

FREEMAN MPOFU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 14 JANUARY 2022 7& 27 JANUARY 2022

Application for bail pending trial

T. Runganga for the applicant
K.M. Guveya for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is charged with three counts, being murder as defined in section 47(1) (a) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*] (Criminal Code); attempted murder as defined in section 189 as read with section 47 of the Criminal Code and malicious injury to property as defined in section 140 of the Criminal Code. It being alleged that on the 28th August 2021 at around 2100 hours applicant in the company of other accomplices assaulted complainants several times all over the body using booted feet, clenched fists, axes, machetes and a spear causing them injuries all over their bodies. One person died as a result of the injuries inflicted by the applicant and his accomplices. The applicant and his accomplices further destroyed a motor vehicle and a makeshift zinc cabin belonging to one of the complainants.

In support of his application applicant filed a bail statement and an affidavit. Applicant contends that the State has no strong *prima facie* case against him. He avers that at the material time he was not at the scene of crime. It is argued that he is a good candidate for admission to bail at this stage taking into account that during arrest he did not attempt to flee and co-operated with the police during investigations. He avers that if released on bail he will not abscond. He has not valid passport and he not been outside Zimbabwe. He is of fixed abode. If released on bail he will not interfere with police investigations. Applicant argues that it is in the interest of justice that he be released on bail pending trial.

This application is opposed. It is submitted that the State has a strong *prima facie* case against him and he is a flight risk. In support of its opposition respondent placed before court an affidavit of the investigating officer. In his affidavit the investigating officer avers that after committing the offence on the 28 August 2021 applicant went into hiding until he was arrested on

the 9th November 2021. He was arrested by the members of the community. He resisted arrest until members of the community subdued him. It is averred that if released on bail he will interfere with witnesses.

Respondent contends that the State has a strong *prima facie* case against the applicant. In his confirmed warned and cautioned statement he admitted that he committed these offences he is charged with. It is argued that in the event of a conviction applicant will be sentenced to a long term of imprisonment and the prospects of such incarceration will motivate him to abscond and evade trial. The respondent contends that it is not in the interests of justice to release applicant on bail pending trial.

It is important to highlight that applicant is facing a crime referred to in Part II of Schedule 3 of the Criminal Procedure and Evidence Act [Chapter 9:07], being murder otherwise than in the circumstances referred to in paragraph 1 of Part I. In terms of section 115C (2) (a)(ii) (B) Criminal Procedure and Evidence Act applicant bears the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail. It then follows that the bar for granting bail in the crime of murder referred to in Part II of the Act is lifted a bit higher by the legislature. This is what the applicant has to contend with and this court must give full effect to such legislative provision

The respondent contends that the State has a strong *prima facie* case against the applicant and that in the event of a conviction he may be sentenced to a severe term of imprisonment. It is argued that the prospects of a long prison term may induce him to abscond and evade justice. There are facts linking applicant to the commission of this crime. In his confirmed warned and cautioned statement applicant admits the allegations made against him. He admits that he was armed with a rock/stone and a log while some of his accomplices were armed with axes, machetes and a spear. He admits that he used the weapons he was armed with during the attack of the complainants and the deceased. For the purposes of determining this bail application this court cannot ignore such evidence, it is admissible. This evidence shows that the State has a strong *prima facie* case against the applicant.

Applicant is facing serious offences and the State has a strong *prima facie* case against him. Upon conviction he may be sentenced to a long term of imprisonment. Considering the seriousness of the offences and the sentence that the applicant might face if convicted, there is a likelihood that the applicant might abscond resulting in the interest of justice being prejudiced. In

my opinion, there is nothing to keep applicant to stand trial and there would be a strong incentive to flee if released on bail. His *ipse dixit* to the contrary in his bail statement and affidavit in this court carries little persuasive weight given the facts of this case and the evidence of the investigating officer.

Further the respondent contends that applicant is a flight risk. The facts of this case shows that he was on the run from the 28th August 2021 to the 9th November 2021 when he was eventually accounted for. He was on the run for a period of approximating two and a half months. He fought the members of the community who apprehended him. He was in fact resisting arrest. These facts speak to the real danger of abscondment should he be admitted to bail thereby jeopardising the proper administration of justice.

Furthermore, the applicant is not only a flight risk but his release on bail given the serious allegations against him of committing serious crimes using machetes, spears and axes etc. and his evading arrest for the period of one and a half months will undermine the objective and proper functioning of the criminal justice system and the bail institution. In essence applicant has not shown on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his release on bail. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

In the result, the application for bail be and is hereby dismissed and applicant shall remain in custody.

National Prosecuting Authority State's legal practitioners
Tanaka Law Chambers applicant's legal practitioners