ORICIOUS MOYO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 26 SEPTEMBER 2017 AND 19 OCTOBER 2017

Bail Application

R Ndlovu for the applicant
N Ngwenya for the respondent

MOYO J: This is an application for bail pending trial. The applicant herein faces a charge of murder. It being alleged that on 22 July at around 22:20 hours the applicant shot the deceased once on the right side of his ribcage after the deceased had confronted him about an alleged affair between the applicant and deceased's wife, one Jacquiline Moyo.

The accused person contends that he is a suitable candidate for bail and that therefore there are no compelling reasons to deny him bail because of the following:

- he did not flee from the police at the initial stages of the matter before the death of the deceased.
- he did not flee even after he learnt of the deceased's death.
- he has a defence to the charge of murder which is evidenced by the case that he is a complainant in a matter which was against the deceased.
- he is a business man with employees numbering 22.
- he resides at Emganwini which property he owns.
- he holds a valid Zimbabwean passport that he uses in his trade of being a cross border transporter.
- he is a family man with seven children.

The state filed an opposition to the application as sought by applicant and stated that the applicant being a cross border trader it would be easy for him to abscond and never to return to Zimbabwe to face his trial.

That he initially faced an attempted murder charge and that he now face a more serious charge which makes the risk to abscond higher.

At the hearing of the application, before any submissions were made, the respondent's counsel made an about turn and sought to abandon the opposition and instead orally concede to the application as being sought.

I reserved judgment in the matter as I was of the view that the concession by the state may not be proper. I needed to satisfy myself as to all the factors relevant to this case. At the end of the day in such a matter the court has to be satisfied that granting an accused person bail, will not prejudice the interests of justice, such interests being an assurance that the accused will indeed attend trial.

Section 117 (1) of the Criminal Procedure and Evidence Act [Chapter 9:07] provides that:

> "Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed unless the court finds that it is in the interests of justice that he or she should be detained in custody."

This section has been upgraded into a constitutional provision in terms of section 50 (1) (d) of the Zimbabwean Constitution which provides that a person who is arrested is entitled to be released unconditionally or on reasonable conditions pending a charge or a trial.

In terms of section 70(1) of the Constitution the presumption of innocence applies at this stage in favour of the applicant until he is proven guilty in a court of law.

The Constitutional provisions alluded herein are to be balanced with the fundamental principle that the proper administration of justice demands an assurance that an accused person will indeed stand trial. In that regard, it is central to the determination of this application whether or not the accused person once granted bail, will indeed attend trial.

In my view a case in point is that of the *State* v *Learnmore Jongwe* a Supreme Court case reported in 2002 (2) ZLR 209.

- the appellant in the *Jongwe* case was a family man.

- he admitted to stabbing his wife, but raised a defence of provocation.

- he was a legal practitioner who was employed and was in fact a Member of Parliament.

- he had co-operated with the police investigations and had in fact surrendered himself to the police.

The Supreme Court held that the allegations by the state were more plausible than the defence he was proffering as it was more improbable and unlikely that it was true that he found his wife making love with another man in an office during the day.

In the *Jongwe* case *(supra)* the Supreme Court gave amongst other considerations the following as being points to allude to in such matters:

a) the seriousness of the charges the appellant faced

b) the strengths and weaknesses in the state case, and the likely penalties.

c) the accused's ability to reach another country.

In the *Jongwe* case *(supra)* the learned Chief Justice CHIDYAUSIKU C. J (as he then was) emphasized the seriousness of the charges and the likely penalties as well as the strengths of the state case. It therefore is a principle of our law in bail applications to consider the cumulative effect of such relevant factors in an application of this nature. I hold the view that no factor standing on its own may sway the court in either direction but it is the existence of a number of factors whose cumulative effect would persuade the court to exercise its discretion in a certain manner.

What is clear from the facts of this matter, which somewhat draws similarities with the *Jongwe* case is that:

1) the applicant is also a family man.

2) the applicant also faces a charge of murder.

3) the applicant admits to shooting the deceased

4) the applicant proffers a different version of what transpired resulting in the shooting

5) the applicant is said to have co-operated with the investigations.

6) the applicant is a gainfully employed cross border transporter with businesses in Bulawayo.

His interests in this regard may be held to equate to those of *Jongwe* a member of Parliament, and a legal practitioner.

An additional aspect which is in this case is that applicant has links across the border in South Africa. Applicant also has the means to travel across the border as a cross border transporter. This court also takes judicial notice of the porosity of the borders of our country especially with the Republic of South Africa.

In *Chiadzwa* v *S* 1988 (2) ZLR 19 (S) it was held that a combination of factors would make international flight likely and that where a person faces a serious charge which will lead to a lengthy imprisonment term on conviction and the evidence against him is strong such that conviction is probable, and that person has the capacity to leave the country and some contacts across the border, there will be a risk of external flight.

The same principle was enunciated in the case of *Ndlovu* v *S* 2001 (2) ZLR 261 (1).

The applicant in this matter faces a serious charge of murder. He admits to shooting the deceased albeit in different circumstances (like in the *Jongwe* case), but his defence that he was being robbed by the deceased meets with difficulties if at all the deceased's wife indeed worked at his shop. I notice from the applicant's statement for bail that he does not mention anything about the deceased's wife. He does not tell us if the deceased's wife indeed worked for him. He does not tell us if he did have an affair with deceased's wife or that he never had such a relationship. The accused also does not tell us what is it that the deceased did which amounted to robbing him. He simply says in his supplementary affidavit that three people pounced on him attempting to rob him. What is it that they did or said in their attempt to rob him? That is a pertinent question especially that the state alleges that the deceased confronted the accused about an affair accused had with his (deceased's) wife. It would appear it is not disputed that applicant's wife worked for the deceased. That would in essence make it more probable that the

deceased confronted the applicant about an affair rather than attempting to rob him. Accused says when deceased attempt to rob him he, (accused) then produced a gun, the deceased who was apparently not armed then tried to disarm him? The deceased does not appear from the facts to have been armed. So it is not clear from the defence what it is that deceased did in attempting to rob the applicant, neither are we told of what prompted the production of the gun and the shooting. In the *Jongwe* case, the Supreme Court set a precedent that allows a court hearing a bail application to assess the possibility of a defence proffered by an applicant for bail. On assessing the applicant's proffered defence, I conclude that the state case is a lot weightier than what applicant is proffering as I have already indicated herein.

The investigating officer in the form 242 raises a valid point that the state witnesses are employees of the applicant and that therefore there is a risk of him interfering with them. Whilst their witness statements may have been recorded and finalized, this court takes judicial notice of the fact that interference with witnesses may occur well after investigations have been completed resulting in witnesses turning hostile and disowning the information they would have volunteered to the police. Whilst impeachment proceedings can be initiated, nonetheless the character of the state case is most likely to be seriously affected and it cannot be in the interests of justice that a person, is released on bail where there is a real risk that he can interfere with the witnesses whom he obviously has influence over as they are his employees resulting in the interests of justice being prejudiced. Whilst the state counsel did not raise the aspect of interference with witnesses, this court takes cognizance of the fact that the investigating officer does raise this pertinent point. This honourable court is alive to the fact that in an employer-employee relationship the employer indeed has an upper hand and the risk of interference with witnesses under one's employment cannot be held to be remote.

In the judge's handbook at page 28, it is stated that in considering whether a ground that an accused may interfere with witnesses is valid, the court should consider *inter alia,* the accused's relationship with any witness and the extent to which the witness may be influenced by the accused.

I hold the view that an employee is susceptible to influence and interference by an employer. Again at pg 32 in the same judge's handbook it is stated that if the accused lives or works with the state witnesses there will be a greater likelihood of interference.

The seriousness of the offence

It is trite that the seriousness of the offence and the likely penalties on their own would not be a sufficient reason to deny an accused person bail. There must be other factors coupled with this aspect that tilt the scales against the granting of bail.

The accused person faces a charge of murder which is serious and if the accused is convicted he may even be sentenced to death. His defence to the charges becomes relevant in so far as it gives an insight as to whether he may be tempted to avoid trial. I have already alluded to the strength of the state case and the probabilities of the defence case. I hold the view that the state case is strong in light of the defence given as I have already stated herein as per the principle laid down in the *Jongwe* case *(supra).* The fact that the applicant has businesses in Bulawayo, would not have much weight where there is a strong *prima facie* case, an applicant may be willing to abandon substantial assets in Zimbabwe to avoid the prospect of spending years in prison. On the other hand a man cannot abandon assets of value for less serious charges which attract not so serious a penalty.

Conduct prior to the murder charges

Applicant has sought to assert that after shooting the deceased, he remained around, did not flee, went to South Africa and indeed came back. I take cognizance of the fact that applicant shot the deceased and rushed to the police to make a report which is in line with his defence, resulting in him being taken as a complainant and the deceased being taken as the offender and accused. There was at this stage no inducement to abscond in my view, as applicant was of the view that everything was under control and that deceased who was in hospital remained an alleged robber. The tables have since turned and the applicant is now facing murder charges. This is as per the submissions made by the state counsel when the court sought clarification as to what exactly transpired prior to the murder charge. Applicant's conduct at that juncture, therefore remains irrelevant in the assessment of whether or not he is likely to stand trial. It seems though at some stage a docket of attempted murder was later opened against the accused person after the deceased had given his version of events. Even then I do not hold the view that that changes the complexion of this matter in any way as a murder charge is obviously more serious with stiffer

penalties. Again, the inducement to abscond from murder charges cannot be equated to that of attempted murder charges as I have shown in this judgment. The more serious the charge, the stiffer the penalties and the higher the flight risk.

Applicant's links with South Africa

Applicant is a cross border transporter and therefore he has links in South Africa. He has the means to travel across and can easily go there and disappear. This is being juxtaposed with the strength of the state case, the seriousness of the charges, and the likely penalty as assessed herein. I have already found that the charges are serious, I have also found that the state case is *prima facie* strong, I have also found that the penalties are heavy with a possibility of the death sentence.

I have also found that the shooting itself is admitted although different reasons are given but I have already found in that respect that, the defence proferred does not render the state case weak. If a defence is to counter a *prima facie* strong state case, and destroy the likelihood of abscondment then it should be *prima facie* probable as per the Supreme Court's principles laid down in the *Jongwe* case *(supra).*

The burden of proof

Counsel for the applicant submitted that section 115 C (2) (a) (iii) of the Criminal Procedure and Evidence Act [Chapter 9:07], which casts the burden of proof in bail applications on accused persons facing serious offences like murder, be found by myself as it has already been so found in two other High Court judgments, to be unconstitutional and therefore inapplicable. I believe otherwise, I am neither persuaded by the findings in the cited judgments and being High Court judgments they are not binding. Section 115 C (2) (a) (ii) of the Criminal Procedure and Evidence Act *(supra*) is law, it stands until it has been declared to be unconstitutional by the apex court. What is before me is not a constitutional challenge but an application for bail. I pronounce the rights as enshrined in the constitution and interpret the law as enunciated in our statute books. In any event I am not persuaded that section 115 C flies directly in the face of the constitution as section 50 (d) of the constitution stipulates that a person who is arrested must be

released unconditionally, or on reasonable conditions, unless there are compelling reasons justifying their continued detention. Indeed where cogent reasons exist, I hold the view that an applicant for bail in specified offences must show the court that nonetheless, he is a suitable candidate or indeed that the so called compelling reasons are not compelling after all by countering such reasons as being either weak or non-existent. I do not hold the view that, that then renders the section unconstitutional.

I accordingly for all the reasons stated herein find that the cumulative effect of the factors assessed herein is that the applicant cannot be held to be a suitable candidate for bail as there is a real risk firstly that he may interfere with his employees who are witnesses in this matter and even more weighty being the fact that he is a flight risk.

It is for the aforestated reasons that I will not exercise my discretion in applicant's favour and the application is accordingly dismissed.

R Ndlovu and Company, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners