

DUMISANI NXUMALO
versus
THE STATE
and
ELPHAS NXUMALO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 9 AUGUST 2017 AND 10 AUGUST 2017

D Moyo and M Mpofu for the applicants
Ms N Ngwenya for the respondent

MATHONSI J: When these two bail applications pending trial were placed before me I directed that they be set down for hearing at the same time. This is because the two applicants are brothers who are jointly charged with their 61 year old father Ernest Nxumalo with one count of murder in contravention of s47 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. They filed separate bail applications although they are represented by the same firm of legal practitioners which applications are opposed by the same state counsel. It was therefore convenient to hear the applications at the same time. This judgment disposes of the two matters.

Dumisani Nxumalo is 38 years old but says he resides at Ernest Nxumalo's homestead, Ensango village 5 in Fort Rixon which is obviously his father's homestead, never mind his age, and a father who is the first accused in the criminal prosecution in which the father and his five sons are accused of assaulting and stabbing Misheck Khanye to death at a police station in Shangani in broad daylight on 18 October 2016. He says he is married with minor children, whose number he chooses not to disclose, and being of fixed abode and with strong ties with his family and community, he is not a flight risk.

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He was arrested on on 14 June 2017, eight months after the offence was committed but says throughout that period he was ordinarily resident at Kessington in Bulawayo where he is employed as a construction worker. He does not give the address in Kessington where he was resident or where he was employed. He will not interfere with state witnesses if granted bail and is not likely to commit further offences given that he has no previous convictions. According to him all these facts commend him for admission to bail pending trial because our law presumes him innocent until proven guilty.

Elphas Nxumalo is 29 years old and says he also resides at his father Ernest Nxumalo's homestead in Fort Rixon although he is a family man with two minor children. He is employed as a builder and was arrested on 11 February 2017, some four months after the commission of the offence although he had remained resident at that homestead throughout that period. He commends himself for admission to bail pending trial on the same further grounds relied upon by Dumisani Nxumalo.

If the allegations leveled against the two applicants, their 61 year old father and their three other brothers who are still at large, are even remotely true then there is a good reason why we as a nation should really be worried. The extent of violent crime that is unfolding in the Fort Rixon and Shangani areas of the Insiza District in Matabeleland South and the lack of respect for the law is extremely alarming.

The state alleges that the deceased Misheck Khanye was accused of viciously attacking the sister of the applicants whom he raped before allegedly cutting her private parts. As a result the entire family of the applicants were an extremely angry lot who set about to exert vigilante or retributive justice. They hunted down the deceased led by none other than their father. They caught up with him aboard a lorry at Shangani Business Centre and confronted him. A police officer from the nearby Police Post was called by someone and he immediately arrested the deceased who was wanted by the police in connection with offences he had committed.

Although the deceased was handcuffed and under lawful arrest, the family pounced. They allegedly manhandled the police officer and disarmed him of the firearm he had in his possession before setting upon the deceased beating him up. The deceased allegedly ran towards

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the police post with the group in hot pursuit as they continued to assault him. Although the deceased made it to the police post, he was pursued and stabbed there as a result of which he died. The applicants and their co-accused absconded immediately thereafter only for Elphas Nxumalo to be arrested on 14 February 2017 and Dumisani Nxumalo on 14 June 2017.

Against that background the state is strongly opposed to bail. Reliance is placed *inter alia* on the affidavit of Milton Maposa, a police officer based at ZRP Fort Rixon who is the investigating officer in the matter. He stated in part:

- “2. I know the accused persons Ernest Nxumalo, Elphas Nxumalo and Dumisani Nxumalo only in connection with this case.
3. I did not know Misheck Khanye during his life time.
4. I hereby oppose bail on the following reasons:
 - The accused persons committed the offence whilst coming from South Africa and they disappeared to an unknown place of which when released they are likely to return to South Africa since they have valid passports.
 - Their addresses in South Africa are not known.
 - The accused persons were always looking for the deceased to revenge for their sister whom he had raped and cut her private parts.
 - The accused persons were on the run after the arrest of their father Ernest Nxumalo, several checks were made at the homestead but they could not be located.
 - They were arrested after some unknown accused persons destroyed their father’s houses and they had the intention to revenge.
 - The accused persons are likely to commit other offences since they are facing another pending case at court CR 06/06/17.
 - The accused persons disarmed a police officer of his service pistol thereby obstructing him from protecting the deceased from being assaulted.
 - The accused persons wanted to stab the police officer with a knife used to stab the deceased.
 - They stay in the same neighbourhood with the witnesses and there is a likelihood of them interfering with witnesses.
 - The other three accused persons Trevor Nxumalo, Busiso Nxumalo and Mduduzi Nxumalo are still at large and when they are released they are likely to disappear forever.”

It is for these reasons that I stated earlier on that if the allegations made against the applicants are anywhere near the truth then there is indeed a cause for serious concern. A whole family of six men with their very own father on tow sets about to take the law into their own

hands against a person suspected of having wronged the family. The suspect is already in police custody but they have no respect for that. Instead they disarm a police officer before clobbering and stabbing a handcuffed person to death. This occurs at 0930 hours in broad daylight in front of a crowd of people in awe of the spectacle. It reads like a script for an action movie.

Murder is a Third Schedule offence. Therefore in terms of s115C of the Criminal Procedure and Evidence Act [Chapter 9:07] the applicants, who are charged with murder, bear the onus of showing, on a balance of probabilities, that it is in the interest of justice that they be released on bail pending trial. In addition where the murder was planned or premeditated, that section provides that the applicant for bail pending trial bears the added burden of showing, again on a balance of probabilities, that exceptional circumstances exist permitting their release on bail.

It is now settled in this jurisdiction that it is a compelling reason to refuse bail, as required by s50 (1) of the Constitution, that there is a likelihood of abscondment if the accused person is released on bail, or if he or she will endanger the safety of the public or any person, or if he or she is likely to commit other offences. Regrettably the two applicants have not even begun to discharge the onus resting on them to establish that it is in the interest of justice that they be released or that there are exceptional circumstances militating for their release.

While they have asserted that from the time the offence was committed on 18 October 2016 they were always available to be arrested, the facts of the matter seem to suggest otherwise. Dumisani Nxumalo was arrested 8 months after the offence while Elphas Nxumalo was arrested 4 months after. There has to be a reason why that is so and it cannot be that the police were not looking for the suspects in a murder case committed under the circumstances I have just outlined above. The investigating officer has suggested that they could not be arrested because immediately after the offence they absconded to South Africa where they are based and that in fact they had only come to this country to exert revenge on the deceased which they did.

Considering that they could not be immediately arrested, there is therefore substance in the assertion by the investigating officer. What it therefore means is that these are people who

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absconded after the offence was committed. They have an affinity for abscondment and are therefore a flight risk.

I am not swayed by the letter produced by Mr *Moyo* for the applicants written by the headmaster of Shangani Secondary School on 8 August 2017 to the effect that;

“The school employed Elphas Nxumalo as a builder from 2015 to the time he was arrested. Mr Nxumalo discharged his duties without fail and in as much as I am aware, he was always at work from the date of employment to the time we were informed that he had been arrested.”

If by that letter is meant to rebut the assertion by the state that Elphas Nxumalo did not abscond after he allegedly committed the offence, not a good job of it was done. In fact that letter has no evidentiary value at all. When I last checked secondary schools were not in the construction business but in the business of educating children. It is not explained why this rural school needed to employ a fulltime builder for a period of two years. The letter certainly does not disprove the investigating officer’s sworn statement that the police made regular checks for the applicants from the time of the commission of the offence at their homestead without success.

In any event, their father Ernest Nxumalo, must have known they were wanted by the police and after his admission to bail one expects that he would have notified them so. They are jointly charged with him and the police would not have failed to advise him they were looking for his sons. Therefore if they are law-abiding citizens they would have surrendered themselves. They did not only to be arrested at 2300 hours and 0300 hours, witching hours indeed.

There is also another dimension to the matter which militates against the admission of the applicants to bail pending trial. It is the strong allegation that they belong to a family which has vengefulness all over its DNA. Even the warned and cautioned statement of Dumisani Nxumalo, which incidentally was filed by himself in support of this application, corroborates the investigating officer’s sworn statement that the family was actually hunting for the deceased whom they intercepted aboard a lorry at Shangani Bus stop.

Having said that it has not escaped my attention that the applicants’ homestead was destroyed by other suspects. Whether these other suspects were also on a revenge mission, has

not been stated, but it is not without reason that after their homestead was destroyed on 11 June 2017 Dumisani Nxumalo crept out of hiding. There is therefore substance in the investigating officer's claim that in his case, he may have come out to avenge the destruction of their homestead, vengefulness being part of the family's DNA as I have stated.

What all this means therefore is that the applicants may indeed be very dangerous people given to committing more offences. In that respect the public is entitled to protection from their depredations and in the absence of exceptional circumstances it would be the height of irresponsibility to admit them to bail. See *AG v Phiri* 1987 (2) ZLR 33 (H) at 39H; 40 A-B; *S v Hlongwa* 1979 (4) SA 112 (D) at 113 H.

In considering an application for bail of this nature this court has a duty to safeguard the interests of the justice delivery system. This is a case in which the victim was taken from the lawful custody of the police, he was subjected to a gang attack in the full view of members of the public in a very small community and as he ran to the police station still in handcuffs he was chased and killed right at the police station. Those that perpetrated that dastardly deed made good their escape and could not be accounted for until after several months. This must have left the community feeling insecure and worried. When they have been finally accounted for this court must ensure that they are kept in custody until they are tried. That is done in order to protect the integrity of the justice delivery system.

In the result, the two bail applications are hereby dismissed.

Samp Mlaudzi and Partners, applicants' legal practitioners
National Prosecuting Authority, respondent' legal practitioners