

CHRISPEN CHIKUNYA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 27 APRIL 2022

Bail Pending Trial

L. Mcijo, for the applicant
K.M. Nyoni, for the respondent

KABASA J: After hearing the parties I delivered an *ex-tempore* judgment and dismissed the application for bail pending trial. I have not been asked for written reasons but decided to give such reasons that notwithstanding.

The applicant is facing a murder charge, it being alleged that sometime during the period extending from end of November to 13th December 2020, the applicant, in the company of four others confronted the deceased who was on his way from Botswana using an undesignated point of entry, and accused him of being one of the robbers operating along the Zimbabwe-Botswana border. They proceeded to assault him using a knobkerrie, open hands, booted feet and a hunters' knife before tying his hands using a rope. They then bundled him into the boot of a Toyota Raum Registration Number ADK 0515 which belonged to one of the accused. The deceased's body was then dumped near a dip tank along the Plumtree border, from where it was later discovered.

The state initially opposed bail on the basis that the applicant was a flight risk. The police had been looking for him from March 2021 and had visited his

home but the applicant had not heeded the police's request for him to come to Plumtree Police Station. Police efforts to arrest him only bore fruit in April 2022 when the applicant was eventually arrested.

At the hearing of the application the state withdrew its opposition, submitting that the applicant's co-accused had been granted bail and there was no justification to treat the applicant differently. The applicant was not aware the police were looking for him and could therefore not be said to have been evading the police. There were therefore no compelling reasons to deny the applicant bail.

Mr. Chinyan'anya who initially appeared for the applicant before *Mr Mcijo* took over submitted that the averments that the applicant was aware the police were looking for him were not correct. The applicant's wife who the police had allegedly seen when they visited the applicant's home had also disputed the assertion that she saw the police who advised her of why they were looking for the applicant.

The applicant's co-accused were released on bail and there was therefore no justification to treat the applicant any different. Stringent bail conditions could be imposed to allay any fears of absconding.

Faced with the state's change of attitude which was at variance with the Investigating Officer's affidavit in which he gave details of how he had tried to arrest the applicant to no avail, I decided to hear from the Investigating Officer for purposes of clarity.

Detective Sergeant Shiku duly came to court and his testimony was to the effect that the deceased's death had initially been taken as a sudden death until

witnesses came through explaining what they had observed which was the assault they had seen being perpetrated on the deceased by the applicant and his co-accused. Thereafter Detective Sergeant Shiku conducted investigations and managed to arrest four suspects who appeared in court and were granted bail. The four suspects did not know applicant's identity particulars except his name, "Chris". The witness managed to get the applicant's cell phone number and called him and this was in March 2021. He advised the applicant of the allegations and that he wanted to interview him. The applicant explained that he was attending to his sick father in Mutare and would avail himself after 2 weeks. In those 2 weeks he also intended to secure the services of a lawyer. 2 weeks lapsed and the applicant did not so avail himself. The detective subsequently obtained a court order and that enabled him to obtain the applicant's residential address from Net-one. When the police visited the applicant's residence, they found applicant's wife who confirmed that the applicant was aware the police were looking for him but had gone to Beitbridge to deliver some goods in a bid to raise money so he could engage a lawyer.

The applicant's cell phone was no longer reachable. The police then obtained another court order so that the Registrar-General's office could provide the applicant's national identity number and his age. A radio message was then sent to all police stations throughout the country with instructions to look for the applicant. On 17th April 2022 the witness received a call from an Inspector Ncube of Nkulumane Police Station to the effect that they had arrested the applicant. The applicant was then escorted to Plumtree and finally appeared in court.

Further investigations revealed that in April 2021 the applicant had left for South Africa but was hijacked whilst there and that forced him to come back to Zimbabwe.

Faced with this evidence and being alive to the two competing interests, i.e., the individual's right to liberty and the proper administration of justice, the issue was whether it was in the interests of justice to grant the applicant bail.

Bail is a Constitutional right which makes any arrested person entitled to their liberty unless there are compelling reasons justifying their continued detention.

Section 50 (1) (d) of the Constitution provides that: -

“(1) Any person who is arrested –

(a)

(b)

(c)

(d) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention.”

Section 115 C of the Criminal Procedure and Evidence Act, Chapter 9:07 provides that where the accused is facing a Part II 3rd Schedule offence, such accused shall bear 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.

Where however, there are no compelling reasons to deny bail, I hold the view that the court ought to be guided by the legal position that an accused person is presumed innocent until proven guilty and a denial of bail cuts across such presumption.

Section 117 (2) of the CPE Act provides what amounts to compelling reasons justifying a denial of bail.

Where it has been established that there is likelihood that the accused if released on bail, will not stand his or her trial, or appear to receive sentence, denial of bail will be justified.

In *State v Biti* 2002 (1) ZLR 115 (H) the court stated that a judicial officer should always grant bail where possible and should lean in favour of the liberty of the applicant provided that the interests of justice will not be prejudiced.

In *State v Ncube* 2001 (2) ZLR 556 (S) the court also emphasized the need for a judicial officer to bear in mind the presumption of innocence when considering a bail application and to grant bail where possible.

In casu the applicant was clearly evading the police. The question therefore was, if I overlooked the concerted efforts which were made before the applicant was finally arrested and proceed to grant him bail, am I essentially saying should the applicant default court, the police are to have another run around in order to arrest him and ensure he submits himself to due process?

Counsel for the applicant submitted that the applicant panicked and must be given another chance. He panicked for over a year? And now that what made him panic became a reality and he has experienced prison, will such panic not be heightened should he be granted bail, such that the earlier evasion of the police will become more marked due to a fear of the possibility of facing trial and going back to prison.

Co-accused ought to be treated the same as a failure to do so will be tantamount to unfair discrimination. However, the four co-accused who were granted bail did not conduct themselves in the manner that the applicant did.

Had the applicant reported to the police after the 2 weeks he had asked for, ostensibly because he needed such time to find a lawyer before going to the police, he too would have been entitled to bail.

It cannot be ignored that applicant was finally arrested over a year later and this was due to the fact that he was evading the police. This sets him apart from the other persons he is jointly charged with thereby justifying treating him differently. (*State v Ruturi* HH26/03)

Counsel made an issue out of the fact that the deceased's body was decomposed such that a post mortem could not be conducted and so that weakens the state case. I did not purport to be pre-judging the matter but my response was that it is not unheard of that circumstantial evidence may secure a conviction even where due to decomposition, the cause of death could not be ascertained.

The issue is to allow the wheels of justice to turn unimpeded so that applicant faces trial and his guilt or innocence is established by a court.

Where he has demonstrated an unwillingness to submit himself to due process granting him bail would not be in the interests of justice. The docket is ready and the matter must be allowed to be determined by the court, through trial, now that all the accused have been accounted for.

The fear of abscondment was therefore not a bald unsubstantiated assertion, (*State v Hussey* 1991 (2) ZLR 187 (S)).

It is for these reasons that I held that the applicant was not a good candidate for bail and consequently dismissed the application.

Liberty Mcijo and Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners