

REMEMBER MOYO

1st APPLICANT

and

GILBERT MOYO

2nd APPLICANT

versus

THE STATE

RESPONDENT

HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 1 MARCH 2002

J Tshuma for the 1st applicant
N Mathonsi for the 2nd applicant
H S M Ushewokunze III for the respondent

Bail Application and Application for Leave to Appeal

KAMOCHA J: The two applicants are brothers. They are charged with two counts of murder. Firstly, they are alleged to have taken part in the murder of

Limukani Luphahla on 27 October 2001 in the Lupane area. The second charge is that

of murdering Cain Nkala on 5 November 2001 at Norwood Farm after having allegedly kidnapped him from his Bulawayo home.

The first applicant was arrested on 11 November 2001 while he was on his way to Harare with one Khethani Augustine Sibanda. The second applicant Gilbert Moyo - "Gilbert" was arrested the next day - 12 November 2001.

After hearing submissions from counsel on both sides I granted applicants bail

on the following conditions.

"It is ordered that:-

- Court
- (1) each applicant deposits \$5 000,00 with the Registrar of the High Court of Bulawayo;
 - (2) he reports once a week every Friday between the hours of 6.00am and 6.00pm at Luveve Police Station;
 - (3) he resides at 4735 Gwabalanda, Bulawayo; and

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- (4) he does not interfere with state witnesses.

After the above order had been issued the state counsel gave notice that he

wished to appeal against the above decision in terms of the provisions of section

121(2) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07] as amended by

section 2 of Act 8 of 1997.

The notice to appeal was only in respect of the first applicant Remember Moyo

- "Remember". The state counsel proceeded to apply for leave to appeal. Both counsel made submissions at the end of which I declined to grant the state leave to

appeal. I indicated that my reasons for granting the applicants bail and refusing to

accede to the application for leave to appeal would follow. These are they.

The state opposed bail on the following grounds:-

- (1) If granted bail the applicants are likely to abscond.
- (2) The applicants are facing very serious offences and there is sufficient evidence linking the applicants to the commission of the offence.
- (3) It is not in the interest of justice that the applicants be released on bail pending trial.
- (4) Investigations into the matter are now complete and the applicant's matter is ready for trial.

The facts relied upon by the state are contained in two affidavits sworn to by

Detective Inspector Martin Matira. Both affidavits are quoted in extenso hereunder.

The one relating to Remember Moyo reads:

"I, MARTIN MATIRA force No. 025856 D do hereby make oath and swear that:-

- (1) I am a Detective Inspector in the Criminal Investigation Department of the Zimbabwe Republic Police and I am the investigating officer in this case.
- (2) I know the accused REMEMBER MOYO only in connection with this case. He is an active member of MDC being the Regional Intelligence Security Officer and is employed as a driver by the party based at its Bulawayo office.

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(3) On the 26th October, 2001 Nkanyiso MOYO, Spencer MGUNI and Thandazani MPOFU who are all MDC activists had a fight with Limukani LUPHAHLA and Thembinkosi NGWENYA @ BHUNYA who are ZANU PF youth members based in Lupane. Nkanyiso and his gang lost the fight sustaining some injuries. On the 27th October, 2001 Nkanyiso and his gang had a meeting and phoned their MDC offices in Bulawayo and spoke to the accused requesting for reinforcement to fight their rivals.

Accused addressed the matter to one Nicholas Sonny Masera the Deputy National Security officer.

(4) On 29/20/2001 MASERA gave accused an MDC Toyota Hilux Reg 733-394R white in colour and ordered him to take with him Kethani Augustine SIBANDA, Matshobana NGWENYA for the mission in Lupane.

(5) Accused Remember, Khethani and Matshobana got to Lupane at about 1700 hours and met witnesses Sideliwe TSHUMA, Beauty NCUBE, Ottalia NYONI from whom they enquired the whereabouts of Nkanyiso and others. They then met and accused requested for a full detail on how they (Nkanyiso and others) were assaulted by Limukani LUPHAHLA and Thembinksoi NGWENYA. Nkanyiso, Lungile, Trevor took accused Remember, Khethani and Matshobana went to Limukani's house posing as Detectives from Hwange who had come to assist him on arresting people who were disturbing them in Lupane. The accused(s) were seen by witnesses Xwayani MPOFU and Turkler NDLOVU who will testify. The accused with co-accused took Limukani into the Toyota Hilux Reg. No. 733-394R hand-cuffed him and took him to a point along the Lupane/St Lukes'' Road where they killed him by strangulation. They then drag him to a point in the bush and set his body on fire. Limukani's body was burnt beyond recognition.

(6) Accused Remember with his accomplice drove back to Bulawayo and reported mission accomplished to Nicholas Sonny Masera who authorised payment of \$3 000 each. Thembelani MKANDLA will testify to that effect and will produce the MDC Petty Cash Voucher as exhibit " "

(7) Remember and Khethani were identified by Nkanyiso MOYO, Lungile MOYO and Trevor MGUNI before police identification parade held at Bulawayo Central Police Station by Detective Inspector KHUMALO as people who came looking for the now deceased on 29/10/2001. The photographs are produced as exhibit" ". Also witnesses Beauty NCUBE, Sideliwe TSHUMA and Ottalia NYONI who saw accused on the 29/10/2001 at Lupane enquiring for directions to any MDC supporters in the area all identified the Toyota Hilux Reg. No. 733-396R to be the vehicle accused was driving at Lupane before the kidnapping. Photos will be produced as exhibit" ".

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(8) Accused in his arrest confessed in his Warned and Cautioned Statement that he kidnapped and killed Limukani LUPHAHLA with his co-accused. The statement is produced as Exhibit" ". The state will also produce the MDC Petty Cash Voucher for \$9 000 endorsed Mat North Operations as Exhibit" " being proof of payment.

Will produce the photos of the Toyota Hilux Reg. No. 733-394R which was recovered by Police on 04/12/2001 at Exhibit" " the MDC vehicle which was being used by the accused person on kidnapping Limukani LUPHAHLA.

(9) On 5th November 2001 at about 2015 hours CAIN NKALA was kidnapped from his Magwegwe West home by accused REMEMBER MOYO and his accomplices, Khethani SIBANDA, Gilson MOYO, Sazini MPOFU, Prince NDLOVU, Matshobana NGWENYA and Gilbert MOYO. They took CAIN NKALA to a point in Norwood Farm near Solusi University tortured him and later killed him by strangulation using shoe laces from the shoes that were worn by SAZINI MPOFU on the day in question. The body was later buried in a shallow grave.

On 11/11/2001 accused Remember MOYO was arrested whilst driving to Harare with co-accused Khethani SIBANDA. They were to obtain forged travelling documents and cash of R1.5million to transport accused as they were to escape the investigations. On his arrest

accused Remember MOYO was posing as Ronnie MOYO. He produced a South African Drivers' Licence No. 60210003493 valid from 02/04/99 to 02/04/2004 bearing his South African identity numbers as 02/701206603082. Accused Remember was implicated by co-accused Khethani SIBANDA. The state will produce KHETHANI's warned and cautioned statement as Exhibit"

Remember was also implicated by co-accused Gilbert MOYO. The state will produce Gilbert MOYO's warned and cautioned statement as exhibit"

(10) Accused was arrested after having been implicated by his co-accused KHETHANI AUGUSTINE SIBANDA. Khethani SIBANDA made indications leading to the recovery of Cain NKALA's remains at Norwood Farm on 13/11/2001 near Solusi University.

(11) Accused are also being implicated by Sazini MPOFU whose shoe laces were used and found tied around the deceased's body when it was exhumed. The state will produce Sazini MPOFU's warned and cautioned as exhibit"

The state will also produce the petty Cash Voucher for \$3 5000 which Thembelani was ordered to process and pay by MASERA, the deputy National Security officer for MDC who in turn paid each accused \$5 000 as a token of thanks for having killed Cain NKALA.

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The state will also produce indications made by Sazini MPOFU and Khethani SIBANDA leading to the recovery of Cain NKALA's body as Exhibit"

Accused Remember MOYO's South African Drivers' Licence in the name of Ronnie MOYO produced before court as exhibit"

(12) Isaac MAPOSA has since been checked by the Police at MDC offices Harvest House and investigations have revealed that he absconded to Canada on 27/11/2001.

(13) If granted bail accused is likely to abscond to Canada and stay with Isaac MAPOSA.

(14) Accused was identified by independent witnesses who need to be secured by the state.

(15) Also viewing the seriousness of the case accused will abscond. I therefore strongly oppose bail."

The one that follows relates to Gilbert Moyo.

"I, MARTIN MATIRA Force Number 025856D do hereby make oath and swear that:-

1. I am the investigating officer to this case.
2. On 5th November 2001, CAIN NKALA was kidnapped from his house at house number 5504 Magwegwe West Bulawayo by accused with his accomplices Remember Moyo, Khethani Augustine Sibanda, Sazini Mpofu, Prince Ndlovu, Gilson Moyo and Matshobana Ngwenya.
3. On the 11/11/01 Khethani Sibanda was arrested whilst driving to Harare with accomplice Remember Moyo.
4. Khethani Sibanda confessed to had been involved in the kidnapping and killing of CAIN NKALA. He took me and Insp Ncube and indicated where he had buried the remain of CAIN NKALA with his co-accused namely Gilbert Moyo, Remember Moyo, Sazini Mpofu, Gilson Moyo, Prince Ndlovu and Matshobana Ngwenya.
5. From the scene Khethani Sibanda directed me to house number 4734 Gwalabanda Bulawayo where I arrested Gilbert Moyo. I verbally

warned and cautioned him about the case and he confessed that he was involved in the kidnapping and killing of CAIN NKALA on 5/11/01 from his house at number 5504 Magwegwe West in Bulawayo.

6. I requested him to take me for indications to the place where they buried the remains of CAIN NKALA and he indicated to me that he was not familiar with the place, he might get lost. However he emphasised that it was along Plumtree road.
7. On the 14/11/01 at about 1600 hours, a warned and cautioned statement was recorded from the accused at Z.R.P. Nkulumane by Detective Inspector Maphosa and Detective Chief Inspector Makheleni. Accused gave his reply freely and voluntarily without due influence.

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He wrote his reply in vernacular SiNdebele in his writing. I will produce the warned and cautioned statement before the court as exhibit" ". The accused wrote his warned and cautioned statement which alibies to be verified.

8. On the 8/11/01 accused went to MDC offices where he collected \$10 000,00 from Thembelani Mnkandla the MDC Regional Secretary for Matabeleland Provinces. The money was for accused persons and Gilson Moyo. This money was a thanks token from Fletcher Dulini thanking the accused and others for a job well done of having killed CAIN NKALA. Thembelani Mnkandla will testify on this payment. I will produce the MDC petty vouchers dated 5/11/01 for \$5 400,00 dated 7/11/01 for \$35 000,00 before the court as Exhibit" ".

9. Accused was implicated by Khethani Sibanda. He has made indications to the recovery of CAIN NKALA's remains. I will produce his indications and warned and cautioned statement for the accused as exhibit" " before the court.

I will further produce the photos of the Toyota Hilux Raider white colour registration numbers 733-394R which accused mentioned in his warned and cautioned statement. This is an MDC vehicle which was used by accused and his accomplices on committing this offence, exhibit" ".

10. Remember Moyo his elder brother implicated him. Remember Moyo confessed to the kidnapping and killing of CAIN NKALA. I will produce Remember Moyo's warned and cautioned statement before the court as exhibit" ".

11. Sazini Mpofu confessed to the killing of CAIN NKALA and made indications leading to the recovery of CAIN NKALA's remains. He implicated the accused on this case. I will produce Sazini Mpofu's warned and cautioned statement before the court as exhibit" ".

12. Accused was directly involved in the kidnapping and killing of CAIN NKALA. If granted bail he is likely to abscond because of the seriousness of the case.

13. I strongly oppose bail to be granted on the accused person."

I shall first turn to deal with the case of the second applicant Gilbert Moyo -

"Gilbert" who is facing one count of murder of Cain Nkala. He denied any knowledge of the murder and raised an alibi. He stated that he was at his rural home

when the murder was committed. He had come to visit his brother Polisani Moyo a

week before he was arrested.

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On the night of 12 November 2001 the police led by Inspector Martin Matira went to house number 4735 Gwabalanda, Bulawayo to arrest Gilbert whom they found sleeping. His brother Polisani was also sleeping at the same house. Both were

subjected to assaults with clenched fists after they had identified themselves.

The applicant was asked to name the people whom he had lent some money. He said he had lent Remember Moyo a sum of \$1 000,00. Remember had borrowed the money as he wanted to travel to Harare. He was arrested in Gweru on his way to Harare.

The applicant was then accused of having undergone some training and was put into a police vehicle and driven around town before being taken to Nkulumane Police Station during the early hours of the morning.

At the police station he was taken to a toilet where he was tortured. His head

was forced into a toilet chamber while the toilet was flushed in order to choke him.

Thereafter the head was pulled out and he was asked about the murder of Cain Nkala.

He denied any knowledge of the murder and stated that he had only come to town for

a visit since he was a communal home dweller.

The torture then took another form. The police pinned him against the wall

and belaboured his stomach with fists and booted feet. A button stick was used on his

head and was slapped in the face. He was all the time being asked to admit that he

was part of the group that committed the offence. The police also threatened to shoot

him for refusing to go and make indications in front of cameras along with other co-accused and insisting that he knew nothing he could indicate. They told him that

after shooting him they would claim that he was trying to escape.

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Later, during the ordeal the applicant was exhausted and scared for his life and

agreed to do whatever the police told him. Since he knew nothing about the facts of

the matter the police called in one Khethani Augustine Sibanda who was made to narrate a story about what had happened to Cain Nkala. Thereafter Khethani Sibanda

was taken out of the room. The applicant was then ordered to recount what Khethani

Sibanda had said while they recorded that as the applicant's statement. The applicant

still had difficulties in remembering portions of the narration and the recording officer

would fill him in. The statement he was made to sign was compiled in that fashion.

The statement was not confirmed by a court of law since the applicant challenged it from the on set. It remains inadmissible until a court of law rules it

admissible after a trial within a trial.

The state cannot rely on the confessions of the applicant's co-accused since

those cannot be used against the applicant. Such confessions can only be used against

those who made them if they are found to be admissible.

The state seemed to rely on the affidavit by Matira supra where he claimed that the applicant confessed that he was involved in the kidnapping and killing of Cain

Nkala on 5 November 2001 from his home at number 5504 Magwegwe West in

Bulawayo. But that is denied by the applicant who raised an alibi which Matira said

he was going to verify.

When he was requested to go and indicate the scene of the murder he told Matira that he did not know the place and would not be able to indicate it. Matira said

the applicant emphasized that it was along Plumtree road. This of course cannot be

correct since the murder occurred along Solusi road near Solusi. This can only

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suggest that applicant did not know where the murder took place that is why he said

he would not be able to indicate the scene and named a wrong road all together.

Plumtree road and Solusi road are two different roads leading in different directions.

Quite clearly there does not seem to be any admissible evidence linking the

applicant to the crime of murder that he is facing. He is therefore entitled to be

admitted to bail. There was no evidence to show that he would abscond if released on

bail. It is in the interest of justice that where a person is not linked to the crime he is

alleged to have committed he should be granted bail pending trial, Finally the applicant cannot be denied bail because the investigations are complete and the matter

ready for trial since he is entitled to his liberty until proven guilty.

I now turn to deal with the first applicant Remember Moyo - "Remember" who faces two counts of murder. He was arrested in Gweru en route to Harare in the company of Khethani Sibanda.

He was assaulted at Gweru Police Station after his arrest. On the way from

Gweru to Bulawayo he was handcuffed, leg ironed. At a certain lay-by near Mbembesi he was pulled out of the motor vehicle, kicked, punched and slapped by

Matira, Ngwenya and others. The applicant went on to state that he was kicked in the

testicles, struck on the head and left side of the body. The wheels of the motor vehicle

injured his jaws. He was lifted by the legs by grabbing the leg irons and he sustained

sores on both his achilles tendons.

Thereafter he was taken to Mbembesi Police Station where he was detained.

He was chained to a ring in the cell and was handcuffed, and remained in the cells for

3 nights. He was denied blankets and mosquitoes attacked him severely. All this was

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done in order to extract a confession to the two charges of murder. In addition to

being forced to falsely confessing to committing the offences he also was being forced

to falsely implicate certain people.

The applicant was adamant that he did not participate in the abduction and murder of Cain Nkala and Limukani Lumphahla.

In as far as the murder of Limukani Lumphahla is concerned Matira averred that

evidence would be led from Nkanyiso Moyo, Lungile Moyo and Trevor Mguni. But these witnesses are alleged to have had a fight with the deceased earlier. They are in

fact also co-accuseds to the murder of Limukani. They are all on bail. These co-accuseds do not seem to say that they saw the applicant murder Limukani. Matira

alleged that these co-accuseds identified the applicant. No useful purpose was served by such an identification parade since they were identifying a colleague.

Although there are witnesses who said they saw the applicant in the Lupane area on the fateful day their evidence does not say that they witnessed the applicant

murder Limukani.

The state cannot rely on the confessions made by the applicant's co-accuseds.

The applicant's alleged confessions are inadmissible at this stage. It seems to me that

there is no sufficient evidence at this stage to directly link him to the murder of

Limukani. More evidence may be led at the trial to establish that. But at the moment

the applicant should be presumed innocent until proven guilty at the trial.

As regards the abduction and murder of Cain Nkala the state seems to depend

on the confessions of the applicant and his co-accused. But these are inadmissible.

Those made by his co-accused cannot be used against him. His alleged confessions

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seem to have been extracted illegally. The evidence of Matira is purely speculative

and hearsay. He has no independent direct admissible evidence linking the applicant

to the murder.

It has not been shown that if granted bail the applicant would abscond. I hold

the view that there is no sufficient admissible evidence linking the applicant to the

commission of these serious offences.

The state claimed that it was not in the interest of justice that the applicant be

released on bail pending trial. I do not agree. Quite to the contrary, justice demands

that the applicant be granted bail. He is entitled to his liberty until proven guilty.

The fact that investigations are complete and the case is ready for trial should

work in the applicant's favour. He can no longer interfere or hinder any investigations

as they are complete.

In the light of the foregoing I granted both applicants bail on the conditions set

out on page 1 and 2 of this judgment.

The state then indicated that it wished to apply for leave to appeal against the

granting of bail to Remember Moyo only.

The state submitted that the court had erred in granting bail to Remember when there was evidence of two witnesses who saw him participating in the kidnapping of Limukani. The further submission was that the court had not taken

cognisance of the degree of participation and involvement of Remember. Finally the

state's complaint was that the court should not have taken into account the findings it

made in the Spooner's case.

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I do not agree with the state counsel that there is evidence from two witnesses

saying they saw Remember participating in the murder of Limukani. The witnesses said they saw Remember in the Lupane area. That is what is contained in paragraph 5

of Matira's affidavit in respect of Remember. The state contended that Remember should not have been granted bail in the light of his degree of participation. That then

made his case different from the cases of other accused who have already been granted

bail. I was unable to find any direct link of Remember to the commission of the murder of Limukani. Similarly he was not directly linked to the murder of Nkala.

Matira's evidence was mere speculation and hearsay. I see nothing wrong with the

court relying on its earlier findings in a hearing involving the same people. The case

is the same and so is the evidence.

In conclusion I hold a view that there is no direct admissible evidence to link

Remember to the crimes.

It seems to me, therefore, that the application for leave is devoid of any merit and is accordingly dismissed.

Webb, Low & Barry applicants' legal practitioners
Criminal Division of the Attorney-General's Office respondent's legal practitioners