

LINDANI CAPHU
versus
THE STATE

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

Bail Application

P. Butshe-Dube for the applicant
Ms M Ndlovu for the respondent

MATHONSI J: The applicant is a 20 year old young man who says he is awaiting his O level results having written the examinations at Luveve Study College in Bulawayo in November 2015, an allegation which has not been disputed by the state. It is trite that what is not disputed in the opposing affidavit is taken to have been admitted.

The applicant was arrested on 26 December 2015 on a charge of murder it being alleged that the previous day, on Christmas day, he stabbed a rival suitor, Limukani Ncube to death using a kitchen knife in a fight over a woman. The allegations as appear in the Request for Remand Form 242 are that:

“On 25 December 2015 near 17000 houses Cowdray Park Bulawayo the (accused) and the complainant had a misunderstanding over a girlfriend at around 2100 hours which resulted in the accused person stabbing the now deceased once below the left shoulder and once on the right shoulder. The deceased was taken to Empompini Police Base on a wheelbarrow and he however died along the way. The accused used a kitchen knife to stab the deceased.”

The applicant has now come to this court seeking his admission to bail pending trial. He states that he resides with his mother at House No. 18316 Cowdray Park Bulawayo and is a student aforesaid. He is pleading not guilty to the charge. According to him he had an altercation with a group of boys from Block 17 in Cowdray Park who questioned why he, as a resident of Block 18, had a girlfriend in Block 17. He was accosted by a gang of more than ten

people while he was in the company of a friend and in the ensuing brawl the deceased was stabbed although not by him.

The applicant states that he was rescued by his cousin who escaped with him in a motor vehicle with his assailants in hot pursuit. His attackers vented their anger on the motor vehicle after which they proceeded to his house which they pummelled causing extensive damage as evidenced by the photographs that he produced. As he was still under attack he was forced to seek refuge at his grandfather's house in Magwegwe from where he was arrested the following day. It is his mother who directed the police to where he was.

The bail application is opposed by the state on the grounds set out in the affidavit of the investigating officer, Assistant Inspector Malven Ndlovu, who states:

“The accused is still in custody and I wish to oppose bail on the following grounds;

1. When Lindani Caphu was arrested he was still holding the murder weapon in his right hand.
2. The accused made threats to the witnesses who effected a citizen's arrest and a South African registered car came and whisked him away from the citizens who were still holding him by his two hands.
3. Accused's mother was later interrogated and told the police that the accused was hiding at a certain house in Magwegwe and police went and arrested him.
4. Since accused is a local person the community where he lives is baying for his blood seeking revenge and his safety once out of custody will be in danger.
5. The probability of accused running away is high due to the gravity of the offence.”

Ms Ndlovu who appeared for the state relied on the risk of abscondment as the only ground for opposition asserting that the charge the applicant is facing is a very serious one and with the state case against him being very strong, this will act as an incentive for abscondment. She submitted that the fact that the applicant was sprung off from a citizen's arrest in a foreign registered vehicle points to an inclination to abscond if granted bail.

In my view all these are lame excuses for opposing bail. It has been stated on numerous occasions that the seriousness of the offence on its own cannot constitute sufficient ground for

denying an applicant bail. There must be more evidence pointing to the applicant's affinity for abscondment as would persuade the court that he will not stand trial if admitted to bail: See *S v Putsayi* HH 404/15;

It has been submitted that the fact that the applicant was whisked away in a foreign registered motor vehicle and was only arrested at a house in Magwegwe where he was allegedly hiding, points to an inclination to abscond. I do not agree. What that argument ignores completely is the fact that this was a gang fight between two rival groups with that of the applicant badly outnumbered. There can be little doubt that the applicant was under attack with the assailants even venting their anger on his house and the fleeing motor vehicle. For his safety it was necessary for the applicant to beat a tactical retreat. I am therefore not satisfied that his conduct points to a desire to abscond. Quite to the contrary it points in the opposite direction. His mother pointed his location and even though he had an opportunity to run, he did not do so until the police came for him.

Assistant Inspector Ndlovu has tried to suggest that the applicant should be kept in custody for his own safety as the community is still baying for his blood. Officer Ndlovu may be a good law enforcer who means well and I am sure the applicant is no doubt indebted to him for his concern about his safety. However, it is unlikely that his indebtedness could extend to a desire to remain in custody; *S v Japoko and Others* HH 172/12; *S v Putsayi, supra*.

It is now a constitutional imperative that an arrested person be released unconditionally or on reasonable conditions pending trial unless there are compelling reasons for his continued detention (section 50(1)(d) of the constitution). The state has not adverted to any such compelling reasons as the fact that the applicant faces a serious charge or that he will abscond do not equate to compelling reasons when there is no evidence suggesting the desire to abscond. The applicant should therefore be admitted to bail.

Accordingly it is ordered that:

The applicant be and is hereby admitted to bail pending trial on the following conditions; that;

- a) He deposits the sum of \$150-00 with the Registrar of the High Court Bulawayo.
- b) He resides at 1332/2 Old Magwegwe Bulawayo until the finalization of the matter.

- c) He surrenders his passport or other travel documents, if any, to the Registrar of the High Court Bulawayo.
- d) He does not interfere with evidence or any witnesses in this matter.
- e) He reports twice a week on Mondays and Fridays between the hours of 0600 hours and 1800 hours at Luveve Police station until the matter is finalized.

Mcijo, Dube and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners