

WISDOM MPILWENHLE NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J

BULAWAYO 14 JANUARY 2022 & 20 JANUARY 2022

Bail application pending trial

Applicant in person

K. M. Guveya, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is charged with the crime of murder as defined in section 47(1) (a) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. It being alleged that on the 2nd June 2019 applicant hired the now deceased (deceased) person who was a sex worker. The two proceeded to Silver Sands Lodge in Bulawayo, at the lodge a misunderstanding ensued which degenerated into a fight. Applicant strangled the deceased resulting in her death and stole her cell phone. Applicant then stashed the body under the bed and fled from the scene.

In support of his application, applicant filed a bail statement. In his statement he contends that he resides at number 536 Emganwini, Bulawayo. He is 26 years old. He is employed as a Rock Blaster at a mine in Filabusi. He is engaged to be married and has a one year old child. Further applicant contends that he neither has a pending case nor a previous conviction. He does not have a passport and has never been outside the borders of Zimbabwe.

Further applicant contends that he has a defence to the charge. He avers that he hired deceased who was a sex worker. While in their room at the Silver Sands Lodge a stranger came to the room and claimed that he was the husband of the deceased. Applicant says he fled and left the two in the room and does not know what happened thereafter.

In his oral submissions in court applicant made the point that he is not a flight risk. He is of fixed abode. Although his step father had obtained a Protection Order barring him from entering house number 536 Emganwini, Bulawayo the two have since reconciled. The

statement recorded by the police was obtained from him through unlawful means, i.e. by duress. He emphasised that the law presumes him innocent until proven guilty by a court of law and that the seriousness of the offence standing alone is not a reason to refuse to release him on bail pending trial. He submitted that the administration of justice would not be prejudiced by his release on bail.

The application is opposed and the respondent contends that it is not in the interests of justice to release applicant on bail pending trial. 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. The officer avers that there is a video footage taken at Silver Lodge showing applicant entering the reception room with the deceased. It is said he made positive indications at the scene of crime. It is averred that in his confirmed warned and cautioned statement he admitted the killing of the deceased.

The investigating officer says on the 2nd June 2019 in the morning the Lodge house keeper advised applicant that it was time to check out. Applicant is alleged to have said he wanted to extend his booking for a day since his partner was still drunk. He paid for the extra day. On the 3rd June 2019 day of the check out the applicant was nowhere to be seen and the body of the deceased was found under the bed. Further it is averred that the police obtained applicant's photographs from the videos and pictures downloaded from Silver Sands Lodge. His photograph was the put in the press. His relatives contacted applicant and advised him that the police were looking for him, he then ran away. It is argued that he booked the Lodge under a false name.

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. There is a video footage showing applicant entering the Lodge in the company of the deceased. In his confirmed warned and cautioned statement he admits he strangled the deceased until she died and stashed her body under the bed. In fact the Lodge cleaners found the body of the deceased under the bed. The investigating officer in his affidavit says applicant made positive indications at the scene of crime. Applicant says the warned and cautioned statement was obtained under duress. 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 a serious offence 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 case 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 submissions 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. Applicant booked the Lodge using a false name. After the commission of the offence he fled. He disappeared until such time that the police put his photograph in the press, his relatives contacted him and advised him that the police were looking for him, instead of reporting to the police he fled and disappeared. He was on the run for approximately one year. 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 and his evading arrest for the period of one year 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 respondent's legal practitioners