trousers was tied around the neck of the deceased. He made statements and indications at the scene of crime. In the event he is convicted he is likely to receive a very heavy sentence, even capital punishment. The expectation of a heavy sentence would undoubtedly provide an incentive to abscond and leave the country. I also factor into the equation that after the commission of this crime the applicant absconded to neighbouring Botswana. He crossed the borders without travel documents. He was arrested in the neighbouring country for contravening the immigration laws in that country, and he was deported back to this country. He was able to cross borders without proper travel documentation, and if released on bail he will just abscond.

[11] The applicant's argument that he will not abscond because his photos have been circulated far and wide such that should he attempt to escape, he will easily be identified and re-arrested cannot be taken seriously. It cannot alley the legitimate fears of the State that if admitted to bail he will abscond and evade his trial. For the purposes of this application, and at this stage I am not satisfied that the applicant has established a defence which has reasonable prospects of success at the trial, this is a factor pulling the pendulum against the granting of bail. It is a fundamental principle of the administration of justice that an accused person should stand trial and if there is any cognizable indication that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence. See: *S v Fourie* 1973 (1) SA 100 (D) 101g.

[12] The seriousness of the offence with which he is charged, the strong *prima facie* case against him, the fact that after the commission of the crime he fled to Botswana, successfully crossing borders with travel documents makes him a risk candidate for bail. The temptation for the applicant to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002. This is a text book case where the refusal of bail and the detention of the applicant in custody is in the interests of justice. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

In the result, it ordered as follows:

The bail application be and is hereby dismissed.

National Prosecution Authority, respondent's legal practitioners