

BLESSED MASEKO

Versus

THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 18 JUNE 2020

Bail pending trial

M. Ncube, for the applicant

N. Ngwenya, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is being charged with the crime of murder as defined in section 47 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. On the 29 April 2020, applicant appeared before the Gwanda Magistrates Court, whereupon he was placed on remand and detained in custody. Since the applicant is facing a murder charge, an offence specified in the Third Schedule, the magistrate had no jurisdiction, with the personal consent of the Prosecutor – General, to entertain his bail application. This is so in terms of section 116 (c) (iii) of the Criminal Procedure and Evidence Act [Chapter 6.09], (the Act) which provides that a magistrate shall not, without the personal consent of the Prosecutor-General, admit a person to bail or alter a person's conditions of bail in respect of an offence specified in the Third Schedule. He was then advised to make his bail application before this court.

The allegations from which the charge of murder arises are set out in the Police Form 242, commonly called a Request for Remand Form. It states that:-

On the 23rd and 5th days Of April 2020 at Thandabantu store, Mtshabezi turnoff, Gwanda the accused persons were acting in concert with a common purpose manhandled the deceased and they assaulted him all over the body with open hands, booted feet, pieces of farm and block bricks, switches and logs killing him in the process. The accused then left the body of the deceased lying in the bush on the 25th day of April 2020 after he had been found missing at his family home. The body had injuries on the head, face and swollen neck and chin.

According to Form 242, there is evidence linking the accused to the commission of the offence. First, it is alleged that the applicant was positively identified by witnesses from the scene. Second, it is alleged that the applicant made indications at the scene corroborating facts

observed there at. Third, it is said, pieces of farm and cement bricks used to assault the deceased together with a log were recovered and identified by witnesses.

The investigating officer, deposed to an affidavit opposing the admission of the applicant to bail. In the main, the grounds for opposition are summarised in section C of Form 242. It is alleged that the accused is facing a very serious offence which calls for capital punishment in the event of a conviction; most of the witnesses originate from the accused's neighbourhood and it is likely that they will interfere; two of the accused persons are still outstanding and they are in constant liaison with the arrested accused and when on bail they may prejudice their location and arrests; the accused persons have no formal employment to earn a living; and the deceased's aggrieved family are neighbours to the accused and due to the traumatic disposition, violence may occur in the event of revenge against either party.

Respondent is not opposed to the applicant being admitted to bail pending trial. In its response, respondent makes the following points:

1. In terms of section 50(1)(d) of the Constitution, any person who is arrested must be released unconditionally or on reasonable conditions pending trial unless there are compelling reasons justifying their continued detention. See *S v Munsaka* HB 55/16. Incarceration pending trial is an exception which is only justifiable where it is shown that there are compelling reasons for the applicant's continued detention.
2. *In casu*, the respondent has had an opportunity to go over the investigating officer's affidavit and will concede that the reasons advanced in opposition of bail are not compelling enough to warrant denial of bail. It is common cause that the applicant was arrested at his homestead four days after the commission of the offence. This is an indicator that he never attempted to flee from the area nor is this alleged by the investigating officer in her affidavit.
3. The applicant is jointly charged with three other persons and it is not clear what role he played in the demise of the deceased. The respondent has sought clarity on this issue from the police and it is said that statements are yet to be recorded.
4. In light of the defence that the applicant is proffering and the circumstances of this case that it was a gang attack by a number of people against the deceased who was drunk and acting violently it cannot be argued that the state has a strong case as against the applicant.

5. It is the respondent's submission that it would be in the interests of justice if applicant were to be admitted to bail pending trial.

The allegations against the appellants are serious and grave. Applicant still has the presumption of innocence in his favour. Again, the seriousness of the allegations standing alone is no basis of refusing to admit a person to bail.

I do agree that he is not a flight risk. According to the respondent, applicant has been aware of these charges and he remained in his homestead for four days preceding his arrest. He did not attempt to flee.

If there is evidence that the accused is not a good candidate for bail, let such evidence be placed before court in order of a just decision to be made in accordance with the law. In the absence thereof, the court will have to rule on the basis of what is available before it.

Refusing a person admission to bail is a serious matter. It is a serious inroad into the right to liberty. It must be taken serious, because it is serious. If the prosecution makes a concession, the court is not bound by such concession, but must give it due consideration. It is the prosecution that has got the docket to the investigations. It is the prosecution that communicates with the investigating authorities.

The prosecution has not placed the applicant within the ambit of section 1(d) of the Third schedule to the Criminal Procedure and Evidence Act [chapter 9:07] which says an accused charged with murder, where — the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy, shall bear the *onus* to show that it is in the interests of justice that he be admitted to bail. Therefore, the *onus* is on the prosecution. It concedes that it has not discharged the *onus* to show that the applicant is not a good candidate for admission to bail at this stage.

I did not cause this matter to be set-down for argument because of the view that I take, that the concession by the prosecution has been properly made. Although I hold the view that section 50(1)(d) of the Constitution is not the appropriate provision to anchor a bail application at this stage, nothing turns on this point.

I take the view that, on the facts of this case, the concession, that the applicant is a good candidate for admission to bail, has been properly taken and I accept it. In conclusion, I find that it is in the interests of justice to release applicant on bail pending trial.

Disposition

In conclusion, I find that it is in the interests of justice that the applicant be released on bail. In the result, applicant is admitted to bail on the following conditions:

1. That he deposits a sum of \$1000.00 with the Clerk of Court, Gwanda, Magistrate's Court.
2. That he reports once in two weeks at Mkwidze Police Base, between 6 a. m and 6 p.m. until this matter is finalised.
3. That he resides at John Maseko's homestead, Manongwe Village, Chief Masuku, Gwanda, until this matter is finalised.
4. That he does not interfere with State witnesses.

T.J. Mabhikwa and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners