

GODFREY MAVHURAFERO  
**versus**  
THE STATE

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 15 JULY 2016 AND 21 JULY 2016

### **Bail Application**

*P Butshe-Dube* for the applicant  
*T Hove* for the state

**MATHONSI J:** The applicant resides at 10248 Cowdray Park Bulawayo. He was arrested on 22 May 2016 on allegations of murder and is jointly charged with Artwell Ndiweni, Dumisani Ncube and Mgcini Xaba. The latter was admitted to bail by this court on 7 July 2016 while the two other accused persons are still in custody.

According to the affidavit of Detective Assistant Inspector Pius Lungisani Tshuma of CID Homicide Section in Bulawayo, the deceased Shingai Dhliwayo was lured to Botswana on 30 April 2016 by the accused persons on the pretext that they wanted to hire her decoration and catering company for a wedding in Botswana. Once in Botswana they robbed the deceased of her valuables which included cash, laptop, sumsang tablet and a ZTE cellphone, before killing her and leaving her body tied to the trunk of a tree in a bushy area in Tshesebe Botswana.

The body of the deceased was discovered on 7 May 2016 and a post mortem was conducted which concluded that she died due to a combination of strangulation and gagging. The officer goes on to say that accused one (Artwell Ndiweni) was found in possession of a grey pouch inscribed “Lufthansa Consulting” belonging to the deceased and also led the police to recover the deceased’s ZTE cellphone from his wife.

The good detective goes on to reveal that cellphone records have shown that it is Artwell Ndiweni who lured the deceased to Botswana pretending to be a client and that it is Ndiweni who implicated the other three accused persons including the applicant.

On the grounds for opposing bail he states:

- “Botswana police who are investigating the case intend extraditing the accused persons to face trial in that country. If released on bail, there are high chances that the accused might abscond.
- If released on bail, the accused persons are likely to interfere with witnesses and evidence as we are still in the process of recovering other stolen property.
- All accused persons are known criminals who commit robbery cases and operate in the Zimbabwe-Botswana border area. They have been arrested on numerous occasions at Plumtree border for entry and exit by evasion, to and from Botswana. Therefore if given bail, they are likely to abscond and skip the country.”

Unfortunately Detective Tshuma did not cite any previous conviction or arrest record, neither did he refer to any specific pending case that informed his conclusion that all the accused persons are known criminals who have been arrested on numerous occasions. His has just remained as a bold assertion.

The applicant has now approached this court seeking his admission to bail pending trial. He states that he is an excellent bail candidate because he is of fixed abode and has never evaded the police or resisted arrest. He has no pending cases, neither does he have any previous convictions. He is an unsophisticated person who has no means to sustain a livelihood outside the country. He does not even possess a passport.

Although he challenged the investigating officer to prove any previous convictions he may have, the opposing papers filed by the state are significant not only by their brevity, being merely one rumbling paragraph, but also by a signal failure to take up the applicant’s challenge. Although the claim that the applicant and his alleged accomplices are cross border criminals, not a single reference speaking to any criminal activity is mentioned.

The applicant has explained that he was arrested merely because the police had come to his house looking for Mgcini Xaba, now a co-accused, whom he had hired as a builder to construct a structure at his house in Cowdray Park Bulawayo. When the police failed to find Xaba they simply arrested him although he does not know Artwell Ndiweni and Dumisani Ncube who allegedly implicated him in the commission of the offence.

It is remarkable that the confession allegedly made by one of the co-accused persons Dumisani Ncube makes no mention whatsoever of the applicant. According to him only himself

and Artwell Ndiweni were involved in the killing at the instance of someone else. He said in his warned and cautioned statement:

“I am Dumisani Ncube. I do admit the allegations preferred against me. I left Zimbabwe on the 29<sup>th</sup> of April 2016 going to Botswana in the company of Artwell. We boarded a granivia car and we disembarked at the Zimbabwean side of the Zimbabwe-Botswana border. We were approached by a man called Chakalisa who is used to Artwell. He told us that, there was a person he wanted us to kill and that he was going to pay us P10 000-00 each and we agreed. We parted ways while he properly (lawfully) entered the border and we evaded the border since we did not have passports with us. We met again with Chakalisa at the garage (filling station) in the Botswana side. Chakalisa came driving a white kombi, in the company of a stout dark man and the deceased. They were all seated at the front seat while the deceased was between them. We got into the car, Artwell and I, and Chakalisa drove us towards Francistown. We drove for a short distance and Chakalisa then stopped the car requesting to pour some water into his car and asked us to disembark from the car. We then held the deceased taking her into the bush while Artwell was choking her in order to prevent her making noise. Chakalisa drove the car towards where we bound the woman, the now deceased, to a tree, he drove the car saying that we were to meet at the border where he was going to give us our money. We left the deceased bound and boarded a certain car that we stopped and went back to the border but we could not find Chakalisa.”

Nowhere in that confession is the applicant mentioned. If the state has another confession which includes the applicant it would have produced it. It did not. In addition, absolutely nothing belonging to the deceased was recovered from the applicant lending weight to his claim that he was arrested as some kind of a fishing expedition after the police could not find Mgcini Xaba.

Mgcini Xaba has himself been admitted to bail by this court. In the case of *Xaba v The State* HB 180/16 this court, per MAKONESE J, noted that the state had consented to his admission to bail because the evidence against him “is weak.” The learned judge pronounced that:

“In the instant case it is clear from the affidavit of the investigating officer 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 E63 mobile phone was found in his possession. The applicant has however explained the circumstances in which the applicant came to possess the mobile phone.”

The warned and cautioned statement of Artwell Ndiweni does not contain a confession. He completely denies being involved in the killing of the deceased and does not implicate anyone, certainly not the present applicant. He also states that he bought the cellphones that were found in his possession from some young men or boys in Botswana.

Mr *Hove* for the state submitted that he is not aware of any other statement which may have implicated the applicant. Clearly therefore the investigating officer was not being truthful when he alleged that the applicant was implicated by Artwell Ndiweni. He was not. If there was no basis for denying Xaba bail when he was found in possession of a cellphone linking him to the offence then the situation of the present applicant is even more unassailable because there is absolutely nothing connecting him to the offence. It is therefore surprising that the state has seen it fit to oppose the application.

In any event, the current legal position as provided for in s50 (1) (d) of the constitution is that an arrested person is entitled as of right to be released either unconditionally or on reasonable conditions pending a charge or trial. It is only where it is shown that there are compelling reasons justifying that person's continued detention that an arrested person can be denied bail. See *S v Munsaka* HB 55/16.

All the reasons relied upon by the state in seeking to deny the applicant bail are not sustainable. In fact there is absolutely no basis for denying the applicant bail especially as a co-accused found in possession of a cellphone linking him to the offence has been admitted to bail.

In the result it is ordered that the applicant is admitted to bail pending trial on the following conditions:

1. The applicant shall deposit the sum of US\$150-00 with the Registrar of the High court Bulawayo.
2. The applicant shall reside at 10248 Cowdray Park Bulawayo until the finalization of the matter.
3. The applicant shall report every Mondays and Fridays at Luveve Police Station between 6am and 6pm.

4. The applicant shall not interfere with witnesses in this matter.

*Mathonsi Ncube Legal Practitioners, applicants' legal practitioners*  
*National Prosecuting Authority, state's legal practitioners*