

MGCINI XABA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 4 & 7 JULY 2016

Bail Application

Miss S. Munherendi for the applicant
Miss N. Ndlovu for the respondent

MAKONESE J: The applicant is facing a charge of murder. The allegations are that on 30th April 2016 in Botswana, applicant acting in concert with three other male adults he is jointly charged with lured the deceased across the Botswana border whereat they robbed and murdered the deceased by strangulation.

The brief circumstances of this matter as reflected in the request for remand Form 242 are as follows. On 7 May 2016 and at around 0830 hours a Botswana national was looking for his stray cattle in a bush within Jakalas Village, Tshetshebe, Botswana when he discovered the lifeless body of a female who was later identified as Shingai Dhliwayo. A report was made at Tshetshebe Police station. Preliminary investigations revealed that the deceased had been lured to Botswana on the pretext that her company, Shekinah Events (Pvt) Ltd was to provide catering and decorating services for a wedding that was to be held in that country. Sadly, the deceased was dragged into a bush and strangled to death before her body was tied to a tree.

The deceased was robbed of her valuables that included a cellphone, an undisclosed amount of cash and a laptop amongst other things. On the 11th of May 2016 a post mortem examination was conducted on the remains of the deceased by a Botswana consultant pathologist who concluded that the cause of death was due to a combination of strangulation and gagging. Police investigations led to the arrest of Artwell Ndiweni, Dumisani Ncube, Godfrey Mavhura Fero and the applicant.

The state consented to the granting of bail to the applicant, contending that the evidence against the applicant is weak and that there is no evidence that the granting of bail pending trial to the applicant would in any way, jeopardize the interests of justice. I set the matter down for argument in terms of section 117 (5) of the Criminal Procedure and Evidence Act (Chapter 9:07) which provides as follows:

“Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interest of justice as contemplated in subsection (4).”

In order to make a proper assessment of the interests of the applicant and the strength of the state case I directed the state to present all the evidence against the applicant including the statement of the investigating officer dealing with the matter. The investigating officer as deposed to an affidavit wherein he sets out the brief background to the arrest of the applicant and his co-accused persons. The relevant portion of the affidavit is in the following terms:

“... During the interrogation, the three accused persons mentioned above implicated the accused person, Mgcini Xaba and this led to his arrest as well. Upon his arrest, a Nokia E63 cellphone with IMEI number 356836029748198 was recovered. This recovered cellphone was the same cellphone which had a Net-One line that was used to lure the now deceased to Botswana before her death.

During interrogation, Mgcini Xaba denied the charge and stated that during the period of the murder he was here in Bulawayo and had spent most of his time with his sick sister, Violet Xaba. Ngcini Xaba further stated that he got the Nokia E63 cellphone from Artwell Ndiweni on 20 May 2016.

His alibi has since been investigated and his sister confirms that she was with him during that period. Furthermore Artwell Ndiweni confirmed that the Nokia E 63 was his and he had lent it to Mgcini Xaba on 20 May 2016.

Further to that, Mgcini Xaba, was at a later stage, exonerated by his three accomplices who had implicated him in the first place.”

I have had occasion to examine the warned and cautioned statement made by the applicant at CID Homicide offices, Bulawayo on the 1st of June 2016 and it would seem that his version of events has a ring of truth. The applicant avers in his statement as follows:

“I went to a rural home on the 22nd of April going to David Xaba’s homestead under village head Timothy Ndlovu. I had taken a child for treatment by a prophet called Saul Ncube. I last saw Saul Ncube on the evening of 28 April when he came to my home. I woke up at dawn on 29 April and I boarded Ray Ncube’s commuter omnibus which took me to Renkini/Country bus terminus around 7 in the morning. Pretty Xaba welcomed me at the Renkini/Country bus terminus I went to my sister’s house where I spent the day. On the 30th I spent the day assisting my sister after helping my father board means of transport in the morning at Renkini/Country bus terminus he sold wares until it was 11pm. I took my sister to her house then I went to retire to bed. Artwell Ndiweni came to my house on 20 May and he brought a cellphone which he had promised to lend it to me on the 19th May when we met by Magadzira tuckshop. I only used it on 20, 21 and 22 May. On the 23rd of May I took it to a charger at my sister Violet Xaba’s car. Police officers looked for me at my house and they did not find me as I was at work. They again came back in the evening and they found me and subsequently arrested me. Police officers took away my satchel which was full with my property. I deny the charge being levelled against me and that I know nothing about it.”

It is trite that in an application for bail pending trial what is of paramount importance is the consideration of whether or not the interests of justice will be compromised if applicant is granted bail. Factors for consideration in this regard are; the risk of abscondment, the risk of interference with witnesses or the propensity to commit further offences. In the case of *Khabo v The State* HB-53-10 the court held that where possible the courts should lean in favour and not against the liberty of the applicant unless it is shown to the satisfaction of the court that the applicant will not stand trial if admitted to bail or that the administration of justice will be jeopardized by the release of the applicant. In showing that an accused is not a suitable candidate for bail pending trial, the state must table cogent and well substantiated reasons before the court and not mere bald assertions. See the case of *State v Hussey* SC-181-91.

In *S v Fourie* 1973 (1) SA 100 at page 101, MULLER J, stated as follows:

*“It is a fundamental requirement of the proper administration of justice that an accused person 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 ... But if there are no indications that the accused will not stand trial if released on bail or that he will interfere with witnesses or otherwise hamper or hinder the proper course of justice, he is *prima facie* entitled to and will normally be granted bail.”*

In the instant case it is clear from the affidavit of the investigating office that there are no cogent reasons for denying the applicant bail in this case. Although applicant is facing a serious charge, it is a well established position of our law that the seriousness of an offence on its own is not a good ground for denying an applicant bail pending trial. It is only where the seriousness of an offence is coupled with the apparent strength of the state case against an accused person that bail pending trial would be denied. The only piece of evidence that links the applicant to the offence is the fact that a Nokia E 63 mobile phone was found in his possession. The applicant has however explained the circumstances in which he obtained the cellphone. Applicant's co-accused has verified the circumstances in which the applicant came to possess the mobile phone. In my view, there is no evidence that the granting of bail pending trial to the applicant, will in anyway, jeopardize the interests of the due administration of justice.

I am satisfied that the applicant is a proper candidate for bail pending trial.

I accordingly order as follows:

The applicant be and is hereby granted bail pending trial in terms of the draft order.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners